IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

CRIMINAL APPEAL NO. 51 OF 2020

(Appeal from the judgment of the District Court of Tanga at Tanga (Hon. J.C BISHANGA) dated 24.6.2020 in criminal case No. 62 of 2020)

RAMADHANI JUMA @ MOHAMED .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

Date of last order: - 14/2/2022
Date of Judgment: - 18/02/2022

JUDGMENT

L. MANSOOR, J

In this Appeal, the Appellant is dissatisfied with the Judgment of the District Court of Tanga at Tanga whereby he was convicted and sentenced to a mandatory term of 30 years imprisonment of trafficking in narcotic Drugs c/s 15A (1)(2)(c) of the Drug Control and Enforcement Act No. 5 of 2015 as amended in 2017.

It was alleged before the trial court that the appellant, on 20th day of August 2019 at Bombo Area (Amboni Street) within the District, City and Region of Tanga, the appellant was found trafficking in narcotic drugs to wit: two (2) sulphate of cannabis sativa commonly known as Bhang weighing 43.25 kilograms.

In proving its case, of which a conviction was entered against the appellant, the prosecution called a total of five witnesses: F.1818 DC Yohana (PW1), SP Oscar Joshua (PW2), Anatory Steven Mkonda (PW3), H.1246 DC Mwinyi (PW4) and H.6329 DC Deusdedit (PW5). The prosecution also tendered three exhibits; certificate of seizure (Exhibit P1), two sulphate bags containing suspected bhang (Exhibit P2) and Chief Government Chemist Examination Report (Exhibit P3).

In a nutshell, the material facts which led to the institution of the case against the appellant are that on 20.8.2019 around 7.00hrs, SP Oscar Joshua Ngumburu (PW2), OCCID of Tanga District received information from an informer that in the house of one Semfuko at Bombo area there were narcotic drugs. The accused was among the tenants in the said house in question.

Following the information, PW2 together with other two police officers including F1818DC Yohana (PW1) went to the house in question. Anathory Mkonda (PW2), a hamlet leader witnessed the search. During search, they retrieved two sulphate bags containing the suspected bhang (Exhibit P2) from the bedroom of the appellant under his bed.

PW2 prepared a certificate of seizure (Exhibit P1) which was signed by PW1 and PW2. The appellant was then taken to Chumbageni police station along with Exhibit P1. It is from this basis of the material facts that the appellant was arraigned to court and charged.

The appellant has preferred a total of four grounds of appeal, namely:

1. *That, the learned trial magistrate erred in law and in fact by convicting the appellant relied (sic) on Exhibit P2, suspected bhang while prosecution failed to prove the chain of custody as it failed to tender a certificate of handing over exhibit to prove the chain of custody.*

2. *That, the learned trial magistrate was not crapulous enough no notice that, the certificate of seizure exhibit P1 was issued unprocedural as there was no receipt issued by a seizing officer as required by section 38(3) of the Criminal procedure act (Cap 20 RE 2002)*

3. *That, the learned trial magistrate erred in law and in fact by convicting the appellant relying on exhibit P3, a chief Government chemist examination report, while the*

prosecution failed to brought (sic) one JOYCE NJISYA infringer (sic) section 203(3) of the Criminal procedure act (Cap 20 RE 2002).

4. *That, the prosecution did not prove their cade (sic) beyond reasonable doubt.*

The Appellant, therefore, humbly prays this Honourable court to allow the appeal, quash conviction and set aside the sentence and set him at liberty.

On the 29th day of November 2021, the Court ordered the matter be disposed by way of written submissions. The parties complied as ordered. The appellant submitted in person while the respondent was represented by the learned state attorney, Elizabeth Muhangwa.

The Appellant intertwined ground number one and three and argued them jointly whereas the second and fourth grounds he argued them separately.

Submitting on the first and third ground of appeal, the appellant argued that the trial magistrate erred in law and in fact by convicting the appellant relying only on exhibit P2 without a

certificate of handing over to prove the chain of custody. He stated that relying also on exhibit P3 without calling one Joyce Njisa (the chief government chemist analyst who was alleged to have examined exhibit P2 and prepared exhibit P3) infringed section 203(3) of the Criminal Procedure Act (CAP 20 RE 2002) thus rendering a miscarriage of justice. Again, failure of the prosecution/respondent to call the police officer who destroyed exhibit P2 rises many questions without answer and consequently to his reasoning the chain of custody was totally broken therefore there is a strong and irresistible suspicion that the two sulphate bags which were suspected to contain bhang were tempered with. It was therefore a duty for the prosecution to clear out all the reasonable doubts or suspicions.

He cited four cases to justify and fortify his argument: ***Illuminatus mkoka v. R (2003) TLR 245, Miraji Malumbo V, DPP, Malik H. Suleiman V. SMZ (2005) TLR 236 and Paulo Maduka and four others V. R criminal appeal No.110 of 2007.*** Unfortunately, the appellant did not properly cite some of the cases nor did he furnish the court with the hard copies for the unreported cases.

He stated that PW5, DC Deusdedit did not mention the name of the Chief Government Chemist whom he met at the material time. He did not also mention the name of the author of report (Exhibit P3). He also pointed out that the other weakness is on the issue of inventory and the absence of evidence to when and the circumstances under which the seized drugs were destroyed and who destroyed the same. He invited the court to have a look at the case of **Mohamed Juma @Mpakama V. Republic, criminal appeal No.385 of 2017** where the court stated that in application for inventory, accused person must be present when an inventory form is placed before a magistrate requesting for an order for destruction of exhibit.

Regarding the second ground of appeal the appellant submitted that failure to issue a receipt in respect of Exhibit P1 (Certificate of Seizure) contravened section 38(3) of the Criminal Procedure Act (CAP 20 RE 2002). He argued that besides being admitted and relied upon by the trial court to convict the appellant, exhibit P1 was not read in court after admission.

Submitting on the fourth ground of appeal, the appellant argued that since the defence case raised many doubts against the

prosecution case, it is obvious that the prosecution did not prove its case beyond reasonable doubt, he therefore prays this honourable court to quash the conviction, set aside the sentence and the appellant be set at liberty from prison.

The learned state attorney for the respondent supported both the conviction and sentence imposed.

Responding on ground number one, the respondent argued that the chain of custody was very clear. She asserted that there was nowhere the chain was broken.

She submitted that the evidence on record is clear in that on 20/8/2019 having received the information from an informer, PW1 and PW2 testified that they went in the house in issue. Before search they called independent witness Anathory Steven Mkonda (PW3) to witness the search.

Both PW1, PW2 and PW3 testified that the bhangi in issue was retrieved from appellants room under his bed. After seizing the substance PW2 prepared a Certificate of seizure which was signed by PW1, PW2, PW3 and the appellant. Thereafter PW1 and PW2 took the appellant to Chumbageni Police where the said

two sulphate bags of bhang were handed over to the exhibit keeper one DC Mwinyi (PW4) by PW2.

On 21/8/2019, PW4 handed exhibit P2 to DC Deusdedit (PW5), an investigator of this case, to take the exhibit to Government Chemist for examination. PW5 took it to the Government Chemist on the same date. The substance was measured and weighed 43.25 kg and labelled `NZL/479/2019. The exhibit was then returned to PW5 on the same date who thereafter handed it over to PW4.

She stated that even though there is no documentation as to how PW2 handed over exhibit P2 to PW4, there is sufficient evidence on how PW4 handed over exhibit P2 to PW5 and how the said exhibit was taken to Government Chemist office and returned to PW4.

To support her argument, she cited the case of **Jibril Okash Ahmed V. The Republic, criminal appeal no.331 of 2017 at page 38.**

Regarding ground number two, the respondent conceded that the receipt was not issued as required by section 38(3) of the Criminal Procedure Act (CAP 20 RE 2002). As to the effect of the

anomaly, she addressed the court that the anomaly is very minor and legally speaking cannot invalidate the seizure certificate or affect its admissibility or even is to be expunged from the record. She referred the position in the case of **Jibril Okash Ahmed (supra).** She further argued that although the receipt was not issued, the appellant signed a certificate of seizure to prove that exhibit P2 was found inside his room and during trial when exhibit P2 was admitted in court the appellant did not object to its admission.

In attacking the third ground of appeal, the respondent criticized the appellant for citing improper provision of the law. She submitted that section 203(3) of the Criminal Procedure Act does not apply to this type of the case. She cited section 19 of the Government Chemist Laboratory Authority Act No.8 of 2016 to be the proper provision. The section provides that a report issued by the Government Laboratory Analyst shall be admissible and be sufficient evidence unless the opposite party require that the Chief Government Chemist or Government Laboratory Analyst who issued it be summoned as a witness. This right was waived.

To cement the argument the respondent has directed the court to refer at page 13 of the proceedings of the trial court. The first paragraph clearly shows that the appellant elected the author of the exhibit P3 not be called as a witness.

She moreover invoked section 143 of the evidence Act CAP 6 RE 2019 to demonstrate that there is no number of witnesses required to prove any fact. Therefore, even though the Government Chemist was not called as a witness the witnesses who testified before the trial court were enough to prove the case against the appellant.

Submitting on the fourth ground, the respondent stated that the prosecution proved the case against the appellant beyond reasonable doubt. She narrated on how the information of the alleged bhangi was obtained, how the search was conducted, how the certificate of seizure was prepared, how the appellant was taken to Chumbageni Police station, how the seized exhibit was handled and taken to Government Chemist for examination and thereafter returned to police station for safe custody.

She furthermore stated that when exhibit P1, P2 and p3 were admitted in court the appellant never objected to their

admissibility nor did he cross examine about the said exhibit. The Attorney cited the case of **Hatari Masharubu @ Babu Ayubu v. the Republic, Criminal Appeal No.590 of 2017 at page 6** (unreported) to show that failure to cross examine a witness on very crucial matter entitles the court to draw an inference that the opposite party agrees to what is said by that witness in relation to the relevant fact in issue.

From the submissions of the parties and the evidence on record, I find that issues for determination by this court are as follows.

1. Whether there was proper chain of custody.
2. Whether section 38(3) of the criminal procedure was complied.
3. Whether it was mandatory to summon the Government Chemist who examined the suspected substances,
4. Whether the evidence adduced was sufficient to prove the charge.

I prefer to start with the second ground of appeal. In this ground the appellant is complaining about the procedure adopted during searching and seizing the substances alleged to be bhangi. His main concerns are twofold; failure of the seizing

officer to issue a receipt and failure of the prosecution to read the contents of the certificate of seizure (exhibit p1) at the time it was admitted in court.

Section 38(3) of the criminal procedure act provides as follows.

"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"

The learned state attorney has submitted that it is true that there is no evidence from prosecution side which show that the receipt was issued to the appellant. To her understanding the contravention are minor and legally cannot invalidate the admissibility of the certificate of seizure and since the appellant and other witnesses signed and the appellant didn't object to the certificate of seizure (exhibit P1) he should not complain on appeal.

Section 38(3) of the Criminal Procedure Act by using the word **shall** mandatorily requires issuance of a receipt to acknowledge

seizure. However, the term receipt is not defined under the Act, nor its format is not provided for in both the acts, i.e., the Criminal procedure Act (supra) and the Drug Control and Enforcement Act (supra), but to my understanding it entails a written document acknowledging receiving a thing.

I am aware that an act which is mandatorily required to be done under the law cannot be compromised. It must be done and failure to do it, is fatal to the party's case. However, in our jurisprudence, case law has demonstrated that non issuance of a receipt under section 38(3) of the Criminal Procedure Act is not fatal but rather a minor anomaly. In **JIBRIL OKASH AHMED V. THE REPUBLIC (supra)** the court of appeal at Arusha had this to say.

> *"Moreover, that provision imposes a duty on the arresting officer to issue a receipt. Ms. Sekule readily admitted that no receipt was issued. We however don't think that such an anomaly affects the substance of the seizure certificate. The omission or contravention is minor and, legally speaking, cannot invalidate the seizure certificate or affect its admissibility or even cause it to be*

expunged from the record. On that we are reinforced by our finding in the case of Page 40 of 46 ***Nyerere Nyague vs. The Republic, Criminal Appeal No. 67 of 2010*** *where it we stated that.*

"It is not therefore correct to take that every apparent contravention of the provisions o f the CPA automatically leads to the exclusion o f the evidence in question."

Regarding exhibit P1 as to whether it was read or not, I took time to read the whole proceeding of the trial court. At page 16 and 17 of the proceedings, the trial magistrate properly admitted exhibit P1 and hereunder is what he noted at page 17.

"Court; *prayer granted and the contents of exhibit p1 have been read in court."*

At this juncture, I find this ground of appeal to lack merit and therefore dismissed accordingly.

I now turn to the first and third grounds of appeal because, to some extent, are closely related or rather intertwined. The concern of the appellant is that the prosecution never proved the chain of custody and admitting the Chief Government

Examination Report (Exhibit P1) without calling Joyce Njisya (a Government Chemist Analyst) infringed section 203(3) of the criminal procedure act (cap 20 RE 2002) now R.E 2019.

I would rather start by making a statement that the issue of chain of custody in cases of this nature is pertinent. And it is settled law that in cases involving arrest, seizure, custody, and later production in court of the seized property as exhibit, there must be proper explanation of who and how the property was handled from where it was found and seized up to the point when it is tendered in court. The reason intended is to ensure authenticity of such evidence.

The Court has consistently taken that position right from the case of **Paulo Maduka and 3 Others vs Republic, Criminal Appeal, No. 110 of 2007, Abuhi Omari Abdallah and 3 Others vs Republic, Criminal Appeal No. 28 of 2010 and Kashindye Bundala vs Republic, Criminal Appeal No.32 of 2014 (unreported).**

Further and recently, the Court lucidly expounded the legal principles governing chain of custody in the case of **Chacha**

Jeremiah Murimi and 3 Others vs Republic, Criminal Appeal No. 551 of 2015 where it stated that: - Page 35 o f 46

*"In establishing chain of custody, we are convinced that the most accurate method is on documentation as stated in **Paulo Maduka and Others vs. R., Criminal Appeal No. 110 o f 2007** and followed in **Makoye Sam we/ @ Kashinje and Kashindye Bundala, Criminal Appeal No. 32 o f 2014 cases (both unreported).** However, documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors must be looked at depending on the prevailing circumstances in every case. For instance, in cases relating to items which cannot change hands easily and therefore not easy to tamper with, the principle laid down in Paulo Maduka (supra) would be relaxed."*

I will start to test whether the Government Chemist Analyst was duty bound to be summoned under the provision of 203(3) of the Criminal Procedure Act (cap 20 RE 2002) now R.E 2019. For the

interest of justice am indebted to reproduce the section together with section 203(4) of the Act (supra)

> *(3) When any report is so used in any proceeding other than an inquiry the court may, if it thinks fit, summon, and examine the analyst as to the subject matter of that report.*
>
> *(4) In this section "Government analyst" includes a senior pathologist, a pathologist and any person appointed by the Minister responsible for health to perform the duties of a Government analyst under this section. Chief govt chemist does not follow under this thus wrong citation of the provision.*

It is clear from the outset that section 203 of the Act provides for use of report of the Government Analyst as evidence in any inquiry or trial. Under subsection (3), the provision allows the court if it thinks fit, summon, and examine the analyst as to the subject matter of the report. Subsection (4) defines *"Government analyst" includes* a senior pathologist, a pathologist and any person appointed by the Minister responsible for health to perform the duties of a Government analyst under this section.

Apparently, the court did not find it fit to summon the analyst one Joyce Njisya hence appellants complain. The respondent attacked this as wrong provision. The learned state attorney cited section 19 of the Government Chemist Laboratory Authority Act No.8 of 2016 to be the proper provision.

The section provides that:

> "a *report issued by the government laboratory analyst shall be admissible and be sufficient evidence unless the opposite party require that the chief government chemist or government laboratory analyst who issued it be summoned as a witness.*

The learned state attorney further submitted that, the appellant's right to call expert witness was waived by himself. To cement the argument the respondent has directed the court to refer at page 13 of the proceedings of the trial court. The first paragraph clearly shows that the appellant elected the author of the exhibit P3 not be called as a witness.

I will start by making it clear that both sections of the acts provide for expert witnesses, and they infer admissibility of Government Analyst report appointed by the minister of health.

The difference I see in on duty of calling the witness. In Criminal Procedure Act the duty is casted to the court while in the Government Chemist Laboratory Authority Act the duty is upon the accused.

The term "the court may, if it thinks fit" is not defined in the Act but I have no doubt that it entails using courts discretion or power to decide based on its evaluation of the circumstances of the case and guided by the principle of law.

Coming back to section 203(3) of the Criminal Procedure Act, I pose to ask, would any reasonable person draw an inference that failure of the court to call the Government Chemist Analyst did prejudice the appellant or did the act of omission occasion the breakdown of chain of custody. Probably not. By reading the words of the section the provision does not make it mandatorily but a discretion of the court. From this reasoning I find that calling a Government Analyst who examined the substance and prepared the report was not necessary because the law provide the admissibility in the absence of the maker unless otherwise called by the court.

Embarking on section 19 of the Government Chemistry Laboratory Authority Act No.8 of 2016, it was the duty of the appellant to call the Government Analyst. However as submitted I agree with the learned state attorney that the appellant assumed to waive his right. The trial magistrate clearly addressed him and hereunder is what the court recorded at page 31 of the proceedings.

> ***Court:*** *the report- chief examination report dated 11/11/2019 is hereby admitted and marked as exhibit P3. The accused person has been addressed in terms of section 19 of Act No.8/2016 and elected the author of the report is not called as a witness.*

I am convinced that the trial magistrate had in mind that the appellant had no legal representation and therefore considering the serious nature of the offence the trial magistrate exercised his power judiciously. But however, and although being impacted with the knowledge of the provision section 19 of the Government Chemist Laboratory Authority Act No.8 of 2016, the appellant opted the author (Joyce Njisya) not be called in court.

Further, having thoroughly perused the proceedings of the trial court, am satisfied that, prosecution/respondent proved the chain of custody just immediately after the arrest, seizure, custody, and later production in court of the seized property as exhibit. Even though there was no documentation, I agree with the learned state attorney that there is proper explanation of who and how the property was handled from where it was found and seized up to the point when it is tendered in court.

The coherence of the chain of custody is obviously clear and undoubtable; on 20/8/2019 having received the information from an informer PW1 and PW2 went in the house in issue. Before search they called the independent witness Anathory Steven Mkonda (PW3) to witness the search.

Both PW1, PW2 and PW3 retrieved exhibit p2 (bhangi) from appellants room under his bed. After seizing the substance pw2 prepared certificate of seizure, which was signed by pw1, pw2, pw3 and the appellant. Thereafter pw1 and pw2 took the appellant to Chumbageni Police where the said two sulphates bags of bhang were handed over to the exhibit keeper one DC

Mwinyi (PW4). It was PW2 who handed the said exhibit p2 to PW4.

On 21/8/2019, PW4 handed exhibit p2 to DC Deusdedit (PW5), an investigator of this case, to take the exhibit to Government Chemist for examination. PW5 took it to the Government Chemist on the same date. The substance was measured and weighed 43.25 kg and labelled `NZL/479/2019. The exhibit was then returned to PW5 on the same date who thereafter handed it over to PW4.

From the outlook of the handling of exhibit P2, I am of the finding that there is nowhere that the exbibit was tempered with. Though there was no documentation, I am satisfied that the handling was coherent and therefore casts no doubt. To my reasoning and taking reference to the recent case of **Chacha Jeremiah Murimi and 3 Others vs Republic, Criminal Appeal No. 551 of 2015 (supra),** it is now settled law that documentation will not be the only requirement in dealing with exhibits. An exhibit will not fail the test merely because there was no documentation. Other factors must be looked at depending on the prevailing circumstances in every case.

Having ruled out the three grounds, it goes without saying that the fourth ground of appeal has no merit. The prosecution proved its case beyond reasonable doubt.

All said, this appeal is without merit. It is hereby dismissed.

DATED AND DELIVERED AT TANGA THIS 18TH DAY OF FEBRUARY 2022

L.MANSOOR

JUDGE

18/02/2022