IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 39 OF 2023

(Originating from Criminal Case No 50/2021 of the Resident Magistrate Court of Kibaha before Hon. J. LYIMO-SRM dated 17th august, 2022)

WILLIAM THOMAS @MAHINDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

14th February & 17th April 2024

MWANGA J.

The appellant herein was charged before the Resident Magistrate Court of Kibaha at Kibaha with one count of trafficking Narcotics Drugs contrary to Section 15 A (1) and (2) (c) of the Drugs Control and Enforcement Act, Cap. 95 [R.E 2019]. According to the prosecution, on 12th November, 2021 at around 21:00hrs in the Kibaha bus terminal area within the Kibaha District in the Coast Region, the appellant trafficked 9.51 Kilograms of cannabis sativa commonly known as Bhangi.

The facts disclose further that, on the material date the appellant was traveling by AL-SAEDY bus from Tabora to Dar es Salaam Region,

claiming he was going to look for the ocean water for his sick wife. On his way, the bus conductor insisted on checking for his ticket to see his destination. According to the appellant's own words, he refused to show him the ticket arguing that the bus conductor was not the one who sold him a ticket and, hence has no right to inspect him. But he told the bus conductor that, he would drop him at the Mbezi bus Stand, in Dar es salaam.

In advertently, the bus conductor dropped him at Kibaha Bus Terminal and subsequently handed over him to a police officer, F. 6012 Coplo Adams who was on his daily duties of inspection of vehicles in the area. The aim was for Coplo Adams to assist the appellant to reach Kongowe area. At that particular juncture, the appellant was carrying two bags; a bag pack and a plastic bag commonly known as "Shanghai kaja".

Interestingly, the said police officer got suspicious of the appellant on what he was carrying. According to him, he felt a smell of "bhangi". He therefore opened the bags and found some leaves which he suspected to be "bhangi". When questioned, the appellant insisted that it was the medication he was taking to the Kongowe area. He, consequently arrested the appellant and called his colleagues who eventually arrived and took the

appellant to Moses Jackson, an the independent witness. The alleged "bhangi" was thereafter seized and a certificate of seizure was prepared, signed by both police officer, the independent witness and the appellant. Then, the appellant was taken to the police station and subsequently arraigned in court for the charges of trafficking 9.51 Kilograms Narcotics Drugs commonly known as Bhangi.

During the trial, the appellant flatly denied the charges. After a full trial, the court was satisfied that the prosecution proved its case beyond a reasonable doubt, and the appellant was sentenced to 30 years imprisonment.

Displeased, the appellant has preferred the present appeal fronting nine (9) grounds of appeal which can be paraphrased as follows;

1. That, the trial Magistrate erred in law and fact in convicting the appellant based on exhibit P3 (Backpack and Shangazi kaja) when the same were neither labeled nor sealed at the scene of the crime contrary to the procedure of law.
2. The prosecution did not explain why the alleged exhibit P3 was delayed from being sent to the Government Chemist from

12/11/2021 to 30/11/2021 the omission which cast doubt on the prosecution case

3. The prosecution case was highly improbable or implausible against the appellant as there was no explanation as to why the appellant was put to police restraint over the prescribed time by Cap 20 R.E 2019
4. That the magistrate erred in law and fact in convicting the appellant based on exhibit PE. 2 (caution statement) when the same failed to observe and consider that the appellant was not a free agent at the time of interrogation contrary to the provision of section 48,52,53 and section 58 (1) (a) (b) of the criminal procedure Act Cap 20 R.E 2019 now (2022)
5. The prosecution failed to parade the said bus conductor to testify in court concerning the circumstances of the appellant's apprehension.
6. The trial court did not make a proper and sufficient evaluation, analysis weighing, and consideration of the defense evidence which raised a reasonable doubt on the prosecution case.

7. The evidence of Pw1, Pw2, Pw4, Pw4, Pw5, Pw6, Pw7, and Pw8 evidence was insufficient, contradictory, improbable, and unreliable to establish the appellants guilty beyond a reasonable doubt, hence exhibit PE1, and PE3 lack evidential value to incriminate the appellant
8. Exhibit PE9 the statement of Mwokili) was admitted in contravention of section 34B (2) © (d) (e) of the Evidence Act, Cap 6 R.E 2019 The omission which renders the said exhibit a nullity
9. That, the prosecution did not prove its charge against the appellant beyond any reasonable doubt as required by law.

Hearing of the appeal was done by way of written submission as the appellant appeared in person, while the respondent had a representation of Mr. Clarence J. Mhoja. Learned State Attorney who prepared the respondent's written submission.

The appellant's contention in support of 1st and 2nd grounds of appeal is on Exhibit P3. He submitted that on the date of search, no mark was placed on Exhibit P3 to provide proof that they are the same items which were shown in court and that there were no marks or signs placed on the

seized item. He contended that, in this case, prosecution did not give any plausible explanation as to why they delayed sending the said exhibit P3 to the government chemist for analysis of the same from 12/11/2021 to 30/11/2021. To him, that cast doubt on the prosecution case as to whether what was seized from the appellant is the same as what was brought in court. He added that the omission is fatal as it contravenes PGO 229 (4) (c).

In rebuttal, it was Mr. Mhoja's submission that, the appellant did not cite any authority supporting the requirement of labeling or sealing exhibit. He submitted that labeling of exhibits is governed by PGO GN No. 315 of 2021 in which the duty of labeling is vested to the investigating officer and not to every police. He added that, it was PW5 who restrained the appellant before handing him over to PW1, and the same are not investigating officers. He insisted that, the exhibit keeper PW6 testified to having registered the said exhibit in the exhibit register on entry number 347/2021 and she labeled them as such. To bolster his argument, he referred the court to the case of **Livinus Uzo Chime Ajana vs Republic**, Criminal Appeal No. 13 of 2018 (CAT-Unreported).

He added that when exhibit P3 was tendered in court the appellant had no objection. If he had no knowledge of the same he could not have remained silence. In other words, he would have objected to its admissibility as he ably objected to the tendering of other exhibits.

Concerning unexplained delay in sending the exhibits to the government chemist, he countered the same by submitting that, no law prescribes the time limit for sending the drugs to the government chemist after seizing them. According to him, the important thing is to observe the chain of custody which was well observed because after the drugs were seized from the appellant it was put in a store narrated by PW6 before she handed them to PW8 who took them to the government chemist for analysis. He said this ground lacks merit. In a short rejoinder, the appellant reiterated what he submitted in his submission in chief.

I have considered the rival submissions by both parties. I am of the considered view that the first and second grounds need not detain this court. As correctly submitted by Mr. Mhoja, exhibit P3 could not have been labeled at the scene of crime by PW5 and PW1 as they were not investigating officers. The law requires that the same be labeled by investigating officers. See the case of **Gabriel Lucas vs Republic,**

Criminal Appeal No. 557 of 2017 (CAT- unreported). Further, as per the credible account of prosecution witnesses PW6 the same bags collected from the appellant were labeled and the same was kept in a store before handling the same by PW8 who took them to the government chemist for analysis. In addition, the same were kept in custody until when it was tendered at the trial. Again, both PW5 and PW8 were believed by the learned trial magistrate and I have no cogent reason to find otherwise. I, thus, uphold the trial court's finding that there was no possibility of tampering with the exhibit. Further when the same were tendered in court appellant did not challenge the same.

Concerning the claim on unexplained delay in sending exhibit P3 to the government chemist, the same is also baseless. As rightly submitted by Mr. Mhoja there is no time frame prescribed by the law for sending the exhibit to the government chemist after seizing them.

On the 3rd ground of appeal, the appellant laments that the trial magistrate was wrongly subjected to an unfair trial for the failure to consider that the prosecution did not give any plausible explanation on the reasons to put the appellant in police custody over the prescribed period as

required by law under section 32 (1) of Cap 20 R.E 2022. He cast doubt on the prosecution case as he was psychologically tortured and/or frustrated.

In reply, Mr. Mhoja contended that the ground is misconceived because the said provision has nothing to do with the merit of the case. According to him, the appellant has failed to prove how his long detention before arraignment in court, if at all is true, did impacted him in proving or disproving any fact concerning the offense he was charged with. He added that if all appellant was so detained, he had his remedy under section 390 of the Criminal Procedure Act [Cap 20 R.E 2022]. He placed reliance on the case of **Gabriel Lucas Republic Vs R**, Criminal Appeal No.557 of 2017(CAT-Unreported).

I have dispassionately considered the rival submission by the parties concerning this ground of appeal. I have also inquisitively perused the trial court's record to see whether the appellant's complaints have a basis. However, I found nothing suggesting that the appellant was detained as he wanted this court to believe. The reason am so holding is not farfetched. Looking at the record, nothing substantiates the appellant's claim which means that he did not bring that complaint to the trial court's attention. I am of the view that the trial court was the best place to consider and

determine this issue. Further, even if the appellant was prolonged detained as he wants this court to consider, his claim has no comportment on the merit of the case. My stance finds solace in the case of **Gabriel Lucas vs Republic** (supra) where the court of appeal being faced with a situation akin to this one had the following to say;

> ***"With respect, we agree with the learned state attorney that there is nothing on record substantiating the claim that the appellant suffered such prolonged illegal detention at the hands of the police. Before us appellant candidly acknowledges that he did not bring such a complaint to the attention of the courts below. We think that the trial courts were best placed to consider and determine the issue had the appellant brought it up. Thus, both courts cannot be blamed for not calling with an allegation of which they were not cognizant. Given the circumstances, we find this claim not just an afterthought but also implausible. At any rate, the said claim has no bearing on the merit of the case".***

Based on the above authority, the third ground of appeal is destitute of merit and the same is dismissed forthwith.

On the fourth ground of appeal, the appellant lamentation is that in exhibit P2, the caution statement was wrongly relied upon as the same was illegally obtained and admitted in court as it was obtained in contravention of sections 53,57 (30 (a) (i) and 58 of the Criminal Procedure Act, Cap. 20 R.E 2022. He referred the court to the case of **Emmanuel Malahya vs R,** Criminal Appeal No. 212 of 2004 (CAT-unreported). He then implored the court to expunge exhibit P2 from the record.

In response, it was Mr. Mhoja's Submission that, the law governing caution statements about drug offenses is not the Criminal Procedure Act, Cap 20 [R.E 2019] but rather the Drugs Control Enforcement Act, Cap 95 [R.E 2019], and the relevant position is Section 48 of that law. In his rejoinder, the appellant stressed that failure to comply with sections 53,57, (3), and 58 of Cap. 20 [RE 2019] is fatal and incurable. He urges the court to expunge exhibit P2 for being illegally obtained and uncorroborated.

I have perused the available record where it is evident on page 16 of the proceedings, that the appellant raised his complaint during the trial. The trial court conducted an inquiry and was satisfied that, the appellant was addressed to his rights in which he opted not to bring any witness as he had none. After inquiry, the court believed that the statement was

legally obtained and admitted the same. As rightly pointed out by the learned state attorney, the applicable section in recording the appellant's cautioned statement was section 48 of the Drugs Control and Enforcement Act where the statement shows, *inter alia* that the appellant was cautioned, given his rights where he chose to be recorded in his own present. It also shows date, time and place of interrogation which is within prescribed time; and the same was read to him. Finally, it provides the certification and also contains the names of the recording officer. Thus, I find no reason to differ from the trial court's findings.

On the fifth ground of appeal, the appellant contends that the trial court failed to draw adverse inferences for the failure of the prosecution to call the said bus conductor named by PW5. To him, the said bus conductor was an important witness to be paraded as he was the only person who could tell the court whether or not the appellant was the very person who was on the particular bus. He complained further that the agreed facts were not read over to the appellant and the registration number of the alleged bus was not mentioned in court. He was of the view that the omission cast doubt on the prosecution case.

In rebuttal, Mr. Mhoja admitted that the record does not show that, the trial magistrate did read over and explained to the appellant in language understood by him the agreed facts. However, he submitted that the omission does not affect the whole proceedings but rather the part of the preliminary hearing alone. He placed reliance on the case of **Brayson s/o Katawa vs Republic** (Criminal Appeal No. 259 of 2011) [2012] TCA 31 (Tanzlii). Concerning the summoning of the bus conductor he was of the view that, as per section 143 of the Evidence Act, (Cap 6 R.E 2022) what matters is the quality of evidence and not the number of witnesses. He added that as to who should testify it is the discretion of the prosecution to decide and not the accused person; the only exception is when the witness is a material one whose absence leaves out evidential gaps in the prosecution case. He argued the bus conductor was neither a material witness nor was he qualified to be a witness. To cement his position, he cited the case of **Yankami Idd or Alfan Idd @ Nyanzabara vs Republic**, Criminal appeal No. 249 of 2019 (CAT Unreported).

Having considered the above submission, I wish to point out that, the purpose of the preliminary hearing as per section 192(1) of the Criminal Procedure Act, Cap 20 RE 2022 is just to speed out the prosecution

case/promote fair and expeditious trial and not otherwise. Thus, the fact that the agreed facts were not read over to the appellant does not vitiate the proceedings. Further, the appellant has not stated how the omission by the trial magistrate to read over the agreed fact or has prejudiced him in any way, thus his complaint is baseless.

As regards the complaint that adverse inference should have been drawn against the prosecution case for failure to produce the said bus conductor who is said to have handled the appellant to PW 5, it is my finding that, this complaint is equally utterly meaningless. Unquestionably, it is in evidence that the bus conductor was the one who handled the appellant to PW5 begging him to show the appellant direction in reaching Kongowe thus, he was not a material witness because he was not even aware that the appellant was carrying such drugs. What is important is that, there was appellant's bus ticket showing that he was traveling with AL SAEDY High Class bus from Tabora to Dar es salaam and indeed he was dropped at Kibaha bus Terminal (Mailimoja bus terminal). The bus ticket was admitted as exhibit P6 and no objection was registered. In view of this, there was no particular reason why the prosecution should have called him as their witness because there is no maximum numbers of witnesses

needed to call for the prosecution to prove the case. See also the case of **Yankami Iddi or Alfan Idd @ Nyanzabara vs Republic** (supra).

On the eighth ground of appeal, the appellant complains that, exhibit P9-statement of Sgt. Mwokili was illegally or un-procedurally admitted in court as the same was admitted in contravention of section 34B (1) (2) a-f of the Evidence Act, Cap. 6 [R.E 2022]. According to him, the same was admitted into evidence on 25th July 2022, while for the first time, the trial court was informed of the intention to use such statement as evidence on 18th July, 2022. He argued that the law requires the copy of the statement to be served on the adverse party ten days before the date it is intended to be tendered in evidence hence the same was illegally admitted in court. He implored the court to allow this ground of appeal.

In response, respondent admitted the contention that exhibit P9 was admitted in contravention to Section 34 B (e) of the Evidence Act as notice had to be served to the adverse party ten days before the date it is intended to be tendered into evidence but the same was tendered seven days since the service of the notice. Hence, the same should be expunged from the record. However, he contended that the said notice was not referred by the trial court in convicting the appellant. H argued that, even

in the absence of the said statement, there is sufficient evidence to sustain a conviction against the appellant.

In my considered view, upon perusal of the trial court's record, it is evident that, on 18/07/2022 prosecution presented their intention to the court to bring the statement of Sgt. Mwokili into court, and the same was tendered in court on 25/07/2022, which is seven days after the notice was tendered to court. The issue is whether the prosecution contravened the law. As per Section 34B of the Evidence Act, in tendering witness statements under the above section, the prescribed conditions should be observed. Admittedly, Section 34 B (2) (e) was contravened, thus, I proceed to expunge the statement of Sgt. Mwokili (Exhibit P9) from the record. Therefore, this ground has merit

The sixth, seventh, and ninth, grounds of appeal can be dealt with conjointly as the same are entwined. The appellant laments that the trial magistrate failed to make an evaluation, analysis assessment, and balance and resolve the doubts in the prosecution case in the appellant’s favor. He said, the prosecution has failed to establish the appellant's apprehension in connection with the case at hand as there was no photograph picture taken at the scene of the crime to prove the same consequently, the case

was not proved beyond a reasonable doubt, and the appellant reserves to benefit from the doubts.

Responding on these grounds of appeal, it was the respondent's submission that, in an offense of trafficking in narcotic drugs like the one the appellant was charged with, the prosecution must prove at least two important elements; **firstly,** what the accused was trafficking is nothing but drugs, and **secondly,** the alleged weight must have not exceeded fifty kilograms. Relying on the case of **Goodluck Kyando vs R** [2006] TLR 363, on the credibility of witnesses, he submitted that the trial court which saw the demeanor of all witnesses chose to believe the prosecutor's witnesses and convicted the appellant forthwith. He referred this court on page 10 of the impugned judgment in which the trial court evaluated the evidence of both parties and found that prosecution witnesses remained reliable credible and consistent throughout the trial and the same was not dismantled in cross-examination. He added that the appellant's caution statement (exhibit P2), seizure certificate (exhibit P1), the evidence of a government chemist (PW4), the evidence of the police officer who restrained the appellant with the alleged drugs (PW5), and the evidence of the independent witness sufficiently prove the necessary ingredients of

trafficking in narcotic drugs C/S 15A of the DCEA. His view is that, the rest of the prosecution witnesses furthered the prosecution case and contributed to adding more weight to the available evidence against the appellant. In rejoinder, the appellant had nothing much to add rather than stressing his prayer for the appeal to be allowed and be set free.

I have dispassionately considered the rival submissions by the parties regarding the grounds of appeal and revisited the lower court records to find whether the appellant's complaints are reflected therein. Regarding the contention that the trial magistrate did not evaluate, analyze, assess, balance, and hence resolved the doubts in the prosecution case has no legs to stand. The record speaks loudly on pages 10-12 of the impugned judgment that, the trial magistrate analyzed and evaluated both the evidence of prosecution and defense and came to a finding that defense evidence could not shake the prosecution evidence.

It is very clear to me that, after a careful re-appraisal of the evidence on record, the prosecution established to the required standard of proof that the appellant trafficked in the narcotic drugs and the bags containing cannabis sativa belonging to the appellant was seized at the kibaha bus terminal on 12/11/2021. Besides, the appellant acknowledged to have

carried the said bags of cannabis sativa having signed the seizure certificate exhibit P1 and in his caution statement in Exhibit P2.

I find no other reasonable explanation except the fact that he had the bags of cannabis sativa for the sole purpose of trafficking them. All prosecution witnesses who had handled the said bags of sativa told the trial court about the movement of the same up to the crucial point of analysis by the Government Chemist and finally their exhibition at the trial. All these were documented and therefore, constituted an assurance that the exhibited sativa (Exhibit P3) were the items that the appellant had in possession and that the Government Chemist (PW4) subsequently confirmed to be cannabis sativa.

The appellant's claim that the prosecution has failed to establish appellant apprehension in connection with the case at hand as there was no photograph picture taken at the scene of the crime to prove the same could not dislodge the prosecution case.

Given what I have endeavored to discuss, I am satisfied that, the available credible oral account of PW1, PW2, PW3, PW5, PW6, and PW7 in respect of the fact that the appellant was the owner of Exhibit P3, together

with the documentary account contained in Exhibits PI, P2, P4, PE5, point to the guilt of the appellant to have been found trafficking in drugs on 12/11/2021.

That has been said and done, it can be safely concluded that the prosecution case was proved to the tilt. I, thus, dismiss the 6th,7th and 9th grounds of appeal for lacking merits. The resultant consequence the appeal is destitute of merit and the same is dismissed forthwith.

It is so ordered.

H. R. MWANGA

JUDGE

17/04/2024