**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**
**MOSHI DISTRICT REGISTRY**
**AT MOSHI**

**CRIMINAL APPEAL NO. 33 OF 2020**
*(C/F Criminal Case No. 55 of 2020 District Court of Hai at Bomang'ombe)*

**ZENA OMARY RASHID ..... APPELLANT**
**VERSUS**
**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*Last Order: 23rd December 2022*
*Judgment: 23rd January, 2023*

**MASABO, J.:-**

Before the District Court of Hai (the trial court), the appellant herein was arraigned with and convicted of the offence of trafficking in narcotic drugs contrary to section 15 A (1) and (2) (c) of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017. It was alleged that, on 14th February, 2020, at Kia Junction within Hai District in Kilimanjaro Region, the appellant was found trafficking 12.30 kilograms of narcotic drugs to wit Cathedillis Khat commonly known as *Mirungi.*

To prove its case, the prosecution led evidence that, on the material date while on duty, PW1, a Police Officers at KIA Junction stopped a passenger motor vehicle known as Raqeeb Bus with registration No. T. 669 DGB for inspection. The said bus was from Tanga heading to Arusha and upon inspection, he found a sulphate bag with AZAM logo in the booth of the bus containing *Mirungi.* According to PW1 during the inspection the bus

conductor revealed that the luggage belonged to the appellant herein who was also present. PW1 then filed a certificate of seizure and arrested the appellant. When the seized product was taken to the Government Chemist in Arusha by PW2, it was revealed to be Mirungi. A report from the Government Chemist was admitted as exhibit P1.

After the trial court was satisfied that the appellant had a case to answer, she was accorded right to defend herself. She however waived it as she defaulted appearance hence the trial court proceeded to convict and sentence her in absentia. Disgruntled by the conviction and sentence, she has filed this appeal advancing 6 grounds as follows;

1. The trial magistrate erred in law and fact in convicting and sentencing the appellant while no proper chain of custody was established;
2. The learned magistrate erred in law and in fact in convicting the appellant without considering that the accused person was not properly identified to be the owner of the luggage;
3. The trial magistrate erred in law and fact in convicting the appellant on the basis of the charge which was defective;
4. The trial magistrate erred in law and fact in relying on exhibit which was wrongly tendered and admitted to the court;
5. The learned magistrate erred in law and in fact in convicting the appellant without considering that the prosecution did not prove its case beyond reasonable doubt;
6. The trial magistrate erred in law and fact in failing to evaluate and address the evidence properly which led to the miscarriage of justice.

At the hearing, the appellant was represented by Mr. Kitaly, learned counsel. Supporting the appeal, Mr. Kitaly abandon the third and fourth ground and jointly submitted on the fifth and sixth grounds that, the trial court failed to properly evaluate evidence presented before it. He elaborated further that, according to the lower court record, PW1 testified that the appellant agreed that the seized *Mirungi* belonged to her and that she was taking them to Mererani. However, such confession was never recorded in terms of section 27 of **The Evidence Act** [Cap 6 R. E. 2019] and the appellant was never taken to a jstice of peace to record an extra judicial statement as required by the law. The anomalies are fatal and wates downs the credibility of the confession and PW1's testimony.

Apart from that, Mr. Kitaly averred that, the bus conductor is the one who allegedly identified the appellant and linked her to the her luggage. He witnessed the inspection and signed the certificate of search and seizure. But, he was not summoned before the trial court to testify what transpired on the material date and no reasons were advanced on such omission. Apart from that, none of the passengers from the bus were summoned to corroborate PW1's testimony as to what transpired on that day. He argued further that, assuming that the bus conductor was non traceable, the prosecution could have tendered his statement through section 34B of the Evidence Act but that was not done. The failure to summon any of these important witnesses was a fatal omission capable of attracting an adverse inference against the prosecution as held in the cases of **Raphael**

**Mhando Vs. Republic**, Criminal Appeal No. 54 of 2017 CAT (unreported) and **Aziz Abdallah Vs. Republic** [1991] TLR 71.

Submitting on the first ground of appeal, the learned counsel averred that, it is a cardinal principle of criminal law that, a chain of events showing movement of exhibits recovered in possession of the accused person ought to have been clearly shown by documenting each stage in the investigation. That, in establishing the chain of custody, PW1 testified that, they filled and signed the certificate of seizure. However, the said certificate was never tendered in court as evidence. In absence of an independent witness it creates doubts whether the police officers really searched the bus and seized the alleged drugs.

Regarding the second ground, the learned counsel submitted that the owner of the seized Mirungi was not properly identified. He argued that, since the luggage was not found in the appellants hands and she disputed ownership, the prosecution ought to have led an independent witness or documents to prove that the luggage was really owned by the appellant and not any other passenger. Mr. Kitaly cited the case of **The Director of Public Prosecution Vs. Mussa Hatibu Sembe**, Criminal Appeal No. 130 of 2021 CAT (unreported). He prayed that this appeal be allowed, the trial court's decision be quashed and the appellant be acquitted.

In reply Ms. Mary Lucas, the learned State Attorney for the Respondent, submitted that the chain of custody was thoroughly established by the

prosecution witnesses. She asserted that, the record credibly shows that the appellant was arrested on 14th February, 2020 at KIA Junction trafficking 12.30 kilograms of Narcotic drugs commonly known as *Mirungi*. After the appellant's arrest and seizure, the seized drugs were handled over to the exhibit keeper PC Tumaini who handled them to PW2 DC Elizabeth to be taken to the Government Chemist for analysis. Thereafter, it was returned back to the exhibit keeper until 21st February, 2022 where she took the exhibit to court for inventory purposes. To cement her stance, she cited the case of **Sophia Seif Kingazi Vs. Republic**, Criminal Appeal No. 273 of 2016 (ureported) and in **Chacha Jeremia Murimi 83 Others Vs. Republic**, Criminal Appeal No. 551 of 205 (Unreported) where it was held that, the aim of chain of custody is assurance that there is no tampering of an exhibit at any given time and, it is relaxed when the exhibit involved cannot be easily tempered. She added that, the exhibit involved in the instant matter was of such a nature which cannot change hands easily hence difficult to temper with.

Ms. Lucas went on submitting that under section 36 of the DCEA, there is a rebuttable presumption that a person found in possession of narcotic drugs committed the offence. Therefore, since in this case the evidence produced by the prosecution shows that the appellant was the one found with the luggage having narcotic drugs and she admitted before police at the time of arrest that she owned the luggage it is obvious that she committed the offence. Also, the fact that the appellant absconded bail and gave no defence to rebut the presumption is a sufficient proof that she is guilty.

In his rejoinder, Mr. Kitaly reiterated his earlier submission and insisted that the chain of custody was broken. The appellant was not properly identified, important witnesses were never summoned and there was no independent witness. All these suffices to allow the appeal nd discharge the appellant.

Upon reading the submissions and the records from the trial court, I will now proceed to determine the appeal. The pertinent issue to be determined is whether the case against the appellant was proved to the required standard. According to the record, the only evidence proving that indeed the appellant was found trafficking 12.30 kilograms of narcotic drugs Mirungi is PW1's testimony. From the testimony of this witness who conducted the search and seized the said Mirungi, it is gathered that the search and seizure was witnessed by the appellant herself and the bus conductor and a certificate of seizure was issued. However, as submitted by the appellant, the certificate of seizure was never tendered in court to prove what was seized on the material date and the exhibit itself was not tendered as it had already been disposed of. Also, the bus conductor was never summoned to testify as an independent witness to what really transpired on the fateful day. Thus, the evidence of PW1, remained as the sole evidence against the appellant.

Issuance of certificate/receipt for the seized items is a legal requirement set out under **Section 38(3)** of the Criminal Procedure Act which provides that:-

> '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 the witness to the search, if any."

The purposes of issuance of the receipt is well articulated in **Selemani Abdallah and Others v. Republic**, Criminal Appeal No. 354 of 2008 (unreported), where it was held that:

> "The whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that the evidence arising from such search is fabricated will to a great extent be minimized.
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As per this authority, there can be no doubt that, much as oral evidence is in itself a credible form of evidenced and carries weight similar to documentary evidence, it is incapable of eliminating the complaints in the same way as documentary evidence would do. It can therefore, not be overemphasized that where, as in the present case, a receipt was issued after seizure of exhibit, it should be produced in court to eliminate the complaints as to fabrication. Failure to produce it cultivates a fertile ground for suspicion, especially where as in the present case, no reason is advanced as to why the same was not presented. PW1 just narrated how he seized and recorded the findings on the certificate. This was rather odd and leaves a lot to be desired.

It is similarly intriguing that no independent witness from the bus full of passengers was summoned. Even the bus conductor who identified the owner of the luggage and signed the certificate of seizure was not summoned to corroborate PW1's story. While it is true that in terms of section 143 of the Evidence Act, Cap 6 R.E. 2019, a party is not compelled to parade a certain number of witnesses to support his case, it is a settled principle that, failure to summon key witnesses during trial entitles the court to draw an inference adverse to the party who ought to have summoned the said witness as set out in Section 122 of the same Act which states that the court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient

reasons. Applying this provision in **Aziz Abdallah v. The Republic** [1991] TLR 9, the Court of Appeal held that,

> 'Where a witness who is in a better position to explain some missing links in a party's case is not called w ithout any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one".

In the circumstances of the present as narrate above, I am of the considered view that, the bus conductor was an important witness to substantiate claims by the prosecution that the alleged *Mirungi* was seized from the appellant. His testimony would have bolstered PW1's story that he searched the booth, found the luggage, had the appellant herein identified as the owner, prepared and signed a certificate of seizure and had it counter signed by the appellant in acknowledgment that indeed the luggage was hers. As no reason for the absence of this witness was advanced, I am persuaded that this is a fit case to infer an adverse inference against the prosecution for the failure to call the bus conductor to testify.

Another conspicuous anomaly is on the disposal of the exhibit. As correctly argued by the appellant's counsel, since the said drugs were perishable and were not physically tendered in court as they had already been disposed of, the prosecution ought to demonstrate that the procedure for disposal of perishable exhibits, including taking and producing a photograph of the

exhibit, as set out in Paragraph 25 of the Police General Orders (PGO No. 229) was duly complied with. The provision states thus,

> "25. Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner (if any) so that the Magistrate may note the exhibits and order immediate disposal. Where possible, **such exhibits should be photographed before disposal**." (Emphasis added)

Applying the above paragraph in **Mohamed Juma @ Mpakama Vs. Republic,** Criminal Appeal No. 385 of 2017, CAT at Mtwara, the Court of Appeal underscored that:

> "This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard. In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposal order (exhibit PE3). While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate. In addition, **no photographs of the perishable Government trophies were taken as directed by the PGO**".

In the present case, there was no disposal order. All what was produced by the prosecution is an inventory form admitted as exhibit P3 which was neither signed by the magistrate who allegedly ordered the disposal of the exhibit nor stamped with the court seal. And, contrary to the PGO, there was no photograph of the disposed of exhibit to prove that it existed. Moreover, much as PW2 testified that she took the seized drugs to the court for inventory purpose and produced the inventory form, the record is silent on whether the appellant was heard in the disposal proceeding hence a presumption that he did not. The three glaring anomalies above are all fatal and have vitiated the weight accorded to Exhibit P3 and all evidence concerning the disposal of the exhibit.

When these glaring anomalies are considered conjointly, it becomes questionable whether the prosecution case was proved to the required standards. Needless to emphasize that, it is a cardinal principle of law in our jurisdiction that, in criminal cases, the prosecution shoulders the burden of proving its case beyond reasonable doubt. The burden never shifts to the accused. As emphasized in ***Mohamed Haruna @ Mtupeni & Another Haruna @ Mtupeni & Another v. Republic***, *Criminal Appeal No. 25 of 2007 (unreported)*.

> "Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that **an accused person can only be convicted on the strength of the**

**prosecution case and not on the basis of the weakness of his defence."**

The prosecution is not discharged of this duty by the mere fact that the accussed rendered no defence or defaulted appearance when called to defend himself. For these reasons, I join hands with the appellant's counsel that the conviction cannot be sustained as the case against the appellant was not proved to the required standards.

Accordingly, I allow the appeal, quash and set aside the conviction and sentence of the trial court and subsequently order the appellant's immediate release unless otherwise held in custody for other lawful cause.

It is so ordered.

Dated and delivered at Moshi this 23rd day of January, 2023.

X

Signed by: J.L.MASABO

**J.L MASABO**
**JUDGE**
**23/01/2023**