IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

(DC) CRIMINAL APPEAL NO. 34 OF 2020

(Originating from Criminal Case No. 133 of 2019 of the District Court of Tanga at Tanga)

OMARY SAID @ ATHUMANI.....APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 15/07/2021
Date of Judgment: 23/07/2021

AGATHO, J.:

The appellant was brought before the District Court of Tanga charged with offence of trafficking in narcotic c/s 15A(1)(2)(c) of the Drug Control and Enforcement Act No. 5 of 2015 as amended by section 9 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017. It was alleged that on 24th day of August 2019 at Kiomoni area within the District, City and Region of Tanga the appellant was found trafficking in narcotic drugs to wit Catha edulis "khat" commonly known as Mirungi, a weight of 7.15. He denied the charges and the prosecution brought five (5) witnesses to testify and prove that he committed the offence. The trial court was satisfied that the appellant was found guilty, convicted,

and sentenced him to thirty (30) years imprisonment. Dissatisfied with that decision he preferred an appeal to this court with six grounds as shown below:

(1) That the learned trial Magistrate erred in law and in fact by convicting the appellant relying on (Exhibit P1) a certificate of seizure which was issued unprocedurally as there was no receipts issued by the seizing officers as required by section 38(3) of the Criminal Procedure Act [CAP 20 R.E. 2019].

(2) That the learned trial Magistrate erred in law and in fact by convicting the appellant, relying on (Exhibit P2) a chief government chemist Examination report while the prosecution failed to summon one Joseph Jackson Ntiba who alleged to prepare the said exhibit, hence infringed section 203 (3) of the Criminal Procedure Act [CAP 20 R.E. 2019].

(3) That the learned trial Magistrate erred in law and in fact by failure to notice that there was not any independent witness instead the police officer.

(4) That the learned trial Magistrate wrongly acted on the retracted caution statement and was not read out after its admission.

(5) That the learned trial magistrate was not scrupulous to notice the contradiction in the charge sheet and the face of judgment regarding the exact date of the alleged offence occurred.

(6) That the learned trial magistrate erred in law and in fact in convicting the appellant by failing to consider the appellant's defence.

On the hearing date the appellant's counsel, Kiariro stated that there are six grounds of appeal. He preferred to submit on only five grounds of appeal. He abandoned the fifth ground of appeal.

The court evaluated the submissions from each party and made observation as follows. Regarding the first ground of appeal whether tendering certificate of seizure without receipt is fatal as it contravenes section 38(3)of the the Criminal Procedure Act [CAP 20 R.E. 2019]. The appellant's counsel submitted that nowhere in the records show that the appellant signed any receipt. The respondent's counsel on his side refuted the allegation and argued that the receiving of the certificate of seizure was done in accordance with the law. He added that the same was proper under the 3rd schedule of Drugs Control and Enforcement Act (DCEA) form DCEA 003. And according to section 48(2)(c)(vii) DCEA, it provides that whenever a person is arrested the arresting officer shall record and issue receipt or fill in the observation form of an article or a

thing seized (the form is set out in the 3rd schedule of the DCEA). As per the said provision, the seizing officer had two options either to issue receipt or to fill in the observation form. Therefore, Section 38(3)of the the Criminal Procedure Act [CAP 20 R.E. 2019] which requires receipt and signature does not apply to drugs as per Section 48(2)(c)(vii) DCEA. In **Shabani Said Kindamba v R, Crminal Appeal No. 390 of 2019** while citing the case of **Mbaruku Hamisi and 4 Others v R., Consolidated Criminal Appeals No. 141,142,143 & 145 of 2016 and the case of Selemani Abdallah v R., Criminal Appeal No. 354 of 2008(unreported)** at page 15 and 16,the Court of Appeal of Tanzania held that the purpose of issuing receipt under section 38(3) of the the Criminal Procedure Act [CAP 20 R.E. 2019] is to minimize complaint of fabrication and that the seized item come from the purported place or person.

The respondent's counsel added that where there is a conflict between DCEA andthe Criminal Procedure Act [CAP 20 R.E. 2019], the DCEA prevails as per section 48(6) of the DCEA. This may however be disputed because there was no conflict of laws here. Moreover, DCEA is not there to replace the Criminal Procedure Act [CAP 20 R.E. 2019]. It is also important to note that section 32(4) and (5) of DCEA subjects itself to the application of the Criminal Procedure Act [CAP 20 R.E. 2019]. This

was also stated by the Court of Appeal of Tanzania in the case of **Shabani Said Kindamba v R, Criminal Appeal No. 390 of 2019 (unreported)** at pages 12-13, judgment delivered on 2nd June 2021.

The Court of Appeal of Tanzania also held in the case of **Jibril Okash Ahmed v R, Criminal Appeal No. 331 of 2017, Court of Appeal of Tanzania at Arusha (unreported)** at page 40 that lack of signature is a minor anomaly legally speaking and cannot invalidate the seizure or affect its admissibility. The first ground of appeal therefore fails for lack of merit.

As for the second ground of appeal, the court asks itself whether the trial magistrate erred in relying on exhibit P1 (Chief Government Chemist Examination Report) whose maker Joseph Jackson Ntiba was not summoned to appear as prosecution witness. Whether that contravened section 203(3) of Criminal Procedure Act [CAP 20 R.E. 2019] and occasioned failure of justice and prejudiced the appellant. The appellant's counsel was of the view that under Section 203(3) of the Criminal Procedure Act [CAP 20 R.E. 2019] whenever a report is tendered, a person who prepared it should be called upon to testify on the content of the report and may be cross examined. In the case of **Mohamed el Dabba v AG for Palestine [1991] A.C. 156** which was cited in the case of **Azizi Abdala v R [1991] TLR 71**, the Court of

Appeal of Tanzania held that, it is the duty of the prosecutor to call a witness who prepared the document or the report which could be called upon to testify to prove any material fact. Failure to do so may lead to miscarriage of justice to the accused because he cannot cross examine on the report. The counsel for the appellant submitted further that failure to call Joseph Jackson Ntiba denied the appellant's right to cross examine the person who prepared exhibit P2. He prayed that the ground of appeal be allowed. The respondent's counsel rejected the claim and submitted that Section 203(3) of the Criminal Procedure Act [CAP 20 R.E. 2019] provides that where the court deem fit it may summon and examine the government analyst as to the subject matter of the report. The respondent's counsel submitted that the court has discretion. It can call the analyst when it deems fit. He went on submitting that the person (witness) claimed not to have been called upon, the Government Chemist Laboratory Authority Act No. 8 of 2016 under Section 19 provides that the report issued by the government laboratory analyst shall be admissible and shall be sufficient evidence of the act or observation stated in the report unless the opposite party requires that the Chief Government Chemist or Government Laboratory Analyst who issued it to be summoned as a witness. The above provision provides for situations under which the government laboratory analyst or chief

government chemist to be called as witnesses. It is also apparent on records (at page 27 of the proceedings) that when exhibit P2 was tendered by PW3 the appellant did neither object nor demand that Joseph Jackson Ntiba be called upon to testify. The respondent's counsel pleaded the court to dismiss the second ground of appeal for it is baseless.

On the third ground of appeal, we ask whether the failure to bring an independent witness is fatal as it prejudiced the appellant. The appellant's counsel cited the case of **Shiraz Mohamed Shariff v D.P.P. [2005] TLR No. 401** where it was held that when accused is arrested at a crime scene it is required that there be an independent witness. Although it is not clear in the records whether there were many people at the crime scene, the appellant's counsel persuaded this court that the crime was committed at around 20:00, on the road, open space within Tanga City, there should have been an independent witness, who could have been called to testify. He argued that failure to bring the independent witness broke the chain of custody. It was broken from the time of appellant's arrest to the time when the articles were sent to the government chemist. In the case of **Zainabu Nassoro @ Zena v R, [2017] TLSR 84** the Court of Appeal of Tanzania outlined three steps. Firstly, the underlying rationale for establishing chain of custody was to

show a reasonable possibility that the item that was finally exhibited in Court as evidence has not been tempered with or contaminated along its way to the Court. Secondly, it was extremely important for the Police to ensure proper custody of the suspected substances and to avoid possibility of tempering or contamination with other substances. Thirdly, by the time the specimen of suspected narcotics reached the office of Chief Government Chemist, its chain custody has been irretrievably broken down while in the Police hand. The Counsel submitted that with the three principles laid down by the Court of Appeal of Tanzania in the above case and for failure to bring the independent witness it creates doubt as to the custody of the item (exhibit) and its nature, which is against the Police Guideline under the PGO Number 229 Rule 40 which provides guideline/procedure for documentation of chain of custody. In the case at hand the said requirement/procedure was not observed. The failure of the prosecution to abide to the above requirement is a reason for allowing the appeal he submitted (the counsel for the appellant). He argued further that the prosecution did not bring any independent witness as required by section 48(2) of DCEA. The DCEA 3rd schedule has seizure certificate or observation form which requires two witnesses to sign it. In the present case there was not signature of the independent witness. It is only the seizure (police) officer who signed it.

This according to the appellant's counsel is against the law. He stressed that the appeal should be allowed.

The respondent's counsel objected the 3rd ground of appeal and submitted that the appellant was arrested by the police officers who were performing their duties. Under section 48(2)(c)(ii) of DCEA gives power to police officer to stop, search and detain any person who is reasonably suspected of carrying, conveying, storing, transporting, cultivating, importing, exporting, or possessing any narcotic drug. The provision gives mandate to the police to do what they did in the circumstances of the case at hand. The counsel submitted that the law as cited herein above does not require an independent witness. He added that section 38(3) of the Criminal Procedure Act [CAP 20 R.E. 2019] does not require independent witness because the provision says signature of owner, and a signature of witness of seizure if any. This was also stated in the case of **Jibril Okash Ahmed's case** supra at pages 40-41. It is my view that even if the independent witness could have required by the law, the case at hand falls under Section 42 of the Criminal Procedure Act [CAP 20 R.E. 2019], that is emergency where there is no possibility of calling independent witness. The police were patrolling. It is not like a situation where search warrant is required, and

hence independent witness could have mandatorily been a legal requirement.

It is also clear on the records (page 14 of the proceedings) that PW1 stated that it was at 20:00 when they saw a motorcycle passing carrying the bag, the driver looked back and hit the edge of the road and fell. The police rushed to where he fell to help him. The driver surprisingly attempted to flee. They arrested him. After opening the bag they found Mirungi. The respondent's counsel rightly submitted that it was at night. It was hence difficult to get an independent witness. Moreover, after the arrest the certificate of seizure was prepared. The counsel submitted that the law does not require independent witness during seizure or arrest. The respondent's counsel prayed that the third ground of appeal be rejected for lacking merit.

This court observed that despite good arguments from the respondent's counsel, the prosecution, and the counsel himself did not address properly the issue of chain of custody. The chain of custody seemingly was broken especially for not bringing in government chemist to testify. The police should have ensured proper custody of the suspected substance to avoid tempering with, and contamination (as held in the case of **Zainab Nassoro@Zena's case (supra).** But then again it is unclear how the issue of chain of custody and independent witness are

connected. The appellant's counsel mixed the two. I am of the view that the independent witness is unrelated with chain of custody here. The independent witness aims at ensuring that the police do not fabricate cases or plant evidence. The chain of custody on the other hand intends to ensure that all steps or stages of handling evidence (substance/exhibits) seized by the police is properly documented to avoid tempering with and contamination. Guidance on chain of custody is provided for in the PGO 229 Rule 40 and the Court of Appeal of Tanzania decision in **Paul Maduka v Republic, Criminal Appeal No. 110 of 2007 (unreported)**. From the above submissions and the court's considerations the third ground of appeal is dismissed for lacking substance.

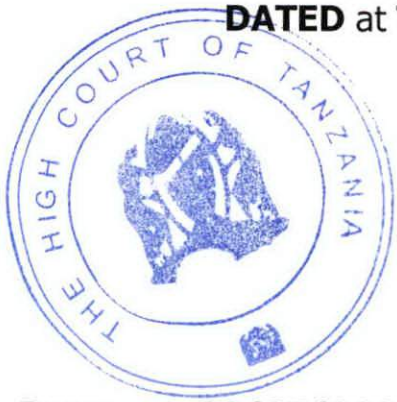
The fourth ground of appeal was whether the trial magistrate erred to convict the appellant without considering the defence. The appellant's counsel argued that the court did not consider the defence evidence and mitigation that he is 20 years now and during the trial he was 18 years old (as found under page 47 of the proceedings). And that he was a first offender. The appellant's counsel was of the view that 30 years imprisonment sentence was excessive as it is maximum. With respect, the issue of trial court not considering defence is false because it is clear in the proceedings at pages 7-8 that the trial magistrate considered the

defence case and observed that DW1 testimony was inconsistent with that of DW2. Moreover, the question of sentence being excessive depends on the provision of the Act establishing the offence, the Minimum Sentences Act, Chapter 90 R.E. 2002, as well as mitigation and aggravating factors. It should be remembered that during the arrest the appellant attempted to flee immediately after knocking the edge of the road with his motorcycle. This shows mens rea. He knew what he was carrying. He did not explain why he attempted to flee. Again while riding the motorcycle after passing the police why was he looking back. The attempt to flee is inconsistent with his innocence as it was stated in the case of **Eliya Kundasen Shoo v R., Criminal Appeal No. 288 of 2015 (unreported)** as referred in the case of **Jibril Okash Ahmed's case** at page 44. It is for the above reasons that the fourth ground of appeal collapses.

Turning to the question of retracted caution statement, it is unclear from the records looking at pages 3-4 of the judgment whether it was retracted or not. If it was retracted, the procedure is that the trial court ought to have conducted an inquiry. Comfort is however given by the appellant's counsel silent abandonment of that ground of appeal. From that perspective the fourth ground of appeal also looses its footing.

From the above parties' submissions and observations of the court this appeal lacks merit, and it is dismissed.

DATED at **TANGA** this 23rd Day of July, 2021.



U. J. AGATHO
JUDGE
23/07/2021

Date: **23/07/2021**

Coram: Hon. Agatho, J

Appellant: Present

Respondent: Joseph Makene State Attorney for the respondent

B/C: Alex

Court: Judgment delivered on this 23rd day of July, 2021 in the presence of the Appellant, and Joseph Makene State Attorney for Respondent.

U. J. AGATHO
JUDGE
23/07/2021