IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A. KITUSI, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 367 OF 2019

ALLAN DULLER .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salam)

(AMOUR, J.)

dated 23rd day of August, 2019.
in
HC. Criminal Session Case No. 154 of 2015.

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JUDGMENT OF THE COURT

13th September & 23rd November ,2021

LILA, JA:

Allan Duller, the appellant herein, stood charged with the offence of trafficking in narcotic drugs contrary to section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Chapter 95 of the Revised Edition, 2002 (the DPITDA). He was convicted as charged and sentenced to serve a jail term imprisonment and also to pay a fine of TZS. 524,194,200.00 being three times the market value of the narcotic drug the subject of the charge. In imposing the jail term, the learned judge put it this way:-

"I sentence the accused to Twenty-Seven (27) years jail term including the seven (7) years he spent in remand custody which have to be deducted from his said imprisonment term.
For avoidance of doubt, he will serve a twenty (20) years jail term."

It is common ground that on 7/4/2012 the appellant was at the departure lounge at Julius Kambarage Nyerere Airport (JNIA) within Ilala District in Dar es Salaam Region vying for Ireland aboard Kenya Airways. Like other passengers, the appellant put his luggage on a conveyor belt of the screening machine and he passed through it for screening too. Up to this point Emanuel Joshua Richard (PW10) and the appellant are at one.

What followed thereafter puts each party at guard. According to (PW10) who was operating the screening machine, the luggage put on the conveyor belt was a large suit case which was blue in colour. As it passed through the screening machine, PW10 detected a blue colour on it something that prompted him to call the duty supervisor one Lydia Mwenisongole to assist in finding out what was it to which Lydia heeded. Lydia asked the owner of the suit case who was present at the screening machine who turned out to be the appellant to open the bag. Lydia inspected it and did not find anything. Another security officer one Ahmed Zomboko (PW6) joined the exercise. The bag was screened

again while wide open and the blue colour still appeared. Lydia proceeded with other activities leaving PW6 to proceed with the checking of the bag. PW6 started by putting it on the scanning machine and saw things like dates in the bag. He checked the bag and found various clothes and shoes which did not match with what was reflected in the scanning machine. He, again, took the bag to the scanning machine and still the images appeared. That prompted him to ask permission from the owner of the bag that was already identified through baggage reconciliation done by Lydia to be Allan Duller (the appellant) to allow him tear the bag. The appellant granted permission on condition that in the event nothing was to be found he should be compensated as he had travelled with such bag many times. The bag was tone in the presence of one Gration George, Lydia and the appellant by removing the clothing above it and an artificial layer of the bag glued on top, the bottom part of the bag and upon letting the arm through a hole, a powder like material smelling coffee came out. Then a nylon bag with some contents was found therein. The trio and the appellant left to the police station located just between 25 and 30 paces from the departure lounge. Besides, movement of both the suit case and the holder of it at the departure lounge were monitored by CCTV camera operated by Nuhu Adam Kisweswe (PW7) upon being instructed to do so by Mr. Jingu, the Security Manager at the JNIA. The person whose

movement was tracked was described as having put on a long – sleeved shirt, white in colour pressed under his trouser with a tie on his neck and having a suite case and a hand bag. The coverage was both on how he placed his luggage at the scanning machine for inspection, how he picked it on the other side and the way the luggage was handled generally. PW7 recorded it in a play back system in a CD (Exhibit P4) that was separate from other occurrences. He named the clips as MCHAGA 1 to MCHAGA 9. Upon being played, the described person was seen arriving at the departure lounge, pushing the suit case, putting it on the scanning machine, the blue suit case left (not collected) by the owner, the suit case opened by the passenger for inspection, the suit case returned to the scanner for the second time and the passenger being taken to ADU offices and later on the way they left JNIA by a motor vehicle Registration No. T 992 ACE.

At the police station they met PF. 18342 Insp. Majinji Peter Pimbili (PW9) and one Kennedy. The former had already been informed by SGT Emanuel (PW10) of the incident. According to PW9, when the inner part of the bag was removed, a plastic/nylon packet divided into fifteen parts/portions was retrieved containing white powder suspected to be narcotic drugs. PW9 reported the matter to SACP Nzowa who directed the appellant be taken to Anti-Drug Unit (ADU) offices. Lydia handed to PW9 the appellant's documents including passport no. PT 1600830 of

Ireland (exh. P6), air ticket (Exh. P7) and a vaccination card. The name in the passport tallied with the appellant's name when he was asked to introduce himself. PW9 took the suit case, packet and the documents to ADU HQ and handed them to ASP Neema (PW8) who recorded it in Exhibit Register book using case file No. JNIA/IR/98/2012.

On her part, SP Neema (PW8) said she received from SGT Majinji (PW9) on 7/4/2012 at 4.00pm a huge packet portioned into small portions and the suit case (exhibit P5) which she registered in the exhibits Register No. JNIA/IR/98/2012, appellant's passport and air ticket and kept them in the exhibit room. On 9/4/2012 the packing in a manila khaki paper and sealing of the exhibit by PW8 was done in SACP Nzowa's office in the presence of the appellant, an independent witness one Zainabu Duwa Maulana (PW5), ASP Salmini Shelimo, A/Insp. Makole and Cpl Adam. Zainabu Duwa Maulana and A/Insp. Makole testified as PW5 and PW4, respectively and they stated that they were asked by SACP Nzowa to attend in the wrapping and sealing of the packet by PW8 which was due to be taken to the Government Chemist. While PW4 was a police officer, PW5 was a ten cell leader. The two told the trial court that the wrapping of the packet was done by PW8 in their presence, appellant's presence and Commissioner Nzowa. PW4 further said Commissioner Nzowa asked the appellant if the parcel was seized from him and the appellant admitted so. They stated that after the wrapping

and sealing, the parcel was returned to the store by PW8. On 10/4/2012 the sealed packet was taken to Government Chemist Laboratory for examination by PW8, A/Insp Makole Bulugu Makole and D/Cpl Adam where it was received by one Isaka, a chemist, who registered it as laboratory No. 219/2012. One Ms. Bertha Fredrick Mamuya (PW2), also a chemist, was also present. Ernest Isaka took out the powder from the packet and weighed it and found it to be 3882.92 grams. He also conducted a preliminary test and found it to be cocaine hydrochloride. Another sample was taken for confirmatory test after which PW2 wrapped the packet again, sealed, signed on it and stamped it with the office stamp and handed it back to PW8.

Bertha Fredrick Mamuya (PW2), a principal Chemist in the Government Chemist Office was forthcoming before the trial court that while in office on 10/4/2012, Neema (PW8) and his two colloquies went there and assigned Mr.Ernest Isaka to do the preliminary test of the substance taken there by PW8 and was later informed that it weighed 3882.92 grams and was Cocaine Hydrochloride. Ernest Lujuo Isaka passed away before the case was scheduled for hearing. She wrapped, stamped, signed it and handed it back to Neema (PW8) who then left leaving them to proceed with confirmatory test. She tendered the khaki (brown) envelope containing a parcel of cocaine and was admitted as exhibit P2. She also tendered in court the suit case, passport and air

ticket which were admitted as exhibits P5, P6 and P7 respectively. She went further to state that a suspect is not required to be present when they conduct laboratory test.

Daniel Zakaria Matata (PW3), the Acting Government Chemist told the trial court that he received a report related to Laboratory No. 219/2012 on 24/5/2012 and after verifying that the management system and procedures were followed, he approved the report by signing it after Ernest Lujuo Isaka had signed it. He tendered the report and was admitted as exhibit P3. On the delay in releasing the report, he stated that it was because of other exhibits they received for analysis. The late Ernest Lujuo Isaka's witness statement was tendered by A/Insp. Wamba Msafiri Makutubu (PW11), the investigator of the case who had received it from SP Salmin Shelimo who recorded it but could not tender it because he was in training in Canada. The statement was received by the trial court and admitted as exhibit P8. It was to the effect that the white substance was taken to Government Chemist on 10/4/2012 by ASP Neema and a preliminary test done on that day and the substance was handed back to ASP Neema.

Christopher Joseph Shekiondo (PW1), then Commissioner of the Drugs Control Commission (the DCC), told the trial court that he received application form from police ADU for assessment of value of

the narcotic drugs in police file No. JNIA/IR/98/2012 showing the seized cocaine hydrochloride seized weighed 3882.92 grams. Exercising his powers bestowed on him under section 27(1)(b) of the DCEA to prepare and issue a certificate of value of drugs, he discharged his duty by determining the price by multiplying the weight times the price of the drug that was TZS 45,000.00 and found it to be worth TZS 174,731,400.00. He prepared the report and sealed it with the official seal of the DCC. He tendered the certificate and was admitted as exhibit P1. He added that he did not see the drugs but acted on the letter (application form).

The appellant elected to make a sworn defence. He denied to have committed the offence. It is, however, on record that he admitted being at the JNIA on 7/4/2012 at 1.00pm in the process to travel to Ireland where he lived. As opposed to the prosecution who led evidence that he had a blue suit case, he said he had a black brief case. He explained that there were many passengers who were directed to put their bags on the conveyor belt for checking. Like other passengers, he placed his brief case on the scanning machine for checking, walked through the machine and was physically searched but nothing suspect was detected. He then picked his belongings including the brief case, wrist watch, belt, wallet and documents. He was, thereafter, approached by a certain person who alerted him that a certain woman wanted to talk to him.

That woman who was holding a bag turned out to be Lydia Mwenisongole (henceforth Lydia) who happened to be his girlfriend between 2008 and 2009 but he had to call off their relationship because of her drunkenness habits and refusal to be converted into a Muslim. Upon moving closer to her while holding his brief case, Lydia turned against him and claimed that the bag she held belonged to him. He was accordingly arrested. He was, generally, suspicious that, it might be due to that broken relationship that Lydia decided to link him with exhibit P5 hence the present accusations against him.

All the same, at the conclusion of the trial, the learned trial judge was satisfied that the charge was proved. For the effectual determination of the case, the learned judge formulated four issues to guide him. These were; **one;** whether the prosecution proved that the accused person was found trafficking in narcotic drugs; **two**, whether the packet allegedly seized from the accused on 7/4/2012 was the one taken to the Chief Government Chemist for analysis; **three**; whether the prosecution proved that the packet alleged to have been seized from the accused on 7/4/2012 contained narcotic drugs, and **four**, whether the prosecution proved its case beyond reasonable doubt.

To all the issues, relying on the testimonies of eleven (11) witnesses (PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8, PW9, PW10 and PW11) who the learned judge found to be reliable and eight (8)

exhibits tendered, his findings were in the affirmative. The alleged grudges between the appellant and Lydia following the breakdown of their friendship as a cause of his being linked with the offensive blue suit case (exhibit P5) in which exhibit P2 was retrieved was found highly implausible and dismissed. The appellant was found guilty of the offence charged and was accordingly convicted and sentenced as hinted above.

Before us the appellant raised a good number of grounds of appeal in his three sets of memoranda of appeal he lodged in Court. On 30/12/2019 he lodged his memorandum of appeal comprised of fifteen (15) grounds of appeal which was subsequently followed by the first supplementary of appeal which he filed on 14/2/2020 and the second one which he lodged on 29/9/2020 comprising six (6) and eleven (11) grounds of appeal, respectively. Read closely, we entirely agreed with Mr. Juma Nassoro, learned advocate, who acted for the appellant at the hearing of the appeal, that some of them were repetitive both in nature and substance. Cognizant of that situation, the parties agreed and the Court blessed that the appeal be considered and determined upon consideration of four basic issues which stem out of the grounds of appeal. In tandem with that, Mr. Nassoro sought and was granted leave by the Court under Rule 4(2)(a) of the Tanzania Court of Appeal Rules, 2009 to bring to the attention of the Court two legal points for determination.

The four (4) issues stemming out from the grounds of appeal for our determination were:-

1. Whether exhibit P5 (suit case) alleged to have carried the narcotic drugs in issue (exhibit P2) belonged to the appellant,
2. Whether failure by the prosecution to call Lidya Mwenisongole, the trial court was entitled to draw an adverse inference against the prosecution,
3. Whether it was proper in law to convict and sentence for trafficking in narcotic drugs in the absence of the certificate of seizure, and
4. Whether chain of custody of exhibit P2 did not break.

The two legal points pointed out by Mr. Nassoro were:-

1. The learned trial judge did not make a proper summing up notes to the wise assessors, and
2. Exhibit P4 was erroneously tendered by the prosecution instead of the witness.

As hinted above, Mr. Juma Nassoro, learned advocate, represented the appellant in this appeal. He was assisted by Mr. Joseph Mabula, learned advocate. On the other side, Ms. Veronica Matikila and

Elizabeth Mkunde, both learned Senior State Attorneys, represented the respondent Republic.

Mr. Nassoro was first to address the Court on the two legal points he pointed out. While referring to the provisions of section 298 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA) which imperatively require the assessors to give their opinion after the trial judge has read to them the summing up notes, he contended that in the present case the wise assessors were not completely addressed on the essential ingredients of the offence of trafficking in narcotic drugs as indicated in section 2 of the DPITDA with which the appellants were charged. He pressed that the anomaly amounted to the trial being taken to have been conducted without aid of assessors hence vitiating the trial. He cited to us the case of **Bakari Selemani @ Binyo vs Republic**, Criminal Appeal No. 12 of 2019 (unreported) to support his contention. If successful, he was not inclined to support issuance of an order for retrial on account of the evidence on record being weak. As to why the evidence was weak, he deferred his arguments to a later stage when arguing other grounds of appeal.

On the second legal point, it was Mr. Nassoro's argument that page 155 lines 1 to 4 of the proceedings in the record of appeal vividly show that the CCTV CD was tendered by the prosecutor and received as

exhibit P4 instead of being tendered by the witness as is the established practice. He insisted that the witness intimated his wish to the court to tender the CD qbut the prayer to tender it as exhibit was made by one Mr. Tawale, learned State Attorney who prosecuted the case. He further argued that the CD was not smoothly received as exhibit as there was an objection, though on another ground, which was raised by the appellant's defence counsel. He prayed exhibit P4 be expunged from the record of appeal.

Turning to the first issue raised in the grounds of appeal, Mr. Nassoro began by informing the Court, and right in our view, that the crucial issue for determination is whether the suit case (exhibit P5) from which the drugs (exhibit P2) was retrieved belonged to the appellant. Amplifying, he submitted that they painfully took opportunity to explain it in sufficient details in their written submission to the trial court particularly from page 260 to 262 of the record of appeal but the same were disregarded in the composition of the judgment. According to him, the evidence is clear that only Lydia Mwenisongole, PW6, PW7 and PW10 were at the departure lounge hence the only ones who could tell, with certainty, whom exhibit P5 belonged. Unfortunately, he stressed, neither of them was forthcoming to the trial court that he/she saw the appellant either putting it on the screening machine nor taking it after the screening. As for the evidence by PW6 that he asked Lydia whom

exhibit P5 belonged and was told that it belonged to the appellant, Mr. Nassoro faulted it as being unreliable because Lydia was not called to testify so as to confirm that. He showed dissatisfaction with the evidence by PW6 that he sought and was permitted by the appellant to tear off the suit case (exhibit P5) so as to check its contents, arguing that no other witness corroborated that evidence. To cement his assertion he referred us to the Court's decision in **Ndalahwa Shilanga and Another vs Republic**, Criminal Appeal No. 247 of 2008 (unreported). He added that PW9 cannot be relied on as there was no evidence supporting him that exhibit P5 was opened using password.

The CCTV camera coverage of the incident as demonstrated in court was also a subject of criticism by Mr. Nassoro who contended that none of the eleven (11) witnesses was able to tell the trial court that he saw and identified the appellant carrying exhibit P5 at the departure lounge when the CD (exhibit P4) was displayed.

Another witnesses' evidence attacked by Mr. Nassoro was that of PW5 particularly at page 34 of the record but was of the view that it is not helpful in resolving the dispute on whom exhibit P5 belonged as it shows that she asked the appellant on whom the parcel belonged and not the suit case (exhibit P5).

PW10's account of what transpired at the screening machine was also seriously attacked by Mr. Nassoro for not being able to explain the appellant's link with exhibit P5 and that his evidence differed with that of PW6. According to Mr. Nassoro, Lydia was a crucial witness to tell with certainty whom exhibit P5 belonged and no other witness. He concluded that much as the trial judge found all the prosecution witnesses reliable but on the evidence, the finding was not bone out of the record hence improper.

Next for elaboration by Mr. Nassoro was the 2nd issue which primarily touched on the effects of failure by the prosecution to summon Lydia as a witness for the prosecution. Mr. Nassoro stressed that PW6, PW9 and PW10 named Lydia and her involvement in the baggage reconciliation hence ownership of exhibit P5. But, to his surprise, she was not called as a witness without any acceptable reasons being assigned although her statement was read as one of the intended prosecution witnesses during the committal proceedings. Arguing further, he stated that if her attendance could not be procured for any acceptable reasons then her statement could be tendered as a witness statement in terms of section 34B of the Evidence Act, Cap. 6 R. E. 2002 (now 2019) but that was not done hence creating doubts which entitled the trial court to make an adverse inference against the prosecution case. He pressed that Lydia was a crucial witness in the determination of

whom the bag (exhibit P5) from which the drugs (exhibit P2) was found and he faulted the learned trial judge for failure to address himself on this fact. To that end, he was of the view that the appellant should benefit from the doubt.

Briefly but focused, Mr. Nassoro addressed the Court in respect of the 3rd issue. He argued that exhibit P2 was seized by PW9 who was in terms of section 38(3) of the CPA imperatively required to issue a receipt indicating a list of seized items. For unexplained reasons, in the present case, none was issued and produced in court during trial which fact casts doubts whether exhibit P2 was retrieved from the appellant, he added. Two cases were cited to us asserting that stance namely **Abuhi Omari Abdallah and 3 Others vs Republic,** Criminal Appeal No. 28 of 2010 and **Selemani Abdallah and 2 others vs Republic,** Criminal Appeal no. 384 of 2008 (Both unreported).

Lastly, Mr. Nassoro took issue with the delay in issuing the Government Chemist Report for, while exhibit P2 was seized on 7/4/2012, the Government Chemist Report was issued on 24/5/2012 with no explanation from the prosecution for the delay of over thirty days hence raising doubt whether exhibit P2 was not tempered with or contaminated.

In her response, Ms. Matikila resisted all the four issues and the two legal points pointed out. Like Mr. Nassoro, she started arguing on the legal points.

Submitting on the sufficiency of the summing up notes, she was firm that it was sufficiently done because all the necessary ingredients of the offence charged were brought to the attention of the wise assessors. While making reference to pages 316 and 317 of the record, the learned Senior State Attorney argued that the issues the learned trial judge raised and the explanation given sufficed and the assessors were made to know the ingredients of the offence. She insisted that the style adopted by the learned judge could be unfamiliar but all the same it was informative enough to the assessors. In support of her arguments she referred us to the Court's recent decisions in **Jackrine Exsavery vs Republic**, Criminal Appeal No. 485 of 2019 and **Marceline Koivogui vs Republic**, Criminal Appeal No. 469 of 2017 (both unreported).She distinguished the case of **Bakari Selemani @ Binyo vs Republic** (supra) in which she said the ingredients of the offence were completely omitted. She, however, urged the Court in the event it finds otherwise then an order for retrial would be just arguing that there is strong evidence linking the appellant with the commission of the offence as she would disclose later when arguing on other issues.

The second legal issue was argued by Ms. Mkunde who was emphatic that exhibit P4 was properly tendered by PW7. Elaborating on that, she stated that the witness (PW7) prayed to tender the exhibit and the prosecutor simply insisted it and even if he was wrong to do so, the infraction did not prejudice the appellant. She referred us to the case of **Abbas Kondo Gede vs Republic**, Criminal Appeal No. 472 of 2017 (unreported) to cement her stance. She discounted the case cited by Mr. Nassoro stating that it is distinguishable without assigning any explanation.

> In respect of the first issue which was whether exhibit P5 (suit case) alleged to have carried the narcotic drugs in issue (exhibit P2) belonged to the appellant, the learned State Attorney made reference to the evidence by PW6, PW7, PW8 and PW10. According to her, these witnesses were crucial in establishing who owned exhibit P5. Starting with PW10, she was emphatic that he was managing the screening machine and he saw everyone who placed his baggage for inspection and when exhibit P5 passed through the machine he detected an unusual feature in it and he called Lydia Mwenisongole to do physical search which was done on inspection table close to him hence was able to see all

that happened. That when Lydia arrived, she asked who was the owner and the appellant responded that the bag belonged to him. Even when a further checking was done by PW6, he was the one who operated the screening machine and that the appellant was there. As for PW6, the learned Senior State Attorney argued that PW6 took over the exercise of checking the bag and he said he was told by Lydia that the bag belonged to the appellant and he verified by looking at the passport. Further, she submitted, PW6 sought permission from the appellant to tear the bag after he had realised that what was seen in the screening machine did match with what he saw physically after removing all the clothes. That the appellant gave a conditional permission to compensate the appellant in the event nothing suspect was to be retrieved. Submitting further, she contended that PW7 tracked the owner of the bag right from when he entered into the lounge to when the baggage passed through the screening machine and unusual colour detected and the other steps taken. Taken together, these witnesses who were found to be reliable by the

judge, there was ample evidence that the bag (exhibit P5) belonged to the appellant, Ms. Matikila insisted.

Then there followed responses by the learned Ms Matikila in respect of the second issue. It related to the failure by the prosecution to call Lydia as a witness, whether an adverse inference should have been drawn against the prosecution. Ms. Mkunde was insistent that there was no need to call Lydia as her evidence would have been similar to that of PW6 and PW10 with whom she was with during the scanning process of the suit case (exhibit P5) to retrieval of exhibit P2 from exhibit P5. Explaining further, she argued that the screening of the bag was done by PW10 who saw the appellant pass at the screening machine as the suit case also passed and noticed an unusual feature in the suit case and called Lydia. That evidence was not challenged during cross-examination and was supported by PW5, an independent witness, who during the packing exercise asked the appellant if the parcel belonged to him and he confirmed so. Likewise, she added, PW7 who managed the CCTV also monitored the movement of the appellant and exhibit P5 and was able to establish a link between the two. That aside, she stated that the trial judge found all the eleven witnesses credible and, as the would be evidence by Lydia was fully covered by PW6, PW5, PW7 and PW10, there was no need to call her as a witness. Otherwise, she turned to the appellant's side and while referring to the case of

Yanga Omari Yanga's case (supra), argued that if she was important to them; they could have called her as a defence witness.

On the issue of the contradiction on whether the bag was opened by password, the learned State Attorney submitted that about seven years had lapsed before the trial was conducted hence there was lapse of memory on the part of prosecution witnesses for which they may be excused. She supported her assertion with the case of **Marceline Koivogui vs Republic**, (supra).

The absence of a seizure certificate did not pose any difficulty on the learned State Attorney to provide an explanation. According to her the incident arose at the NJIA to which there was no preparation on the part of the police. Under the circumstances, she argued, section 38 of the CPA was inapplicable but section 42 of the CPA. Being an emergent search there was no time to prepare a seizure certificate. Again, reference was made to the case of **Marceline Koivogui vs Republic**, (supra) to bolster the assertion. She discounted the case of **Abuhi Abdallah vs Republic** and **Selemani Abdallah and 2 Others vs Republic** (supra), cited by Mr. Nassoro as being distinguishable.

Chain of custody of exhibit P2 was seriously contested by the State Attorney. The weight of exhibit P2 was a key issue here. Although the learned Senior State Attorney conceded that there was a difference in

weight between what PW8 and PW1 (GVT Chemist) found that it was 4kgs and 3882.92kgs, respectively, it was her argument that PW8 simply made a preliminary weighing but PW1 was the one mandated to give a proper weight. She accordingly urged us to take the weight given by PW1 as being the weight of exhibit P2. The case of **Marceline Koivogui vs Republic**, (supra) was cited as providing that stance of the law.

In conclusion, the learned Senior State Attorney submitted that absence of the seizure certificate and a delay of about four days from the date of seizure and the issuing of the Government Chemist Report, taken alone do not affect chain of custody. Arguing more, she stated that a preliminary test was conducted and the results were revealed and released on the same day but what remained was a confirmatory test which required more time. She also challenged the defence for not cross-examining the witnesses on the delay when they testified so that they could offer an explanation. On that failure, she dismissed that complaint as being an afterthought and should be disregarded.

Before retiring, she sought leave of the court to draw the attention of the Court on the kind and nature of sentence imposed which, according to her, suggested that the appellant started serving the sentence even before she was convicted and sentenced. Her concern

was directed in the words *"I sentence the accused to Twenty Seven (27) years jail term including the seven (7) years he spent in remand custody which have to be deducted from his said imprisonment term"* which the trial judge deployed in sentencing the appellant.

In rejoinder, Mr. Nassoro started with the issue of sentence. To him no matter the wording, it was clear that the appellant was sentenced to serve twenty years imprisonment which was proper in law hence there was no need to fault the judge.

Rejoining on the issue of failure to call Lydia as a witness, Mr. Nassoro insisted that Lydia could provide answers on how the suit case was opened and could confirm that the appellant told her that the suit case belonged to him. This evidence was not covered by PW6, PW7, PW8, PW9 and PW10, he stressed.

Mr. Nassoro also maintained his arguments that the chain of custody was broken as no acceptable explanation was given by the witnesses on the difference in weight between what PW8 and PW1 found. That, he argued, was clear evidence that exhibit P2 was tempered with.

Assisting Mr. Nasssoro, Mr. Mabula reiterated Mr. Nassoro's submission in chief on insufficient summing up notes adding that the

wise assessors were not told the meaning of narcotic drugs hence could not opine properly.

On the need for certificate of seizure, Mr. Mabula insisted that the search was not an emergent one hence section 42 of the CPA did not apply as the search was done at the ADU offices at the JNIA where they are supposed to have the certificates. Addressing himself on the case of **Marceline Koivogui vs Republic** (supra) relied on by the prosecution, he submitted that in that case although certificate of seizure was not issued, witnesses were summoned to give evidence.

In our deliberation we shall start with the first issue. In that issue we are called upon to determine whether the summing up notes were sufficient. Section 265 of the CPA, puts it clear that it is mandatory that all trials before the High Court be conducted with the aid of assessors. Their participation is governed by the provisions of section 298(1) of the CPA which requires the trial judge upon conclusion of reception of evidence from the prosecution and the defence to sum up the evidence of both sides and invite the assessors to give their opinion which should also be recorded. Much as the word used is "may", which suggests that it is not mandatory but the assistance it lends to assessors in the discharge of their duty, it is now a long rooted practice that it is now necessary to do so (see **Hatibu Gandhi and Others v R** (1996) TLR 12,

Khamisi Nassoro Shomari vs SMZ [2005] TLR 12and **Mulokozi Anatory vs Republic**, Criminal Appeal No. 2014 (unreported). The purpose of summing up the case to assessors is to enable the assessors to arrive at a correct opinion hence assist the trial court arrive at a just decision. That can be achieved only where the learned trial judge, in the summing up notes, touches on all essential facts and elements of the offence charged in relation to the applicable law. That way, they are enabled to give meaningful opinions. (see **Said Mshangama @ Senga vs Republic**, Criminal Appeal No. 8 of 2014 and **Masolwa Salum vs Republic**, Criminal Appeal No. 206 of 2014 (both unreported). The consequences of failure by the trial judge to discharge that duty were explained by the Court in **Tulubuzwa Bituro vs Republic** [1982] TLR 264 and in the case of **Abdallah Bazaniye and Others vs Republic** [1990] TLR 42 that a trial cannot be taken to be with the aid of assessors and the same is rendered a nullity. In the latter case the Court explicitly stated that:-

> *"...We think that the assessor's full involvement as explained above is an essential part of the process that its omission is fatal, and renders the trial a nullity."*

We have seriously examined the arguments by both the learned Senior State Attorney and Mr. Nassoro. They had different views over

the sufficiency of the summing up notes. Mr. Nassoro was of the view that they fell short of explaining the ingredients of the offence of trafficking in narcotic drugs and the meaning of narcotic drugs as provided under section 2 of DPITDA as opposed to Ms. Matikila who was of the different view.

We have considered the summing up notes as reflected at pages 296 to 317 of the record of appeal, the assessors' opinions at pages 318 to 320 and the learned judge's judgment as reflected at pages 329 to 355 of the record so as to see whether the summing up notes sufficiently informed the assessors the facts of the case and the ingredients of the offence charged in relation to the law applicable. It is vivid that, in the summing up notes the learned judge explained to the assessors the accusation that was laid at the appellant's door by narrating to them the particulars of the offnce, evidence by both sides, final submission by both sides and that the duty to prove the charge lay on the prosecution. He, moreover, highlighted the key areas they should address in their respective opinions as being:-

> "1. Whether the prosecution proved that the accused person was trafficking in narcotic drugs.
> 2. Whether the prosecution proved that the packet alleged to have been seized from the accused on 7/04/2012 contained narcotic drugs.
> 3. Whether the packet allegedly seized from the accused

on 7/04/2012 was the one taken to Government Chemist for analysis.

4. Whether the prosecution proved its case beyond reasonable doubts.

The learned trial judge also reminded the assessors to consider the credibility of the witnesses and contradictions in their respective evidence, if any, and give their opinions. Based on the summing up notes, all the assessors returned a verdict of guilty.

Closely examined, the wise assessors' opinions have a lot of bearing to the matters brought to their knowledge in the summing up notes. Even the trail judge's judgment is grounded on those matters and issues addressed to the wise assessors. We think that the contention by Mr. Nassoro that the assessors were not told what the offence charged entailed is false for the record at page 297 is explicit enough that not only were the particulars of the offence fully explained to the assessors but also the position of the law on the issue of sentence in the event of a conviction was fully explained. We find that explanation sufficient. What seems to be an issue here is the style the learned judge adopted in preparing the summing up notes to which we have occasionally held it to be ineffectual provided that the notes sufficiently informed the assessors of the case before them. (See **Jackrine Exsavery vs Republic** (supra).

Admissibility of the CD (exhibit P4) formed the crux of the second legal issue pointed out by Mr. Nassoro. He contended that it was tendered by the prosecutor instead of the witness hence it should be expunged from the record of appeal. We have examined the proceedings at page 155 of the record. We do not find merit in the contention. The record bears out that after being shown the CD and identifying it by the word "copy" and the date, PW7 prayed to tender it as exhibit in court. Thereafter, Mr. Tawale, learned State Attorney, repeated the same words to the court. The prosecutor's statement came after the witness had indicated and expressed his desire to have the CD admitted as exhibit. That, in our view, was nothing but an invitation to the court to consider the prayer by the witness to have the CD admitted as exhibit. An akin situation occurred in the case of **Abas Kondo Gede vs Republic** (supra) rightly cited by the learned Senior State Attorney and the Court held that the prosecutor's words were a mere request to the court to act on the witnesses' prayer to receive and admit the exhibit and did not prejudice the appellant. We have taken liberty to read the case of **Kisonga Ahmad Issa and Another vs Republic** (supra) cited to us by Mr. Nassoro and we agree with the learned Senior State Attorney that it is distinguishable. It seems clear to us that in that case it was the prosecutor who sought to tender exhibits P5 and P9 instead of the witness (PW9) and the Court held that to be improper on account of

the prosecutor constituting himself/herself as a witness in tendering the exhibit. It is noteworthy that there was no indication that PW9 had earlier on prayed to tender the two exhibits before the prosecutor rose and invited the court to admit the exhibit as is the case herein. Such a remarkable factual distinction renders it irrelevant here.

The above findings conclude our discussion on the two legal issues advanced by Mr. Nassoro with an inescapable finding that they lack merit and are hereby dismissed.

We now turn to consider the four issues arising from the appellant's grounds of appeal

We shall begin with the crucial issue whether the suit case (exhibit P5) from which the drugs (exhibit P2) were retrieved belonged to the appellant. Mr. Nassoro was emphatic that only Lydia who dealt with baggage reconciliation could resolve the issue who owned exhibit P5 and that in the absence of her evidence the testimonies of PW6, PW7 and PW10 could not help in the determination of that issue. Ms. Matikila was of the opposite view. Consideration of the roles played by the named witnesses, we think, will justly resolve the matter. We remember that Mr. Nassoro invited us to have a glance on the written submission he filed in the High Court particularly those reflected at pages 260 to 262 of the record which he complained to us that the learned trial judge turned

a blind eye on it. To lend assurance to Mr. Nassoro, we have seriously read the submission. It is plain that an identical issue was raised as issue No. 2. To a large extent, the written submission referred to us bore semblance with the arguments he presented to the Court orally. In the first place, Mr. Nassoro conceded that PW6 and PW10 were at the departure lounge on that material date and time and were the persons who could tell whom exhibit P5 belonged. He, however, stated that neither of them told the trial court that they saw the appellant carry the bag either outside or inside the lounge and put it on the screening machine or taking, claiming or demanding it after the screening process. He submitted further that PW6, PW8, PW9 and PW10 upon being cross-examined on anything they found connecting the appellant with exhibit P5, they answered in the negative. Regarding the CD (exhibit P4), Mr. Nassoro submitted that no one witness, upon it being displayed, came out with the view that they identified the appellant. On the evidence by PW6 and PW10 that Lydia asked the appellant and he admitted that the bag belonged to him and that PW6 told the trial court that it was Lydia who did the luggage reconciliation, Mr. Nassoro submitted that such evidence is hearsay because Lidya did not testify and her witness statement was not tendered to support that evidence. In his further submission on that issue, he submitted that PW9's evidence that he found the appellant's driving license in exhibit P5 was not true because

the driving license was not listed as exhibit during committal proceedings, such evidence contradicts that of PW6, PW8 and PW10 who said nothing was found in exhibit P5 and, lastly, that it was not admitted in court as an exhibit to form part of the evidence. According to him, there was nothing linking the appellant with exhibit P5 hence he deserved an acquittal.

We have duly considered the arguments by both sides. Given the decisive nature of the issue, we are not surprised why it turned out to be highly contentious. We say so mindful of the fact that the appellant's presence at the JNIA departure lounge at the material time, putting his luggage on the screening machine for checkup and exhibit P2 being found in exhibit P5, as indicated above, are matters which from the evidence on record and arguments before us, were not in dispute. The issue here is which luggage was it, was it exhibit P5 or not.

The record will bear testimony that the whole incident began at the departure lounge and particularly at the place the passengers and luggages are screened by a scanner machine. We think this is an undisputed fact. According to the evidence, Emanuel Joshua Richard (PW10) was operating the screening machine. Passengers and the appellant put their luggage on the belt and passengers passed through it for checking. According to PW10, he detected a blue colour inside the

suit case (bag) which raised suspicion. He called Lydia, the security supervisor of that shift, so as to physically inspect the bag. The bag was carried by the owner and placed on the inspection table, opened by the owner and Lydia did not find anything. She ordered the bag be scanned again, yet the blue feature still appeared and was detected by PW10 who still operated the machine. It was then when Ahmed Rajabu Zomboko (PW6) joined the exercise and was instructed by Lydia to proceed with the checkup while she proceeded to do other things. The evidence by PW10 and PW6 is clear on this. PW6 put it on the screening machine again and the image of something like dates still appeared. He placed it on the inspection table and removed the clothes therein but did not find anything resembling what he saw in the screening machine. After removing all the contents, he took it to the machine again and still saw the images. That prompted him to tear it out but he sought permission from the owner to do so and was allowed on condition to compensate it if nothing was to be found. PW6 told the trial court that he was told by Lydia the owner was Allan Duller who he verified to be the appellant when he saw the Irish passport. As they were ready for compensation this is what followed as revealed by PW6 at page 143 of the record of appeal:-

"...We tore the bag's cover (kitambaa cha juu), then met another layer beneath it that was similar to

the bag itself. It was superimposed there using a strong glue and screws.

We broke that layer of a bag that was artificial. I then took my hand to the opening behind that layer. My hand came out with some powder like material that was actually a COFEE like AFRICAFE.

By then GRATION George had joined us when we tore the bag. Lydia was also with me. The inspection table had a one (10 meter with ALLAN DULLER was standing across that table as I inspected the bag.

Apart from powdered coffee in the bag, we also saw some additional material like a nylon bag with some contents inside it. We therefore decided to move to the airport's police post/station'

I, Ahmed Zomboko, Lydia Mwenisongole, Gration Geeorge, the suspect Allan duller left the departure area and walked for abpout 25 to 30 paces to the police station. We took the bag withus."

Both PW6 and PW10 identified the appellant in court as the person whom they referred to as the one who owned exhibit P5. Besides, Nuhu Adam Kisweswe (PW7) who monitored the CCTV camera told the trial court that he was asked by Mr. Jingu to monitor movement of a suspected passenger from the arrival stage till the manner of inspection and that the passenger had dressed in long white sleeve shirt with a neck tie and that the shirt was not loose. When the relevant clip was

displayed, he was able to show such person pushing a trolley carrying a suit case, putting it on the conveyor belt ready for scanning, the passenger opening the suit case for inspection by security officer, the same being taken to the scanner again, the same being inspected again by removing all the clothes and taken to the scanner once again followed another inspection and conversation between the security officer and the targeted passenger before they moved to the ADU offices.

Much as we agree with Mr. Nasssoro that neither of the witnesses was able to identify the appellant in the displayed CD, closely examined, it is clear that PW7's explanation about the picture displayed by the CD reflected or rather matched with the evidence by PW6 and PW10 on the ownership of exhibit P5. So PW7's testimony lends support to the evidence by PW6 and PW10. There was a contention that PW5's evidence should not be relied for stating that it was a parcel not a bag, we think is a non-issue for it mostly depended on how one referred to exhibit P5. It is notable that the prosecution witnesses referred to it as a either a bag, a suit case and sometimes a parcel. They used the words interchangeably. The fact remained that they referred to one and the same thing, exhibit P5. We therefore entertain no doubt that the above evidence, in its totality, shows that the appellant was the owner of the suit case (exhibit P5). We accordingly agree with the learned Senior

State Attorney that the learned judge's finding at page 344 of the record of appeal on ownership of exhibit P5 was founded on cogent evidence and the prosecution evidence managed to prove so.

We now move to consider the second issue. It is on whether failure by the prosecution to call Lidya Mwenisongole, the trial court was entitled to draw an adverse inference against the prosecution. The principle of adverse inference finds its basis on an assumption that the evidence which could be, and is not, produced would, if produced, be unfavourable to the person who withholds it. The Court had an occasion to elaborate on the circumstances under which that principal applies in the case of **Aziz Abdalla V.R** (1991)TLR 71(CAT) that:-

> *"Adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution side".*

In the present case, Mr. Nassoro invited us to make an adverse inference from unexplained failure by the prosecution to call Lydia Mwenisongole who was the person who did the baggage reconciliation hence the person who would have cleared or confirmed the nagging doubts on the ownership of exhibit P5. Ms. Matikila conceded, and rightly so, that it was true that Lydia did the baggage reconciliation. PW6 was also very clear on that. But as demonstrated above Lydia left PW6 to proceed with the inspection of exhibit P5 after she had told him

that the appellant was the owner of it. He (PW6) proceeded with the checkup by taking it back to the scanner machine after removing the clothes without being able to see what was detected by the machine. He again detected the unusual substance which prompted him to seek permission from the appellant to tear the bag who gave a conditional permission that he should be compensated if nothing would be retrieved. PW6 tore it at the time when Lydia had again joined them. PW10 who managed the scanner machine witnessed all that and as indicated above, he told the trial court that checkup was done on the checkup table that was close to him and was able to see everything. We, in the circumstances, do not think that the failure by the prosecution to call Lydia to testify justifies any adverse inference being drawn against the prosecution as there is no suggestion that she would have given better evidence than PW6 and PW10 did regarding the incident. As rightly argued by the learned Senior State Attorney, evidence she could give was sufficiently covered by the two witnesses. Otherwise, calling her would only add the number of witnesses not the value of evidence which is immaterial in terms of section 143 of the Evidence Act Cap 6 R.E 2019, which provides that no particular number of witnesses shall in any case be required for the proof of any fact. This complaint is baseless and is dismissed.

Linked to the above issue is Mr. Nassoro's contention that the evidence by PW6 that he asked Lydia whom exhibit P5 belonged and was told that it belonged to the appellant, is unreliable because Lydia was not called to testify. We think this argument is without merit too. As stated above, proof of a fact is not dependent on number of witnesses but his or her competence and credibility. The Court has stated so in innumerable decisions. For instance in **Yohanes Msigwa v R** (1990) TLR 148, the Court categorically stated that in terms of section 143 of the Evidence Act, Cap 6 R.E. 2002, there is no specific number of witnesses required for the prosecution to prove any fact and that what is important is the quality of the evidence and not the numerical value.

There was an allegation that PW6 was incompetent to testify and was unreliable. He was 42 years old, Muslim and was dully affirmed before his evidence was recorded. We see nothing irregular in taking his testimony. It is now settled law that all witnesses are entitled to credence unless there are good reasons for not doing so, (see **Goodluck Kyando vs Republic** [2006] TLR 363). Besides, the learned judge found that all the eleven prosecution witnesses were credible and reliable. Being a trial judge who had an opportunity to see them testify at the dock was better placed to assess his credibility by demeanour as that, in law, is the exclusive domain of the trial court. (See **Lucas Nandi vs The Director of Public Prosecutions**, Criminal Appeal No.

24 of 2018 and **Nyakuboga Boniface vs Republic**, Criminal Appeal No. 434 of 2017 (both unreported). We are also alive that credibility of a witness can be determined by the court in other ways as the Court pronounced itself in the case of **Yasin Ramadhani Chang'a vs Republic** [1999] T.L.R. 489 and **Shabani Daud vs Republic**, Criminal Appeal No. 28 of 2001 (unreported) both quoted in **Nyakuboga Boniface vs Republic**, Criminal Appeal No. 434 of 2017 (unreported) that:-

> *"Apart from demeanour.... The credibility of a witness can also be determined in other two ways that is,* ***one by assessing*** *the coherence of the testimony of the witness, and* ***two****, when the testimony of the witness is considered in relation to the evidence of other witnesses."*

Like the trial court, we have examined the prosecution evidence on record as summarized above and found the same consistent and coherent. We have no reason to doubt the credibility of PW6.

Mr. Nassoro had also elaborated on the appellant's complaint that PW9 could not be relied on as there was no evidence supporting him that exhibit P5 was opened using password. In fact, Mr. Nassoro was suggesting to us that PW9 evidence was loaded with unsupported evidence hence he should not be believed. We, in the first place agree with Mr. Nassoro that PW9 said so as reflected at pages 198 and 199 of

the record of appeal. No other witness talked of how exhibit P5 was opened. Much as we agree with the learned Senior State Attorney that other witnesses might have not been forthcoming about it due to lapse of memory given the time that had lapsed from the date the offence was committed to the date PW9 testified in court, we have also asked ourselves whether how Exhibit P5 was opened was very material to the case. The charge concerned trafficking in drugs. Evidence on record is very clear that at first opening and inspection of exhibit P5 was done in the presence of the appellant, PW6 and PW10 and others and later the underneath part the bag forcefully opened after the appellant had given his permission and exhibit P2 was retrieved from therein. A material fact here to us and the bottom line of the evidence is that the bag was opened. Other matters are so trivial that they do not affect the substantive evidence. That said, we accordingly agree with the learned Senior State Attorney that the omission by other witnesses to tell how the bag was opened was not material and we do not see how that prejudiced the appellant and even Mr. Nassoro did not tell us any injustice occasioned. The omission was therefore inconsequential and did not affect PW9's credibility.

On those basis, we are convinced that there no any cogent reason to doubt the credibility of any of the prosecution witnesses. The attack

on the learned judge's finding is therefore quite unjustified. We dismiss this complaint too.

The third issue was whether it was proper in law to convict and sentence the appellant for trafficking in narcotic drugs in the absence of the certificate of seizure. It is common ground that no certificate of seizure was filled and issued after the seizure of the suit case (exhibit P5) and the drugs (exhibit P2). The learned brains parted ways on whether the search was immergence one to which section 42 of the CPA applies or it was a planned and designed search to which section 38 of the CPA applied and incumbent upon the prosecution to fill and issue a seizure certificate. Mr. Nassoro pressed that the latter was the case while Ms. Matikila was insistent that the former situation was the case. We think a resolve to the issue calls for the critical analysis of the circumstances under which the drugs were retrieved. In our recent decision in the case of **Badiru Mussa Manogi vs Republic**, Criminal Appeal No. 118 of 2020 (unreported), we discussed at length on the applicability of section 38 of the CPA in which we explicitly stated that where search is a planned one, a police officer conducting the search must carry with him a search warrant issued by Police Officer In-charge of a police station authorizing him to conduct the search and must fill a seizure certificate which should be signed by those present during the search and also receipt acknowledging seizure of the thing retrieved

must be issued. That is in terms of section 38(1) and (3) of the CPA. We also distinguished with the emergence search conducted in terms of section 42 of the CPA. Under this section, a police officer is justified to conduct search without warrant where he believes on reasonable grounds that there exists anything connected with an offence hence a need for an immediate search. The issue of there being a search warrant or a certificate of seizure does not and the law does not require issuance of a certificate o seizure.[See **Maluqus Chiboni @ Silvester Chiboni and John Simon vs Republic**, Criminal Appeal No. 8 of 2011 (unreported) cited in the case of **Marceline Koivogui vs Republic** (supra)]. This is sufficient for the legal position.

In which category of search did the search conducted in the present case fall is what we are asked to determine. The circumstances that obtained are therefore a determinant factor. As indicated above, the whole incident arose at the departure lounge following PW10 detecting a blue colour in exhibit P5 when passing through the scanner machine. There is no dispute about this. Lydia Mwenisongole and latter PW6's involvement came about after PW10 had called and informed the former on what he had detected. Even PW9 was informed by PW10 of the incident and went to verify the information. More so, PW7 was instructed by the Security Manager of JNIA at 4:00 pm to and record the incident which had taken place at the departure lounge at 1:00pm.

There is, therefore no indication however slight, from the evidence that any of the prosecution witnesses that such incident would happen so that any preparation could be done including having a seizure certificate. Even Mr. Nassoro did not suggest prevalence of circumstances to the contrary. We hasten to hold that the search was an emergence one and for that reason section 38 of the CPA was inapplicable. The complaint on the absence of the seizure certificate is baseless and is inconsequential.

Chain of custody of exhibit P2 cropped up as an issue in the appellant's grounds of appeal. The main contention by Mr. Nassoro here is that it did break. It seems this is now a common ground in cases of this nature. We will therefore not be sailing on unchartered vessel. It is, we consider, well established in law that movement of exhibits from the time of its seizure, investigation and production in court must be of such nature that will eliminate the allaying fears about the possibilities of its tempering are avoided. The leading authorities on this are the often cited cases of **Paulo Maduka and 4 Others vs Republic**, Criminal Appeal No. 110 of 2007 and **Abuhi Omari Abdallah and 3 others vs Republic**, Criminal Appeal No. 28 of 2010 (both unreported) in which the Court insisted that the chain of custody must be clearly shown so as to establish that the exhibits are not tempered with. Presence of paper trail was most preferred. A distinction was, however, drawn in the case of **Kadiria Said Kimaro vs Republic**, Criminal Appeal No. 301 of 2017

(unreported) between money involved in the former two cases which could change hands easily and pellets of drugs in the latter case which could not easily change hands whence the Court made it clear that the absence of paper trial is inconsequential provided the witnesses are consistent and credible. The Court in arriving at that stance relied on its earlier decision in the case of **Joseph Leonard Manyota vs Republic**, Criminal Appeal No. 485 of 2015 (unreported) in which it was held that not every time the chain of custody is broken an exhibit will not be admitted in evidence. To say the least, this did not relieve the court from discharging its duty to satisfy itself that the item seized is the one produced in court as exhibit.

The substance of Mr. Nassoro's complaint is that the unexplained difference in weight of exhibit P2 casts doubt on whether it was the one retrieved from exhibit P5.

Guided by the above legal positions, we now address ourselves to the issue raised. To recap, it was not disputed that PW8 weighed exhibit P2 and found it to be 4kg while PW1 (GVT Chemist) found it to be 3882.92kgs. Was the difference explained away? is the crucial issue to be determine. We have no hesitation to agree with Mr. Nassoro that no explanation was offered by any of the prosecution witnesses. The learned Senior State Attorney attempted to provide an explanation from

the bar that PW8 simply made a preliminary weighing. That is no evidence and cannot be relied on in the determination of this issue. However, relevant for our consideration is her prayer that the Court should rely on PW1 who, being an officer from Government Chemist is the person mandated to give the proper weight. She put reliance on the Court's decision in **Marceline Koivogui vs Republic**, (supra). Mr. Nassoro urged us to infer that the difference proved tempering.

We have read the case cited to us by the learned Senior State Attorney and we respectfully agree with her that it underlined the correct position of the law. For avoidance of doubts this is what the Court propounded:-

> *"Next for consideration is the alleged discrepancies in the testimony of PW2, PW3 and PW10 as to what was weighed and packaged. We wish to point out that, the examination and weighing of narcotic drugs is an expertise which is the domain of the Government Chemist. We say so because although PW10 was present when the testing was done, not being an expert in the respective field, whatever he said in that regard is*
>
> *insignificant. In our considered view, from the cumulative evidence on the record, since the process to establish weight of heroin was conducted by PW3, we are satisfied that the test revealed that the 72 pellets*

contained heroin hydrochloride weighing 1073.82 grams..."

To a large extent, the issue involved in the present case and the above cited case, bore semblance so that we see no reason to depart from the above finding of the Court. We need not overemphasize that expert evidence deserves respect though not binding to which a departure calls for an explanation. (See **Said Mamwindi v. R.** [1972] HCD no. 212).

We lastly have to consider the issue brought to our attention by the learned Senior State Attorney. It concerned the clarity of the order of the trial court on the imprisonment sentence meted out. In the first place, we find Ms. Matikila's argument that the order meant the appellant started serving the sentence even before conviction and sentence is a far-etched and unreasonable interpretation of the otherwise clear and unambiguous order by the trial judge. Read as a whole and contextually, we comprehend the order to must have simply meant that the appellant was sentenced to a jail term of twenty years after trial judge had taken into consideration, as a mitigating factor, the period of seven years the appellant had been in remand prison. Even looking at the notice of appeal found at page 357 of the record of appeal it is indicative that he was sentenced to serve such term of imprisonment which is suggestive that the order was comprehensible to

the appellant. More so, at a certain stage of her argument, Ms. Matikila admitted to this fact. All the same, Ms. Matikila's arguments is a good reminder to learned judges and magistrates to ensure that the final orders they give are free from any ambiguity lest they may create a confusion in the execution process. We need not overemphasize on the need to be careful on that.

For the foregoing reasons, this appeal is without merit. It is dismissed in its entirety.

DATED at **DAR ES SALAAM** this 12th day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgement delivered this 23rd day of November, 2021 in the presence of the appellant in remotely via Video link from Ukonga Prison and Mr. Genes Tesha, learned Senior State Attorneys for the respondent/Republic is hereby certified as a true copy of the original.

K. D. MHINA
REGISTRAR
COURT OF APPEAL