THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 78 OF 2022

(Originating From Lindi District Court in Criminal Case No. 07 of 2022)

HADIJA SELEMANI CHILUMBA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

7th & 26th June 2023

LALTAIKA, J.

The appellant herein **HADIJA SELEMANI CHILUMBA** was arraigned in the District Court of Lindi at Lindi (the trial court) charged with Trafficking in Drugs c/s 15A(1) and (2) (c) of the Drug Control and Enforcement Act Cap 95 as Amended by The Written Laws Misc. Amendment Act No. 5 of 2021. When the Charge was read over and explained to the appellant (then accused) she denied wrongdoing. The trial court entered a plea of not guilty and proceeded to conduct full trial.

Having been convinced that the offence was proved beyond reasonable doubt, the appellant was convicted as charged and sentenced to serve 30 years in prison.

Dissatisfied, the appellant has appealed to this court on eight grounds. In spite of the grammatical and other errors, I choose to reproduce hereunder:

1. *That the trial court erred in law and fact in convicting and sentencing the appellant basing on incredible, unreliable, and uncorroborated evidence of the prosecution witnesses.*
2. *That the trial court erred in law and in fact in failing to realize that there was huge contradiction within the prosecution evidence in respect of various aspects.*
3. *That the trial court erred in law and fact in convicting and sentencing the appellant relying on the evidence of exhibit p2 collectively which was weighed and sealed in the absence of the appellant.*
4. *That the trial court erred in law and fact by failing to appraise objectively credibility of the prosecution evidence.*
5. *That the trial court erred in law and fact in convicting and sentencing the Appellant by failing to evaluate properly the evidence brought before the court as result arrived at a wrong conclusion.*
6. *That the trial court erred in law and fact in convicting and sentencing the appellant in a case whereby the chain of custody was broken contrary to the mandatory of law.*
7. *That the trial court erred in law and fact in convicting and sentencing the Appellant in a case whereby its decision relied on the weakness of the defense rather than the strength of prosecution evidence of accepting everything put on him without cautioning itself on whether the appellant when cross examined understood the nature of questions put on him.*
8. *That the trial court erred in law and fact in convicting and sentencing the appellant in a case which the prosecution failed to prove it beyond reasonable doubts as charged.*

At a later stage, almost at the eleventh hour, the appellant added one more additional ground. For reasons that will be clear shortly, I choose not to reproduce the additional ground.

When the appeal was called on for hearing, the appellant appeared in person while the respondent Republic was represented by **Mr. Melchior Hurubano**, learned State Attorney. The appellant, on her part, had nothing substantial to add to her elaborate grounds of appeal. She asked the learned State Attorney to proceed with his part while reserving her right to a rejoinder.

Upon taking the stage, Mr. Hurubano did not hesitate to announce that the respondent Republic opposed the appeal. He insisted that the respondent supported both conviction and the sentence of the trial court.

Mr. Hurubano stated that he would like to group the grounds of appeal into four and argue them as follows. He mentioned that the first group consists of the first, second, third, fourth, seventh, eighth, and first additional grounds of appeal. He explained that all these grounds revolve around the failure of the prosecution to prove the case beyond reasonable doubt.

Referring to the cited provisions of the Drugs Control and Enforcement Act (supra) Mr. Hurubano averred that the prosecution needed to establish two main elements. **Firstly, whether the items trafficked were narcotic drugs, and secondly, whether the items belonged to the accused person.**

On the first element, the learned State Attorney pointed out that PW1 (Government Chemist) had examined the substances and confirmed that they were narcotics, specifically Bangi. He referred to the testimony of the chemist recorded on page 8 of the trial court's proceedings. Mr. Hurubano highlighted that the government chemist's report, admitted as Exhibit P1,

served as *prima facie evidence* according to Section 48A(1) of the Drug Act. Since the report clearly stated that the type of drug was *bangi*, he emphasized that no one could dispute it.

Regarding PW2, the bus conductor for BUTI LA ZUNGU BUS (T240 DRM), Mr. Hurubano explained that the witness testified that the appellant asked the car to stop while she was holding two bags. The conductor took the bigger bag, marked it with the seat number VIP6 and the appellant's name, and placed it in the boot. When the police stopped the car, the conductor was able to identify the luggage as belonging to the appellant. The conductor informed the police accordingly, and they seized both the bag in the boot and the small bag.

Mr. Hurubano emphasized that the appellant received a seizure certificate and signed it. He asserted that based on PW2's evidence, there was no doubt that the luggage belonged to the appellant. He further stated that PW2 and other **witnesses were credible**, and their testimony was reliable since they had no personal connection to the appellant or any **reason to falsely implicate her.**

Regarding the appellant's complaint about not receiving a receipt for the seized items, Mr. Hurubano referred to the Court of Appeal of Tanzania's decision in **RAMADHANI IDD MCHAFU V. REPUBLIC** Crim Appeal No 328 of 2019 page 15 where the apex Court had stated that since the appellant had signed a seizure certificate and did not disown his signature during his defense, that by itself amounted to confessing. Mr. Hurubano argued this court to follow suit since the current appellant did not dispute

signing the certificate of seizure, it could be considered as a confession, making the receipt unnecessary.

Moving on to the fifth ground of appeal, in which the appellant complained about the trial court's failure to evaluate the evidence, Mr. Hurubano immediately objected to this ground, stating that the trial court had indeed evaluated the evidence of both sides, as documented from page 7 to 15 of the impugned judgment. Even if the trial court had failed in this regard, reasoned the learned State Attorney, it wouldn't vitiate the judgment because the first appellate court has the power to conduct a reevaluation of evidence. To bolster his argument, he cited the case of **KAIMU SAID V. R.** Crim App 391 of 2019.

Combining the sixth, third and the first new additional grounds of appeal, Mr. Hurubano alleged that they all centered on the complaint that the chain of custody was not maintained. Referring this Court once again to the case of **RAMADHANI IDD MCHAFU V. REPUBLIC** (supra) the learned State Attorney argued that the chain of custody could be proved not only through documentary evidence but also through the oral account of witnesses.

Mr. Hurubano referred to the proceedings where PW4, on pages 21 and 22, explained how Exhibit P2 was seized from the appellant and passed on to PW3. PW3 further explained that he kept the exhibit until he handed it over to PW5, who then took it to PW1, the government chemist. PW1 eventually returned it to PW5, who, in turn, gave it back to PW3, the exhibit keeper, until it was required in court. Mr. Hurubano prayed for the dismissal of these grounds for lack of merit.

Regarding the second additional ground of appeal, Mr. Hurubano stated that the appellant's complaint was that the search conducted on the bus **violated section 38(1) and (3) of the Criminal Procedure Act Cap 20 RE 2019 (the CPA).** He acknowledged that there was no search warrant but maintained that the search was legal. He referred to section 42(1)(a) and (b) of the CPA Cap 20 2019, which permits searches without a warrant during emergencies. He argued that the search was conducted in an emergency situation because the police were not aware that the bus was carrying drugs. He cited page 21 of the proceedings where PW4 was asked at the SIDO checkpoint without prior knowledge.

It was Mr. Hurubano's reasoned opinion that the search did not prejudice the appellant as it was not conducted in her home place, therefore it did not violate her right to privacy and dignity. He also stated that there was no need for the police to plant anything against her. Finally, he prayed for the entire appeal to be dismissed for lack of merit.

The appellant on her part stated that on 27/2/2022, she was traveling from **Nyangao to Dar es Salaam for treatment due to chest pains.** Upon arrival at the barrier, the police stopped the car, and the driver, conductor, and agent got off and engaged in a conversation with the police. Afterwards, the police approached and ordered that the car be taken to the police station. The appellant mentioned that five people, including herself, were instructed to step out of the vehicle and were given pieces of paper to sign. The conductor informed the police that the appellant was pretending and not actually sick. A police officer named Hezron requested the appellant

to sign the papers, but she told the bus conductor that the luggage did not belong to her.

The appellant insisted that she was searched and found with drugs for treating tuberculosis (TB) and other deceases. The police who conducted the search contacted her doctor at Temeke, who confirmed that she required monthly check-ups. Subsequently, the appellant was taken to Sokoine Regional Hospital, where she underwent an examination that confirmed the presence of TB. The authorities informed her that she would be taken to court on the third day but granted her bail. She also mentioned that the weight of the *bangi* (cannabis sativa) allegedly found in her possession was 13 kilograms.

The appellant revealed that due to her sickness, she was advised not to turn up to court and deliberately miss the date of judgment, but she refused, insisting that she did not commit the offense and that she had never engaged in any drug-related business. She prayed that this court sets her free.

I have **dispassionately considered the grounds of appeal**, submission by the learned State Attorney against the grounds, additional oral statement of the appellant and records of the lower court. I do not intend to make this analysis long. Nevertheless, there are a number of issues that I feel must be shared here even if they do not constitute the *ratio decidendi* as such but are merely an *obiter dictum.*

It is not common in Tanzania for women to be associated with *bhang* (or **bangi** as it is spelled in normal, everyday Kiswahili.) Incidences of women arrested in airports with cocaine and other *sophisticated* drugs are also not

as common. I would also add that those women arrested in airports are different compared to the present appellant. They are probably educated, have travelled abroad at least ones, and possibly speak a foreign language. Their involvement in organized criminal rackets can be established. The appellant is a normal Tanzanian woman, devoid of any of these characteristics and this worries me quite a bit.

It is worrisome for women in general and more importantly an *average woman* (housewife, mama ntilie) to be associated with drug trafficking. In a culture like ours that respects women and hardly associate them with crimes *allowing* women to be involved in *bangi* is extremely disastrous. There are also chances that women may be used as a scapegoat. I cannot rule out the possibility of men turning a woman into a sacrificial lamb and unite to testify against her to the very last minute**. It is against this background that I take a careful look at the information presented before this court** to appeal against the decision of the trial court.

The appellant's complaint is the first, second, third, fourth, seventh, eighth, and first additional grounds, although Mr. Hurubano has said they faulted proof of the prosecution case beyond reasonable doubt, I think that is too general. I will narrow down to examine whether the trial court failed to properly analyze the evidence it had gathered by considering both the prosecution and defense evidence to arrive at the conviction it had reached.

The Court of Appeal of Tanzania has consistently held in many of its decisions that the analysis and evaluation of evidence entail an objective

scrutiny of both the prosecution and defense evidence, rather than merely summarizing or narrating it. See **GAUDENCE SANGU VS. REPUBLIC (CRIMINAL APPEAL NO. 88 OF 2020) [2022] TZCA 784 (7** December 2022), Tanzlii, **LEONARD MWANASHOKA V. REPUBLIC, CRIMINAL APPEAL NO. 226 OF 2014, AND RASHID ISSA V. REPUBLIC**, Criminal Appeal No. 416 of 2016 (both unreported).

The Court further emphasized that summarizing the evidence separately for both sides is distinct from subjecting the entire evidence to an objective evaluation in order to separate the relevant information from the irrelevant. Furthermore, considering evidence and then disregarding it after proper scrutiny or evaluation is different from not considering the evidence at all during the evaluation or analysis. See **LEONARD MWANASHOKA VS. REPUBLIC (CRIMINAL APPEAL NO. 226 OF 2014) [2015] TZCA 294** (24 February 2015), Tanzlii, page 5.

I have read the impugned judgement and I am satisfied that it is based on a balance of analysis of both the prosecution and the defence evidence. The learned magistrate, as it appears on page 6 to 8 of the judgement analyzed the evidence of the appellant. Here is what the learned magistrate wrote on page 8 after spending preceding paragraphs expounding the story of the appellant:

> *"In her defence she maintains that she is innocent as she had no bag. She was travelling to Dar es Salaam for medical purpose. But the prosecution evidence is very clear that, the accused boarded Buti La Zungu Bus and seated on VIP seat Number 6..."*

The learned Magistrate continued with the balancing exercise weighing the two competing versions of the story until he concluded as he did, and such a conclusion is what informed his verdict. In **MZEE ALLY MWINYIMKUU @ BABU SEYA VS. REPUBLIC** (Criminal Appeal No. 499 of 2017) [2020] TZCA 1776 (17 September 2020) the Court of Appeal emphasized on the need for a first appellate court to step into the shoes of the trial court and consider the defence evidence. In the matter at hand, I see no reason to do so because the trial court did indeed consider the evidence adduced which was mainly continuous claim of innocence. I see no merit on these grounds.

The issue of the chain of custody has also been at the center of the complaints. I endeavor to examine whether the same was broken down by prosecution witnesses.

In the case of **PAULO MADUKA & OTHERS VS. REPUBLIC (CRIMINAL APPEAL NO. 110 OF 2007) [2009] TZHC** 69 (28 October 2009), the Court of Appeal of Tanzania defined the "chain of custody" as the chronological documentation and/or paper trail that shows the seizure, custody, control, transfer, analysis, and disposition of evidence, whether physical or electronic. It is emphasized that the chain of custody is recorded to establish the connection between the alleged evidence and the alleged crime, ensuring that the evidence was not fraudulently planted to wrongly incriminate someone.

Similarly, in the case of **JOSEPH LEORNARD MANYOTA VS. REPUBLIC**, Criminal Appeal No. 485 of 2015 (unreported), the Court

articulated the reasons behind observing the chain of custody, stating that evidence of this nature must be handled scrupulously and carefully to prevent tampering, contamination, or fraudulent planting of evidence, all in the interest of justice.

However, recent developments in the Court's stance indicate that for items that do not easily change hands, the Court has relaxed its compliance with the chain of custody, as directed in the case of **PAUL MADUKA & OTHERS VS. REPUBLIC** (supra). This position has been expressed in numerous cases, such as **JOSEPH LEONARD MANYOTA VS. REPUBLIC** (supra), **ISSA HASSAN UKI VS. REPUBLIC**, Criminal Appeal No. 129 of 2017, and **KADIRIA SAID KIMARO VS. REPUBLIC**, Criminal Appeal No. 301 of 2017 (all unreported), as well as **ANANIA CLAVERY BETELA VS. REPUBLIC [2020] 2 T.L.R. 112.**

In the present case, the movement of the two bags allegedly containing dry leaves suspected to be bhangi started from where the bus was stopped and inspected, and they were, allegedly, found in the appellant's possession. The evidence shows how Exhibit P2 was seized from the appellant and passed on to PW3. PW3 further explained that he kept the exhibit until he handed it over to PW5, who then took it to PW1, the government chemist. PW1 eventually returned it to PW5, who, in turn, gave it back to PW3, the exhibit keeper, until it was required in court. I see no merit to this ground of appeal either.

The appellant's complaint on impropriety of the search must be dealt with separately. The complaint that the search was conducted without a search

warrant and without the issuance of a receipt for the seized items after the certificate of seizure was issued. The appellant contends that this contravenes **section 38(1) and (3) of the Criminal Procedure Act [Cap. 20 R.E 2022].** It is indeed true that the search in this case was conducted without a search warrant and without issuing a receipt. It appears that the police received intelligence tips that the appellant was trafficking in narcotic drugs. It is in this line of reasoning that I agree with the learned State Attorney that it was an emergence situation. I also agree that subsequent to the search, the rights of the appellants as provided for by the CPA were taken into consideration.

Finally, the appellant has complained in general terms that the prosecution case was not proved beyond reasonable doubt. As correctly argued by the learned State Attorney, in a charge on trafficking in drugs, the prosecution is duty bound to prove two elements, first, that the items trafficked were narcotic drugs, and second, that the items belonged to the accused person.

The dry leaves suspected to be *bhang* were taken to the government chemist as per the acceptable standard operating procedures. Among the prosecution witnesses that were lined up, PW4 testified how it was established scientifically that the dry leaves were not any other leaves but were indeed prohibited *cannabis sativa*. This closed the chapter on the first element.

As for the second element namely whether the "dry leaves" belonged to the appellant, I must say this has taken quite a bit of my time. I have gone

through the lower court records and read over and over the statement of the appellant on appeal. I cannot see how the bus conductor and other people present would choose to force unto the appellant such a life changing calamity. I have also tried to imagine the situation where the bags belonged to someone else who alighted from the bus earlier but even such a possibility, as much as it does not form a part of the grounds of appeal, is farfetched.

As alluded to above, the appellant is an *average* woman. She probably thought it is not easy for her to be suspected or even linked to trafficking in drugs. Unfortunately, the unexpected happened. Consequently, I dismiss the appeal in its entirety for lack of merit.

It is so ordered

E.I. LALTAIKA
JUDGE
26/6/2023

Court:

Judgement delivered under my hand and the seal of this court this 26th day of June 2023 in the presence of Mr. Melchior Hurubano, learned State Attorney and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
26/6/2023

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
26/6/2023