

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TABORA

AT TABORA

DC CRIMINAL APPEAL NO. 71 OF 2021

(Originating from Tabora Resident Magistrate's Court in Criminal
Case No. 71/2019)

MACHEMBA PENDAELIAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of Last Order: 15/5/2023

Date of Judgment: 15/5/2023

MATUMA, J.

The appellant Machemba Pendaeli stood charged in the Resident Magistrate's Court of Tabora at Tabora for Unlawful Trafficking in narcotic drugs Contrary to Section 15A (1) and (2) of the Drugs Control and Enforcement Act No. 5 of 2015.

After a full trial he was found guilty, convicted and sentenced to suffer a custodial term of twenty (20) years.

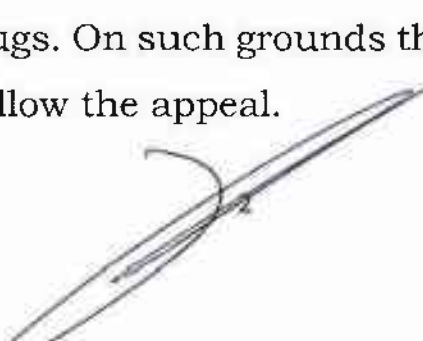
Having been aggrieved by such conviction and sentence, the appellant has preferred this appeal with five grounds but whose general complaint is that;

- i) *The prosecution case was not proved against him beyond reasonable doubts.*

At the hearing of this appeal, the appellant appeared in person while the respondent/Republic was represented by Mr. Robert Kumwembe learned State Attorney.

The appellant opted for the learned State Attorney to start addressing the court so that he would respond later. The learned State Attorney took the floor and from the right beginning he supported the appeal. He submitted that the prosecution case was not proved to the required standard and thus the appellant's complaints in the grounds of appeal deserves to be accepted and this appeal allowed.

The learned State Attorney argued that the chain of custody of the alleged exhibit (drugs) was broken and potential witnesses such as WP Eliza, Officers from both the Government Chemist office and the Weighing and Measurement Agency were not called to testify on the manner they worked with the exhibit. He cited to me the case of ***Aldo Kilaji versus The Republic, Criminal Appeal no. 466 of 2019*** (unreported) in which the court of appeal held that in cases involving narcotic drugs the prosecution has the duty to bring in evidence the expert who examined the drugs to establish his findings that the exhibit was really drugs. On such grounds the learned State Attorney urged this court to allow the appeal.



The appellant on his part having heard the full support of his appeal by the learned State Attorney did not want to consume the time unnecessarily. He simply informed this court that he joins hands with the learned State Attorney in his submissions and prayed for the appeal to be allowed.

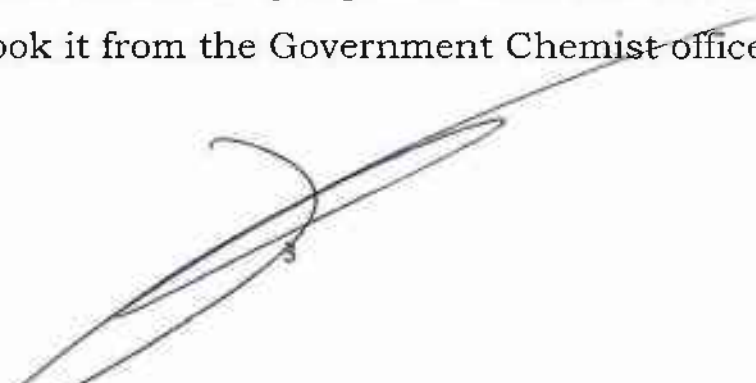
Having gone through the records of the trial court, the grounds of appeal and the submissions made by the parties in support of the appeal, I find that this appeal has been brought with sufficient cause and thus deserves to be allowed.

As stated supra, the appellant was charged for trafficking in narcotic drugs. In the circumstances, for the conviction to be entered, the prosecution ought to have proved beyond any reasonable doubts for among others, that; -

- *The appellant was found trafficking in such narcotic drugs.*
- *That the alleged narcotic drugs were really narcotic drugs in accordance to the definition given under the law.*

In the instant matter, the learned trial magistrate found that the chain of custody of the alleged narcotic drugs was not proved in a accordance to the guidance given in the case of **Paulo Maduka & 4 others Versus Republic, Criminal appeal No. 110 of 2007** (CAT).

The learned trial magistrate further doubted the government chemist report because it was tendered by a person who was not the maker nor the one who took it from the Government Chemist office.

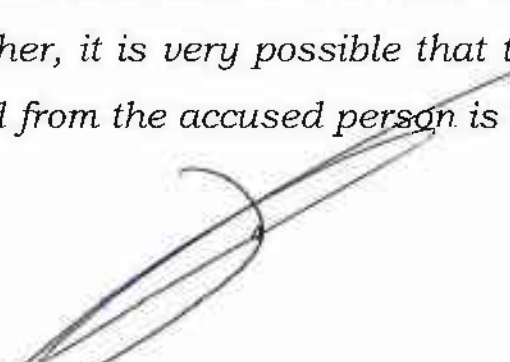


By the findings of the trial magistrate as stated above, there is no doubt that he refused to accept the evidence of the prosecution which purported to establish that the appellant was found trafficking in narcotic drugs because there was no proof of the chain of custody to ensure that the exhibit was not tempered with, and that even the government chemist report was tendered Contrary to the guiding procedure provided for in the case of **Jeremiah Murimi and 3 others Versus Republic, Criminal Appeal No. 551 of 2015**. That findings by the trial court is in line with the complaints of the appellant in his grounds of appeal and the submission made by Mr. Robert Kumwembe learned State Attorney in support of the appeal.

Up to that juncture, the appellant ought to have been acquitted but the trial magistrate grounded the conviction on the strength of the extra – judicial statement as reflected at page 6 of the trial court's judgment;

“In an extra – judicial statement by the accused person, it is shown categorically that the accused person together with his fellow namely Jumanne, they were heading to Kahama to sale the narcotic drugs which they were carrying, he even stated that in the luggage there were Seven (7) baskets of narcotic drugs.

Therefore, apart from the fact that the chain of custody was broken after the prosecution side having failed to tender in court the document which was used to move the narcotic drugs from one point to another, it is very possible that the narcotic drugs which was seized from the accused person is the same which



was tendered in court as it is not always when the chain of custody is broken that an exhibit is being tempered with."

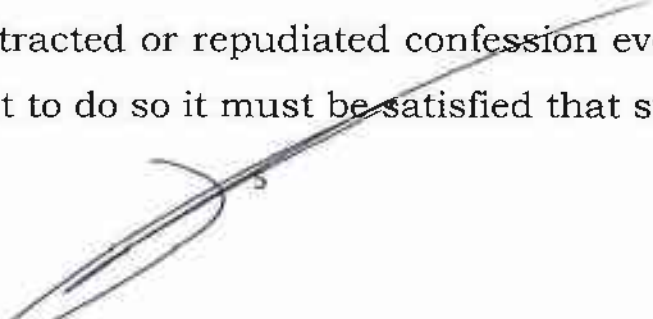
Under the circumstances, it is obvious, had there been no extra – judicial statement the trial court would have not found the appellant guilty nor convicted him.

The prosecution side having not challenged the findings of the trial court in relation to chain of custody and failure to give adequate evidence from the government chemist, it is taken that such finding is settled. In fact, the Respondent herein has supported such findings as revealed supra. I take it that the parties are not at issue that the seizure, custody of the exhibit and its establishment to be really a narcotic drugs was not sufficiently proved as rightly determined by the trial court.

The issue is therefore whether the extra judicial statement sufficiently fulfilled the gap to the effect that the appellant was found trafficking in the said narcotic drugs and that they were really narcotic drugs.

The extra – judicial statement exhibit P6 was repudiated by the appellant at the time it was sought to be tendered in evidence. That necessitated the trial court to undergo an inquiry.

It is a settled law that to ground conviction on a retracted or repudiated confession, there must be corroborative evidence to such retracted or repudiated confession. The court may however proceed to convict on the retracted or repudiated confession even if there is no corroboration but to do so it must be satisfied that such



confession is containing nothing but only the truth. See; ***Festo Mwanyangila Versus Republic, Criminal Appeal No. 255 of 2012.***

In the instant case, the trial magistrate did not rule out that the extra – judicial statement was a true statement but acted on it by guessing that it might be true;

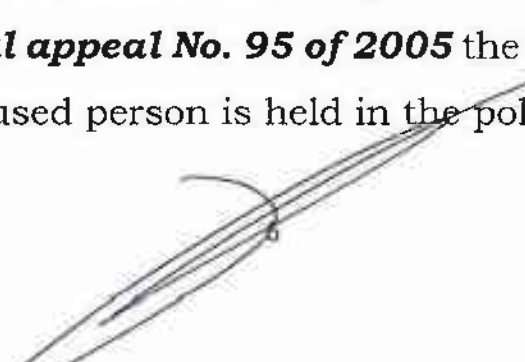
“It is very possible that the narcotic drugs which was seized from the accused person is the same which was tendered in court.”

That approach was wrong. The trial court should not have acted on the statement by way of conjectures because conjectures and speculations have no room in criminal trials. See; ***Mohamed Musero Versus Republic [1993] TLR 290, Shishir Shyamsingh Versus Republic, (DC) Criminal Appeal No. 54 of 2020*** HC at Kigoma.

Since the trial court abrogated the duty of determining whether the extra – judicial statement was a true confession, I step into its shoes to execute that duty being the 1st appellate court.

The appellant was arrested on 02/05/2019 but he was brought to the justice of the peace to record his extra – judicial statement on 21/05/2019. He was then arraigned in court on 10/06/2019.

On record there is no explanation for why a delay to procure the extra – judicial statement from the appellant and even the delay to send him to court. In the case of ***Janta Joseph Komba & others Versus Republic, Criminal appeal No. 95 of 2005*** the Court of Appeal held that where the accused person is held in the police custody for such

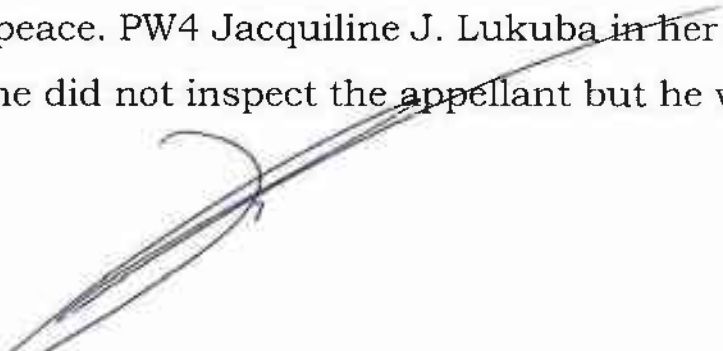


longer period, it is doubtful that he was a free agent when he finally made the statement.

Since the appellant was held in police custody since 2/5/2019 up to 21/5/2019 when he was made to make the extra – judicial statement, in the absence of any explanation for such a delay the purported confession is doubtful and cannot be acted upon. More so, when even after the same was procured on 21/5/2019, the appellant continued to be incarcerated into the police cell up to 10/06/2019 without any explanation why such a delay to arraign him in court within twenty four hours from his arrest as dictated by the law. The conclusion therefore is that; had the appellant been arraigned in court within such prescribed period, the purported extra – judicial statement could not have been obtained.

On the strength of the decision in Janta Joseph Komba supra, I doubt whether the appellant was a free agent when he was taken to the justice of the peace after having been incarcerated into the police cell for such longer period, more so, when there is no explanation for what prompted the appellant to be taken to the justice of the peace after he had spent untold period into the police cells.

But again, the said extra – judicial statement contravened the Chief Justice Guidelines when PW4 the justice of the peace recorded such statement without inspecting the appellant to satisfy herself whether he was not subjected to physical torture prior to have been brought to the justice of the peace. PW4 Jacqueline J. Lukuba in her evidence made it clear that she did not inspect the appellant but he was



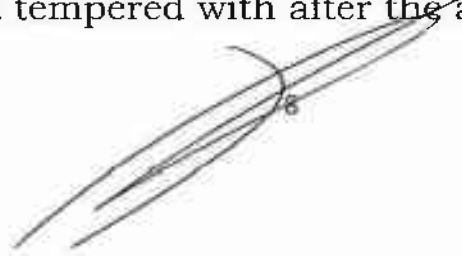
inspected by the court clerk. She tried to explain that she did not inspect the appellant by herself because the appellant was a male.

The Chief Justice Guidelines do not provide for the justice of the peace to delegate his or her duties to any other person. If it was not practicable for her to execute her duty she could have arranged for another justice of the peace to do that duty.

Even though there is no rule of practice or procedure that prohibits a female justice of the peace to inspect the male accused. To do so would mean that female Magistrates or Judges cannot conduct trials against male suspects whose evidence includes exposing their bodies to establish whether there were physical tortures by observing scars, marks, wounds or injuries. Sometimes Magistrates or Judges would find themselves necessitated to observe and or inspect the bodies of suspects for the purposes of satisfying themselves of the identification of the accused persons when the victims testify to have seen certain features in the bodies of suspects including on private parts.

Not only that but also the extra – judicial statement is not signed by the appellant on every page to avoid the possibilities of having been tempered with. The appellant signed only at the last page which in itself contains no any statement relating to the alleged offence.

The relevant and material pages containing the narrations of the crime are not signed by not only the appellant but also the justice of the peace. It is therefore doubtful whether such extra – judicial statement was not tempered with after the appellant has left the



justice of the peace's office. The doubts as a matter of law should be resolved in favour of the appellant as I do hereby do.

I therefore find that the extra – judicial statement was wrongly acted upon to find the appellant guilty more so, when it was not corroborated with any other piece of evidence.

Having devalued the contents of the extra – judicial statement, I find no further evidence to sustain the conviction of the appellant because it was the only evidence which was relied upon to convict.

I therefore allow the appeal, quash the conviction of the appellant and set aside the sentence of twenty years which was meted against him.

I order his immediate release from custody unless otherwise lawfully held. It is so ordered.

A. MATUMA

JUDGE

15/5/2023

ORDER

Judgement delivered in chambers in the presence of Mr. Robert Kumwembe, learned State Attorney for the Republic and the appellant in person. Right of appeal explained.



A. MATUMA

JUDGE

15/05/2023