IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB - REGISTRY)

AT IJC MOROGORO

CRIMINAL APPEAL NO. 5582 OF 2024

(ORIGINATING FROM THE DECISION OF CRIMINAL CASE NO 9 OF 2023 FROM MOROGORO, RM'S COURT BY LYAKINANA (PRM) DATED 18.10.2023)

TELESPHORY FOCUS MSANGI.....1ST APPELLANT

RASHID RAMADHANI HAJI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

DATE OF JUDGEMENT - 12TH JUNE, 2024

MANSOOR, J.

On 25th January 2023, before the Resident Magistrate Court of Morogoro (here in the Trial Court) the appellants herein-above were charged with the offence of trafficking in narcotic drugs contrary to Section 15A (1), and 2 (c) of the Drugs Control and Enforcement Act, [Cap 95 R:E, 2019] which reads as follows"

Section 15A. Prohibition on trafficking of narcotic drug or psychotropic substances or illegal dealing or diversion of precursor chemicals of less amount

1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals or substances with drug related effects or substances used in the process of manufacturing drugs of the quantity specified under this section, commits an offence and upon conviction shall be liable to imprisonment for a term of thirty years.

2) For purposes of this section, a person commits an offence under subsection (1) if such person traffics in—

c) cannabis or bangi weighing not more than fifty kilograms.

Briefly as depicted from the proceedings of the Trial Court, the case for the prosecution was that; the police were informed that there is a suspect carrying with him some stock of drugs and was to pass through Melela – Mlandizi Area in Morogoro along Iringa- Morogoro Road and probably to proceed towards Dar es Salaam. On 14th February 2022, the Police therefore arranged a trap and stopped the Motor Vehicle with Reg. No. T 134 CMX Make Toyota Spacio, called the required search witness and the two

appellants herein who were in the car were searched in his presence. During the course of the search it was found that there were two polythene bags (commonly known as "salfeti bags") in the vehicle put on by the appellants herein. It was apparently found to contain cannabis (bangi). The whole of the alleged article of cannabis (bangi) was seized, taken possession of in presence of the independent search witness. The consignment contained in the two bags was accordingly seized and sealed by in presence of the appellants on the spot. The seized bangi, the driving license of the 1st appellant herein, the Motor Registration Card, and the Vehicle were taken to Morogoro Central Police and was handed over to the police exhibit keeper one D/SSgt E8949 Kwilinus Luambano. The accused persons were also handed over to the Police, they were interrogated and they recorded their cautioned statements.

Investigation was then carried out and the substance was sent for examination to the Forensic Science Laboratory, i.e. Government Chemist. Upon receipt of the report from the Forensic Science Laboratory the appellants herein came to be charged for the trafficking narcotic substances contrary to section 15A, 1 and 2 (c) of the Act. The case was committed to the Trial Court where after trial the accused persons now the appellants met

with conviction and were each sentenced to serve a jail term of 30 years. The consigned was ordered to be destroyed, and the seized Motor Vehicle was forfeited.

The defense of the accused consisted of denial of the prosecution case while alleging that they were framed by the police. The first appellant said he gave a lift to the 2nd appellant who was heading to Kiwengwa -Bagamoyo, and charged him TZS 8,000 for fuel. Immediately after the 2nd appellant boarded the Vehicle, they were stopped by the police and taken to Morogoro Police Station, they did not know why they were apprehended as the police did not inform them the reasons for their arrest. His license and vehicle were seized, and on the 4th day after the arrest and detention, he recorded his cautioned statement under duress as he was tortured. He denied to have been found with any substance.

The 2nd appellant as well said he stopped the car which was being driven by the 1st appellant at Mlandizi- Melela Area along Iringa- Dar Road, he asked him for a lift to go to Kiwangwa- Bagamoyo but the 1st appellant told him his destination was Chalinze but agreed to board the Car to Chalinze. He paid TZS 8,000 to the 1st appellant for fuel. Immediately after he boarded the car, they were stopped by the police who took them to Central Police Morogoro.

They were locked up and forced to sign a Cautioned Statement on 18th February 2024, four days after the arrest and detention.

There is no defense evidence except the aforesaid defense version in further statement of the accused persons.

The two appellants herein were aggrieved by the conviction and sentence, they filed their joint appeal raising the following grounds of appeal;

1. That, the trial court grossly erred in law and in fact by shifting the burden of proof to the accused persons whereby it went on to convict them on weakness of defense evidence.
2. That, the trial court grossly erred in law and in fact by convicting the accused persons while prosecution side failed to prove the charge beyond the reasonable doubt.
3. That, the trial court grossly erred in law and in fact by admitting Statement of witness one Juma Salehe Adam without due regard of conditions stipulated under the law. Further that, the trial court denied the accused persons right to cross examine the said witness.
4. That, the trial court erred in law and in fact by its failure to evaluate evidence properly and hence reached erroneous decision.

5. That, the trial court grossly erred in law and in fact by failure to consider fatal irregularities in chain of custody of prosecution exhibits.

The appeal was argued by written submissions. The appellants enjoyed the services of Advocate Baraka Lweeka and Advocate Suzana Mafwere of Nkira Advocates whereas the respondent on its part had the service of Mr. Shaban Kabelwa the State Attorney.

The counsels for the Appellants started arguing on ground number three (3) of the Appeal submitting that the procedure for admission of the Statement of a Witness Juma Salehe Adam under Section 34B of the Law of Evidence Act [Cap 6 R.E.2022] (herein the Evidence Act) were faulted, and as such the Statement of the Independent Search witness admitted under this Section be expunged from the records.

They submit that the statement of the independent witness Juma Salehe was admitted on 16th August 2023 and marked as Exhibit "P13" in total disregard of the provisions of Section 34B (1) and (2) (a)(b)(c)(d) and (e) of the Evidence Act. To emphasize on the procedure for admission of a statement of a person who cannot be found under Section 34B of the Evidence Act, the Counsel refers to the case of **Republic vs. Badatu**

The learned counsels argue that there was no notice produced before the Trial Court for production of the Statement under Section 34 B of the Evidence Act. On that date the State Attorney simply expressed his intention to file the notice but he did not file it through the Court Registry. There was an order issued by the Trial Magistrate that the documents received in Court without being filed they be served on the appellants, but those documents were produced in court without being filed.

The Counsels for the Appellants argue further that the records of trial court do not show any effort conducted to convey the witness summons to Juma Salehe Adam. They said there was no proof that the said Juma Salehe Adam, who was the independent search witness was served with the summons to appear in Court to give evidence as there was neither proof of service nor proof that he could not be found. The Counsels argue that the independent witness in seizure was material witness on part of prosecution and that prosecution avoided to call the said material witness and by failure to call material witness whose evidence was considered and conviction based on the same, infringed the appellants' right to cross

examine the witness and entire fair trial was thus affected. The Counsels invited the Court to draw negative inference against the respondent herein for calculated refusal to call independent witness and to buttress their argument they referred to the case of **AZIZI ABDALLAH VS R [1991] TLR 71** where the Court of Appeal of Tanzania (CAT) had held:

> "failure to call such material witnesses who are within reach but are not called without sufficient reasons being shown by the prosecution is fatal"

The counsels therefore urged the court to find that there was no independent witness during the Seizure of the substance, and that the certificate of seizure admitted as evidence and marked as exhibit P5 be expunged from the records. They also prayed that exhibit "P13", which is the Statement of an independent Witness of the Search admitted on 16th August 2023 should not be considered in reaching the finding as it was a mere hearsay not corroborated.

On ground 3, the Republic, the respondent herein, who was represented by the Learned State Attorney, Shaaban Kabelwa, submitted that the respondent complied with the requirements of production of a statement of

the witness who cannot be found provided under section 34B (1) and (2) (a), (b), (c), (d), (e), and (f) of the Evidence Act. He further reproduced the above provision as follows:

S. 34B.-(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written or electronic statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.

(2) A written or electronic statement may only be admissible under this section-

(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence:

Provided that, the court shall determine the relevance of any objection;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read.

Mr. Kabelwa reffered this court at pages 58 to 59 of the Trial Court Proceedings of 18th day of July, 2023 where the State Attorney informed the trial court orally on the intention to use the witness statement of Juma Adam Salehe under Section 34B (1) and (2) of the Evidence Act, and the written notice to use the said witness statement was filed in Court and served on the accused persons/Appellants. The State Attorney reproduced the proceedings as hereunder:

> *"SA: For hg. I have no witness. We did not manage to get witness. We intend to file to this court the statement of the said witness who is called Juma Adam Salehe. We will produce the said statement to this court under Section 34B (1) and (2) of the Evidence Act, Cap 6 R.E 2022. Also I have the said notice, witness statement and two summons which proved that we failed to get the said witness.*
>
> *Sgd. L Lyakinana-PRM 18/07/2023*
>
> *Court: Notice, witness statement and two summons received by this court. the same served to all accused persons.*
>
> *Sgd. L Lyakinana-PRM 18/7/2023"*

The Attorney relied on the Court of Appeal decision in the case of **Fabian Edmund vs Republic** (Criminal Appeal No. 540 of 2019) [2023] TZCA 17770 (23 October 2023), at page 18 and 19, the Court held as follows:

> *'It is cardinal principle of law that, in order for a statement made by a person who cannot be called or be found to give evidence in court to be admitted in evidence, such statement must meet the requirements set out under section 34B (2) (a) to (f) of the Evidence Act cumulatively. Paragraph (f) of section 34B (2) of the Evidence Act provides for the witness statement to be read over to the maker and signed by both the maker and recorder".*

The State Attorney argues that by supplying a copy of the statement to the accused persons, there is no room of cross examining a person who did not appear in court to give his examination in chief, and this is why his evidence needs corroboration.

The State Attorney did not submit on whether there was proof provided on failure to procure the witness and simply stated that, that was a procedural error and that it is settled that on every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice. He referred to the case of **Flano Alphonce Masalu @ Singu vs Republic (Criminal Appeal 366 of 2018) [2020] TZCA 197 (30 April 2020)).** He submitted

that the accused persons were not prejudiced since they were supplied with the witness statement on 18/7/2023. The State Attorney still insists that the procedures for tendering a statement of a witness under Section 34B of the Evidence Act were not flouted, and prayed for dismissal of the 3rd ground of appeal.

In deciding this issue, I shall be guided by the decision of the Court of Appeal sitting at Arusha in the case of **Adinardy Iddy Salimu and Joseph Evarist @ Msoma vs Republic, Criminal Appeal No. 298 of 2018 (tanzlii),** in which the Court of Appeal expunged from the records the Dying Declaration which was admitted under Section 34B of the Evidence Act as its admission was contrary to the requirements of Section 34B. The prosecution in that case failed to give prior notice to the accused persons as required under section 34B (d) of the Act. The Court of Appeal had this to say:

> *"The Court has on several occasions emphasized on the mandatory requirement of the law that, for a statement to be admitted in lieu of oral direct evidence, the conditions stipulated under the cited provision must cumulatively be complied with. (See:* ***Willy Jengela vs Republic (supra), Mhina Hamis vs Republic, Criminal Appeal No. 85 of 2005 19 and Fredy Stephano vs Republic, Criminal Appeal No. 65 of 2007***

(both unreported). In the light of the stated position of the law, the question to be answered is whether or not the dying declaration met the threshold of reception in the evidence. The answer is in the negative and we are fortified in that account because prior to tendering of the dying declaration at the trial notice was not served to the appellants so as to enable them to exercise their statutory right to object to its being tendered in the evidence against them. In view of the said circumstances, the appellants were convicted on the basis of the evidence (dying declaration) they were not made aware of which was a serious omission. That said, we decline Ms. Sulle's suggestion that the listing of the dying declaration as an exhibit during committal proceedings sufficed as notice envisaged under section 34 B (2) (e) of the Evidence Act and that the appellants were aware of the statement. We are fortified in that account because what is listed as an exhibit in committal proceedings is not a substitute of notice envisaged under section 34 B (2) (e) of the Evidence Act which categorically requires prior notice to be given to the other party so as to enable him/her to exercise the right to oppose the statement to be relied upon by the prosecution. In addition, the omission to comply with the mandatory statutory requirement cannot be remedied by the failure by the appellants to object the same because it was incumbent on the trial Judge to ensure that the law is complied with to the letter before acting on the dying declaration. In the premises, since the dying

declaration of the deceased was improperly admitted in evidence and acted upon to convict the appellants, we accordingly discount it. - See - TWAHA S/O ALI AND 5 OTHERS VS REPUBLIC, Criminal Appeal No. 78 of 2004 (unreported).

Now, the question that really arises is as to the proper interpretation of Section 34B of the Evidence Act. From my understanding, the provision constitutes an exception to the general rule that hearsay evidence is not admissible, refers to different statements which have been made relevant and therefore admissible although they are hearsay evidence. As for section 34B (2), the provision is divided into six sub-clauses and these sub-clauses deal with the nature of the statements referred to in this section, and as held by the Court of Appeal in the above cited case, each of the sub-clause of Section 34B (2) must be strictly complied with. Sub-clause (a) is on admission of Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts and must be proved to the satisfaction of the Court.

As deducted from the provision the first to prove is whether the said Juma Adam Salehe was dead, and so proof of his death ought to have been brought to court and court should have been satisfied that the said witness is dead and his statement could have been admitted as an exception falling under Section 34B of the Evidence Act. There was no such proof in this case. Again, there was no proof that the person Juma Salehe Adam was outside Tanzania, or was incapable of giving evidence or that he could not be found. The State Attorney simply produced summons to the Court saying that they could not reach him.

Admittedly, the Evidence Act, under Section 34B sanctions the admission of the evidence of an absent witness only on certain specified grounds. Evidence Act, have been set forth in the section itself. They are as follows: (1) when the witness is dead or (2) cannot be found or (3) is incapable of giving evidence or (4) is kept out of the way by the adverse party or (5) if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable. The learned Magistrate should have considered whether it was true that the said important witness was summoned and that the summons had reached him, and whether it was true that his whereabouts

were unknown and could not be reached or found. In other words, he should have come to a finding whether it was unreasonable in the circumstances on account of the delay or expense which might be involved to postpone the trial in order that the investigating officer might be examined. The Trial Magistrate ought to have received and recorded evidence of the whereabouts of the absent witness say from the leaders of the local Government or Village Leaders or even Street Leaders, and their affidavit to prove that the witness is either dead, or have moved and his address was unknown to any of the leaders or relatives. Production of Summons which were unserved was not proof that the witness was summoned to appear or that his whereabouts were unknown and thus he could not be found. This aspect of the matter does not appear to have been considered by the learned Magistrate at all and, in view of what is stated in the summons, it is rather difficult to understand why the trial could not have been adjourned for about a week or so, in order that the whereabouts of the witness could have been searched and known and so that the evidence of such an important witness might be taken.

It is trite that when the evidence of an absent witness is admitted under Section 34B of the Evidence Act, the grounds for its admission should be

stated fully and clearly, to enable the High Court to judge of the propriety of its admission. Assuming that there are reasons why the Court thinks fit to dispense with the personal attendance of a witness, and circumstances are disclosed showing that his presence could not be obtained without an unreasonable amount of expense and delay, the evidence to supply such reason and to prove such circumstances should be formally and regularly taken and recorded.

Again, it is true that the requirements of Section 34B (2) (d) of the Evidence Act were not complied with. This subsection requires that the notice to tender the statement must be given to court and served to the opposing party/parties before the hearing at which the statement is to be tendered in evidence. From the proceedings reproduced herein by the Counsels of the Parties, it appears that the notice was given to the Court on the same day, i.e. on 18 July 2023, and the same day the statement was admitted as evidence. The law requires that the notice must be given before the hearing so that the opposing party may get a chance to object. The opposing party has about 10 days to object as shown in section 34B (e) of the Evidence Act. Accepting the Notice, the same day and continuing with trial the same day the notice was served was a mistrial as the opposing party was denied to

exercise his rights to oppose or object the admission of the statement of the absent witness as given under Section 34 B (2) (e) of the Act, which reads:

> (e) *if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence:*
>
> *Provided that, the court shall determine the relevance of any objection;*

The evidence of the independent search witness was improperly admitted, and this has greatly prejudiced the right of the appellants, thus, the statement of the absent witness admitted as Exhibit P 13 is expunged from the records. Equally the Certificate of Seizure (Exhibit P5) which was admitted in contravention of Section 38 of the Criminal Procedure Act, [Cap 20 R.E 2019] which requires that it be signed by the independent witness is expunged from the records.

Therefore, the seizing of the substance, the subject of the case was improperly seized, and that there is an absence of an independent witness and that the entire case of the prosecution is based on the evidence of the raiding team who are all police officers. There is no independent witness.

Therefore, the case of the prosecution cannot be accepted based on their evidence alone. There is no independent witness. No doubt there are no independent eye-witness who witnessed the seizure of two bags of cannabis sativa from the Vehicle belonging to the 1st appellant. The Police have violated a very important step of investigation and that has greatly affected the case of the prosecution. In the absence of corroborative evidence by an independent eye-witnesses and in the presence of only police witnesses, the burden cast on the Court is that such an evidence would have to be carefully scrutinized by the Court. The Court cannot straightaway accept the evidence, as it accepts the evidence of an independent eye-witness. In the absence of an independent eye- witness, the evidence of the police officers has been shaken by the evidence of the appellants during trial, and I must hold that owing to the important nature of the evidence which has been improperly admitted in this case, I have no option but to allow this ground of appeal and order release of the appellants from imprisonment. The conviction and the sentence passed on the appellants will, therefore, be quashed and set aside and it is directed that the appellants herein namely TELESPHORY FOCUS MSANGI and RASHID RAMADAHNI HAJI be released from imprisonment immediately, unless they are held for any other lawful cause.

Having extensively expounded on the 3rd ground of appeal, and since this ground disposed the entire appeal, I shall not determine the rests of the grounds of appeal.

IT IS SO ORDERED.

DATED AND DELIVERED AT MOROGORO THIS 12TH DAY OF JUNE 2024

(LATIFA MANSOOR J)
JUDGE
12TH JUNE 2024