IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

(DC) CRIMINAL APPEAL NO. 08 OF 2023

SELEMANI KASSIM BRASH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Originating from Criminal Case No. 05 of 2020 at the Court of Resident Magistrate of Tanga at Tanga)

JUDGMENT

01/08/2023 – 10/08/2023

NDESAMBURO, J.:

The appellant has approached this court seeking to challenge the Court of Resident Magistrate's decision, which convicted and sentenced him to twenty years imprisonment. Initially, the appellant was charged with an offence of trafficking in narcotic drugs contrary to section 15(1)(b) of Drugs Control and Enforcement Act No. 5 of 2015, read together with paragraph 23 of the first schedule and sections 57(1) and 60(2) both of Economic and Organized Crimes Control Act, Cap 200 R.E 2002 as amended by Written laws (Miscellaneous Amendments) Act No. 3 of 2016.

Briefly, on 26th May 2020 at 2300 hours at the Horohoro boarder area, within Mkinga District, and Tanga City, the appellant was apprehended by Ismail Japhet Mbaga, PW5 trafficking 123.53 kilograms of narcotic drugs, namely Catha edulis "khat" commonly known as mirungi.

To prove its case, the prosecution summoned a total of 5 witnesses and tendered six exhibits. Ismail Japhet Mbaga, PW5, a SUMA JKT supervisor, on 26th May 2020 at 2300 hours, while on his way home at the Horohoro boarder area, he saw a parked motorcycle near his house, he went closer and found two passengers who were disembarking, one of the passengers carried a sulphate bag on his shoulder. He apprehended the passenger with a sulphate bag, who is the appellant. Upon being questioned by PW5, the appellant admitted to having carried khat. PW5 told the trial court that he made an effort to call the police but in vain, and later on, he took the appellant to Horohoro police station and handed over the appellant and the exhibit to inspector Ally Mnyone, PW1.

While at the police station, the appellant's sulphates were searched by PW1 before two witnesses namely PW5 and the independent witness Isaya Hoza, PW2 suburb chairperson of Horohoro, where plants suspected to be khat were discovered.

PW1 admitted having received the appellant with three bags on the alleged date. He further testified that he called PW2 to witness the search, and on his arrival, he notified the appellant, who was in police custody to come for the search. The search was conducted where green leaves suspected of being narcotic drugs were retrieved; 85 bundles were recovered from 3 bags. He after that, prepared a seizure certificate signed by the trio. The seizure certificate was tendered and admitted in court as Exhibit P1. After that, the appellant and the exhibit were shifted to Mtandikeni police station in Mkinga District.

Sgt Athuman, PW3, is an exhibit keeper who testified that on 27th May 2020 at night hour, he recalls having received an exhibit in connection with an offence of narcotic drugs with registration number MTN/IR/176/2020 from Sgt Mnyone, PW1. He countered and kept the record in the exhibit register book and stored it in the exhibit room. On the following day, he handed the exhibit to Dc Martin, PW4, who took the exhibit to Chief Government Chemist (CGC) for further action. On the same date, in the evening, Dc Martin returned empty sulphate bags that he kept under his custody.

Dc Martin took the exhibit and the appellant to the CGC, where Jovitus Mukela weighed the suspected khaki which weighed 123.53 kilograms. A sample for analysis from each sulphate was drawn and

assigned lab No. N2C 394/2022, the remaining exhibit was returned to him. The officer from the CGC signed form number 001 and stamped it. Dc Martin then went to the Court of Resident Magistrate, where he made an application for the destruction of the remaining suspected khaki, which was granted and an inventory form was issued and tendered as Exhibit P6. Dc Martin also tendered a report from the Commissioner of the Drug Control Commission (Exhibit P3) and a sample receipt (Exhibit P5).

The appellant distanced himself from the offence charged. He denied being arrested on the alleged date but on the 22nd May 2020. He wondered why PW5 did not involve neighbours and, in particular, an independent witness at the time of his arrest despite his admission that there were residential homes nearby where he was arrested. He further challenged the prosecution's evidence for failing to tender any exhibit that signifies his admission of the offence as alleged.

At the end of the trial, the trial court was satisfied that the prosecution case was proved beyond a reasonable doubt, convicted and sentenced the accused as hinted above.

The appellant was dissatisfied with both the conviction and the sentence metered on him and hence this appeal. In the petition of the appeal, he has raised four grounds which are summarised below:

i. *The learned trial magistrate was scrupulous to notice a palpable contradiction in the evidence of the prosecution witnesses and the charge sheet regarding the exact date of the alleged offence.*

ii. *The learned trial magistrate erred in law and failed to notice contradictions in where the narcotic drugs were retrieved.*

iii. *The learned trial magistrate erred in law and fact to convict the appellant without considering that the chain of custody was broken and did not summon the CGC.*

iv. *The prosecution did not prove its case beyond a reasonable doubt.*

When the matter came for hearing, the appellant fended himself. At the same time, Ms. Faraja Ngalata, a learned State Attorney, represented the Respondent/Republic, and from the onset, she was clear that they were not supporting the appeal. The hearing was agreed to proceed by way of written submission.

In addressing the first ground of the appeal, the appellant submitted that there is a variance between the charge sheet and evidence adduced by the prosecution witnesses, particularly PW1, PW2 and PW5. He expounded that while the charge sheet states that the offence was committed on the 3rd of May 2016, the above witnesses testified that the offence was committed on the 26th of May 2020. Based on the decision of

Mwita Nyamuhanga v Republic, [1992] TLR 188, the appellant submitted that the charge against him was not proved.

Arguing in support of the second ground, the appellant faulted the trial magistrate for failing to notice and resolve the contradiction in the evidence on record regarding where the narcotic drugs were found. He submitted that PW5, in his testimony, stated that he noticed the appellant who had carried a sulphate bag and when interrogated him, he admitted to having carried "mirungi". On the other side, the facts read to him during the preliminary hearing stated that PW5 found the appellant who was on his way with "mirungi" and that there were two other sulphate bags of "mirungi" in a nearby house, that the appellant was taken to that house and the two bags were retrieved. To support his assertion, the appellant cited the case of **Mohamed Said Matula v Republic** [1995] TLR 3, which calls for the court to address the inconsistency and decide whether they are minor or go to the root of the case.

The appellant challenged the court's decision which convicted him without considering that the chain of custody was broken and for the failure of the prosecution to summon the CGC officer, namely Jovitus Mukela, who examined Exhibit P3. He submitted that the chain of custody was broken because there was a missing link in handling the sample from when it was alleged to have been seized from him up to the time of

analysis by the CGC. Further, the prosecution failed to summon Jovitus Mkella, who examined the alleged khat. Therefore, the prosecution has been unable to prove its case.

Lastly, on the fourth ground, the appellant argued that the prosecution did not prove its case beyond a reasonable doubt. That the appellant had the duty to raise doubts which he did.

In reply to the first ground, Ms. Ngalata argued that there was no variance between the charge sheet and the evidence adduced by the prosecution witnesses. She further averred that the charge sheet was substituted and read over to the accused person. Therefore, the first ground has no merit and should be dismissed.

On the second ground of appeal, she argued that the evidence of PW5 was clear, especially where the appellant was apprehended. She cited page 52 of the proceeding to prove that PW5 testified that the appellant was arrested near the residence of PW5 while he was heading home and that the appellant had a sulphate bag on his shoulder. On the issue of contradiction of facts read during the preliminary hearing from the evidence of PW5, Ms. Ngalata submitted that the purpose preliminary hearing, as provided by section 192 of the Criminal Procedure Act, Cap 20 R.E 2022, is to accelerate trial and, therefore, its contents will not affect

the trial. She cited the case of **Byaton Kaundama v Republic**, Dc Criminal Appeal No. 7 of 2023 and that the cited case of **Matula** is not applicable.

Responding to the third ground, she contended that section 143 of the Evidence Act, Cap 6 R.E 2022, provides that no particular number of witnesses is required to prove any fact; therefore, it is upon the prosecution to choose whom to bring to prove its case. She also referred this court to section 19 of the Government Chemist Laboratory Authority, 2016, which states that the report issued by the Authority shall be conclusive evidence unless the opposite party requires that the chief government chemist or government laboratory analyst who gave it be summoned as a witness. It was her submission that the appellant did not exercise his right. Furthermore, the report was tendered by the investigator, PW4 who had knowledge of it. She wrapped up by submitting that it was not a statutory requirement to summon a government chemist to maintain the chain of custody.

Still, on the third ground, she contended that the chain of custody was maintained. She submitted that PW1 narrated how the search was conducted at Horohoro police, and after that, the accused and the exhibit were transferred to the Mtandikeni police station. Athuman, PW3, the exhibit keeper, registered and stored the exhibit, which was 85 bundles of

"mirungi" together with three sulphate bags. Likewise, PW3 testified how he received the 85 bundles of suspected "mirungi" packed in three sulphate bags on 27th May 2020; he recorded it and assigned the reference number. On the same date, he handed the exhibit to Dc Martin through the occurrence book to take it to the CGC for measurement; in the evening, Dc Martin returned three empty sulphate bags. PW4 testified how he handled the exhibit from the point when he collected it from PW3 and took it to the CGC for measurement. Jovintus Mukela weighed the exhibit, found it to be 123.53 kilograms, and drew samples from each pocket. The rest of the exhibit was destroyed following a court order, and the inventory form was filled in. She, therefore, argued that the chain of custody was maintained from when the exhibit was handed over to the exhibit keeper to its disposal. Therefore, she urged this court to dismiss this ground.

Lastly, the learned State Attorney submitted that the prosecution case was proved beyond a reasonable doubt, whereby credible witnesses were summoned. The government report confirmed that what was unlawfully possessed by the appellant was the narcotic drug to wit "mirungi", which is prohibited by section 15(1)(b) of Act No. 5 of 2015. It was also proved that the appellant committed the offence charged with. She supported her stance with the decision of **Waziri Shabani Mizogi v Republic**, Criminal Appeal No. 476 of 2019.

She finally concluded that the appeal has no merit and prayed to be dismissed.

The appellant filed no rejoinder submission.

This court has examined the record of appeal, grounds of appeal and submission made by both sides, and it is now in the place to determine the appeal.

Before dealing with the grounds of the appeal, I would like to state that this court, as the first appellate court has the power to re-evaluate the evidence on record and come up with its own decision, as how it was stated in the case of **Juma Kilimo v Republic**, Criminal Appeal No. 70 of 2012. I will be guided by the above principle in dealing with the instant appeal.

On the first ground, the appellant alleges that there was a variance between the charge sheet and the evidence adduced by the prosecution witnesses. The contention is that while the charge sheet shows that the offence was committed on 3rd May 2016, the evidence indicates the offence was committed on 26th May 2020. Having gone through the record of the appeal, on page 26 of the proceeding, on that date, the appellant was absent; however, Mr. Mangowi, a learned State Attorney, is recorded to have prayed, among others, to substitute the charge sheet, the prayer

which the court granted. The record further reveals on page 29 that the substituted charge was read over and explained to the appellant, who pleaded not guilty. That is the charge on which the accused was convicted, and a copy is found in the record. The charge sheet was supported by the testimonies of PW1, PW2 and PW5 who testified that the incident to have occurred on the 26th May 2020. Based on the above, therefore, there was no variance between the charge sheet and the evidence adduced by the prosecution. As rightly submitted by Ms. Ngalata, the first ground has no merit and is dismissed.

On the second ground, the appellant is faulting the trial court's decision for failing to resolve the evidence's contradiction regarding where the narcotic drugs were retrieved. The crust of the matter lies in the contradiction between the evidence of PW5 and the fact read to the accused during the preliminary hearing. Indeed, the record of appeal evidences inconsistency as to where precisely the alleged three sulphate bags were retrieved. PW5 testified that he apprehended the appellant with a sulphate bag he was carrying. In contrast, the facts during the preliminary hearing show that two other sulphate bags were recovered inside a nearby house. However, the learned State Attorney argued that there was no inconsistency and that section 192 of Cap 20 aimed to accelerate the trial. Therefore, the contents of the preliminary hearing will

not affect the trial. I join hands with Ms. Ngalata that in terms of section 192 of Cap 20, the purpose of the preliminary hearing is to accelerate the trial. Further, the facts read during the preliminary hearing, save for undisputed facts signed by the parties, do not form part of the evidence. Very fortunate, this issue was tested by the Court of Appeal in the case of **Pantaleo Teresphory v Republic**, Criminal Appeal No. 515 of 2019, where it was held:

> *"In terms of section 192(1)(2)(3) and (4) of the Criminal Procedure Act, save for the facts which are recorded in the memorandum of undisputed facts and which the parties sign to acknowledge so, the rest of the facts read out to the appellant during the preliminary hearing do not become part of the evidence."*

As per the memorandum of undisputed facts signed by the parties on the 28th of June, 2023, the issue of retrieval of two sulphate bags from a nearby house that the appellant is contesting on this ground, unfortunately, was disputed. Therefore, the ground raised by the appellant is unmerited and is dismissed for the above reason.

Ground number three of the appeal carries two complaints, namely the failure of the prosecution to summon Jovitus Mukela, the government

laboratory analyst who alleged to examine the suspected khat and the inability to observe the chain of custody from when the alleged khat was seized until it was tendered in court. Ms. Ngalata argued that, as per section 19 of the Government Chemist Laboratory Authority Act, 2016, it was not mandatory for the analyst to be summoned unless the appellant so requested. On top of that, the law does not require a particular number of witnesses to prove the case. On the chain of custody, she submitted that the chain of custody was maintained and narrated the evidence of the prosecution evidence from when PW1 seized the exhibit to when it was weighed, the sample was withdrawn, and the court's order destruction of the remained exhibit.

I would like to start with the first part where the appellant is blaming the prosecution for failure to summon Jovitus Mukela, the government laboratory analyst who alleged to examine the suspected khat. To begin with, I would like to make it clear that Jovitus Mukela was not an analyst who analyzed the suspected khat. As per Exhibit P3, the analysis of the exhibit was conducted by Michael S. Benard. The record reveals that Jovitus Mukela was an officer who received the suspected khat from PW4 on the 27th of May 2020 and completed form number DCEA 001, a special form for recording exhibits shifted to CGC, the form was tendered in court as Exhibit P4. Exhibit P4 which is altered shows that 85

green leaves suspected to be khat were received by the office of the CGC. I have analyzed Exhibit P4, I regret to state that, the tendered exhibit is questionable as it is altered specifically on the amount and description of what was received by that office.

Reverting to the ground of the appeal, I concur with the learned State Attorney that the provision of section 19 of the Government Chemist Laboratory Authority Act, 2016 does not make it mandatory for the chief government chemist or government laboratory analyst who issued the report to appear and testify, however, the officer may be summoned where the opposite party demanded his or her attendance. The record of the trial court does not show that the appellant requested Jovitus Mukela to be summoned, however, the appellant was unrepresented and for the smooth administration of justice, the court ought to have informed him of his right to demand the expert to be summoned even though he did not request his appearance and he did not object to the tendering of Exhibit P4. The appellant would be availed of an opportunity to cross-examine the witness-bearing in mind that Exhibit P4, as shown above, is altered.

In regards to the second part of this ground where the appellant is contesting that the chain of custody of Exhibit was not established to the tilt, while the Respondent/Republic submitted the opposite. Being the first appellate court, this court will re-evaluate the entire evidence of the

prosecution to find out whether or not the chain of custody was broken. However, the re-evaluation of the evidence, I wish to state the law in what a chain of custody and its purpose is clear and has on several occasions been illustrated by the Court of Appeal. For instance, in the case of **Paulo Maduka v Republic**, Criminal Appeal No. 110 of 2007 it was illustrated as follows:

> *"...a chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence be it physical or electronic ... the purpose is to establish that the alleged evidence is in fact related to the alleged crime rather than for instance, having been planted fraudulently to make someone appear guilty, ... it requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it."*

Despite the above, it is not always that the chain of custody is required to be documented. The authentication on the handling of the exhibit will differ depending on the circumstances of each case, and oral evidence may suffice. See **Chacha Jeremiah Murimi and 3 Others v Republic**, Criminal Appeal No. 551 of 2015.

In the instant appeal, the prosecution in a bid to prove its case and in particular that the chain of custody was intact, PW5 testified that on the 26th of May 2020 at around 2300 hours he apprehended the appellant who had a sulphate bag suspected of carrying contraband. PW5 went further and stated that, having apprehended the appellant, he took him to Horohoro police station, where one of the sulphate bags was searched and mirungi was found; he recalled to have signed a certificate of seizure. PW2 on his side, witnessed the search as an independent witness where 85 bundles of khat were retrieved from the three sulphate bags. PW1, on his side, admitted to having received the appellant, who was brought to him by PW5; he called an independent witness (PW2) to witness the search where 85 bundles of suspected mirungi were retrieved from three sulphate bags. He prepared a certificate of seizure which the appellant, PW2, duly signed, and he also signed it. The appellant and the exhibit were after that transferred to Mtandikeni police station, where the exhibit was handed to PW3. PW3 admitted that on the 27th of May 2020, at night, to have received the exhibit marked MTN/IR/176/2020 in connection to narcotic drugs from PW1. He recorded it in the exhibit register and marked the same with registration number 7/2020 and stored it. On the same date in the morning hours, he handed the exhibit to PW4, who took it to the CGC laboratory. At the CGC laboratory, PW4 was received by Jovitus Mukela

who weighed the exhibit which was found to be 123.53 kilograms. Jovitus Mukela drew some samples from each bag for analysis.

I have curiously analysed the evidence of the above PW1, PW2, PW3 and PW5, their pieces of evidence raise questions on the handling of the suspected khat from the time it was seized by PW5 to the time it was handed to PW3 for storage, I will explain. After being arrested on the 26th of May 2020 at night, the prosecution evidence shows that the appellant was taken to Horohoro police station and later transferred to Mtandikeni police station. PW3 shows that the suspected khat was handed to him by PW1 on the 27th of May 2020 at night. The prosecution evidence is silent on how the exhibit was handled from the time when PW5 apprehended the appellant to the time it was handed to PW1. The evidence is also silent on how the same exhibit was stored and controlled from when it reached the hands of PW1 to when it reached PW3 on the night hour of 27th May 2020. The above untold evidence raises doubt that a reasonable person would be justified to question the chain of custody of the alleged khat. It should be noted that the untold evidence of the chain of custody of this exhibit covers the period before the same was taken to the CGC laboratory for analysis where it was concluded that the sample withdrawn from the 85 bundles was khat.

It is evident that the prosecution tendered a certificate of seizure, which was objected to but later on, admitted in evidence as Exhibit P1, this piece of evidence supports that the appellant was found with 85 bundles of suspected khat, however as elaborated above, the chain of custody of this exhibit is questionable and it cannot conclusively be said that, what was apprehended from the appellant, its contents were the very same that was taken to PW3 and later on confirmed by the CGC to be khat.

To say the least, the trial court failed to properly evaluate the evidence on the records. Had it so done so, it would have realized that the chain of custody was not maintained, and hence, the prosecution did not prove its case beyond a reasonable doubt. Consequently, the appeal is hereby allowed, the conviction is quashed, and the sentence is set aside. The appellant shall be released from prison if not held therein for another justifiable cause.

It is so ordered.

DATED at **TANGA** this 10th day of August 2023

H. P. NDESAMBURO

JUDGE