IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 79 OF 2021

(C/F Criminal Case No. 131 of 2019 District Court of Mwanga at Mwanga)

TRIFONIA BATHROMEO @ KAVISHE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 11th November, 2022
Judgment: 28th November, 2022

MASABO, J.:-

Trifonia Bathromeo @ Kavishe, the appellant herein, was arraigned, tried and convicted of the offence of unlawful trafficking of Narcotic drugs to wit, 24.5 kilograms of Khat Edulis, commonly known as *mirungi*, contrary to section 15 A (1) and (2) (c) of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017 before the District Court of Mwanga at Mwanga (the trial court).

The prosecution's case was that, on 28th August 2019 while on duty, police officers at Kifaru area Mwanga district were told by an informer that the appellant had boarded a Saibaba Bus with registration T.690 BUW at Njia Panda heading to Dar es Salaam and that she has carried along two sulphate bags containing raw bananas in which she has hid 25 and 26 bundles of fresh leaves *Mirungi*. Armed with such information, PW1, PW2 and PW3

stopped the bus at Kifaru, Mwanga, searched the booth of the bus whereby they found the two sulphates, which according to the bus conductor belonged to the appellant. The appellant and the bus conductor were taken to police station for interrogation and their statements were recorded. The conductor was later on released and the appellant was arraigned before the trial court and tried for the above offence.

The appellant's defence was a total denial. She denied possession of the alleged parcels and denied to have boarded the bus at Njia Panda. She claimed that she boarded the bus at Moshi Stand. Further, she stated that she travelled on 26th August, 2019 and not 28th August, 2019 as alleged by the prosecution. In the end, the trial court found the prosecution's case credible, convicted and sentenced the appellant to 30 years imprisonment.

Disgruntled by the conviction and sentence, the appellant has filed this appeal advancing 10 detailed grounds of appeal which can be summarised as hereunder;

1. The offence against which she was convicted was not proved to the required standard;
2. The trial magistrate failed to note the gap on the date when the said drugs were taken to the government chemist;
3. The chain of custody was not intact;
4. Documents tendered by PW2 were wrongly admitted as they did not follow proper procedure;
5. Exhibit P6 was wrongly relied upon as the arresting officer was the one who recorded the statement;

6. The conviction was based on inconsistent, contradictory, weak and unreliable prosecution evidence;
7. Exhibit P5 was not cleared for admission;
8. Exhibit P7 was wrongly admitted as it was said to have been filed on 22nd December, 2020 while on that day the prosecution only prayed to adjourn the case;
9. The court erred by admitting exhibit P4 from PW2 who was not the maker of the said report; and
10. Essential witness i.e. the Government Chemist was not summoned to testify.

Hearing of the appeal was by way of written submissions. The appellant was represented by Mr. Caesar Shayo, advocate whereas the respondent was represented by Ms. Mary Lucas, learned State Attorney.

Supporting the 1st ground of appeal, Mr. Shayo silentsly abandoned the 2nd ground of appeal, jointly submitted on the 5th, 6th, 8th, 9th and 10th grounds and he submitted separately on the rest grounds of appeal to wit, ground number 1, 3, 4 and 7.

Submitting on the first ground of appeal he reasoned that, it is a cardinal principle that in criminal law, the burden of proof lies on the prosecution to prove the case beyond reasonable doubt as provided for under **section 111 of Evidence Act**, Cap 6 R.E. 2019. The, weakness of defence case cannot be used to build up the prosecution case. The prosecution in the present case failed these principles as there are a number of doubts in its case which

shows that the appellant's conviction was based on the weakness of her defence as seen at page 4 of the trial court's judgment.

On the 3rd ground he submitted that the chain of custody was clearly broken and in fortification he ciled the decision of the Court of Appeal in **Paul Maduka,** Criminal Appeal No. 110 of 2007 and **Zainabu Nassoro @ Zena Vs. Republic**, Criminal Appeal No. 348 of 2015 (all unreported) where the Court underscored the importance of chain of custody in ensuring that the alleged evidence is, in fact related, to the crime and has not been tampered with. He then argued that, in the present case, there was no documentation on change of exhibits from one officer to another contrary to Police General Order. He added that, by its nature, the exhibit could easily pass hands hence it could be easily tampered, Hence, it was crucial that the chronological documentation and parading of witnesses be observed but that was not done. No single witness was called from the Government Chemist to testify on how the sampling and analysis of the exhibit was done to prove that the seized substances were indeed narcotic drugs. The failure to call this material witness draws inference that had he been called in court he would have given adverse evidence as held in the case of **Said Hemed Vs. Mohamed Mbilu** (1984) TLR 84.

Regarding the 4th ground, Mr. Shayo asserted that, during trial, the prosecution prayed to recall PW2 so that he could tender statement of Khalfan Mdemu as exhibit. However, the said statement was never tendered instead he tendered the statement of one Alfan Mdemu Juma without oral notice and contrary to section 34 B (2) of the Evidence Act, Cap 6 R.E. 2019.

On the 7th ground, the learned counsel asserted that, exhibit P5 was admitted without being cleared for admission first. Submitting jointly on the 5th, 6th, 8th, 9th and 10th grounds of appeal he briefly submitted that, as pointed out in the 1st ground, the case against the appellant was never proved to the required standard as there are many inconsistencies and weaknesses in the prosecution evidence. In summation, he prayed that his appeal be allowed, the conviction and sentence be set aside and the appellant be released unless held for other lawful purposes.

In reply Ms. Lucas submitted that, the prosecution proved its case beyond reasonable doubt. The inconsistencies raised by the appellant are minor and do not go to the root of the case. She averred that the appellant was charged with the offence of unlawful transportation of 51 bundles of fresh leaves of Narcotic drugs namely Khat Edulis, commonly known as Mirungi. That, according to **section 36 of the Drugs control and Enforcement Act Cap 95** there is a rebuttable presumption that a person found in possession of narcotic drugs commits the offence. Further the prosecution evidence was solid. PW1 clearly narrated how she arrested the appellant in possession of the said narcotic drugs which were in sulphate bags. According to PW1, after they stopped the bus, searched it and impounded the two sulphate bags with fresh leaves suspected to be *Mirungi*, the bus conductor identified the appellant as the owner of the two bags and when asked she admitted ownership. She added that this evidence, as credibly corroborated by PW2, a policeman who was among the police officers who conducted the search,

was uncontroverted. Besides, the appellant signed the seizure note in acknowledgement of ownership and when the substances was tendered as exhibit in court, she did not object. Thus, she is estopped from disputing ownership.

Regarding the chain of custody, Ms. Lucas submitted that, evidence rendered by prosecution witnesses clearly disclosed how the exhibit were handled from the time of seizure until when they were disposed. PW1 and PW2 arrested the appellant and impounded the exhibit; later, PW2 handed the 51 bundles of leaves wrapped in banana leaves to PW4 PC Graciano, the exhibit keeper who kept them to 5th September, 2019 when they were taken to the Government Chemistry Laboratory for analysis and was thereafter returned to the exhibit keeper where it remained until on 22nd December, 2020 when PW2 took it to the trial court for inventory process in the presence of the appellant and the same were disposed off. The certificate of seizure and inventory form were tendered in court as exhibit P3 and P7.

The learned state Attorney conceded to the fact there was somehow broken chain of custody as the exhibit keeper did not explain the movement of exhibit from him to PW2 who took them to government chemistry. However, she argued that, it has no damage to the prosecution's case as the exhibit is of the nature that cannot be tempered easily hence an exception to the rules in **Paulo Maduka Vs. Republic** (supra). Cementing her argument she cited the case of **Hepa John Ibrahim Vs. Republic** Criminal Appeal No. 105 of 2020, CAT (Unreported) where the court quoted with approval its previous

decision in **Kadiria Said Kimaro Vs. Republic** Criminal Appeal No. 301 of 2017 (Unreported), where it was held that;

> "it is not in every case that documentation will be the only requirement to prove chain of custody of the exhibits, the circumstance of particular case should be considered establish authentically and handling of exhibit especially where the nature of the said exhibits is such that they cannot be easily tempered with".

She concluded that, the trial court cannot be faulted for convicting the appellant.

As to the procedure taken in admitting the statement of Khalfan Mtende, which is challenged in the 4th ground of appeal, the learned conceded that in deed the procedure was fraught and prayed that it be expunged from the record as it did not fulfill the requirement of section 34 B of the Evidence Act. In conclusion, she prayed that the appeal be dismissed as the prosecution proved the offence charged beyond reasonable doubt.

In his rejoinder, Mr. Shayo reiterated his submission in chief and added that since the learned State Attorney has conceded to the breakdown of the chain of custody, the appeal should be allowed as the seized item can easily be tempered with. He added that, as the learned state attorney has also conceded to the expungement of the statement of Khalfan Mtende, the remaining evidence will not suffice to sustain the conviction. In summation, he maintained that this appeal be allowed. This marked the end of the submissions.

I have carefully read and considered the record placed before me and submissions above. The main issue to be answered after determining the grounds of appeal fronted by the appellant is whether the case against the appellant was proved to the required standard. This being a first appeal, I am tasked, while determining the ground of appeal, to re-evaluate the evidence and form independent finding on whether the prosecution proved its case.

In prelude and as correctly argued by the appellant's counsel, it is indeed a cardinal law that, in criminal cases, the burned rests upon the prosecution to prove the case against the accussed person (section 110 and 111 of the Evidence Act) and the standard required is proof beyond reasonable doubt. It is similarly trite that, this burden never shifts. Put otherwise, there is legally no corresponding duty for the accused person to prover his/her innocent. Thus, the prosecution cannot be based on weakness of the defence case but the strength of the prosecution's case.

Moving to the specific grounds of appeal, I prefer to start with the second, third and 10th ground of appeal which I will consider jointly as they all revolve around the breakdown or otherwise of the chain of custody of the 51 bundles of Mirungi allegedly seized from the appellant. From PW1 and PW2 it is gathered that; the search was done by police officers who later on involved the bus conductor and the appellant. The seizure certificate which was tendered and admitted in court as exhibit P1 shows that, the seizure was witnesses by three police officers who testified in court as PW1, PW2 and PW3 and the bus conductor, who was also suspected and interrogated for

the offence before he was latter discharged, which clearly suggests that there was no independent witness hence offensive to the legal requirement that, seizure should be witnesses by an independent witness. Dealing with a similar issue in **David Athanas @Makasi and Another Vs. The Republic**, Criminal Appeal No. 168 of 2017 CAT at Dodoma (unreported), the Court of Appeal held that the search ought to have been done in the presence of an independent witness who also ought to sign the certificate of seizure and concluded that, since there was no independent witness, the certificate is devoid of weight. Similarly, in the present case, since the certificate admitted as Exhibit P1 was not signed by an independent witness, it is devoid of weight and I disregard it. I may also add that, I have found it rather intriguing as to why there was no independent witness while the bus had other passengers who could have played the role.

Ascending to the movement of the exhibit, the record shows that, after arresting the appellant and the bus conductor, it was PW3 who handed the seized parcels of Mirungi to the exhibit keeper one PC Graciano, PW4 at Mwanga Police station. The later testified that he kept the exhibit until 5th September, 2019 when he handed them over to PW2 who took the same to the Government Chemist at Arusha for analysis and returned them on the same day. The appellant has advanced two complaint the first being that, there is no paper trail and oral narration, an argument which I can only partially agree as there is on record, documentations showing the movement of the exhibit from one witness to another. Exhibit P31, P32, P33, clearly show how the exhibit moved from PW3 to PW4; and how PW4 handed them to PW2 on 5/9/2019 and how on the same day, PW2 returned the exhibit to

PW4 on the same day. The crucial evidence missing from the record is that of the Chemist who extracted the sample of the exhibit. In my view, considering that the entire clue that handled the exhibit were police officers, it was crucial that this witness be summoned to identify the exhibit and prove that the exhibit before the court was the one relayed to him for examination.

This lands me on the 10th ground of appeal as to the omission to call the Government Chemist. The position is settled that, much as the law does not prescribe a specific number of witnesses required to prove a case, the prosecution is duty bound to call all the material witnesses and the omission of which may attract an adverse inference as held in **Aziz Abdallah vs Republic** [1991] T.L.R. 71, where it was stated that:

> "...the prosecution is under a prima fade duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution"

Since in the present case, no reasons were advanced as to why the chemist was not called, I find it a fit case upon which to drawn an adverse inference against the prosecution's case.

The 4th ground of appeal challenges the admission of a caution statement of the bus conductor one Khalfani Mdemu Juma, the only person who according to the record, ardently identified the appellant as the owner of the sulphate. His statement was tendered by Exhibit P2 who was recalled to tender the

same on allegation that the said Khalfani Mdemu Juma was at large. The appellant's argument which has been conceded to by the learned State Attorney is that, the production of this statement offended the provision section 34 B (2) of the Evidence Act, Cap 6 RE 2019. This section stipulates that, a court may admit in evidence a written statement where, the maker of such statement cannot be called as a witness for various reasons, such as death, physical or mental illness or being outside the country or where procurement of his attendance in court is impracticable. The statement may also be admitted if the court is satisfied that all reasonable steps to procure the attendance of such witness have ended barren or where he is unidentifiable or cannot attend by operation of law. It is now settled that, the conditions for admission of the witness statement as stipulated under section 34B are cumulative, meaning that, for a statement to be admitted, the conditions stipulated under section 34B(2) must cumulatively/collectively be met.

In the present case, as correctly argued by both parties, there was a blatant disregard of the above provision the main of which is that, the statement sought to tendered is different from the one tendered. Records show that, on 22/12/2020, the prosecution sought to tender a statement of Alfan Mdemu, a prayer which was granted by the court but when they appeared in court at the next appearance on 19/1/2021, they produced a statement of Khalfani Juma Mdemu which was admitted as Exhibit P6. The irregularity has rendered the statement untenable. The 4th ground of appeal is consequently sustained and the statement is hereby expunged from the record.

Having expunged this exhibit, it has become obvious that the remaining evidence do not suffice to sustain the conviction against the appellant as the evidence that could have credibly linked her to the offence is the testimony or statement of the bus conductor. It is to be recalled that, it was the bus conductor who positively identified the appellant as the one who boarded the bus with the said parcels. Nothing else linked her to the parcel. PW1, PW2, PW3 all testified that they searched the booth first then called out the conductor to identify the owner of the suspicious parcels and when he came, he pointed to the appellant who sat on seat number "L8". As the parcels did not have any mark linking it to seat No "L8", the prosecution's case against her is the weakest one.

In view of what I have demonstrated, I find no need to proceed to the remaining grounds as the findings above sufficiently disposes of the appeal. Accordingly, I allow the appeal, quash and set aside the conviction and sentence of the trial court. It is subsequently ordered that the appellant be immediately released unless otherwise held in custody for other lawful cause. It is so ordered.

Dated and delivered at Moshi this 28th day of November, 2022.

11/28/2022

Signed by: J.L.MASABO

J.L MASABO
JUDGE
28/11/2022