IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 32 OF 2020

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

AKIDA ABDALLAH BANDA ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania (Corruption and Economic Crimes Division) at Dar es Salaam]

(Mashaka, J.)

dated the 9th day of December, 2019

in

Economic Case No. 11 of 2018

.....

JUDGMENT OF THE COURT

13th March & 28th April, 2023

MWAMBEGELE, J.A.:

On 09.12.2019, the Corruption and Economic Crimes Division of the High Court (Mashaka, J. – as she then was) acquitted the respondent Akida Abdallah Banda of two counts of trafficking in narcotic drugs contrary to section 15 (1) (b) of the Drugs Control and Enforcement Act, No. 5 of 2015 read together with paragraph 23 of the First Schedule to the Economic and

Organised Crime Control Act, Cap. 200 of the Laws of Tanzania as amended by the Written Laws (Miscellaneous Amendments) Act, 2016 – Act No. 3 of 2016. It was alleged that on 07.11.2016, the appellant trafficked in 58.49 kilograms of narcotic drugs known as cannabis sativa and 26.51 kilograms of narcotic drugs known as *cathaedulis* (khat) commonly known in Kiswahili as *mirungi*. The Director of Public Prosecutions, the appellant herein, was aggrieved by the acquittal, hence this appeal.

The appellant preferred only three grounds of appeal; namely, that the trial judge erred in law and fact in; **one**, holding that the chain of custody of Exh. P2 was not properly established; **two**, drawing adverse inference against the appellant for failure to call witnesses who removed the respondent from the car (Exh. P4) after hitting the fence of PW4 and; **three**, doubting the credibility of prosecution witnesses when elaborating how Exh. P2 was retrieved from Exh. P4.

When the appeal was placed before us for hearing on 13.03.2023, Ms. Cecilia Mkonongo, learned Senior State Attorney assisted by Ms. Edith Mauya, State Attorney, appeared for the appellant. The respondent, despite being served by publication in the Habari Leo Newspaper of 02.03.2023,

defaulted to enter appearance. In the circumstances, Ms. Mkonongo prayed for leave and was granted to proceed with the hearing of the appeal in the absence of the respondent.

Arguing in support of the first ground of appeal, Ms. Mkonongo submitted that it was SSP Iddy Kiyogomo (PW3) who arrested the respondent with the narcotic drugs; admitted in evidence and marked Exh. P2 collectively (henceforth Exh. P2) and took the same to his office and then handed to Corporal Innocent (PW2) who was the Exhibits Keeper and thereafter No. 3857 Detective Corporal Deusdedit (PW5) got it from him and took it to Elias Mulima (PW1) of the office of the Government Chemist Laboratory Authority (GCLA), henceforth the Government Chemist. PW5 later took it to PW3 for custody until the same was produced in court by PW1. Admittedly, she went on, at p. 89 PW2 might sound as if he collected Exh. P2 from the Charge Room Office (CRO) but that mishap is in cross examination where the cross examiner asks any question. What actually transpired is that he collected Exh. P2 from PW3 as he stated at p. 87 of the record of appeal. Ms. Mkonongo admitted that there was no paper trail of Exh. P2 but was quick to submit that the chain of custody may be proved

through an oral account as was held by the Court in **Abas Kondo Gede v. Republic**, Criminal Appeal No. 472 of 2017 (unreported). Ms. Mkonongo admitted that Exh. P2 was wrapped in the absence of the respondent and taken to PW1 but that no law was offended for that and the respondent was not prejudiced. She insisted that it was not the law that an accused person must be present when wrapping and taking a sample to the Government Chemist. The same was labelled by PW5 who, as an investigator, was the correct person so to do in terms of PGO 229 (8) (1) of the Police General Orders. She thus prayed for this ground of appeal to be allowed.

The remaining two grounds of appeal were argued by Ms. Mkonongo conjointly. She submitted that it was true that the two witnesses who were at the scene of crime and witnessed the respondent being taken out of Exh. P4 and Exh. P2 being retrieved therefrom, were not called. She contended that those witnesses would not have added anything useful to what Wilbert Kitima (PW4) testified. PW4 was a witness of truth, she submitted, and his evidence could prove the case against the respondent even without the witnesses who were not called. She insisted that, in terms of section 143 of the Evidence Act, no number of witnesses is required to prove a certain fact.

She cited **Athumani Rashidi v. Republic**, Criminal Appeal No. 264 of 20116 and **Yohana Said Nguyeje v. Republic**, Criminal Appeal No. 206 of 2015 (both unreported) to buttress this point.

With regard to the custody of Exh. P4, Ms. Mkonongo admitted that there was a bit of contradiction in the testimony of PW2 and PW3 on who exactly kept it. She submitted that the exhibit was the subject of two cases; a traffic case and the one from which this appeal emanates. There was thus a confusion on who exactly kept it in respect of which case. However, she submitted, the discrepancy did not go to the root of the case as the same was not a subject matter of the charge.

The learned Senior State Attorney concluded that the evidence against the respondent was quite strong to mount a conviction against him in that a certificate of seizure was filled in the presence of an independent witness; Asha Omary Mkumbi (PW6) and the same was tendered in evidence without any objection by the respondent as appearing at p. 128 of the record of appeal.

The reason why the respondent was acquitted by the trial court was on, *inter alia*, the chain of custody being not fully established. It was the

stance of the learned Senior State Attorney that the chain of custody was not broken. We agree and we proceed to demonstrate. It is plain that Exh. P2 was retrieved from Exh. P4 and the record bears out that the respondent's line of defence does not dispute that. The appellant's defence was that the same might have been planted by Adam Bush and David Modestus who according to him were in bad blood for they thought he was making amorous advances towards Modestus's wife under the pretext that they had one kid before she was married. In the circumstances, we think, it was established beyond reasonable doubt that the same was retrieved from Exh. P4. The evidence also bears out that it was taken to the Police Station where PW3 kept it until later when he handed it to the exhibits keeper, PW2. Later, PW2 handed it to PW5 who took the same to PW1 of the office of the Government Chemist. After the same was examined by PW1, PW5 took it back to PW2 for custody until at a later stage when, again, PW5 took it to PW1 for production in court when he testified on 25.02.2019.

With the above evidence, we are of the view that the chain of custody of Exh. P2 was properly established notwithstanding the absence of paper trail which fact, as Ms. Mkonongo submitted, rightly in our view, that the

chain of custody may be established by oral evidence. In **Abas Kondo Gede** (supra), we were confronted with a similar argument. We observed at p. 16 of the written judgment of the Court:

> *"... even where the chain of custody is broken, the court may still receive the exhibit into evidence depending on the prevailing circumstances in every particular case provided it is established that no injustice was caused to the other party."*

In the case at hand the chain of custody was established by oral accounts of witnesses. In view of the fact that the respondent does not dispute that Exh. P2 was found in Exh. P4 only that he alleged the same might have been planted by his nemeses who did not testify, we strongly feel the evidence on record sufficiently established the chain of custody even though the paper trail might have been weak.

The learned trial judge made heavy reliance on the principle on chain of custody laid in **Paulo Maduka & Four Others v. Republic**, Criminal Appeal No. 110 of 2007 (unreported). At p. 299 of the record of appeal, the learned trial Judge heavily relied on the "chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and

disposition of evidence, be it physical or electronic" to hold that it was not the case in the matter before her and acquitted the respondent. Much as we agree that the principle we set in **Paulo Maduka** regarding the chain of custody and paper trail is still good law, we still appreciate that recent jurisprudence improved the same with regard to items which do not change hands easily. There is a good number of our decisions to this effect – see: **Joseph Leonard Manyota v. Republic,** Criminal Appeal No. 485 of 2015 **Issa Hassan Uki v. Republic,** Criminal Appeal No. 129 of 2017, **Kadiria Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2017 (all unreported) and **Anania Clavery Betela v. Republic** [2020] 2 T.L.R. 112. In all these decisions we laid a principle to the effect that the principle set out in **Paulo Maduka** (supra) can be relaxed in cases where the subject matter is an item which cannot change hands easily. In **Issa Hassan Uki**, for instance, we observed:

> *"In cases relating to chain of custody, it is important to distinguish items which change hands easily in which the principle stated in **Paulo Maduka** would apply. In cases relating to items which cannot change hands easily and therefore not easy to*

tamper with, the principle laid down in the above case can be relaxed."

Earlier, in **Joseph Leonard Manyota** we had taken the same view and observed:

> *"... 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."*

In **Kadiria Said Kimaro** (supra) we observed that cannabis sativa fall within items which do not change hands easily and therefore not easy to tamper with. In the matter under discussion, the items are cannabis sativa and *cathaedulis* (khat). Like we did in **Kadiria Said Kimaro** (supra) we find and hold that the items in the present case; that is, *cathaedulis* (khat)

and cannabis sativa could not change hands easily and therefore the trial court, by applying wholesale the strict principle set out in **Paulo Maduka** (supra), slept into error. For the avoidance of doubt, we are aware that the trial court also relied on what it said were discrepancies in evidence to acquit the respondent. We have scanned the evidence on record. With unfeigned respect, we have failed to see any discrepancy material to the principle of chain of custody. We thus allow the first ground of appeal as well.

We should now turn to consider the second ground of complaint by the DPP; the appellant. In this ground of appeal, the trial court is faulted for drawing an inference adverse to the prosecution case for failure to call two witnesses who removed the respondent from Exh. P4. These witnesses, we think, are Adam Bush and David Modestus referred to by the respondent in his defence as the ones who planted the narcotic drugs (Exh. P2) in Exh. P4. PW4, the prosecution's star witness testified that at the scene of crime, there were also "two guys" who helped remove the respondent from Exh. P4, put them under arrest and witnessed Exh. P2 being retrieved from Exh. P4. Much as we think it would have been desirable to call them to support the prosecution case, we agree with Ms. Mkonongo that their account was

covered by PW4 and PW6. Going by the principle embodied in section 143 of the Evidence Act that no particular number of witnesses is required to prove a particular fact, and we have held so in a string of our decisions, and having subjected the evidence to that fresh scrutiny as a first appellate court, we are of the considered view that the learned trial judge jumped into barbed wires in taking inference adverse to the prosecution for not calling those two witnesses while the substance of their testimony was covered by the testimony of PW4 and PW6. We find merit in this ground of appeal as well.

The third ground seeks to assail the trial court for doubting the credibility of prosecution witnesses when elaborating how Exh. P2 was retrieved from Exh. P4. In particular here is the testimony of PW4 and PW6. We do not think we will be detained much by this ground. The fact that the respondent did not dispute Exh. P2 being found in Exh. P4, the trial court should not have burnt a lot of fuel in doubting what the witnesses testified, for that was not disputed. We find the last ground of appeal meritorious as well.

In view of the foregoing discussion, having analysed the evidence on record and come to our own conclusion, we are of the considered view that

the case against the respondent was proved to the hilt to mount a conviction against him. The High Court Judge should have convicted the respondent. This appeal is meritorious. Consequently, we substitute the acquittal order with one of conviction of the respondent. We allow the appeal and order that the respondent should be arrested and brought before the High Court for sentencing according to law.

It is so ordered.

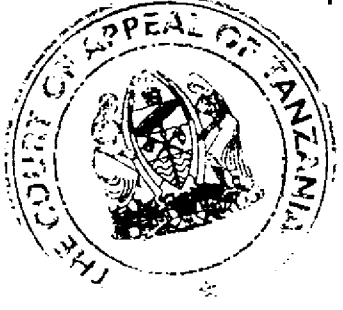
DATED at **DAR ES SALAAM** this 20th day of April, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The judgment delivered this 28th day of April, 2023 in the presence of Imelda Mushi, learned State Attorney for the appellant/Republic and in the absence of the respondent is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL