IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 57 OF 2023

(Appeal from the Judgment of the Temeke District Court by Hon. Mwankenja, J.H, SRM dated 17th February 2023 in Criminal Case No. 290 of 2021)

OMARY SAID AWADHI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 30.10.2023

Date of Judgment: 14.11.2023

DING'OHI, J

OMARY SAID AWADHI, the Appellant herein, was arraigned in the district court of Temeke district at Temeke for unlawful possession of a small quantity of narcotic drugs contrary to section 17 (1) (b) of the Drugs Control and Enforcement (Cap 95 of 2019).

At the end of the trial, the appellant was convicted and sentenced to serve one-year imprisonment ***and pay a*** fine of five hundred thousand shillings. It was ordered that the fine be paid before the start of the custodial sentence.

However, in exercise of revisional powers under section 373(1) (b) of the Criminal Procedure Act, this court (Hon. H. R. Mwanga, J) revised the

sentence and substituted it to a fine of Tshs. 500,000/= or one year imprisonment. That was in criminal revision No. 1 of 2023.

The Appellant felt dissatisfied with both conviction and sentence. He has appealed before this court raising a total of seven grounds of appeal to challenge the above verdict, as follows;

1. That the trial court erred in law and fact by shifting the burden of proving possession to the Appellant.
2. That the trial court erred in law and fact in finding that the allegation of possession has been proved while the prosecution did not prove the alleged possession at all and or to the required standard.
3. The trial court erred in law and fact by according weight to the Seizure Certificate (Exhibit P3) while the circumstances and evidence on record are very clear that at no point in time did the alleged Narcotic drugs namely Cannabis Sativa ever been seized from the Appellant.
4. The trial court erred in law and fact for failure to hold that the chain of custody of an envelope (Exhibit P1) from when an envelope alleged to contain Narcotic drugs namely Cannabis Sativa was found on the desk by students, taken to PW3 by students, opened by PW3 taken to the staff office and brought at the staff meeting for

identification was not maintained during all that material time by the Appellant t and that in all that material time the Appellant was absent.

5. That the trial erred in law and fact by relying on uncollaborated evidence by PW3 that the Appellant admitted that the envelope containing Narcotic drugs namely Cannabis sativa was his while all along the Appellant denied the said admission.
6. That the prosecution failed to call material witnesses (students who found and took the envelope to PW3) to prove that the envelope found on the desk was the same as the one tendered as Exhibit P1) and contained the same substances.
7. That the sentence to the Appellant was not judiciously imposed.

However, in arguing this appeal, the appellant dropped ground No.7, consolidated grounds No.1,2,3, and 5, and argued them together. The ground of appeal No.4 and 6 were also argued together. So, in essence, two sets of grounds of appeal as stated were argued.

Arguing the first set, Mr. Victor Kikwasi for the appellant contended that the appellant was all along disputing the allegation that he was found in possession of narcotic drugs weighing 29.3 grams. He went on to argue that, in criminal cases, a fact in issue is proved when the court is satisfied

beyond reasonable doubt that such fact exists. According to the learned counsel that is provided under section 3 (2) of the Evidence Act (Cap 6 RE 2019). He said that the possession of the alleged drug was not proved by the prosecution. That, the evidence of the PW3 is mostly hearsay as in his evidence he did not say that he saw the appellant in possession of the alleged narcotic drugs. The witness mentioned two sources of information; from two students and a teacher by the name of Frank. But, according to the learned counsel, the said student and a teacher were not called to support the evidence of the PW3. Under the circumstances, the learned counsel contends, the evidence of the PW3s was not corroborated and that evidence alone can not be relied upon to prove that the appellant was arrested in possession of the narcotic drugs. The learned counsel went on to submit that, the evidence that the PW3 testified that the appellant admitted to having possessed the envelope containing narcotic drugs is not true. He contended that the appellant before and during trial maintained his defense that he was not aware of what the envelope contained. He said that the statement by the appellant that he did not know what was in the envelope cannot in law be regarded as admission. It was insisted by the learned counsel that the evidence of the PW3 is still wanting. Counsel added further that PW2 who tendered the seizure certificate (Exhibit P3) did not specifically specify how the search was

conducted and how Exhibit P3 was prepared. He contended that The appellant was not searched and found in possession of the alleged narcotic drugs. It was the learned counsel's view that the seizure certificate was prepared at the office of the Director of Temeke Municipality where the appellant was summoned and met with PW2. The learned counsel submitted further that from 6/2/2019 to 15/2/2019, the envelope allegedly contained narcotic drugs and was not in the possession of the appellant., the evidence over the seizure certificate and narcotic drugs is doubtful in that the seizure certificate was made relied in contravention of section 38 and 41 of the Criminal Procedure Act, Cap 20 RE 2019. Counsel insisted that this ground alone is enough to fault the decision of the trial court.

Arguing the 4th and 6th grounds of appeal the counsel submitted that, in cases involving exhibits, the evidence concerning the chain of custody is of utmost importance. He said the chain of custody of the alleged narcotic drugs was not established to the required standard. He added the chain of custody is said to have been established where there is proper documentation of the chronology of events in the handling of an exhibit from seizure, control, transfer, and tendering the exhibit at trial. The learned counsel supported his position in the case of **The Director of**

Public Prosecution vs Hatibu Sembe, Criminal Appeal No.130 of 2021 (unreported). In the case at hand, there was no chronology of events of handling exhibit P1 from when the same was taken by two students, taken to the teachers' office, opened by teachers, stored at school premises, and taken to the Directors of Temeke Municipality. He is of the view that the chain of custody was broken and the chronology of events as to how and where Exhibit P1 was found would have been explained by the two students but they were not called as witnesses and this raises doubt. The prosecution side had even failed to account for how and where exhibit P1 was stored before being taken to the office of the Director of Temeke Municipality before being taken to the Government Chemists Laboratory. He prayed that this appeal be allowed and the decision of the trial court be quashed and set aside.

In reply, Mr. Adolf Kissima, the learned State Attorney submitted that the counsel for the appellant has entirely relied on the judgment alone without bothering to peruse the records of the proceeding. He argued that the judgment is a summary of what was done in the trial adding that error, if any, noted in the judgment is cured under section 388 of the Criminal Procedure Act. He went on, that during trial the prosecution paraded 5 witnesses and tendered 4 exhibits. That, the PW1, the Government

Chemist testified that the laboratory test revealed that the substance found in the envelope in possession of the appellant was narcotic drugs. Both narcotic drugs and the report were tendered and admitted as Exhibit P1 and P2 respectively. Even PW2 testified in court that the appellant confessed to him that he was found in possession of narcotic drugs. That he tendered a certificate of seizure and the same was admitted as Exhibit P3 without any objection from the appellant. Further, he submitted, that the PW3 testified that the appellant admitted that the envelope contained narcotic drug was found in his possession only that it was sent to him by one of his friends who was not brought to testify to collaborate with the appellant. It is the learned state attorney's stance that the appellant did not dispute the fact that he was found with an envelope containing drugs only that he did not know the contents in the envelope.

Equally, the state attorney added that PW4 testified that he was the one who established the chain of custody from the appellant to the Government Chemistry Department for laboratory tests of the seizure drugs. The PW5 also testified on how the substance was found in the possession of the appellant and how the same was taken up to the Government Chemistry department. He tendered *fomu ya uwasilishaji wa sampuli* which was admitted in court without any objection from the

appellant and was marked as Exhibit P4. He stressed that the law is clear that when the accused person intends to object admissibility of any exhibit he must do so before the same has been admitted by the court and not during cross-examination. Otherwise, shall be construed as he admitted the facts. He said that what matters in proving the case is the credibility of the witness as it was held in the case of **Siaba Mswaki vs R**, Criminal Appeal No.401 of 2019. Counsel insisted that the case was proved beyond reasonable doubt and prayed that this appeal be dismissed.

In rejoinder, the counsel for the appellant reiterated his main submission and added that it is not true that in challenging the decision of the trial court the appellant relied only on a judgment. He reiterated that none of the prosecution witnesses saw the appellant possessing the alleged drugs. Further, he insisted that there was no chain of custody of the seized drugs from the appellant to the Government Chemistry Department.

The main issue for consideration and determination at this juncture is whether this appeal has merit. On visiting the evidence in the trial court record together with grounds of appeal I think this appeal shall not detain me longer. As shown in the good record, the appellant is challenging the findings of the trial court as to the possession of drugs. The trial court found out that the appellant was arrested in possession of an envelope

containing drugs. The main ingredient of the offense the prosecution side required to prove in this kind of case is possession. The appellant does not dispute the possession but that the drugs found in his possession were received from a person he did not know.

Section 17 (1) (b) (supra), under which the appellant was charged and convicted of provides that:

> *17 (1) Any person who is in contravention of any provisions of this Act or permit issued under this Act, possesses in a small quantity any narcotic drug or psychotropic substance which is proved to have been intended for personal consumption or consumes any narcotic drug or psychotropic substance shall on conviction, notwithstanding anything contained in this Part, be liable, if-*
>
> *(a) NA*
>
> *(b) the narcotic drug or psychotropic substance in question is other than those specified under paragraph (a), to a fine of not less than five hundred thousand shillings or imprisonment for a term of three years or to both.*

As earlier said, the actual possession was beyond doubt proved, since the envelope containing drugs was found in the appellant's table and he confessed that the envelope containing drugs was in his possession. Such evidence was enough to convict the appellant as charged. Bringing in the two students who first saw the envelope as suggested the by appellant's counsel would not have changed anything regarding the possession. That is to say, the concern by the appellant's counsel is of no merit. In the same vein, and as correctly argued by the learned state attorney, the appellant did not object to the admissibility of any exhibit during the trial. If he so wished he would have objected before admissibility of the same. For instance, Exhibit P4 (*fomu ya uwasilishaji wa sampuli)* was among the exhibits that were admitted without objection from the appellant. Being admitted without objection means that it was procedural clean, including the chain of custody for the evidence. The appellant can not at this juncture raise an issue against the exhibit which was admitted in his presence and without his objection. It is on that basis I find that the second ground of appeal is also without any merit.

In the event, I find that the entire appeal is without merit. It is hereby dismissed in ***toto.***

S.R. DING'OHI
JUDGE
14/11/2023

Judgment delivered in the presence of Mr. Adolf Kisima for the Republic and the Appellant in person.

S.R. DING'OHI
JUDGE
14/11/2023