

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**CRIMINAL APPEAL NO. 36 OF 2020**

(Originating from the Judgment of the District Court of Tanga

in Criminal Case No. 32 of 2020)

**MBWANA HAMADI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

**MKASIMONGWA, J.**

This appeal is against both conviction and sentence imposed in Criminal Case No. 32 of 2020 of the District Court of Tanga District. In the case, Mbwana Hamadi (Appellant) stood before the Court charged with Trafficking in Narcotic Drugs Contrary to Section 15A (1) of the Drugs Control and Enforcement Act No. 5 of 2015 as amended by the Drugs Control and Enforcement (Amendment) Act, 2017. He was convicted of the offence and sentenced to thirty (30) years imprisonment.

In the Petition of Appeal filed, the appellant listed three grounds as follows:

- 1. That, the certificate of seizure had problem as was not procured according to law.*

2. *That the prosecution failed to establish chain of custody of the exhibit submitted to the Chief Government Chemist and subsequently tendered in the trial Court as evidence.*
3. *That, the case against the Appellant was not proved beyond reasonable doubt.*

The Appeal was contested by the Respondent Republic and on the date the same was placed before the Court for hearing Mr. Ahmed Makallo (Adv) and Mr. Paul Kusekwa (SA) appeared on behalf of the Appellant and Respondent, respectively.

Before what was submitted by the respective learned counsels is stated, I find it material worth to state though briefly the facts of the case as one may conceive from the evidence on record. They are as that: On 21/01/2020 one Juma Omary, the Mafuriko Kati Hamlet leader called A/Insp. Mwakisole (PW1), then stationed at Amboni Police Post, informing that within his area there were many youths dealing, unlawfully, in narcotic drugs. Accompanied by G. 3307 DC Amour (PW2) of Chumbageni Police Station PW1 went to Mafuriko Kati and the Hamlet Chairman led them to the area in question where they arrested Mbwana Hamadi (Appellant) and a fellow named Dula. Whereas the Appellant possessed a bundle packed in a Khaki paper Dula had the Azam Energy Plastic bottle in possession. When

the bundle found in possession of the appellant was searched by the Police Officers they found a substance which they suspected to be bhang. PW1 prepared a Certificate of Seizure which was signed by the two police officers the suspect and Juma Omary who witnessed the search, in seizing the item.

With the seized suspected bhang, Mbwana Hamadi was taken to Chumbageni Police Station where a Police Case File No. TAN/IR/258/2020 was opened and the seized alleged bhang was handed over to the Exhibit Keeper one G. 4488 DC Sinai (PW3) by A/Insp. Mwakisole. Later on, PW3 handed over the alleged bhang to F. 8603 DC. Daudi (PW4) for it to be packed so that it is taken to the Office of the Chief Government Chemist in Dar es Salaam. PW3 so packed the exhibit in the presence of the suspect (Appellant) after which assignment, he returned the same to the Exhibit Keeper (PW3). On 27/01/2020 PW3 handed over the packed exhibit to H. 3954 DC Fredy (PW5) for the later to take it to the Chief Government Chemist, Dar es Salaam office for a laboratory test. At the office the Exhibit was received and registered assigned a Laboratory Number 333/2020. While accompanied by Faustine Wanjala, a Chemist, PW5 went to the Laboratory where the alleged bhang was weighed and met weighing 70.64



grams and samples taken from the bundle were tested and the test revealed that the bundle was of bhang. The sample taken was retained for further examination and that the bundle was repacked and PW5 took it back to PW3 on that same date. Later on 10/02/2020 PW4 was handed over with the Chief Government's Report. The Certificate of Seizure, khaki envelop with suspected bhang and the Chief Government Chemist's Examination Report were tendered to the Court as Exhibits and admitted as such marked **Exhibit P1, P2 and P3**, respectively.

When was invited to argue the Appeal on behalf of the Appellant, Mr. Makallo stated that in the case the prosecution witnesses showed that the Appellant was met in possession of bhang which the police officers had eventually seized. The evidence is silent as to how the seized bang was handed over from one hand to another the act which leads to the conclusion that there was no adherence to the proper chain of custody which according to the decision in the case of **Rashid Omary v. R:** Criminal Appeal No. 106 of 2020, CAT – Tanga (Unreported) has to ensure that since when the Exhibit is seized to when the same is tendered to the Court it is not tempered with. There must be documentation showing transfer of the exhibit from one person to another. As it was not proved

that the chain of custody was not broken the prosecution case was left doubtful.

As regards to the certificate of Seizure **(Exhibit P1)** Mr. Makallo submitted that the same was not legally procured as PW1 did not issue a receipt and that at the time of seizure there was no independent witness to witness the occasion. Mr. Makallo added that the provisions of section 38 (3) of the Criminal Procedure Act [Cap 20 R.E 2019] which is couched in a mandatory manner were not adhered to. Mr. Makallo admitted that indeed, Juma Omary, the Hamlet leader was there during the search and that he is shown to be an independent witness. He said, however, that the police was acting on the information of the leader. As such the later could not be held to be an independent witness during the search.

As far as the third ground of appeal is concerned Mr. Makallo submitted that the prosecution evidence and in particular that given by PW1 is defected by that of the Appellant and Joseph Robert (DW2) which was to the effect that the exhibit (Bhang) was just planted to them by the Police Officers upon the arrest. As such the case was not proved beyond doubt. Mr. Makallo, by way of conclusion, prayed the court that it allows

the Appeal, the convict be quashed, sentence set aside and an order should be given that the Appellant be released from jail.

On the other hand, arguing in respect of issuance of the Certificate of Seizure, Mr. Kusekwa contended that section 38 (3) of the Criminal Procedure Act (CPA), has the same effect as that of section 43 (1), (2) (c) (vii) of the Drugs Control and Enforcement Act (DCEA). Under the later provision of the law, a Police Officer upon seizing drugs may issue a receipt or a form. In terms of section 48 (6) of the DCEA, the DCEA will take precedent where there is a conflict between the CPA and the DCEA. As such the CPA does not apply to the issue at hand. Consequently when PW1 issued the Form **(Exhibit P1)** it was within the requirements of the law.

Regarding to the chain of custody, Mr. Kusekwa contended that it is alleged that the chain of custody of the exhibit was not established. He submitted that it is clear from the evidence on record that, the seizing officer upon seizing it, he took the exhibit, on that same date, to the exhibit keeper (PW3) at Chumbageni Police Station. The later kept it until 23/01/2020 when he handed it over to PW4 who packed it with a view to taking the same to the office of the Chief Government Chemist at DSM. After he had packed it in the presence of the Appellant, PW4 took the



exhibit back to PW3. Later on 27/01/2020 PW3 handed the exhibit over to PW5 who took the same to the Chief Government Chemist at DSM and after analyzing it Faustine J. Wanjala, the Chemist at the Office, repacked and gave it back to PW5 who again took the exhibit back to PW3 on that same date. Mr. Kusekwa submitted that the evidence shows how the exhibit passed from one hand to another and since those who handled the exhibit were called to testify to the court, an allegation that the chain of custody of the exhibit was not cannot stand and in the circumstance, it was not necessary that the transactions be evidenced by documents. To cement that argument, Mr. Kusekwa referred the court to the decision in the case of **Chacha Yerima Murime and three others v. R:** Criminal Appeal No. 551 of 2015 CAT - Mwanza and also **Chukwudi Denis Okechukwu and three others v. R:** Criminal Appeal No. 507 of 2021, CAT at Dar es Salaam, all unreported.

As for the third ground of Appeal, Mr. Kusekwa submitted that it is not doubtful that the Appellant was found in possession of leaves which the Chief Government Chemist had established to be bhang. Indeed DW2 was arrested along with the Appellant. The later was charged separately with the Appellant. The learned State Attorney prayed the Court, that on

the basis of the above submission it finds no merit in the appeal and the same should be dismissed in its entirety.

In a brief rejoinder Mr. Makallo submitted that, the cited cases, which were recently determined by the Court compared to those cited by his learned brother, stressed on the application of section 38 (3) of the CPA and it was insisted on documentation in exhibiting the chain of custody. He reiterated that the case was not proved beyond all reasonable doubt. The Appeal should therefore be allowed.

I have considered the submissions made by the respective counsels for the parties. I have again considered the evidence on record. Determination of this appeal, in my view depends to the answers the Court shall have to the following questions; **One:** whether the Certificate of Seizure was lawfully procured; **Two:** Whether the prosecution established chain of custody, of the exhibit submitted to the chief Government Chemist and subsequently tendered to the Court as evidence. **Three:** whether the case against the Appellant was proved beyond reasonable doubt.

As regard to procurement of the Certificate of Seizure, the Appellant's counsel contended that the same is governed by the provisions of section 38 (3) the CPA. The section reads as follows:-



*"38 (3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."*

Indeed, going by the section, the provisions therein are mandatory. The section, however, does not make it necessary that a Certificate of Seizure must be signed by a witness. A Certificate of Seizure shall be signed by a witness to the search if any. Mr. Kusekwa countered the submission by Mr. Makallo. He said, seizure of Exhibits for crimes under the DCEA is governed by the provision of section 48 of the Act. In particular section 48 (2) (c) (iv) of the Act. The provision reads as follows:

*"48 (2) For purposes of Subsection (1) an officer of the Authority and other enforcement organs when*

*(c) Searches for an article used or suspected to have been used in commission of an offence.*

*(vi) Record and issue receipts or fill in the form an article or thing seized in a form set out in the third schedule to this Act'*

As it was submitted by Mr. Kusekwa, where there are sections in the CPA and DCEA to the same effect for trials involving narcotic drugs those under the DCEA shall prevail. This is by virtue of the provision of section 48

(6) of the DCEA. It remains therefore that it was proper when Form No. DCEA 003 was issued upon search and seizure of the item the subject of this case.

As to whether the prosecution had established the chain of custody of the exhibit, in terms of Order 40 of the Police General Order whenever an exhibit is passed away from the custody of one officer to that of another, the officer who hands over the exhibit must record in the presence of the later officer the name, rank and numbers of the officer to whom he hands over the exhibit and the date and time of the handing over on the back of the exhibit label. This is what known as the chain of custody which was well defined and its rationally and requirement shown in the case of **Paul Maduka and Others v. R:** Criminal Appeal No. 110 of 2007, CAT (unreported) as that:

*"The chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody ... is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone guilty. The chain custody requires that from the moment the evidence is collected, its very transfer from one person to*

*another must be documented and that it be provable that nobody could have accessed it"*

The principles laid down in the case however, can be relaxed in cases where the relevant exhibit can neither change hands easily nor be easily compromised. This was well stated by the Court in the case of **Rashid Omari v. R:** Criminal Appeal No. 106 of 2020, CAT at Tanga (unreported) where it held that:

*"While it is settled law that chain of custody shall be proved by way of trail of documentation as stated in Paul Maduka and others vs. R (supra) this shall not be the only prerequisite in dealing with exhibits. There are other factors to be considered depending on prevailing circumstances of each case. In cases where the relevant exhibit can neither change hands easily nor be easily compromised the principles as laid down in the case of Paul Maduka (supra) can be relaxed."*

In the present case, in terms of paper trail with respect to **Exhibit P2** it was only the Certificate of Seizure (**Exhibit P1**) tendered to the Court. This despite the fact that custody of the exhibit had changed hands since when it was seized to the time the same was tendered to the Court. With regard to oral evidence supporting the chain of custody, it is on record that the alleged bhang was taken to the Chief Government Chemist Office for a laboratory test. At the office the same was tested and analyzed



by Faustine J. Wanjala who consequently prepared a report (**Exhibit P3**).

It is unfortunate that Faustine J. Wanjala was not called o testify to the court which failure impacted the case for the prosecution for it created a gap in the prosecution witnesses in proving the chain of custody.

Lastly, on whether the prosecution proved its case beyond doubt, I have found that the chain of custody of exhibits was not proved. I am thus left with no cogent evidence to find that the charges were proved against the appellant to the standard required in criminal cases.

For the reasons above, I find merit in the appeal and the same is hereby allowed. Consequently, the conviction is quashed and the sentence imposed on the Appellant is set aside. The Appellant shall be released from jail forthwith unless he is otherwise lawfully held.

**DATED** at **TANGA** this 9<sup>th</sup> day of September, 2021.

  
E. J. Mkasimongwa

**JUDGE**

**17/06/2021**

Date: 09/09/2021

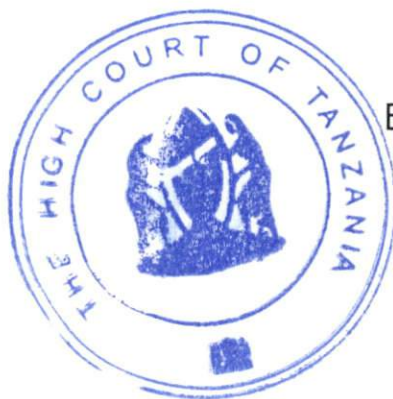
Coram: E. J. Mkasimongwa, J

For Appellants: Present

For Respondent: Absent

C/C: Alex

**Court:** Judgment delivered in Chambers this 9<sup>th</sup> day of September, 2021, in the presence of Mr. Mangowi (SA) for the Republic and Ms. Aisha Kilemela (Adv) for the Appellant and of the Appellant too. Right of Appeal is explained.



  
E. J. Mkasimongwa

**JUDGE**

**09/09/2021**