

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 76 OF 2023**

*(C/f in the District Court of Arumeru, Criminal Case No. 39/2022)*

**LOLIO ZEPHANIA LEMALIE..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

16<sup>th</sup> November, 2023

**D. D. NDUMBARO, J.**

The appellant Lolio Zefania Lemaile is standing charged with the offence of Trafficking Drugs contrary to Section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act (Cap 95 RE 2019) as amended by Section 19 of Written Laws (Miscellaneous Amendments) (No. 5) Act No.9 of 2021 and convicted to 20 years imprisonment.

On the 20<sup>th</sup> day of May, 2022 at Engalaoni within Arumeru District Arusha Region, he was found trafficking narcotic drugs namely cannabis sativa commonly known as "bhangi" weighing 45.4 kilograms contrary to law.

Dissatisfied with the Judgment of the trial court, appealed before this Court against conviction and sentence by lodging a petition of appeal with 5 grounds; -

1. The trial court erred in law and fact to convict the appellant based on an offence which was not proved beyond reasonable doubt
2. The trial court erred in law and fact for failure to resolve the appellant benefit contradiction between the prosecution witness which raises unresolved question
3. The trial court erred in law and fact to appreciate the fact that the alleged independent witness is not credible and his testimony was in contradiction with the substantive part of the case/offence charged
4. To rely on the alleged search warrant against the appellant notwithstanding that the same full of uncertainty and inconstancy with other witness testimony uncertainty
5. The trial court erred in law and fact to rule that there was a proper chain of custody despite the discrepancy in the manner and style in which the explanation alleged ceased narcotic drugs were kept stored and recorded in its movement by PW1.

During submission appellants presented by Advocate Ebrahim Kusenge and Republic represented by Allice Mtenga State Attorney.

On the first ground, the appellant argued that the offence was not proved beyond doubt. The chain of custody was not intact. 1<sup>st</sup> prosecution witness, PW1 testified marking the exhibits with pencil and pen, which he considered mark with pencil is a temporary form. While PW2 testified that, exhibits were marked A and B by the Custodian Officer after he received them from arrest officer PW2. The appellant considers PW1 and PW2 statement contradicting, as to whether it was marked by pencil or marked A and B.

On 2<sup>nd</sup> ground, the appellant faulted that, there was a contradiction on witnesses. PW4 testified that the exhibit was sorted in seal. PW5 testified that it was sealed with sisal rope. this brings suspicion on variations as in the co-exhibit which used to convict the appellant. The said exhibit was objected but it was overruled by court.

On 3<sup>rd</sup> ground, the independent witness statement (PW3) differs from the arresting office PW5. PW3 testified before the trial court that the accused was tired up (page 24 of trial court proceedings) but in cross-examination (Page 25 of trial court proceedings) changed the position that the accused was not tired up.

According to the arresting officer, PW2 testified that after arresting accused (appellant) they found an independent witness who was unknown to them (page 23). PW 2 says they did not find another witness because the place was a bit far. PW2 also testified that they spent almost 1 ½ to reach the arresting area. Based on those statements, the appellant argued that, the time spent to reach that area they would find qualified witness on the way.

The arresting officer testified that the search was ongoing until the next day however, he previously said after 20 minutes of arrest he was done with the accused (appellant) nowhere testified to have come again the next day. Argued that the witness statement was not clear.

Appellant combined 4<sup>th</sup> and 3<sup>rd</sup> grounds. He argued despite those discrepancies yet court could not consider the benefit of the doubt on the accused side. He supported his argument in the case of **Mohamed Said Matula vs TLR No.3 of 1975.**

On 5<sup>th</sup> ground. The appellant argued the chain of custody was not intact. PW2 testified to have filed the arrest warrant at the arresting scene together with the accused, while PW3 testified that the warrant was filled in another place (pages 22 – 24 of proceedings)

In reply, the respondent argued that admission of exhibit P7 (covering the letter), was objected but the objection was overruled because the tender had knowledge of the exhibit.

On the chain of custody, the appellant argued that on 21/05/2022 PW1 testified to have received an exhibit from PW2, he kept exhibits till the date of sorting whereby PW4 and PW3 witnessed sorting. On page 14 he testified to have marked AB and written the exhibit with pen and pencil. It was written in pencil because it did not move.

Despite the temporary mark, there were other marks for identification such as exhibit No., case No., and date of register of exhibit. The government chemist also marked the lab number in the exhibit. exhibit was tendered without objection and accompanied by oral evidence of PW1, PW2, PW4 and PW6

On 2<sup>nd</sup> ground, PW4 testified that the exhibit was sealed and handed over to independent witness PW3 and thereafter to the government chemist, while PW5 testified that it was sealed with sisal rope and was handled to the government chemist. PW5 was not around when the exhibit was handed over to the government chemist, he was on the day of sorting that is 21/05/2022 in the morning, and it was sent to the government chemist on 31/05/2022, There are no inconsistencies of evidence of PW4 & PW5.

The appellant argued, that there was no inconsistency, page 24 said that initially accused was not chained, on P25 it was testified that the accused was chained after search. No inconsistencies on the place where a certificate of seizure was filled, the PW2 arresting officer testified that it was filled in the arresting area and PW3 testified that the next day was called to give an explanation to the police station but not filling certificate of seizure in page 4 he was identifying certificate.

On the credibility of an independent witness PW3, he argued that PW3 is credible because has no interest to any part.

On the 4<sup>th</sup> ground, the tenderer of exhibit P7 (a letter) was competent because had knowledge.

In rejoinder, he faulted that exhibit P1 was supposed to be in a permanent form which shows every movement, but it was marked with a pencil that would affect the chain, further, it was marked AB, Case No. date of seizure etc, which he considers AB as the main mark. if AB is distorted, the whole chain is distorted.

On 3<sup>rd</sup> grounds, the appellant faulted that argument that it was said, PW3 went to give his explanation to the police station the next day however it is not reflected in the proceedings.

Analyzing the matter on the first ground, the appellant faulted that, the offence was not proved beyond doubt specifically on the chain of custody. The prosecution witness (PW2) testified to mark the record in pencil (on page 14) which is considered a temporary form. The custodian officer (PW1) marked exhibits A and B to create confusion.

Considering the submission of both parties and evidence from the court records on the first ground, PW2 testified having sorted the exhibit in the presence of the accused and WP Zuena, he admitted to have written it in pencil and permanent ink on the same exhibit, he wrote in pencil for the purpose of record.

PW1 testified to have received exhibit P1 the narcotic drugs from Assistant Inspector Innocent from the Drug Unit, which was under two sulphates, thereafter he marked two bags as the first one A and the latter B (on page 18 of the proceeding). Exhibit P1 (drugs) was tendered before the court without objection, and the movement of the file was well recorded in exhibit PF. 16. His evidence was also accompanied by oral evidence PW1, PW2, PW4 & PW6.

Court proceeding shows there was chronological documentation of the arrest, seizure and transfer of document, which prove that the chain of custody was intact. The case of **Paulo Maduka** supporting this analysis

**Paulo Maduka and others Vs. The Republic, criminal Appeal  
No. 110/2007 CAT – Dodoma.**

*"...The chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody... 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 guilty. The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have assessed it"*

The movement of exhibit in this matter was chronologically well documented, therefore, I found there was no brokerage of chain of custody on this case

In the second ground appellant claimed to have a contradiction in witnesses on the packaging of the exhibit, PW4 said the exhibit was sealed when it was handled to PW2. PW5 testified that exhibit was sealed with sisal rope (on pages 32-34 of proceedings) when it was handled to PW 2. This brings suspicion as to the packaging of the exhibit.



PW4 testified to have sorted the exhibit in the presence of the accused and witnessed by independent witness Onesmo Luca, he sorted the exhibit in the seal on page 33, and on page 38 during cross-examination, PW2 testified to that the exhibit was sorted in the presence of accused and it was sealed by a sisal rope and tape. It is clear that PW4 testified the exhibit to be sealed, but he did not go further into saying it was sealed with what material. PW2 explained further that, it was sealed with sisal rope and tap, there is no contradiction between of two statements.

In contradiction of the independent' witness statement (PW3 John Shabani Kisuke). PW3 as to whether the accused tired up (pages 24 and 25 of proceedings). Going through trial court proceedings on pages 24 and 25 It is very clear that PW3 testified that the accused was tired of his hand, in cross-examination explained as to when the accused hand was tired up. He said he was tired up after the search. I therefore find no contradiction in the statement of PW3 statement

In the case of Said Hemed v. Republic [1987] TLR 117 Held that,

*"it is the duty of the prosecution to prove beyond reasonable doubt that the accused persons trafficked the alleged drugs and, particularly by proving that, three sacks of cannabis were seized from the accused person".*

From the evidence and submission of parties, the prosecution proved the case beyond reasonable doubt.

I, therefore, confirm the sentence and conviction of the District Court of Arumeru Arusha imposed against the appellant. Appellant be retained in custody unless lawfully ordered otherwise

It is ordered accordingly.

The right to appeal is explained

**DATED** at **ARUSHA** this 16 day of November 2023.



  
**D. D. NDUMBARO**

**JUDGE**