IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 408 OF 2019

1. ERNEST JACKSON @ MWANDIKAUPESI
2. HAMZA SAID REMADHANI ..... **APPELLANTS**

VERSUS

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

(Appeal from the judgment of the Resident Magistrate's Court of Morogoro at Morogoro)

(Kabwe, SRM – Ext. Juris.)

dated the 9th day of September, 2019
in
RM. Criminal Sessions Case No. 79 of 2017

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JUDGMENT OF THE COURT

11th August & 12th October, 2021

NDIKA, J.A.:

The appellants, Ernest Jackson @ Mwandikaupesi and Hamza Said Ramadhani, stood trial in the Resident Magistrate's Court of Morogoro at Morogoro (Hon. Kabwe, SRM – Ext. Juris.) for the offence of trafficking in narcotic drugs contrary to section 16 (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95, R.E. 2002 ("the DPITDA") as amended by the Written Laws (Miscellaneous Amendments) (No. 2) Act, Act No. 6 of 2012 ("Act No. 6 of 2012"). Each of them having been convicted of the offence, was sentenced to life

imprisonment as the mandatory penalty. Apart from ordering the destruction of the seized narcotic drugs (Exhibit P.1), the trial court ordered the forfeiture to the government of a motor vehicle with registration number T.996 BYC (Exhibit P.4) proven to have been the instrumentality of the crime. Dissatisfied, the appellants now appeal jointly against conviction and sentence.

It is vital to provide, at the beginning, the salient facts of the case. Briefly, it was alleged at the trial that the appellants, on 19th September, 2015 at Mafiga within the township and district of Morogoro in Morogoro Region, were found trafficking in narcotic drugs, to wit, 110.84 kilogrammes of *cannabis sativa* commonly known as bhang from Doma to Dar es Salaam in a motor vehicle, make Toyota Noah, with registration number T.996 BYC.

The prosecution case, based on the testimonies of six prosecution witnesses, was as follows: around 19:00 hours on 19th September, 2015, police officer No. E.1100 Sergeant Thabit (PW3) together with two other police officers, namely PC Zuberi and PC Bony, were on patrol in Morogoro. Based on information received from an informant, they drove to an area known as Lungemba in Morogoro to intercept two motor vehicles suspected to be ferrying narcotic drugs. They saw a silver

Toyota Noah with registration number T.996 BYC, which they chased up to Mafiga where they pulled it over.

Upon checking inside the said vehicle, they found the first appellant sitting behind the wheel and his co-appellant occupying a passenger seat. They headed back to Lungemba along with the seized vehicle hoping to intercept the other suspected motor vehicle. They stayed there until 22:45 hours when they gave up and drove to the Morogoro Central Police Station. There and then, the seized motor vehicle was searched in the presence of Aziz Shabani Kipande (PW4), a businessman who also claimed to be the area militia commander, as well as two other police officers, namely No. F.1210 Corporal Nondo (PW5) and PC Philemon. According to PW3, PW4 and PW5, five sacks (Exhibit P.1) suspected to be containing drugs were retrieved from the seized vehicle. A certificate of seizure, prepared by PW3 and allegedly signed by the first appellant and PW5, was admitted as Exhibit P.3.

The seized substance along with the motor vehicle were handed over by PW5 to the then storekeeper, Assistant Inspector Barnabas Alloyce Malya (PW6), on the following day for storage. On 22nd September, 2015, the substance was weighed by an official from the Weights and Measures Agency. Subsequently, on 6th November, 2015,

one Elias Mulima (PW2), a government chemist from the Chief Government Chemist Laboratory Agency ("the CGCLA"), collected samples from the seized sacks for analysis. In his testimony, he averred, as per a drug analysis report admitted as Exhibit P.2, that the collected samples were *cannabis sativa*.

Earlier in the trial, police officer No. PF.19853 Assistant Inspector Ally Mamu (PW1) sought to tender a cautioned statement attributed to the first appellant. This was rejected by the trial court upon sustaining the defence's objection that the statement was procured illegally.

In his sworn defence, the first appellant denied the charge claiming that it was trumped up. While admitting that he was arrested on 19th September, 2015 as alleged, but at a different place at Chamwino along Iringa road, he said he was riding his motorcycle only to be pulled over by two police officers who then took him to the Morogoro Central Police where he was detained for an undisclosed offence. On the following day, PW1 and PW5 interrogated him on the whereabouts of a woman known as Mama Neema, who happened to be his lover. In the course of the questioning, the police officers threatened to fix him up which they eventually did by framing up the case. Moreover, apart from denying to have confessed to the charge, he refuted knowing his co-appellant. His

defence was supported by DW2 Abuu Issa, a motorcycle taxi operator prevalently known as *bodaboda*, who affirmed that the first appellant was riding on his motorcycle in the fateful evening when police officers arrested him for no apparent reason.

The second appellant, too, rebuffed the charge against him. He said he was arrested by police officers at Msamvu, Morogoro on 18th September, 2015 at 20:00 hours, for no apparent reason, as he was heading home. He also denied knowing his co-appellant prior to the arrest. He further refuted to have been arrested at Mafiga and claimed that he did not sign the certificate of seizure.

At the conclusion of the cases for the prosecution and defence, the learned trial Magistrate summed up the case to the assessors who then returned a unanimous verdict of not guilty in favour of both appellants. The learned trial Magistrate, however, disagreed with the assessors as he found the charge proven against both appellants beyond any shred of doubt. In reaching that outcome, he found it established, based on PW3's testimony, that the appellants were arrested at Mafiga driving in the seized motor vehicle (Exhibit P.4); that, based on the testimonies of PW3, PW4 and PW5 as well as the certificate of seizure (Exhibit P.3), the drugs (Exhibit P.1) were retrieved from the seized motor vehicle upon an

emergency search; that, upon expert evidence of PW2 and the drug analysis report (Exhibit P.2), the seized substance was confirmed to be *cannabis sativa*, a prohibited narcotic drug; and that it was being trafficked by the appellants. The trial court considered the appellants' respective defences but rejected them.

The appellants initially raised twenty-three grounds of appeal in their joint memorandum of appeal lodged on 15th April, 2020. On 3rd November, 2020, they lodged five further grounds vide their supplementary memorandum of appeal. In essence, the two memoranda raise the following complaints: **one**, that the learned trial Magistrate (Hon. Kabwe, SRM – Ext. Juris.) lacked jurisdiction to try the matter which had been presided over by Hon. Ndunguru, SRM – Ext. Juris. at the preliminary hearing stage; **two**, that the charge was fatally defective due to being laid under repealed law; **three**, that the assessors who sat with the learned trial Magistrate were not informed of their duties after their selection contrary to the applicable procedure; **four**, that PW4 was allowed to give evidence despite not being listed as a prosecution witness at the committal proceedings contrary to section 289 (1) and (2) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA"); **five**, that the seized motor vehicle (Exhibit P.4) was wrongly

admitted and that it was unreliable; **six**, that the seized substance was recovered following an illegal search on the seized motor vehicle; **seven**, that there was no proof of the part of Exhibit P.4 from which Exhibit P.1 was retrieved and that the alleged recovery was not witnessed by any independent witness; **eight**, that the seized substance (Exhibit P.1) was wrongly admitted in evidence and that it was unduly delayed before laboratory analysis; **nine**, that the owner of the motor vehicle, one Juma Buster, was wrongly not called as a witness; **ten**, that the evidence on record was not properly evaluated; **eleven**, that the drug analysis report and the certificate of seizure (Exhibits P.2 and P.3 respectively) were wrongly admitted in the evidence and that they were unreliable; **twelve**, that the chain of custody of the seized substance was broken; and **thirteen**, that the charge was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellants, who were self-represented, adopted their grounds of appeal as elaborated in their written arguments and supported by their list of authorities. They urged us to allow the appeal. For the respondent, Ms. Elizabeth Mkunde, learned Senior State Attorney, and Mr. Candid Nasua, learned State Attorney, appeared. They resisted the appeal on all grounds except grounds two and three to which they conceded. All the same, we

propose to start with the complaint in the first ground of appeal, that the learned trial Magistrate (Hon. Kabwe, SRM – Ext. Juris.) lacked jurisdiction to try the matter.

Addressing us on the above complaint, Ms. Mkunde referred us to page 24A of the record of appeal containing a transfer order and submitted that the case was duly transferred to the learned trial Magistrate to try the case after Hon. Ndunguru, SRM – Ext. Juris. had conducted a preliminary hearing.

It is, indeed, evident that the case was initially transferred to Hon. Ndunguru, SRM – Ext. Juris. for hearing vide the Judge in Charge's order of 5th October, 2018 in terms of section 256A (1) of the CPA. After Hon. Ndunguru had conducted a preliminary hearing on 18th October, 2018, the matter was transferred to Hon. Kabwe for hearing pursuant to the Judge in Charge's order of 27th June, 2019 in terms of section 256A (1) of the CPA. It is, therefore, clear that Hon. Kabwe's assumption of jurisdiction over the matter was unblemished. The first ground fails.

The appellants' contention in ground two is that the charge was fatally defective due to being laid under repealed law. For the respondent, Mr. Nasua conceded that section 16 (b) (i) of the DPITDA as amended by Act No. 6 of 2012 under which the charged offence was laid

for an act allegedly committed on 19th September, 2015 was repealed on 15th September, 2015 upon the Drug Control and Enforcement Act, 2015 (now Cap. 95 R.E. 2019) ("the DCEA") becoming effective, the effective date having been published vide Government Notice No. 407 of 2015. Certainly, it is without doubt that section 69 (1) of the DCEA expressly repealed the PDITDA. In the premises, Mr. Nasua submitted that the charge was incurably defective as it ought to have been laid under the new law. He thus urged us to nullify the trial proceedings and the judgment thereon and proceed to quash the appellants' respective convictions and set aside the sentences. However, he prayed that the matter be remitted to the lower court for retrial.

The appellants were charged with trafficking in narcotic drugs contrary to section 16 (b) of the DPITDA, which, as amended by Act No. 6 of 2012, stated as follows:

> *"**16.-(**1) Any person who [is]-*
>
> *(a) found in possession or does any act or omits to do any act or thing in respect of narcotic drugs or any preparation containing any manufactured drugs commits an offence and upon conviction shall be sentenced to life imprisonment; and*

(b) ***trafficking in any narcotic drug or psychotropic substance commits an offence and upon conviction shall be sentenced to life imprisonment.***" [Emphasis added]

We agree with Mr. Nasua that the DPITDA was repealed by section 69 (1) of the DCEA, which was operationalized by the Government Notice No. 407 of 2015 on 15th September, 2015, four days before the charged offence was committed as alleged. It is to be noted that section 15 (1) (a) of the DCEA re-enacted the offence of trafficking in narcotic drugs under section 16 (b) of the DPITDA as follows:

"***15****.-(1) Any person who-*

(a) trafficks in narcotic drug or psychotropic substance*;*

(b) traffics, diverts or illegally deals in any way with precursor chemicals, substances with drug related effects and substances used in the process of manufacturing of drugs; and

(c) directly or indirectly facilitates or causes any other person to be used as bondage for the purposes of drug trafficking,

commits an offence and upon conviction shall be sentenced to life imprisonment.

(2) Any person who produces, possesses, transports, exports, imports into the United Republic, sales, purchases or does any act or omits anything in respect of drugs or substances not specified in the Schedule to this Act but have proved to have drug related effects, or substances used in the process of manufacturing of drugs commits an offence, and upon conviction shall be sentenced to life imprisonment.

(3) ***For purposes of this section, a person commits an offence under subsection (1) if such person traffics-***

(i) narcotic drugs, psychotropic substances weighing more than two hundred grams;

(ii) precursor chemicals or substance with drug related effect weighing more than 100 litres in liquid form or 100 kilogram in solid form, or

(iii) ***cannabis and or khat weighing more than fifty kilogram.****"* [Emphasis added]

Since the appellants were alleged to have committed the offence on 19th September, 2015, their charge ought to have been laid under 15 (1) (a) of the DCEA instead of the repealed section 16 (b) of the

DPITDA. The sticking issue is, then, whether the charge was fatally defective as contended by the appellants and conceded by Mr. Nasua.

In **Matu s/o Gichumu v. R** (1951) 18 EACA 311, the erstwhile Court of Appeal for Eastern Africa, echoing and applying the decision of the English Court of Appeal in **R. v. Tuttle** (1929) 45 T.L.R. 357, held that such an irregularity is curable if the repealed section is re-enacted in identical words in the current statute such that it cannot be said that the accused has in any way been prejudiced. To be sure, in the **Tuttle** case, it was held that:

> *"When it appears as it does that the offence under the earlier Act of 1861 was in the same word as the offence under the consolidation Act of 1916, it is clear that the appellant could not have been prejudiced and that no injustice could have been done to any defence which he had by this amendment ...."*

See also this Court's decision in **Zakaria Martin v. Republic**, Criminal Appeal No. 178 of 2008 (unreported) following **Gichumu** (*supra*).

In the instant case, the charging section 16 (b) of the DPITDA was re-enacted and is substantively similar to section 15 (1) (a) of the DCEA, the current statute, both provisions attracting the same penalty, that is,

life imprisonment. In the premises, it is our firm view that the appellants were not prejudiced by the defect in the charge, which we find curable under section 388 of the CPA. The second ground likewise fails.

The appellants contend, in the third ground, that the trial was vitiated by the learned trial Magistrate's failure to inform the assessors he sat with of their duties after their selection contrary to the applicable procedure. To this complaint, Mr. Nasua conceded unreservedly, submitting that the omission was evident at page 33 of the record. He contended that it was settled jurisprudence that such an omission is fatal. Accordingly, he urged us to nullify the trial proceedings and the decision thereon.

In the beginning, we appreciate that by practice the participation of assessors in assisting the trial Judge at the High Court or trial Magistrate with extended jurisdiction commences with their selection by the trial Judge or Magistrate followed up by their clearance with the accused being invited to raise objections against any of them, if any. After selection and clearance, the trial Judge or Magistrate would then inform the assessors of their role and duties – see, for example, **Hilda Innocent v. Republic**, Criminal Appeal No. 181 of 2017; and **Abdallah Juma @ Bupale v. Republic,** Criminal Appeal No. 537 of 2017 (both

unreported). In the former case, the Court stressed the importance of that step as follows:

> *"... it is equally important that although informing the assessors on their role and responsibility is a rule of practice and not a rule of law, as it is for a long time an established and accepted practice in order to ensure their meaningful participation, a trial judge must perform this task immediately after ascertaining that there is no any objection against any of the assessors by the accused before commencing the trial. It is also a sound practice that a trial judge has to show in the record that this task has been fully performed."*

In the instant case, the assessors were properly selected and cleared, as shown at pages 33 and 34 of the record. However, as rightly conceded by Mr. Nasua, the learned trial Magistrate overlooked enlightening them on their role and duties. What then is the legal consequence of this omission? In **Hilda Innocent** (*supra*) and **Abdallah Juma @ Bupale** (*supra*), we held that such an omission was fatal. It should be noted that in both cases, we took into account the fact that in the course of the trial some or all of the assessors asked no questions to witnesses for clarification. It was apparent, therefore, that their role was curtailed as they did not meaningfully participate in the

proceedings. That cannot be said of the situation in the instant case. Having scrutinized the entire trial proceedings, our impression is that the assessors were fully alert and that they actively participated in the proceedings. Their incisive opinions and verdicts of not guilty recorded after the learned trial Magistrate's summing up, as shown at pages 132 to 134 of the record of appeal, confirm that the assessors knew their duties and that they devotedly discharged them despite having not been informed of them before the trial commenced. We would, therefore, dismiss the third ground of appeal as we find the omission complained of having not occasioned any failure of justice.

The claim in ground four that PW4 was wrongly allowed to give evidence as he was not listed as a prosecution witness at the committal proceedings contrary to section 289 (1) and (2) of the CPA is plainly beside the point. It was fully answered by Ms. Mkunde. That although PW4 was not listed during committal proceedings as one of the prosecution witnesses and, therefore, the substance of his evidence was not read out at that stage, he was allowed to testify at the trial on 23rd July, 2019 after the prosecution had given a notice in writing on 8th July, 2019 in terms of section 289 (1) and (2) of the CPA. Having seen the said notice on the original record, we are satisfied that the applicable

procedure was duly followed. The notice given, containing the substance of the evidence intended to be elicited from PW4, was reasonable. We, accordingly, dismiss the fourth ground of appeal.

We now turn to grounds five, six and seven whose common thread is the attack on the legality, propriety and reliability of the search on the seized motor vehicle and the exhibits allegedly seized from the appellants (Exhibits P.1 and P.4).

Beginning with the legality of the search, it is contended that the search was illegal on the ground that it was executed by PW3 at the police station in Morogoro without warrant contrary to the dictates of section 38 (1) of the CPA. Our recent decision in **Shabani Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019 (unreported) was cited for the proposition that a warrantless search not conducted in an emergency is illegal. Mr. Nasua, on the other hand, countered that the search was conducted as an emergency in terms of section 42 of the CPA.

It is in the evidence that PW3, while on patrol with two other police officers in the fateful night after 19:00 hours, intercepted and seized the appellants' motor vehicle (Exhibit P.4) at Mafiga area, which he and his fellow officers took all the way to the police station where it was

searched around 23:00 hours in the presence of the appellants, PW4 and PW5, in circumstances that a search order or warrant could not be sought and obtained. Given these facts, we agree with Mr. Nasua that the search was executed in an emergency in terms of section 42 of the CPA and that no search order or warrant was required.

The appellants claimed that none of prosecution witnesses pointed out what part of the motor vehicle (Exhibit P.4) the drugs (Exhibit P.1) were retrieved from and that no independent person witnessed the search presumably because PW4, who happened to be a non-police witness, was assumed non-independent on account of being a militia commander for the Mafiga locality. Certainly, we agree that none of the prosecution witnesses mentioned the particular part of the motor vehicle from which the sacks of the allegedly illegal substance were retrieved. However, it is clear that PW3, PW4 and PW5 evidently stated that the sacks were retrieved from the seized motor vehicle. It is significant that none of them was cross-examined on that aspect, implying an acceptance of the truthfulness of the fact that the contraband was actually retrieved from the impounded motor vehicle. As we would agreeably rule out PW4 being independent on account of him being a local militia commander even though he was not a police officer, we

should add that the absence of an independent witness was inconsequential on account of the search having been executed in the odd hours of the night in emergency circumstances.

The contention that the seized motor vehicle was wrongly admitted and that it was unreliable is evidently without substance. It was tendered by PW3 and that both PW3 and PW5 identified it by its make and unique registration number as the vehicle that they seized from the appellants in the fateful night containing the contraband. We see no weighty questions raised against its reliability taking into account that both witnesses were not cross-examined by the defence on it. In any case, the appellants' convictions were not founded upon their possession of the motor vehicle but the drugs (Exhibit P.1). In the premises, the fifth, sixth and seventh grounds are without substance. We dismiss them all.

We now move to the grounds eight, eleven and twelve, which we think should be disposed of together. The coalesced complaint here is that the seized substance, the drug analysis report and the certificate of seizure (Exhibits P.1, P.2 and P.3 respectively) were wrongly admitted in evidence, that Exhibit P.1 was unduly delayed for laboratory analysis and that its chain of custody was broken.

We start with the admission of the three exhibits. It was argued by the appellants in respect of Exhibit P.1 that it was admitted in evidence without PW2 having laid the foundation for its admission. Exhibits P.2 and P.3 were attacked on the ground that they were admitted improperly, in particular that they were not read out after they were admitted in evidence. For the respondent, Mr. Nasua counter-argued that PW2 laid the foundation for his tendering of Exhibit P.1 in evidence in that he weighed it and collected samples from it and that he left it at the police station. As regards Exhibits P.2 and P.3, he argued that their contents were duly read out following their clearance and admission.

We have scrutinized the record, at pages 73 and 74, on the admission of Exhibit P.1. It is clear that PW2 established fully his familiarity with the substance as testified that he weighed it and collected samples from it before it was taken back to the storage facility at the police station. That account sufficiently established the foundation of his ability to identify and authenticate the substance in the five sacks. Even though he did not say how he came by immediate custody of the exhibit right before he tendered it, he was competent to tender it on account of his prior knowledge of it. So settled is the rule that a witness who at one point in time possessed any item that is a subject matter of a

trial is not only a competent witness to testify on that thing but also capable to tender it in evidence – see **Director of Public Prosecutions v. Sharif s/o Mohamed @ Athumani & Six Others**, Criminal Appeal No. 74 of 2016; **Director of Public Prosecutions v. Kristina d/o Biskasevskaja**, Criminal Appeal No. 76 of 2016; and **Director of Public Prosecutions v. Mirzai Pirbakhshi @ Hadji and Others**, Criminal Appeal No.493 of 2016 (all unreported).

As regards Exhibits P.2 and P.3, we agree with Mr. Nasua that they were properly handled after they were admitted by the trial court following being cleared in terms of the requirement in **Robinson Mwanjisi & Others v. Republic** [2003] TLR 218. The record shows, at pages 75 and 84, that after the two documents were admitted in evidence, PW2 and PW3 were, respectively, required by the learned trial Magistrate to read out and explain the contents of the documents. Although the record does not expressly indicate that the said documents were methodically read out as directed, it is noteworthy that in the rest of their respective evidence in chief the witnesses canvassed the contents of the documents and thereafter they were cross-examined so substantially on the documents by the defence counsel to leave no doubt that the appellants and their counsel were fully abreast of the contents

of the two exhibits. Given these facts, it cannot be said that the appellants were denied to know the contents of the documents. In the premises, we would follow the course we took in **Chrizant John v. Republic**, Criminal Appeal No. 313 of 2015 (unreported) where, even though the contents of certain documentary exhibits were not methodically read out after their admission, we ignored the anomaly as we were satisfied that the witness who tendered them testified fully on their contents.

In attacking the integrity of Exhibit P.1, the appellants contended that the prosecution failed to adhere to the procedure laid down under the Police General Orders (PGO No. 229) to document the entire movement of the exhibit. That no documentation was tendered on the seizure of the allegedly illegal substance at Mafiga area to its exhibition at the trial and that the exhibit changed hands among PW3, PW5 and PW6 but that fact was also undocumented. To support their argument, they referred us to **Zainabu d/o Nassoro @ Zena v. Republic**, Criminal Appeal No. 348 of 2015 and **Alberto Mendes v. Republic**, Criminal Appeal No. 473 of 2017 (both unreported).

For the respondent, Mr. Nasua refuted the above claim. His essential argument was that the movement of the said exhibit was

established by documentation as well as the testimonies of PW2, PW3, PW5 and PW6 who handled it after its seizure and before its exhibition at the trial. He contended that after it was seized, the substance was securely under lock and key at the police station as the storekeeper (PW6) said. Referring us to page 73 of the record of appeal, he contended that PW2 collected samples from the substance at the police station on 6th November, 2015 in the presence of PW1 and PW6. He took the sealed samples for laboratory analysis in Dar es Salaam. The rest of the substance (Exhibit P.1) remained at the police station securely locked up.

To begin with, we are cognizant of the peremptory requirement as stated in our decision in **Paulo Maduka & 4 Others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported) that the prosecution must produce evidence or chronological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of an exhibit allegedly seized from an accused. It should be stressed that such movement can be proved not just by production of documentation but also by oral accounts of the witnesses who handled the exhibit after its seizure. At any rate, each case will be decided upon its own circumstances. It would also be instructive to recall what the Court

observed in **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported):

> *"... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers,* ***the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course this will depend on the prevailing circumstances in every particular case.*** *"*[Emphasis added]

Guided by the stance, we keenly examined the record of appeal. It is in the evidence that Exhibit P.1 was retrieved from the seized motor vehicle (Exhibit P.4) around 23:00 hours on 19th September, 2015 in the presence of PW3, PW4, PW5 and PC Philemon. This fact is confirmed by the certificate of seizure (Exhibit P.3), prepared by PW3 and signed by the first appellant and PW5. Furthermore, it is in evidence that the seized substance was handed over by PW5 to the then storekeeper, Assistant Inspector Barnabas Alloyce Malya (PW6), on 20th September, 2015 for

storage. At page 95 of the record, PW6 told the trial court that he registered the substance as ER/111/2015 and that it was kept in the exhibits room under lock and key. PW6 recalled that on 22nd September, 2015, the substance was weighed by an official from the Weights and Measures Agency and that on 6th November, 2015, PW2, a government chemist from the CGCLA, collected samples from the seized sacks for laboratory analysis. According to PW2 and his drug analysis report admitted (Exhibit P.2), the collected samples were *cannabis sativa*, a prohibited substance.

Our impression from the above evidence is that the five sacks of the illegal substance remained at the police station securely locked up and that all key witnesses (PW2, PW3, PW4, PW5 and PW6) who handled the substance at different times testified at the trial on the movement of the substance up to the crucial point of analysis by the CGCLA before it was finally exhibited at the trial. All this constituted an assurance that Exhibit P.1 was the item seized from the appellants, which was subsequently confirmed by the CGCLA to be *cannabis sativa*.

We recall that the appellants complained of the delay in taking samples of the seized substance to the CGCLA for analysis. Indeed, it is undisputed that the samples were collected on 6th November, 2015,

which was forty-eight days after Exhibit P.1 was seized. However, as we are satisfied that the seized substance was securely locked up at the police station, we share the trial court's view that its integrity was beyond reproach. It is significant that the testimony of PW6, the storekeeper who took care of that exhibit, was not challenged on that aspect. That said, we dismiss the eighth, eleventh and twelfth grounds as they are unmerited.

Next, we deal with the argument in the ninth ground that the owner of the motor vehicle (Exhibit P.4), one Juma Buster, was erroneously not called as a witness. At first, we are cognizant of the general and well-known rule that the prosecution is under a primary duty to call those witnesses, who from their connection with the transaction in issue are able to testify on material facts and that unexplained failure to call such witnesses may entitle the court to draw an inference adverse to the prosecution case – **Aziz Abdallah v. Republic** [1991] TLR 71.

We appreciate that if the said Juma Buster had been called as a witness he could have testified on how his motor vehicle fell into the hands of the appellants. However, we agree with Mr. Nasua that in the circumstances of this case the said Juma Buster was not a material witness even though he was the owner of the vehicle seized from the

appellants. What was critical in this case was proof that the appellants were found trafficking in a narcotic drug as alleged. The question as to the ownership of the motor vehicle was a non-issue so far as the appellants' criminal liability was concerned. The ninth ground collapses.

Finally we round off with grounds ten and thirteen, which question the trial court's evaluation of the evidence on record and its conclusion that the charge against the appellants was proven beyond reasonable doubt.

Having reviewed the evidence on record, we are satisfied that the appellants' respective convictions were soundly founded on properly evaluated evidence. The evidence of PW3, PW4 and PW5 supplemented by the certificate of seizure sufficiently established that the appellants were found at Mafiga area conveying in the seized motor vehicle (Exhibit P.4) five sacks of a substance (Exhibit P.1), which, based on PW2's testimony and the drug analysis report (Exhibit P.2), was confirmed to be 110.84 kilogrammes of *cannabis sativa*, a prohibited narcotic substance. We entertain no doubt that this evidence sufficiently met the gravamen of the charged offence. The appellants' defences of general denial coupled with the claim that the charge was trumped up were duly considered but rejected by the trial court. Being inherently self-serving

and weak defences, they did not introduce any reasonable doubt in the prosecution case. Accordingly, we uphold the convictions and the corresponding mandatory sentence imposed.

In the final analysis, we find the appeal wholly unmerited. We dismiss it in its entirety.

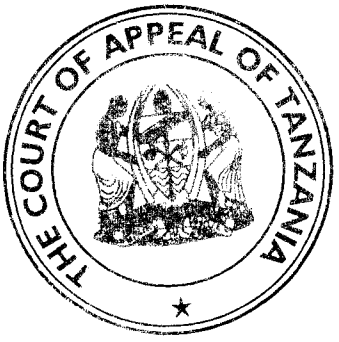
DATED at **DAR ES SALAAM** this 8th day of October, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of October 2021, in the presence of the Appellants in person, linked through video conferencing facility from Ukonga Prison and Ms. Ester Kyara, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL