

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM REGISTRY AT DAR ES SALAAM CRIMINAL SESSION CASE NO. 143 OF 2015 REPUBLIC VERSUS TABIA OMARY KITWIKU@NEEMA

JUDGMENT

W.B. KOROSSO J. In this judgment we start by restating the fact that Tabia Omary Kitwiku@Neema, the accused charge is that of Trafficking in Narcotic Drugs, contrary to section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95 RE 2002 (hereinafter referred to as "the Act" or "Cap 95") as amended by Written Laws (Miscellaneous Amendment) (No.2) Act, No. 6 of 2012. We start by presenting some background to the case discerning from facts as advanced by the prosecution. In brief, it was alleged that on the 5th of November 2012, the accused person, Tabia Omary Kitwiku was arrested at JNIA while en- route to travel to China carrying narcotic drugs, that is, heroin hydrochloride in her body and in effect trafficking narcotic drugs outside the country. The accused was arrested with an Ethiopian airline ticket to Hong Kong and a passport with her name and a visa for China and upon arrest the accused was kept under 1 custody at the Anti- Drug Unit offices situated at JNIA (ADU-JNIA). During the period under police custody from the 5th to the 7th of November 2012 at JNIA at various intervals witnessed by various people which included Police officers and officers from Immigration, TISS and TRA, the accused defecated a total of 75 pellets containing heroin hydrochloride. That there is a record of each time the accused defecated and witnessed as presented in the observation form (Exh.P4) tendered in evidence and admitted. That the said pellets upon defecation were first stored by the shift heads at JNIA and later handed to Afande Neema who stored them at ADU- Kilwa Road officers exhibit Room. The 75 pellets defecated allegedly by the accused person suspected to contain narcotic drugs were packed on the 7/11/2012 at ADU Kurasini in the presence of the accused person and an independent witness in readiness to be taken by a team of police officers led by PW2 to the Chief Government Chemist office for analysis. The case for the prosecution is also that on the 8th of November 2012, the 75 pellets alleged to have been defecated by the accused person were taken to the Chief Government Chemist office and analysed and determined to contain heroin hydrochloride- which are narcotic drugs and found to weigh 994.97 grams. That later they were found to be valued at Tanzanian shillings Forty Four Million Seven Hundred and Seventy Three Thousands Six Hundred and Fifty Only (44,773,650/-) as determined by the Commissioner for Drug Control Commission mandated to value narcotic drugs. The defence denied any knowledge of the 75 pellets and that at no time did the accused

person defecate the said pellets at JNIA. They presented a defence that the accused had mental instability which led to being confused and end up signing documents such as the cautioned statement (Exh. P2) and the observation Form (Exh. P4). The accused person also challenged the credibility and reliability of the witnesses for the prosecution stating they presented evidence to the fact that which was contradictory especially in matters related to the colour of the pellets, which she is accused of 2 defecating at JNIA on specified date and time. The accused person also challenged the chain of custody of the said 75 pellets stating that it was broken due the fact that the pellets were never labelled by the recipients or witnesses_ from the first stage and therefore there is no clarity on whether the 75 pellets analysed by the Govt Chemist office on the 8th November 2012 are the same ones which the accused is alleged to have defecated. That is a background perspective of the case leading us to now move to draw the issues which this Court will venture to consider and determine.

1. Whether the accused person was arrested at JNIA on the 5/11/2012
2. Whether upon arrest between 5/11/2012- 7/11/2012 defecated 75 pellets alleged to contain narcotic drugs.
3. If it is found that the accused person defecated 75 pellets, whether the chain of custody was not broken from the point of the pellets defecation, seizure, analysis to being tendered in Court and admitted as Exh. P2 and whether the said pellets were narcotic drugs, that is, heroin hydrochloride.
4. Whether the accused person did traffic 75 pellets containing heroin hydrochloride as charged
5. Whether the defences raised by the accused person raised any doubts to the presented prosecution case.
6. Whether the charges against the accused person have been proved by the prosecution beyond reasonable doubt. The prosecution presented in Court 16 witnesses and 7 exhibits to prove their case and the defence only had the accused person testify on affirmation, having pleaded not guilty to the charge. Before venturing into addressing the drawn issues for determination we find it pertinent to first present matters which having regard to the evidence presented and the records in Court, are facts which are not disputed or not challenged by the defence or the prosecution. Court Records 3 reveal that the Preliminary Hearing was conducted on the 2 nd of June 2016 before Hon. Dyansobera J, matters drawn in the memorandum of matters agreed are: First, that the accused is known as Tabia Omary Kitwiku; Second, that the accused is a citizen of Tanzania owning a passport No. AB527099; Third, That the accused is charged with trafficking in Narcotic drugs; Fourth that the accused admits that on 5th November 2012 she was at Julius Nyerere International Airport on preparation to fly to Hong Kong by Ethiopian Airlines. Fifth, that the accused after apprehension by the Police- was taken for interrogation; and sixth that after the investigation the information on Narcotic drugs was filed in court against the accused for the offence with which she stands charged. From the above, we discern that the accused person

does not dispute the fact that on the 5th of November 2012 she was arrested at JNIA while preparing to fly to Hong Kong vide Ethiopian Airways. Thus in effect admits that the air ticket Exh. P5 belongs to her and that she possesses Passport No. AB 527099 which has been admitted as Exh.P6. The arrest of the accused person at JNIA, and seizing of Exh. P5 and Exh.P6 is also supported by the evidence of PW14- P2567 D/Sgt Enock and PW16 E 2926 D/Sgt Dacto. The defence did not present any evidence to the contrary regarding this issue of arrest, in fact from the Preliminary Hearing it is clear the arrest is not disputed. From this there is no doubt that from this, there is no need to spend more time on this and that the first drawn issue for consideration on the arrest of the accused person on the 5/11/2012 is answered in the affirmative. The second issue is whether the accused person while under police custody at JNIA from 5/11/2012 to 7/11/2012 defecated 75 pellets suspected to have narcotic drugs and if the chain of custody was not broken from their seizure, analysis to being tendered in Court and admitted as Exh.P2. From the facts not disputed drawn in the Preliminary Hearing, we can discern that it was not 4 disputed that upon arrest the accused person stayed at JNIA for questioning or interrogation, although how many days she stayed for this we consider the evidence presented by both sides. It is also important to understand that while discussing this issue the position of the defence on the issue will also be discussed and thus in effect also addressing issue no. 5 as it relate to the current issue under consideration and determination. The Prosecution relied on PW14- P2567 D/SGT Enock testimony that on the 5/11/2012, while conducting his duties as an Interpol officer at JNIA- in the new wing area where departing and arriving passengers use, at around 16.00hrs when Ethiopian Airlines has started check in, he stopped the accused person, who was a passenger travelling to Hong Kong. This was part of random questioning of people having received information from an informer that there was someone travelling with Ethiopian airlines who had swallowed narcotic drugs. He questioned her and was not satisfied with her responses thus directed one WP Farida to question her further after becoming suspicious from her conduct. During the questioning, they took the suspects ticket and passport and handed her and the ticket and passport to Afande Joseph then to Afande Dacto. This is because from the interview their suspicions were enhanced that there was a high possibility she was carrying narcotic drugs after the interview. This fact was not disputed by the defence as stated earlier, in her evidence she complained of being hassled without being told why she was being questioned and therefore denied the opportunity to continue with her travel. On the issue of whether or not the accused person defecated/emitted pellets while at JNIA when she was under police custody and observation the prosecution provided a number of witnesses. They included PW3 Makole Bulugu stated on 5/11/2012 while on duty at JNIA, he witnessed the accused person go to the toilet four times on the said night escorted by WP Valentine and witnesses 5 from immigration and TRA and 56 pellets were defecated and recorded in the observation form and stored in the drawer at ADU offices. PW3 stated further that on 6/11/2012 around 9.00hrs he handed the 56 pellets to Afande Neema- PW2. On 7/11/2017 he handed one pellet to Afande Neema which he was handed by WP Valentine on taking the accused to the toilet to attend a call of nature. He was also the one who handed the accused airline ticket, passport to Afande Neema using the Occurrence

Book. PW3 also managed in Court to identify contents of Exh. P2, to be those of pellets he had seen during his shift emitted by accused person when attending to a call of nature. PW5- Fatma Saidi Mndolwa a security officer at JNIA testified that on 5/11/2012 at 20.40 she witnessed the accused defecate 18 pellets in the special toilet, she had recorded this in the observation form by signing to have witnessed. PW6- WP 2394 CPL Hawa, a Police officer, testified that on the 6/11/2012 at 16.25 went with the accused to the toilet with other witnesses and witnessed the accused defecate 3 pellets and recorded in the Observation Form- Exh. P4. This witness also identified the pellets in Exh.P2 as being similar to the ones she witnessed the accused defecate at JNIA toilet. PW8-Frieda Tupokigwe Mwamasage a TRA preventive assistant, on 6/11/2012 at around 9.00hrs she was one of witnessed when the accused was attending to a call of nature and she witnessed the accused defecate 8 pellets and recorded in the observation form. At 13.00hrs, the accused defecated two pellets which she witnessed. At 14.00hrs, she again went to the toilet and witnessed the accused person defecate five pellets and filled the observation form. PW8 identified the pellets she witnessed as those in Exh. P2 and identified the observation form- Exh. P4. The other witness on this is PW9 Elizabeth Francis Kiswaga an immigration officer at JNIA stated that on 6/11/2012 at 6.20 hrs she witnessed the accused person defecate 19 pellets and filled the observation form to show this. She also identified the pellets in Exh.P2 as similar to those she had witnessed the accused 6 defecate. Bernadetha Kipangule PW.10 also witnessed on 6/11/2012 at 15.00hrs she witnessed the accused person emit three pellets and filled the observation form. S-till on this issue of the accused defecating pellets, PW11- Upendo Michael Kikudo and Immigration officer posted at JNIA, testified that on 6/11/2012 at 7.30 hrs, she was called by ADU officials and went to the special toilet where she witnessed the accused defecate seven pellets and thereafter filled the observation form. Managed to identify Ex P2 contents as what she had seen before and the observation form. Another witness is PW12- Pamela Michael Mwasi, an immigration officer, working at JNIA who stated that on 6/11/2012 at 21 .40 hrs went to the toilet and witnessed the accused defecate one pellet and thereafter filled the observation form. Amina Shehe PW13, a Customs officer at JNIA, testified that on the 6/11/2012 around 2.00hrs witnessed the accused defecate 12 pellets and thereafter filled. the form. Also identified the pellets in court- Exh. P2 as similar to those she had witnessed the accused defecate. That at 6.30 hrs on the same day, she was called again and went to the toilet with other witnesses and the accused defecated 19 pellets and filled the observation form and signed. Therefore in total .. she witnessed 31 pellets defecated by the accused person. PW15- WP 5459 DCPL Valentine, testified that on the 5/11/2012 while on guard duty of the accused person with Inspector Makole being incharge at JNIA ADU offices, at around 20.30 hrs, the accused wanted to go for a call of nature, and the witness sought witnesses from other departments as directed by her supervisor, and escorted the accused to the toilet where the accused defecated 18 pellets and upon going back to the office she and other witnesses and the accused filled the observation form Exh.P4. It is also in evidence that on the 6/5/2012 around 2.05hrs, again the accused was escorted to the toilet and emitted 12 pellets which where thereafter duly recorded in Exh.P4. At 6.30 hrs, she witnessed the accused defecate 19 pellets. At 8; 10hrs, the accused defecated

7 pellets and she 7 was a witness to this also. On the 6/11/2012 around 21.40Hrs, being on ·shift

- again witnessed the accused defecate one pellet. The witness identified the contents of Exh.P2 as the pellets she had witnessed the accused defecate at various intervals as testified·. That in total she had witnessed the accused defecate 57 pellets. That the pellets were handed to Inspector Makole who stored them for safekeeping. E 2926 DSGT Dacto who was PW16 also testified on the matter related to the accused emitting pellets during the period she was at JNIA at various intervals. That he was on shift duty at the ADU offices JNIA and had seen the witnesses who escorted the accused to the special toilet come back with pellets and sign the observation form. On 5/11/2012 before he left at 23.30hrs he witnessed WP Valentine come with 18 pellets from the toilet after she and other witnesses escorted the accused to the toilet. On the 6/11/2012 at around 9.30hrs WP Sophia handed him 8 pellets after coming out from escorting and witnessing the accused attend a call of nature; At around 13.00hrs, he was handed 2 pellets by WP Sophia, stating they had been defecated by the accused person and at around 14.00hrs he was handed 5 pellets by WP Sophia after the accused person had emitted the same in the special toilet. Again at 15.35hrs, WP Hawa who was on guard duty then handed him 3 pellets which had been defecated by the accused person. That during his shift he had been handed 18 pellets defecated by the accused person. He took the pellets to ADU headquarters and handed them to Afande Neema (PW2) using a notebook and they were recorded by PW2 in the Exhibit Register; The Prosecution also tendered in Exhibit P4, the Observation Form to show the dates, time and intervals and number of pellets emitted by the accused persoh and the names of witnesses who had escorted the accused to the toilet where they saw her defecate the pellets. The prosecution also tendered the accused cautioned statement which was admitted as Exh.P7. 8 ·For the - defence, the only witness to testify on this issue under scrutiny was the accused person herself- DW-1 who denied defecating any pellets and prayed the Court to find the prosecution witnesses to be uhtruthful and lacking credibility. The accused also while acknowledging the signatures in Exh .P4 denied having signed while she was aware stating that she might have signed the document when she was confused since she gets epileptic attacks which makes her mentally confused and unstable for certain period of time. DW1 also reiterated her position of repudiating Exh.P7 stating that she never made it but acknowledged the signatures to be hers, again saying that since she periodically had confusion attacks due to a mental illness it, they might have given her to sign them at that time. The defence also challenged the fact that Exh.P4 only had the names of the witnesses who testified to have witnessed the accused defecate pellets at various intervals at JNIA while the accused was under custody. The defence also challenged the credibility of the witnesses called by the prosecution praying for the Court to consider alleged inconsistencies in their testimonies on having witnessed the accused defecate the pellets, such as PW12- Pamela Michael Mmassy who had said the emitted pellets where white in colour while all the other witnesses stated the defecated pellets were cream, off white, milkish in colour, they contended that the Court should find this a serious discrepancy and

therefore contradicting the evidence of other prosecution witnesses. Another challenge by the defence relevant to the issue under consideration is admissibility of Exh.P2, saying that nowhere where the accused had signed on the envelope during the packing of the envelope at the ADU offices to signify that she was the one who had defecated them and was present. Again that when the 75 pellets were taken to the Chief Government Chemist office, the accused person was not involved at any time and this they contended vitiated the credibility and reliability of the said evidence. The defence therefore prayed that the Court find that the prosecution failed to prove that it is the accused person who defecated the 75 pellets as contended by the prosecution and that the defence has managed to raise a doubt on their evidence, a doubt which should benefit the accused. In considering the evidence advanced by the prosecution and the defence on this issue, the prosecution evidence was that on the 5th and 6th November 2012, at various intervals the accused - defecated pellets totaling 75 pellets. The oral evidence by witnesses who contended they were eye witnesses to this fact was supported by Exh.P4, the observation form were PW3, PW5, PW6, PW8, PW9, PW10, PW11, PW12, PW13 and PW15 all confirmed to have witnessed the accused person emit pellets and to have signed on Exh.P4 recording what was witnessed at each interval. It is true as advanced by the defence that what the witnesses had put in Exh.P4 were their names and not signatures, but can we say this in itself renders their evidence untruthful. The Court observed the witnesses when testifying and even under cross-examination they had stated they had recorded some stated they signed and some stated they put their names. In any case there is no evidence that the said witnesses had grudges or bad blood with the accused persons, fact also conceded by the accused person. We are reminded and guided also by the holding in *Goodluck Kyando V. Republic* (2006) TLR 363 that "witnesses are the eyes and ears in justice delivery, therefore they should be trusted unless there reasons not to do so, we pray our witnesses should be trusted and found to be credible since there has been no evidence to prove/claim otherwise". From what we observed regarding the Prosecution witnesses who testified on what they saw and heard confidently there is nothing which has been advanced for this Court to discredit their testimonies in any way. 10 The Court also considered the accused testimony that while at JNIA with Afande Neema and Afande Valentin~ she believed she could have had an epileptic attack because she only remembers that on the night of 5/11/2012 she was given a document to sign by Afande Neema. That at the time she was unable to read the contents nor was she given an opportunity to read before signing the document. The complaint by the accused against PW2- ASP Neema was that she shouted at her and accused her of trafficking drugs and that PW2, was very harsh to her ordering her to sign many places in a document and she remembers the paper to be about three pages or more. During her testimony though she managed to identify the signatures on Exh.P7 to belong to her but stated she was unaware of the contents of the said exhibit. The accused also acknowledged staying at JNIA for about three days and then being taken to Kilwa Road. Whilst in her testimony in the main trial she had stated that she was given another document to sign acknowledging she signed Exh. P4 but stated that she signed it when she was not feeling very well though she also admitted that she signed the said document on the 5th and 6th of November 2012 on the first page, second page and third

page though she was not informed what she was signing. This testimony of the accused person in Court somewhat contradicts the evidence she presented in her defence during a Trial within Trial on when she signed Exh. P7. While giving evidence in the trial within trial the accused had stated that PW2 had threatened her and made her sign while she was at Kilwa Road ADU officers on the 7th of November 2012. Discerned from this are clear inconsistencies which went to strengthen the prosecution case. Although we find prosecution evidence already discussed is enough by itself to find the accused person did defecate 75 pellets from 5th to 7th of November 2012 at JNIA, there is also the contents of Exh.P7. The Court admitted this in evidence after making a finding that it is a confession by virtue of section 3 of the Evidence Act, Cap 6 RE

2002. Therefore by denying knowing the contents but acknowledging the 11 signatures it is clear that the accused retracted and at the same time repudiated the confession. Being aware that Courts are expected to exercise due care and to warn themselves on the weight to give to a retracted or repudiated confession. The court admitted the retracted cautioned statement of the accused person after an inquiry into the voluntariness and the legal requirements upon conduct of a Trial within Trial. It should be understood that the guiding principle when considering retracted/repudiated confessions is enshrined in the case of *Tuwamoi vs. Uganda* [1967] E.A. 8. We find that bearing in mind the warnings and cautions as expected, the contents of Exh. P7 clearly show that it is only the accused person who can narrate what is stated therein. This is because it outlines the life of the accused person, schools she attended and where she lives, her family life and business and how she got involved with swallowing the pellets. It reveals where she had swallowed the pellets and the number of pellets she swallowed. It reveals the fact that she got involved in this in view of hardships in life and for purposes of improving her life and that of her family- thinking it was more lucrative having been recruited by a colleague. She also explains the struggles she went through in swallowing the pellets from 4/11/2012 the whole night up to 5/11/2012 the day she was expected to travel. Her destination was China. In Exh. P7, the accused alludes to the fact that after the arrest she had gone to the toilet at JNIA and defecated pellets at intervals and signed on Exh. P4 while witnessed by various people. The accused person also narrates what transpired leading to her arrest. iExh. P7 is signed by the accused person after every paragraph, signatures which she had acknowledged in Court that they belonged to her. We find that the contents of the statement leads the Court to find that they are reflections of the truth because no one else could have narrated such but the accused herself. 12 il Some of the statements in Exh. P7 are similar to what she contended in Court especially those related to the fact that she has children and she is the one who takes care of them and also where she lives and the life she had- struggling to generate income and the business she undertook. We find that the retracted/repudiated cautioned statement of the accused is indeed a confession because it admits without exculpating oneself of commission of the offence and thus in line with a definition of a confession under Section 3 of the Evidence Act, Cap 6 RE 2002. The confession by the accused (Exh.P7) having been repudiated or retracted since the accused person denied making the

statement before PW2 ASP Neema, the Court after conducting a trial within trial and satisfying itself on the voluntariness of the statement admitted it as Exh.P7. The Court is aware of the principles guiding the Court when considering: the weight to be given to a retracted or repudiated confession as guided by case Jaw, and therefore having warned itself of the dangers of giving weight to such a confession, proceeds to seek for corroboration on important facts, and in this case on evidence regarding whether the accused person did defecate pellets. We find also that the statements of the prosecution witnesses who testified- that the accused had at various -intervals defecated pellets do corroborate the statement of the accused in ExhP7 on what she had defecated, that is 75 pellets of what she concedes she had swallowed. Another issue corroborated is the number of days she stayed at JNIA, this corroborates the statement of witnesses. There is also the fact that some of the statements in the confession are commensurate to what the accused person stated in the Resident Magistrate's Court at Kisutu during committal proceedings especially relating to defecating of pellets. It is recorded in the hand written records that on the 8th of January 2016 before RE Mwijage PRM as follows: 13 t Court: The accused person is hereby addressed in terms of section 246(3) and

(4) and she replies as follows: Accused person:

1. In the whole exercise I did deliver only 48 pieces t through long call not 75 pieces as revealed in the statements of the witnesses
2. I did that exercised three days only
3. I did not read only the taker of the statements read the same to me. I was only ordered to sign, I did sign.
4. The one called Aunty was the one who told me to take the pieces and I was supposed to be paid at Hong Kong Tshs. 15,000,000/-
5. The USD3000 I was found with I surrendered them to Afande Nzowa who on the next day gave it to me. I had to put it in the bag but when I went to take bath while leaving my bag with Afande Neema and another lady when I came back I couldn't find my USO 3000.0. There was only Tshs. 2200.0
6. Aunty did not tell me what kind of parcel I was supposed to take to Hong Kong she simply told me to swallow the pieces of sweets and I was to be given money after arrival at Hong Kong.
7. I am not financially good. I pray the government to assist me for an advocate who can represent me at the trial. The above is a record of proceedings at the accused committal proceedings to show and in effect she admits to have defecated pellets but disputes the number, stating she only defecated 48 pellets. The accused person also concedes signing Exh. P7 after the statement was read to her. All this in effect giving more strength to the prosecution evidence on the issue. We have considered the accused statement during committal proceedings having regard to the fact that the accused person before making the

said statement was informed adequately on the consequences of such statement in compliance with section 246(3) of the Criminal Procedure Act, Cap 20 RE 2002 which reads: 14 ,1, "You have heard the substance of the evidence that the prosecution intends to -call at your trial. You_m c:l y either reserve your defence, which you are at liberty to do or say anything which you may wish to say relevant to Hie charge· against you; Anything you say will be taken down and may be used in evidence at your triaf'. This provision is also emphasized by the contents of section 246(5) of CPA. The RMs Court records reveal that the accused was informed on this provision before she made the statement. Records show: Court: The requirements under section 246(2) of the Criminal Procedure Act Cap 20 RE 2002 have been complied with. Sgd: R.E Mwijage- PRM 8/1/2016 Court: The accused is hereby addressed in terms of section 246(3) and (4) and she replies as follows: It is then that the accused person makes her statement already presented hereinbefore. This situation was also considered by the Court of Appeal in Leonard Jonathan vs. Republic, Criminal Appeal No. 225 of 2007 at Arusha which held under section 246(2) of CPA an accused person can know in advance of his trial the kind of evidence and the witness who will give evidence in the trial. Therefore we find that the statement of the accused at the committal proceedings is useful to further substantiate the evidence presented by the prosecution on relevant facts addressed. There is also the defence raised by the accused person that she had signed Exh. P4 not with her full faculties, we find not substantiated by any evidence. This Court is aware of the fact that the accused person has no duty to prove her innocence but only to raise doubts. The Court had ample time to observe the 15 "" =. ,,,. :. . . -~ .. accused person in Court and found her to be lucid and able to express herself very -well when given an opportunity as can be observed from her testimony during trial within trial and when she gave her defence. The Court observed the accused as being alert in Court and the Prosecution witnesses all testified that the witness had signed Exh.P4 soon after a toilet visit where she defecated pellets. Bearing this in mind we find the accused defence an afterthought and not grounded on any plausible evidence that would lead the Court to determine that it raises doubt on the prosecution evidence. We therefore find that the prosecution have proved this fact of th_e_a_ccused having defecated 75 pellets and consequently issue number 2 is answered in the affirmative. We now move to the third issue for consideration and determination, that is, if as we have already found that the accused person defecated 75 pellets alleged to contain narcotic drugs, whether the chain of custody was not broken from the point of the pellets defecation, seizure, analysis to being tendered in Court and admitted as Exh. P2 and whether the said pellets were narcotic drugs, that is, heroin hydrochloride as per the charges against the accused person. For the prosecution the chain of custody of the 75 pellets defecated by the accused person was at no time .compromised or broken, contending that, after the accused defecated the pellets, at each interval there was the shift head who took them and stored them and later handed to Afande Neema who registered the handover and labeled the relevant envelope with the relevant case number and that it is the said pellets she had labelled which were packed on the 7/11/2012 and taken to the Government Chemist on the 8/11/2012 and found to be narcotic drugs- type of heroin hydrochloride upon analysis by the chemists. On the other

hand, the accused person denied any knowledge of the 75 pellets stating she did not defecate anything during the time she stayed at ADU-JNIA and that she has no knowledge of the said pellets alleged to have narcotic drugs 16 ~---~--- t The position or the prosecution on this issue was that the handling of the pellets from the time when they were allegedly defecated by the accused person, stored at the ADU offices as testified by 2 witnesses (PW3 and PW16) and handed to Afande Neema PW2 who .stated she had been handed by two people (PW3 and PW16) and recorded this in the Exhibit Register while the those handing had stated they had recorded in the Occurrence Book (OB) and their diaries. There is Exh.P4, the observation form showing the number of pellets defecated at a particular time. PW2-Neema Mwakagenda also stated at length how she stores the exhibits in the exhibit room, .the fact she puts them in an envelope which she labels with the police file number and then the packaging where she packed the exhibits to deliver to the CGC ,in the presence of witnesses at ADU including PW4- Zainab Dua Maulana, the ten cell leader of Kurasini Ufundi area where ADU offices are situated who gave evidence that she had witnessed the packing by Afande Neema who had counted the 75 pellets in their presence taking them from the exhibit room on the 7/11/2012, that the accused was also present. PW4 also identified the contents of Exh. P2 as similar to the pellets she had witnessed being packed in terms of shape, size, colour and also stated the differences she saw, that is the numbers and the extra cellotape in the pellets. The evidence of PW1 on receiving the package at CGC office after registration, that the package had the case file number, and was brought by PW2. The evidence by PW1 that after completing the preliminary test and taking samples for the confirmatory test he packed the exhibits and handed it to PW2, that he had signed the envelope and put the official stamp on it which he identified in Court when testifying. PW1 identified the envelope with the exhibit admitted as Exh.P2 as what he had wrapped and sealed and handed to PW2 on the 7/11/2012 after the preliminary analysis. PW2 stated that he had kept the package in the exhibit room until the time it was tendered in Court. With this evidence the prosecution contention is that the chain of custody. was not compromised at any time from the time of 17 t seizing the pellets defecated by the accused person at JNIA to the time they were tendered in Court and admitted as Exh. P2. The other evidence for the prosecution is the cautioned statement which was admitted as Exh.P7 and we have already discussed in determination of the previous issue. On the part of the defence, they only had one witness and tendered one exhibit for identification purposes admitted as -Exh. 1001. The defence sought to advance that the accused could not defend herself by reason of mental instability, which was ruled out by the court stating that it found her mentally stable. The defence contention is still that the accused is mentally unstable stating that her testimony showed she was confused and had stated that she had signed the caution statement Exh.P2 while not knowing the contents and she had been forced to sign the statement at JNIA while sometimes when questioned by the Court she said she had signed it at ADU offices Kurasini. This.. aspect we have already determined in the last issue. The concept of chain of custody we find was amply expounded by the Court of Appeal in Paulo Maduka and others vs Republic, Criminal Appeal No. 1' 10 of 2007 where it held: "By "chain of custody" we have in mind the chronological documentation and/or paper trail, showing

the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime - rather than, for instance, having been planted fraudulently to make someone appear guilty. Indeed, that was the contention of the appellants in this appeal. The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it".¹⁸ Therefore without doubt the importance of proving chain of custody was not -broken cannot be more emphasized. The principles governing chain of custody for handling exhibits have been expounded in various cases. In Criminal Appeal No. 348 of 2015, Zainab Nassar@ Zena vs. The Republic and Criminal Appeal No. 28 of 2010, Abuhi Omari Abdallah and others vs. Republic propounds that evidence should show how each stage of holding of the exhibit was done from seizure, custody, control, transfer as required by PGO No. 229 Order 40. We are also aware of the various legal provision as cited by the defence on handling of exhibits from time of seizure. We also find distinguishable the cases i I of Abuhi Omari Abdallah and 3 others (supra) because dissimilar to this case, in the said case the witnesses failed to establish where the exhibits were stored for safe custody while in the present case PW2 expounded on the ADU exhibit room as the storage place and the fact that exhibits are labeled with case number. The Court is aware of a chain of precedents of the Court of Appeal settling the proposition that the. exhibits must not only be properly handled, but each such stage of custody through which they pass must be shown and tendered in Court. At the same time we are guided by the holding in the case of Charo Saidi Kimilu and Mbwana Rua Kubo vs Republic, Criminal Appeal No. 111 of 2015 pronounced on the 16th of September 2015 at pg. 17, where the Court of Appeal stated that chain of custody may be proved by oral evidence. " We are also of a considered view that, the chain of custody was not broken from the time of arrest to testing by the Chief Government Chemist and tendering in the trial Court relying on the evidence of PW2, PW3, PW4 and PW4". We find this case having pronounced in 2015 has expanded on previous holding of ensuring that chain of custody is not broken by holding the oral evidence of witness is enough to prove handling of exhibit. ¹⁹ We have considered the evidence of the Prosecution and defence on this issue and find that while it is true that the prosecution witnesses did not tender any documentary evidence to show stages of handling that in itself alone does not deduce that chain of custody was broken. The evidence of PW3 and PW16 who had taken the seized pellets ·defecated by the accused person to PW2 for safe keeping, testified orally on how the handing over was recorded in the Occurrence Book at the Airport and the Exhibit Register- PF 16, a fact acknowledged by PW2- the exhibit keeper who also labeled the pellets with a case number JNIA/IR/265/2012- which is a marking/labelling in itself. There is the evidence of PW4- a ten cell leader of the area, who witnessed the packing of the 75 pellets and PW2 who packed and sealed the pellets on 7/11/2012 at ADU. At the Chief Government Chemist on 8/11/2012, the exhibit was labeled as Lab No. 813/2012 at the reception area and unsealed in the laboratory by PW1 in the presence of PW2 and upon verification of the number of pellets proceeded with analysis. This is also a labeling- a marking by the Chief Government

Chemist Office. PW1 acknowledged unsealing upon verification of the contents as seen from the accompanying letter and PF 180 Form which he acknowledge receiving it. The exhibit-Lab No. 813/2012 (Exh. P2) went through preliminary test which included weighing and analysis of contents and thereafter handed back the exhibit to PW-2 also having packed it and sealed it, a seal acknowledge by PW1 to be there when he unsealed the exhibit in Court-exhibit admitted as Exh.P2. This acknowledgement by PW1 in Court, shows that what he had packed at their offices on the 8/11/2012 is what was tendered in Court, since he also identified the office stamp and his signature on the cover of Exh.P2. From this, from the said evidence we have considered and having considered the denial by the accused and having found that there is no evidence advanced by the defence to raise doubts on the prosecution case on the issue, we are convinced that at no time was the chain of custody compromised or broken. 20 ----- . ' We now move to the second arm of the third issue, whether 75 pellets defecated by the accused person had narcotic drugs and whether it was heroin hydrochloride. The evidence before the Court on this issue is that by the prosecution, were PW1-Machibya Ziliwa Peter- with nine years' experience in analysing samples including narcotic drugs brought to their office having undergone various trainings in the area gave evidence that on the 8th of November, 2012, he had been directed by his supervisor to undertake an analysis of exhibits delivered by ADU officers given Lab No. 813/2012 at the reception. PW1 narrated all the undertakings done when such samples/exhibit arrive, to verify the contents of the accompanying covering letter on the number of the exhibits, which had stated they were 75 pellets and upon verification continued with the preliminary test analysis assisted by other chemists in the presence of Afande Neema who had come with the exhibit and other police officers. That he had first weighed the contents of the pellets and found to be 994.97. The witness gave evidence on how they arrive to know the weight and how the conduct the preliminary test. That the preliminary test found the pellets to have heroin hydrochloride. That after this was conducted, the pellets were covered up where the samples had been taken and taken for confirmatory test were kept in vials, about 75 vials commensurate with the number of pellets. He then repacked the exhibit, signed on top and put the official stamp and handed the package back to Afande Neema. That afterwards a confirmatory test was conducted using samples from each pellet and confirmed the preliminary test results that the pellets relevant to the case file number of the accused contained_ heroin hydrochloride, he prepared a report which was tendered in Court and admitted as Exh.P1. PW2 Neema Mwakagenda also testified on being present when the 21 ___J preliminary analysis and, finding were given and Exh.P1 establish the prosecution contend that Exh.P2, contained heroin hydrochloride and thus narcotic drugs. The value of the narcotic drugs was testified by PW7-Christopher Joseph Shekiondo, the retired Commissioner of the Drug Control Commission, who narrated how he came to the value, stating they use the markeUcommercial value at the date of apprehension which is discerned by the Research team of the Commission. That to arrive at the value they rely on the information/report from the Chief Government Chemist on the type of narcotic drugs and the weight determined. The certificate of value was admitted as Exh.P3 to support this evidence. We have taken into consideration the evidence and submissions by the

Prosecution and the defence and the case cited to support their cases. Having regard to the evidence of PW1 and PW2 and Exh.P1, there is no doubt that the 75 pellets analysed were found to contain heroin hydrochloride. This fact has not in effect been challenged by any contrary evidence from the defence. The issue before us is whether what was examined/analysed at the Chief Government Chemist and labeled as 813/2012 brought by PW2 on the 8/11/2012 which has been admitted as Exh.P2 in this Court is what was seized upon being defecated by the accused person at JNIA between 5th and 7th November 2012. We are thus contended that the candidate analysis of Exh.P2 which was at one time labeled JNIA/IR/265/2012 and then Laboratory Number 813/2012 and now Exh.P2 contains narcotic drugs as expounded in Exh.P1- a report from the Chief Government Chemist which having taken all the relevant factors in consideration, this Court is persuaded that it reveals narcotic drugs were found in the 75 pellets defecated by the accused person. We also find that the weight and value of the narcotic drugs found- heroin hydrochloride is as contained in Exh.P1 and Exh. P3. Our finding on the challenge on valuation on Exh.P3 we adopt the contents 22 of our position on this contained in the Court records. Therefore issue number 3 is determined in the affirmative. Moving to issue number 4, that is whether the accused person did traffic 75 pellets containing heroin hydrochloride as charged PW14- P2567 D/SGT Enock evidence was that on the 5/11/2012, he was working with Interpol at JNIA- working in the new wing area where departing and arriving passengers use. At 16.00hrs when Ethiopian Airlines has started check in he stopped the accused -person, a passenger for Hong Kong having received information from an informer that there was someone travelling with Ethiopian airlines who had swallowed narcotic drugs. He questioned her and was not satisfied with her responses thus directed WP Farida to take her for further questioning. They took her ticket and passport and handed the items to Afande Joseph having suspected her of having narcotic drugs after the interview. PW16-E2926 D/SGT Dacto evidence also supported the fact that he was handed a passport and ticket belonging to the accused from WP Valentine. From this evidence and that of DW1 when testifying in Court and what was agreed during the Preliminary Hearing, there is no doubt that on the day the accused person was arrested she was travelling to Hong Kong. This is also cemented by the evidence in Exh. P7. There is also the evidence of Exh.P6 the accused passport which reveals the visa for China for the accused person and the Ethiopian Airways ticket Exh.P5- all this expressly revealed that the accused was travelling outside the country. The defence by the accused was one of denial, stating that, though he was travelling to China, it was for business purposes- to purchase clothes and not for purpose of drug trafficking. The accused person also challenged the credibility of witnesses who were called by the prosecution stating they lied and they were inconsistent. Alluding to the evidence of PW12- Pamela Michael Mmassy that he had adamantly stated that the colour of the emitted pellets was white in colour 23 while all the other witnesses for the prosecution had stated that the defecated pellets were either cream, off white or milkfish in colour. The denial of the accused in itself as stated earlier does not raise any doubts on the prosecution witness on the issue of emitting pellets as already held in this judgment. This is cemented by the fact that the Court had time to watch, hear and assess all the witnesses testifying in this Court, and found them to be confident and

knowledgeable on what they were testifying. The fact that PW12 stated that the pellets were white and not cream, off-white or milkfish in colour as the other witnesses we take to be the way different people internalize or conceptualize issues. The issue of colour is also very controversial in that how people see colours- white and cream in actuality are not so different to warrant this Court to find PW12 evidence unreliable. We thus find such discrepancy to be minor not going to the root of the matter, that is, pellets emitted being bright in colour in the creamish- whitish category and it is these pellets which were then analysed and found to contain heroin hydrochloride. When you take all the evidence presented in Court and the finding of this Court that indeed the accused person did defecate 75 pellets at JNIA after her arrest on 5th November 2012. There is also the finding of this Court that the 75 pellets proved to have been defecated by the accused person were narcotic drugs- heroin hydrochloride, then this only leads to one conclusion, that the accused person did traffic narcotic drugs- heroin hydrochloride. This finding is drawn having extrapolated and considered the definition of a narcotic drug and what is trafficking? Trafficking being defined under section 2 of the Drugs and Prevention of Illicit Drugs Act, Cap 95 RE 2002 and relevant to the pertaining circumstances particularly subsection (c) that is export from United Republic of narcotic drugs, and also finding that heroin hydrochloride is within the definition of a narcotic drug as contained under Section 2 of Cap 95 and the First Schedule thereto. In 24 the premises we therefore find that the prosecution proved the fact that the accused person did traffic narcotic drugs that is heroin hydrochloride. When considering and determining the four issues above particular defences pertaining to the said issues were addressed. We will now look at the remaining defences not discussed hereinabove which were for general purposes to raise doubts to the presented prosecution case. Particularly the issue of unsoundness of mind which came out during trial proceedings. This issue can also be discerned from Exh P7, already found to be a confession where inside though not formally presented, the accused person seemed to be raising the defence of being of unsound of mind leading this Court to also consider this defence though not properly articulated. There is also the fact that the accused person in her testimony averred that she suffers mental issues and concerns emanating from epileptic attacks which she gets, and that these attacks sometimes can edge into instability or delusion on occasions and loss of memory and that she is undergoing treatment. This defence came about clearly, after the conclusion of presentation of the prosecution case and before the start of the defence, the defence had prayed to the court for the accused person to go for medical examination of her mental capacity to put his defence. The Court having considered the submissions by the parties had refused this motion. The prayer by the defence advanced was under section 216(3) of the Criminal Procedure Act, Cap 20 RE 2002. The said provision states: "if at the close of the evidence in support of the charges it appears to the Court that a case has been made out against the accused person, it shall then proceed to inquire into the fact of the unsoundness of mind of the accused and, for this purpose, may order him to be detained in a mental hospital for medical examination or, in case where bail may be granted, may admit him to bail on 25 sufficient security as to his personal safety and that of the public and on condition that he submits himself to medical examination or observation by a medical

officer as may be directed by the Court' The Prosecution challenged this, stating it was an afterthought and improperly submitted. We start with the general premise that under Section 12 of the Penal Code. The general presumption in criminal law is that every person is sane; or rather that he/she is always in his or her right state of mind at all times and is therefore expected to know what he or she is doing. That is that a person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved. This Court dealt with the matter as can be seen from the Court Ruling on the 29th of May 2017, for this section to be applied the Court has to consider section 216(1) of CPA that the Court has to have reason to believe that the accused is of unsound mind and therefore incapable of making his defence and Section 216(2) of CPA which applies after a prima facie case has been established and declared- where the Court may proceed to inquire into the unsoundness of mind of the accused person. The Court found to have no ground having regard to all circumstances of the case to find that the accused person to believe that or to suspect that the accused person is of unsound mind and incapable of giving defence and ordered for trial to proceed with the defence giving evidence. We should bear in mind the fact that though at no time did the accused person plead to insanity but she pleaded for the Court to allow her to inquire into the state of mind because the defence suspected she could not present her defence. The difference of the two positions was discussed by the Court of Appeal in the case of MT 81071 PTE Yusuf Haji @ Hussein versus Republic, Criminal Appeal No. 168 of 2015 (April 2016) where stated; 26 "There is a marked distinction between unfitness to make defence due to insanity and the plea of insanity as a defence to a charge or information. Section 216 to 218 of the CPA, lay down the procedure to be followed where the accused- - - person is suspected to be incapable of making his defence. In such situations, the issue is as to the unfitness of an accused person to plead and to take his trial and thus, the unsoundness of mind must relate to the time of the trial and the inquiry must be in relation to an accused's mental condition at the time of the trial distinct from his mental condition at the time of the commission of the alleged offence" the case of Tarino vs. the Republic (1957) EA 553 was cited. Having regard to the circumstances in the case it was guided by the provision of section 216(2) and (3) of the CPA. Subsection (3) only applying where the Court proceeds to inquire where it appears to the Court that the accused is of unsound mind and therefore incapable of making his defence. In this case, the Court found no need to proceed to an inquiry being satisfied on the sanity of the accused person and that she was capable of making her defence. Which she did in great detail. Therefore we find that this defence fell and the accused. person was not any anytime denied any opportunity to defend herself and all the principles governing to a fair trial were adhered to in compliance with the laws. Moving to the last issue for consideration, whether the prosecution have proved the charges beyond reasonable doubt. Having found all the issues in the affirmative and having carefully analysed the defence submitted we find that no doubt was raised to challenge the prosecution case. My summing up to the Honorable assessors before requesting their opinions was of the facts and I outlined the main factual issues involved in the case. Using the best of my abilities I also explained to them legal concepts and arguments raised by the prosecution and the defence

counsels. Thereafter, I requested each one of them to share with me his or her opinion, as to the guilty or innocence of the accused person with regard to the offence charged. The Honourable Assessors unanimously were of the opinion that the accused person is guilty as charged and that the Prosecution side proved their case beyond reasonable doubt. For reasons already advanced and demonstrated in this judgment, I find no plausible reasons to depart from the findings of the Honourable Assessors. I am satisfied that the Prosecution have proved the case against the accused person beyond reasonable doubt. In the premises the accused person TASIA OMARY KITWIKU is found guilty of the offence charged, that is Trafficking in Narcotic Drugs contrary to Section 16(1)(b)(i) of the Drugs and Prevention of Illicit Drugs Act, Cap 95 R.E 2002 and consequently convicted accordingly. Ordered . . .

Winfrida B. Korosso JUDGE 5th September 2017 the presence of Ms. Clara Chawe, Learned State Attorney representing the Republic and Ms. Eugenia

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