

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO.104 OF 2021**

*(Originating from criminal case No. 135/2018 in Babati District Court at Babati)*

**ISSA SEIF ABEID.....APPELLANT**

**Vs**

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

**JUDGMENT**

*Date of last Order:18-7-2022*

*Date of Judgment:15-8-2022*

**B.K.PHILLIP,J**

In the District Court of Babati at Babati, the appellant herein was convicted of the offence of trafficking Narcotic Drugs contrary to section 15A(1) of the Drugs Control and Enforcement Act as amended by section 9 of the Drugs Control and Enforcement ( Amendment ) Act No. 15 of 2017.The trial Magistrate sentenced him to 20 years imprisonment.

Aggrieved by the aforesaid decision of the trial Court, on the 3<sup>rd</sup> September,2021 the appellant lodged his appeal in this Court on six grounds of appeal. The same indicates that it was prepared by learned Advocate Raymond Joakim of Land Rights Initiative Centre, who was engaged for drawing the Memorandum of appeal only. On 15<sup>th</sup>

November 2021, when the appeal was called for mention, the appellant prayed to file additional grounds of appeal. I allowed his prayer. He filed six additional grounds of appeal. Later on the appellant engaged the learned Advocate Hamis Mkindi. On his first appearance before the Court, Mr. Mkindi, informed this Court that upon perusing the Court's records he noted that there was a need to file other additional grounds of appeal. For the interest of justice, I granted his prayer. He filed two additional grounds of appeal.

Mr. Mkindi argued the appeal for the appellant whereas the Republic was represented by the learned State Attorney Felix Kwetukia. I ordered the appeal to be disposed of by way of written submissions. In his submission Mr. Mkindi abandoned most of the grounds of appeal filed by the appellant. For avoidance of making this judgment unnecessary long, I will reproduce hereunder the grounds of appeal that have been argued by Mr. Mkindi in his submission.

- i) That the trial Magistrate erred in law and facts to convict and sentence the appellant to 20 years imprisonment by failure to critically analyze the evidence of the appellant but relied on the paraphrased short story of the police.

- ii) That the Honourable Magistrate erred in law and fact in convicting and sentencing the appellant despite that the chain of custody was irretrievably broken beyond repair by PW2, PW3, PW5 ( they did not say whether they sealed or labelled the exhibit after receiving it and did not say where they kept it) , and the said Seleman Said who allegedly received the exhibit for weighing did not testify to establish the chain.
- iii) That the learned Magistrate erred in believing that the exhibit allegedly seized with the appellant on 16<sup>th</sup> August 2018 at 16.00 Hrs was the very same one which was taken to the Government chemistry on 23<sup>rd</sup> August 2018 and found to be "Mirungi"
- iv) That the learned trial Magistrate erred in convicting and sentencing the appellant despite that there was no evidence of the value of the alleged drug. .
- v) That the charge was not proved beyond reasonable doubts.
- vi) That the trial Magistrate erred as he failed to properly analyse and evaluate the prosecution evidence , in result he convicted the appellant who did not commit the crime by basing on incredible , contradictory and insufficient evidence from the prosecution side.

At the trial Court the prosecution case was as follows. That on 16<sup>th</sup> August, 2018 at Mswakini area ,within Babati District the accused did traffic Narcotic drugs namely Catha Edulis commonly known as "Mirungi" weighing 2.71kg. On the fateful day at Mswakini area, police officers, PW1 and PW6 were involved in search in a Min-bus with registration No.T.763 DLT, where the appellant was at seat No.K1. He was suspected to have "Mirungi ".He was ordered to get out of the Bus and was searched. During the search, he was found with 30 small bundles of "Mirungi" tied up on his body using cello tape. Also, they found a ticket for the bus fare issued in his name. Insp. Gregory (PW6) seized the said 30 bundels of "Mirungi " which were in gazette and banana leaves, and issued a seizure certificate. The appellant was taken to the police station and processes for identification of the seized exhibit were conducted. Finally, the accused was charged in Court. The prosecution paraded eleven witnesses to show how the appellant was arrested and chain of custody of the exhibit ( Mirungi). The following were tendered as exhibits for the prosecution case; Certificate of seizure ( Exhibit P1) , Bus ticket ( Exhibit P2) DCEA 001 Form( Exhibit P3), Chain of Custody Form ( Exhibit P4), Weigh Report ( Exhibit P5), Inventory ( Exhibit P6) and Government Chemist Report ( Exhibit P7).

On the other hand the appellant's defence was as follows; That on the fateful day he was travelling from Arusha to Kondoa in Min-bus No.T.763 DLT.He had no bus fare. The conductor dropped him at Mswakini area and asked the assistance of the police .He spent one night at in a police lock up and the next day he was taken to Babati Police Station. Ultimately he was arraigned in Court.

Submitting for the 1<sup>st</sup> ground of appeal Mr. Mkindi contended that the prosecution case was not proved beyond reasonable doubt.The trial Magistrate failed to analyze the evidence adduced and relied on the prosecution evidence without taking into consideration the appellant's defence, which was to effect that he boarded the bus without fare. The bus conductor dropped him at Mswakini area and surrendered him to the police officers. He was taken to Minjingu Police station where he spent one night and later on was taken to Babati police station. Mr. Mkindi also contended that the authenticity of bus ticket Exhibti P2 is questionable.

Submitting for the 2<sup>nd</sup> , 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal jointly, Mr. Mkindi argued that, the trial Magistrate erred in law by convicting the Appellant while the chain of custody was broken beyond repair. PW1 – PW7 testified in Court and admitted that to have collected 30 bundles of

Mirungi tied in gazette and banana leaves, but none of them has testified to have sealed and labelled the 30 bundles of Mirungi which were tied in banana leaves and gazette. He contended that PW2 and PW5 who were storekeepers they did not inform the Court where the exhibit was kept or stored, how it was sealed to avoid possibility of being tempered with. The failure to seal and label the exhibit (Mirungi) contravened paragraph 8 and order 40 of the Police General Orders(PGO) No. 229 which provides for the appropriate way of handling exhibits from seizure to tendering the same in Court.

In line with the above arguments on the doubts in the chain of custody, Mr. Mkindi, further submitted that exhibit P5 ( the report from the weighing officer) was prepared and signed by Selemani Saidi but he did not testify before the Court as the weighing officer who weighed the said narcotic drugs. He was of the view that the failure of the weighing officer to show up before the Court raises doubts not only on the weight of the said narcotic drugs but also breaks the chain of custody. Expounding on this point Mr.Mkindi argued that the alleged drugs were seized on the 16<sup>th</sup> August 2018 and taken to the weighing officer on the 20<sup>th</sup> August 2018 and finally taken to the Chief Government Chemist on 23<sup>rd</sup> August 2018.He contended that the bundle of Mirungi was

weighed after eight days from the date of arrest of the appellant, but surprisingly, this being a perishable good was found with the same weight. To him, that creates doubts on the credibility of the prosecution evidence.

Submitting for the 5<sup>th</sup> and 6<sup>th</sup> grounds of appeal conjointly, Mr.Mkindi argued that PW6, testified in Court that during the search the appellant was found with the said Mirungi tied on his body, but neither PW1 nor PW2 mentioned the part of the appellant's body where the suspected 30 bundles of the said Mirungi were found.He further argued that, the search was conducted in absence of independent witness. PW2 and PW6 testified to have searched the appellant but they did not say where was the search conducted and the independent witness who observed the search, contended Mr. Mkindi.He went on submitting that the bus conductor(PW11) testified that the Appellant was taken out of the bus. An independent witness was important to establish that the appellant was found with 30 bundles of Mirungi . PW11 witnessed the seizure of the said drugs but not search maintained, Mr. Mkindi.In addition, it was Mr. Mkindi's argument that the certificate of seizure, (Exhibit P1) was not signed by an independent witness. It only bears the name of Aisha Halifa as a witness but she did not sign it, thus its

authenticity is questionable and it was not safe for the Court to rely on the same to convict the appellant, contended Mr.Mkindi. He implored this Court to reevaluate the evidence adduced and expunge Exhibit P1 from the Court's records.

Furthermore, Mr. Mkindi argued that the trial Magistrate erred in law and fact when to convict the appellant without observing that the allegedly seized drugs were ordered to be destroyed and in lieu thereof an inventory was produced and received as exhibit P6, but the appellant did not enter appearance before the Magistrate who ordered the disposal of the exhibit. He contended that the appellant's right to be present and heard during the issuance of the Order for disposal of exhibits was violated.

Finally, Mr. Mkindi submitted that Exhibit P6 was prepared in contravention of the acceptable legal procedure, thus the same also deserves to be expunged from the Court's records. To cement his arguments he cited the case of **Bubuya Marwa @ Mwita Vs The Republic, Criminal Appeal No.77 of 2021** and **Mohamed Juma @ Mpakama Vs The Republic , Criminal Appeal No.385 of 2017** (both unreported). He prayed this appeal be allowed, the decision of the lower Court be quashed and set aside, and the appellant be set free.



In rebuttal, the learned State Attorney argued as follows; that the prosecution proved its case to the standard required by the law. The appellant's defence that the conductor (PW11) had grudge against him is an afterthought since he never cross examined her on that issue. Therefore, he is estopped from moving the Court to disbelieve PW11's testimony. To cement her argument she cited the case of **Nyerere Nyague Vs The Republic, Criminal Appeal No.67 of 2010** (unreported).

Responding to the submission in respect of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> grounds of appeal, the learned State Attorney submitted that the chain of custody was not broken. The same was intact from the time of arrest, seizure, sampling and preparation of inventory. The prosecution paraded witnesses to show how the chain of custody of the exhibit (Mirungi) was maintained and explained how the same changed hands from the time of seizure to the time of its disposal. He contended that PW1 and PW6 were the one who arrested and searched the appellant. They took the appellant to the Police Station together with the exhibit (Mirungi) and handed over the same to PW2 who stored the Exhibit in safe place and filled in Exhibit P4 (Chain of custody form). PW3 handed over the exhibit to PW4 who took the exhibit and the accused person to

Babati Police station where the exhibits were received and kept in safe custody by PW5. On 20<sup>th</sup> August 2018, PW5 handed over the exhibit to PW8 who took the exhibit to Seleman Said who weighed the exhibit and found out that it was 2.71 Kg. Thereafter he returned the exhibit to PW5, who kept them in safe custody and on 23<sup>rd</sup> August 2018 PW5 handed over the exhibit to PW7 who took the same to the Arusha Government Chemist office and handed it over to PW3 for sampling and then returned to the exhibit to PW5 for safe keeping. On 24<sup>th</sup> August 2018, PW5 took the exhibit to PW8 who took the exhibit for inventory where exhibit P6 was issued in the presence of the appellant. Thereafter the samples of exhibit were handed over to PW10 who took the same to the PW9 who conducted the laboratory tests and found out that the same were Cat Cathedulis commonly known as "Mirungi". The learned State Attorney maintained the chain of custody was never broken.

With regard to the 5<sup>th</sup> and 6<sup>th</sup> ground of Appeal, the learned State Attorney, maintained that the charge against the appellant was proved beyond reasonable doubts. The prosecution paraded all material witnesses and there was no any inconsistency and or contradiction in the prosecution witnesses could shake or dismantle the prosecution case. The learned State Attorney conceded that upon seizure of the

exhibit, no receipt was issued to the appellant. But he contended that failure to issue a receipt is not fatal because the appellant signed the certificate of seizure, thus he knew what was seized since the same was obtained from his body.

In conclusion of her submission the learned State Attorney prayed for the dismissal of this appeal for lack of merit.

In rejoinder, Mr. Mkindi reiterated his submission in chief and went on submitting that the failure to summon Selemani Said (weighing officer) to testify in Court broke the chain of custody. He contended that he was a crucial witness for establishing the weight of the drugs seized because the weight of the drugs is important in establishing the offence and punishment pursuant to section 15 of the Drugs and Enforcement Act 2015. He added that PGO No.229 paragraph 8 which provides that exhibits have to be labelled was contravened since there was no evidence to prove that the exhibit was sealed to avoid the possibility of the same being tampered with. He insisted that it was imperative for the exhibit to be labelled. To cement his arguments, he cited the case of **Zainabu Nassoro @ Zena Vs The Republic, Criminal Appeal No.348 of 2015**, (unreported).

Lastly ,Citing the case of **Samweli Kibundali Mgaya Vs The Republic, Criminal Appeal No.180 of 2020** ( unreported) ,Mr. Mkindi insisted that it was important to issue a receipt in relation to seizure to make sure that the seized property came from no other place than the one shown in the receipt.

Having analyzed the competing arguments made by the learned State Attorney and Advocate Mkindi, let me start by pointing out that all grounds of appeal are basically on the following concern, One, the propriety and evidential value of the Inventory ( Exhibit P6 ) and Certificate of seizure ( Exhibit P1) . Two, the legal requirement on the keeping the chain of custody of the exhibits unbroken and safe custody and labelling of exhibits. Three, analysis of the evidence adduced. In the determination for this appeal I will deal with the above mentioned issues which I believe will provides answers to all arguments raised by the learned State Attorney and advocate Mkindi.

Starting with the first issue, The Court's records reveal that the certificate of seizure was signed by the appellant and an independent witness namely Aisha khalifa. ( the bus Conductor).Thus, I find, Mr. Mkindi's arguments that there was no independent witness during the

search and preparation of the certificate of seizure in unfounded and have no merit.

With regard to the concern raised by Mr. Mkindi on the inventory form, according to the testimony of PW8, E 3008 DSGT Dongoye and the Court's records, the order for disposal of the exhibit was issued in Court in the presence of the appellant. The Inventory Form (Exhibit P6) was signed by the appellant. In my considered opinion, the Inventory form and certificate of seizure were properly secured and have high evidential value.

With regard to the 2<sup>nd</sup> issue, it is a common ground that the chain of custody of the exhibit has to be kept intact so as to avoid the possibility of anybody tampering with the exhibit in question. In this case the prosecution paraded witness to prove that the chain of custody was not broken from the time of seizure of the exhibit to the time of disposal. They also tendered in Court the Chain of custody form (Exhibit P4) which was duly filled in and shows in detail how the exhibit was changing hands. This is in compliance with the requirement of documenting the chain of custody as laid down in the case of **Zainabu Nassoro @ Zena** (supra). I found the same to be very elaborate and clearly show the movement of the exhibit. In his submission Mr. Mkindi

did not challenge Exhibit 4. However, he contended that the exhibit was not labelled and sealed. In their evidence the prosecution witnesses told the trial Court that the exhibit was wrapped in gazette and banana leaves, and at all stages were kept in safe custody. PW7 the one who took the exhibit ( 30 bundles of "Mirungi") to the Government Chemists told the Court that the Government chemist took 22 grass from the 30 bundles of Mirungi, kept them in an envelop labled as NZL 350/2018. The way the exhibit was handled from the date of seizure to the date it was taken to the Government chemist as evidenced by documentation on the chain of custody ( Exhibit P4), I decline to agree with the arguments raised by Mr. Mkindi that since the exhibit was not labelled, therefore there was possibility of unfaithful people tempering with the same.

On the other hand, the Court's record shows that during the trial the appellant did not cross examine the prosecution witnesses on the issue of labelling the exhibit and did not object to the admission of any exhibits tendered by the prosecution witnesses. This prove that the exhibit ( "Mirungi") was properly handled from the time of seizure to the time of disposal and the appellant was fully involved in every stage, that is why he had not doubts of the reports tendered by the prosecution.

Thus, the holding on the Court of Appeal in the case of **Nyerere Nyangue** ( supra) cited by the learned State Attorney, in which the Court stated that as a matter of principle, a party who fails to cross examine a witness on certain matters is deemed to have accepted that matter and will be stopped from asking the trial Court to disbelieve what the witness said, is relevant here.

In addition to the above, the aim of labelling exhibits is make sure that they are clearly identified so that they cannot be mixed up or confused with other exhibits. In this case all prosecution witnesses explained before the Court that the exhibit in question, ( Mirungi”) was tied up in the gazette and banana leaves. Thus, the same could be clearly identified thorough out the process from the time of seizure to the time of issuance of the order for disposal. In my considered opinion the effect of failure to label an exhibit like drugs in powder form is different from the failure to label an exhibit like the one in question in this case, which was packed uniquely in gazette and banana leaves because the likelihood of mixing up drugs in powder form is so high. All in all, each case has to decided on its own merit depending on the nature of the exhibit in question. In my opinion, not every failure or oversight to label an exhibit, even in circumstances where the exhibit can be

identified due to its nature and package, should render the prosecution case to collapse.

Moreover, the fact that Mr. Seleman Said, the weighing officer was not summoned to testify in Court, does not mean that the chain of custody was broken. The Court's record reveal that Mr. Seleman Said filled in the chain of custody form ( Exhibit P4) which has not been challenged by the appellant's advocate in anyway. He did not keep the exhibit. He received it from PW8, weighed it and was returned to PW5 for safe custody. PW8 tendered in Court the weigh report ( Exhibit P5) which has not been challenged in anyway. Under the circumstances, since Mr. Selamani Said filled in Exhibit P4 and his report was admitted in evidence ( Exhibit P5) there was necessity of calling him in Court and chain of custody has never been broken.

Coming to the 3<sup>rd</sup> issue on the analysis of the evidence adduced, upon perusing the court's records, I am of a settled view that the prosecution proved its case to the standard required by the law and the decision of the trial Magistrate cannot be faulted. The prosecution brought in Court all material witnesses. As alluded earlier in this judgment, the prosecution paraded 11 witnesses who testified on how the appellant was arrested and tendered in Court all documentary evidence



pertaining to the identification of the exhibit as " Mirungi", its weight and disposal. Their testimonies were consistent and not contradictory.

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tion case at all. The

In the upshot, it is the finding of this Court that this appeal is devoid of merit. The same is hereby dismissed in its entirety. It is so ordered.

Dated this 15<sup>th</sup> day of August 2022



  
**B.K.PHILLIP**

**JUDGE.**