

TANZANIA / JUDGMENT

Judgement Criminal Appeal No

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT MOSHI CRIMINAL APPEAL NO. 24677 OF 2024 (C/F Criminal Case No. 501401 of 2023 in the District Court of Moshi at Moshi) GEORGE FRANK DAUDA..... APPELLANT VERSUS DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

JUDGEMENT

10th February & 10th March 2025. MONGELLA, J. This case emanates from the District Court of Moshi, at Moshi (henceforth, the trial court) in Criminal Case No. 501401. In the said case, the appellant stood charged with the offence of trafficking narcotic drugs contrary to Section 15A (1) (a) and (2) of the Drugs Control and Enforcement Act, 2019. It was the prosecution's account that on 08.05.2023 at 15:00hrs at Mjohoroni area within the District of Moshi in Kilimanjaro Region, the appellant trafficked forty-two nine zero (42.90) kilograms of narcotic drugs to wit, Catha edulis (Khat), commonly known as "mirungi." Upon hearing that case, the trial court found in favour of the prosecution side. Consequently, it sentenced the appellant to serve the minimum Page 1 of 18 term of thirty (30) years in prison. Along with the imprisonment term, the trial court ordered for confiscation of a motorcycle make SINORAY, with Chassis No. LD3PCK6J6M2014041 and for the narcotic drugs to be destroyed in terms of Section 353 of the Criminal Procedure Act, Cap 20 R.E. 2022. Aggrieved by the conviction and sentence, the appellant preferred this appeal seeking for the conviction and sentence to be quashed and set aside, respectively. He had the following grounds:

1. That, the learned trial Magistrate erred in law and fact in convicting and sentencing the Appellant herein while prosecution failed to prove its case beyond reasonable doubt.
2. That, the trial Magistrate erred in law and fact in convicting the Appellant herein while there was no proper chain of custody.
3. That, the trial Magistrate erred in law and fact in convicting the Appellant while seizure certificate was not legally prepared and signed.
4. That, the learned trial Magistrate erred in law and fact by failure to properly evaluate the evidence on record and hence wrongly convicted and sentenced the Appellant. Page 2 of 18 The appellant enjoyed legal services of Mr. Pius L. Ndanu, learned Advocate. On his part, the respondent was represented by Ms. Amina D. Mkayala, learned State Attorney. By

consensus, the appeal was argued by written submissions, duly filed within time by both parties. On the onset, Mr. Ndanu informed the Court that the 3rd ground of appeal was abandoned. He further consolidated the 1st and 4th grounds of appeal. Addressing the consolidated grounds of appeal, he commenced by echoing the legal duty on the prosecution in proving the case beyond reasonable doubt. He held the stance that the prosecution failed to discharge this legal duty. Expounding this assertion, he contended that one of the ingredients on the offence of trafficking in narcotic drugs is “possession or control” of the said drugs. Referring to Exhibit P2, a tricycle in which the narcotic drugs were found in, he argued that for the conviction to be sustained, the prosecution had to prove that the appellant was in control or possession of the exhibit. Referring to the evidence on record, he challenged the prosecution for failure to prove the appellant being in possession or control of the exhibit. In the premises, his stance was that the charge was not proved beyond reasonable doubt. Mr. Ndanu proceeded to challenge the prosecution evidence claiming that it was contradictory to the root of the case, thus incapable of warranting a conviction. Specifically, he attacked the testimony of PW2 and PW3 who appear to be eye witnesses. Page 3 of 18 Explaining the alleged contradictions, he contended that the two witnesses contradicted in describing the colour of the sulphate bag/sack carrying the alleged narcotic drugs. That, while PW2 mentioned it to be “navy blue” in colour, PW3 stated that it was “green” in colour. Still on the sulphate bag, he argued that while PW3 testified that there were 4 small sacks in the sulphate bag, PW1 stated that there were 3 sulphates. He further pointed another contradiction relating to the appellant’s description by PW2 and PW3. He contended that while PW2 described the appellant as “short and black”, PW3 described him as “short and white.” Arguing on the consequences of the alleged contradictions, Mr. Ndanu contended that the contradictions are very fatal and affect the prosecution case. He argued that since the prosecution is obliged to prove the case beyond reasonable doubt, the contradictions become more serious as the appellant had denied being arrested in that area and being found with the alleged luggage. In that respect, he held the stance that the trial court ought to have accorded the appellant benefit of doubt instead of convicting him. Still challenging the credibility of the prosecution evidence basing on contradictory evidence, Mr. Ndanu referred to the testimony of PW4 and PW1. He challenged their testimonies for being implausible considering the time of events stated by these witnesses. Expounding on that, he averred that PW4 testified that he received the case file Page 4 of 18 and went to the exhibit room and saw the exhibits then recorded the cautioned statement between 17:07pm and 18:30. He contended that, on the other hand, PW1, who is the exhibit keeper, testified to have received the exhibits on the very same date at 11:25 in the evening. Wondering how PW4 could inspect exhibits not yet received, Mr. Ndanu found the situation posing serious doubts on the prosecution evidence as to whether the exhibits mentioned by PW4 are the ones submitted at the police station, examined by the Government Chemist and tendered before the trial court. He further contended that the situation shows that the appellant was never recorded any cautioned statement as he alleged when the same was tendered in court. He maintained his position that such doubts should have been interpreted in favour of the appellant. He faulted the trial court for not addressing

and considering the alleged contradictions in favour of the appellant. To support his position, he referred the Case of Chacha Ng'era vs. The Republic, Criminal Appeal No. 87 of 2010 (CAT at Mwanza, unreported). Stressing that the prosecution failed to prove the case beyond reasonable doubt, Mr. Ndanu challenged the prosecution for failure to prove if the motorcycle was used by the appellant to traffic narcotic drugs. He contended that during cross examination of PW4 by the appellant about the owner of the motorcycle (exhibit P2), he Page 5 of 18 replied that "you are the owner of the motorcycle if you fail to mention the owner it means it belongs to you." He considered the answer as shifting the burden of proof to the appellant, rendering the prosecution to have failed to prove its case. Referring the decision in Director of Public Prosecutions vs. Shishir Shyamsingh, Criminal Appeal No. 141 of 2021 (CAT at Kigoma, unreported), he insisted on the legal principle that the burden of proof beyond reasonable doubt lies with the prosecution side. He concluded on these grounds praying for the Court to expunge "Exhibit P2" from the trial court record. Addressing the 2nd ground, he faulted the trial court for convicting the appellant in the absence of proper chain of custody of "Exhibit P1." Expounding this assertion, he contended that PW1 stated to have handed to Corporal Adeide a sulphate with fresh leaves, marked "IR/1580/2023" to take to the Government Chemist and the same was returned to him on the very same date. He further referred the Court to PF 16 (as reflected at page 11 of the typed proceedings), under which PW1 shows handing of the exhibit between him (PW1) and Corporal Mchunguzi. He added that PW1 testified further that the exhibit as well contains the signature of PW1 and that of the said Corporal Mchunguzi and registered with No. 130/2023. Majengo, IR1580/2023. In the premises, Mr. Ndanu challenged proof of chain of custody arguing that there is nowhere in the said exhibit showing the said Page 6 of 18 Corporal Adeide signing to have received "Exhibit P1" or receiving it upon return from the Government Chemist. In the circumstances, citing the case of Peter Kihanda & Another vs. The Republic, Criminal Appeal No. 96 of 2021 (CAT at Dodoma, unreported), he insisted that the prosecution failed to prove its case beyond the required standard. He thus concluded by calling for the trial court's conviction and sentence to be quashed. The appeal did not go unopposed. In her reply submission, Ms. Mkayala had the firm stance that the prosecution proved the case to the hilt through the 5 witnesses it paraded. She replied the grounds of appeal by consolidating the 1st and 2nd grounds. Replying on these grounds, she started by showing the ingredients of the offence charged of which the prosecution was duty bound to prove beyond reasonable doubt. Referring to Section 15A (1) (a) (2) of the Drugs Control and Enforcement Act under which the appellant was charged, she mentioned the ingredients of the offence to be: (i) that, the substance found is really or true a narcotic drug; (ii) that, the drugs were found in possession of the accused; (iii) that, the weight of the drugs must be proved; and (iv) that, the chain of custody must be well maintained from the day the substance was seized to the day it was delivered in court. Addressing whether the said ingredients were met or not, Ms. Mkayala contended that; on the first ingredient, it is evident on record that the Page 7 of 18 drugs were real narcotic drugs, to wit, Catha edulis (Khat), commonly known as "Mirungi." To substantiate her position, she referred the Court to the testimony of PW5, the Government Chemist, who proved the substance being Khat as

well as to a report tendered to that effect and admitted as “Exhibit P6.” To further bolster her argument, she referred the Court to the case of Omary Said @ Athumani vs. Republic, Criminal Appeal No. 58 of 2022 (CAT at Tanga). With respect to the second ingredient, it was her argument that PW2 and PW3 well proved that “Exhibit P1” the narcotic drug was found in possession of the appellant. She added that PW3 corroborated this evidence by identifying the appellant in court and stating that the appellant was indeed found with “Exhibit P1.” In addition, she reacted on the appellant’s assertion challenging his description by the prosecution witnesses (PW2 and PW3) for being contradictory. She considered the alleged contradictions being minor arguing that some people are colour blind, that is, they fail to see colours in the traditional way because some cones (nerve cells) in their eyes are missing or do not work correctly scientifically. Showing further that the contradiction is insignificant, she contended that both, PW2 and PW3, mentioned the appellant by his names “George Dauda & George Frank Dauda” in their testimonies, rendering the appellant well identified. Page 8 of 18 As to the third ingredient, Ms. Mkayala contended that proof of weight of the drugs is crucial in establishing the offence and the jurisdiction of the court. As to whether the same was proved or not, it was her stance that the same was proved through the testimony of PW5 who testified to have weighed the drugs and found them weighing 42.90kgs. Speaking of the last ingredient, as to the chain of custody, she started by appreciating the legal stance that the chain of custody of exhibits must be well maintained to ensure high evidential value of the exhibit in the eyes of the law. To that effect, she referred the case of Paul Maduka & 5 Others vs. The Republic, Criminal Appeal No. 110 of 2007 (CAT at Dodoma). She then stated her position that the chain of custody was well maintained. Substantiating her stance, she referred the trial court record saying that it started during the appellant’s arrest on 08.05.2023 with PW3 witnessing the search and seizure of the narcotic drugs, which were “fresh green leaves-Mirungi” “Exhibit P1.” She explained further that after that the seizure certificate was signed by PW2, the arresting officer, PW3, and the appellant himself. That, thereafter, “Exhibit P1” was handed to PW1, the exhibit keeper, on the same day. She explained further that transfer of “Exhibit P1” from PW2 to PW1 was effected by a chain of custody document which was admitted as “Exhibit P3.” She contended that this was done to ensure that what Page 9 of 18 was seized at the crime scene was exactly what was handed to the exhibit keeper. She went ahead submitting that on 09.05.2025 when PW4 wanted to take “Exhibit P1” to the Government Chemist (PW5), he went to the exhibit room whereby PW1 handed the exhibit to him and PW4 signed out the exhibit through “Exhibit P3.” That, PW4 also signed through “Exhibit P3” when he returned back the exhibit. She added that PW5 also acknowledged to have received “Exhibit P1” on 09.05.2023 from PW4 and that he returned the exhibit on the very same date after taking samples from each parcel for examination. Considering the above explanation, Ms. Mkayala held the stance that the movement of the “Exhibit P1” was effectively done during investigation and well demonstrated during trial. She as well disputed there being any contradiction regarding the time “Exhibit P1” was taken from the exhibit keeper. She contended that upon observing “Exhibit P3” they found that the exhibit was taken on 09.05.2023 PW4 and returned back on the same date (she however never mentioned the time

when the exhibit was taken, which is the point of controversy in this ground of appeal). Responding to the appellant's contention that the prosecution ought to have proved that the tricycle "Exhibit P2" was in his possession, Ms. Mkayala considered that not being an essential ingredient of the Page 10 of 18 offence to be proved. She argued that all the ingredients of the offence were proved by the prosecution and the fact that "Exhibit P2" was used in commission of the offence was also proved. She thus called for the Court to dismiss the appellant's prayer that "Exhibit P2" be expunged from the record. Addressing the 4th ground of appeal under which the appellant faults the trial court for failure to properly evaluate the evidence on record, Ms. Mkayala simply referred the Court to page 11 to 18 of the trial court's Judgement. She claimed that it is vivid on those particular pages that the trial court well evaluated and considered the evidence pf both sides and found the prosecution evidence carrying enough weight to convict the appellant. Generally, she found the whole appeal lacking merit and urged the Court to dismiss it. No rejoinder submission was filed by the appellant's counsel. In the premises, I hereby proceed to deliberate on the appeal. Upon scrutinising the grounds of appeal, the trial court record and the submissions by both parties, I find the whole appeal can be disposed under one main ground, which is as to whether the charge against the appellant was proved by the prosecution beyond reasonable doubt. Page 11 of 18 As already stated, the appellant was charged with the offence of trafficking narcotic drugs contrary to Section 15A (1) (a) and (2) of the Drugs Control and Enforcement Act, 2015. 15A.-(1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals or substances with drug related effects or substances used in the process of manufacturing drugs of the quantity specified under this section, commits an offence and upon conviction shall be liable to imprisonment for a term of thirty years.

- (2) For purposes of this section, a person commits an offence under subsection (1) if such person traffics in-
 - (a) narcotic drugs, psychotropic substances weighing two hundred grams or below;
 - (b) precursor chemicals or substance with drug related effect weighing 100 litres or below in liquid form, or 100 kilogram or below in solid form;
 - (c) cannabis or khat weighing not more than fifty kilograms The appellant in this matter was charged for trafficking forty-two nine zero (42.90) kilograms of narcotic drugs to wit, Catha edulis (Khat), commonly known as "mirungi." The appellant, through his counsel, Mr. Ndanu, challenged the prosecution evidence and the conviction that followed on grounds that: one, the prosecution failed to prove his possession or control of the drugs. He based much on "Exhibit P2", the Page 12 of 18 motorcycle found carrying the narcotic drugs and allegedly driven by the appellant. Two, the prosecution evidence contradicted to the root of the case on a number of things being, one, that PW2 and PW3, supposedly eye witnesses, mentioned different colours of the sulphate bag allegedly carrying the narcotic drugs, as blue and green; two, that PW3 and PW1 contradicted on the number of sulphates found with the appellant whereby while PW3 mentioned 4 small sacks, PW1 mentioned 3 sacks; three,

that the evidence contradicted as to the description of the appellant whereby while PW2 described the appellant as “short and black” PW3 described him as “short and white.” Three, the appellant further challenged the prosecution evidence for being implausible as to the time the exhibits were received by the exhibit keeper at Majengo police station. He considered the testimony of PW1, the exhibit keeper who testified to have received the exhibits at 11:25 in the evening and that of PW4 who testified to have seen and inspected the exhibits at the exhibit room immediately before recording the appellant’s cautioned statement between 17:07pm and 18:30pm. He wondered how the exhibits could be examined while not yet received. Page 13 of 18 On the other hand, Ms. Mkayala, learned State Attorney, did not in essence refute the alleged contradictions. She only described them as being minor and not going to the root of the case. Her stance was that the case was proved in consideration of the elements of the offence needing to be proved as enshrined under Section 15A (1) (a) and (2) of the Drugs Control and Enforcement Act, being that: (i) the substance must be a narcotic drug; (ii) the drugs must be found in possession of the accused; (iii) the weight of the drug must be proved; and (iv) the chain of custody must well be maintained from the date of seizure to the date of delivery in court. With regard to the ingredients of the offence to be proved I cannot agree less with Ms. Mkayala. However, considering the ingredients as mentioned above, I find the question as to whether the drugs were found in possession of the accused/appellant being at issue in consideration of the alleged contradictions by the appellant. It is trite law that where contradictions are alleged to exist in the evidence of either side, the court has the duty to determine as to whether such contradictions go to the root of the case as to affect the same. See, *Matera Simango @ Masana vs. The Republic* (Criminal Appeal No. 517 of 2019) [2021] TZCA 621 (29 October 2021); *Abasi Makono vs. The Republic* (Criminal Appeal No. 537 of 2016) [2019] TZCA 299 (30 August 2019); and *Emmanuel Josephat vs. The Republic* (Criminal Appeal No. 323 of 2018) [2018] TZCA 207 (2 October 2018). Page 14 of 18 It should be noted that in his defence, the appellant denied being caught in possession of any narcotic drugs. He claimed to have been arrested at a place where he was with his friends, who were consuming khat, cannabis and alcohol, but ran away escaping arrest. During hearing, the prosecution through PW4 tendered supposedly the appellant’s cautioned statement. The trial court admitted the cautioned statement after conducting an inquiry following the appellant repudiating the same. He claimed to have not made any statement, but forced to sign a document, which came to be tendered as his cautioned statement. The law is clear that a repudiated/retracted cautioned statement can only be relied upon in presence of some other corroborative evidence, unless the trial court assures itself of its credibility and dangers of acting on an uncorroborated statement. See, *Nehemia Rwechungura vs. The Republic* (Criminal Appeal No. 71 of 2021) [2021] TZCA 704 (30 November 2021) and *Ali Salehe Msutu vs. Republic*

[1980] TLR 1. In the matter at hand, the corroborative evidence on record, in my observation, is the one presented by other witnesses, of which the appellant challenges for being contradictory and implausible as explained hereinabove. Since the appellant denied being caught in possession of the narcotic drugs, then in my considered view, the description of

the drugs and its packaging becomes crucial. It is not disputed by both parties that Page 15 of 18 there was contradiction as to the colour of the sacks/packaging of the narcotic drugs whereby the prosecutions witnesses contradicted by mentioning different colours, to wit, blue, navy blue, red and green. Ms. Mkayala considered the contradiction minor while further defending that some people are colour blind not being able of describing the exact colours. While I agree about some people being colour blind, I am of the view that each case has to be treated in accordance with its own circumstances. In the matter at hand, I find this issue crucial and going to the root of the matter as the appellant denied being caught with the drugs. If indeed the prosecution witnesses were colour blind, that fact should have been established during trial taking into consideration that the prosecution was aware of the exact colour of packing and noted the discrepancy between its witnesses in mentioning the colour. Bringing the argument at this appellate stage renders the same coming from the bar, which cannot be entertained. The appellant further challenged the prosecution evidence as to the time of receiving the exhibits at the exhibit room on ground of being implausible. While I am alive of the position that the discrepancy by the witnesses on time might not be fatal due to lapse of memory after passing of time (See, *Wilson Elisa @ Kiungai vs. The Republic* (Criminal Appeal No. 449 of 2018) [2022] TZCA 629 (13 November 2022)), I am still of the opinion that each case has to be treated in accordance Page 16 of 18 with its own peculiar circumstances. In the matter at hand, the appellant's counsel, in challenging the credibility of the prosecution witnesses, contended that the evidence as to receiving of exhibits was implausible connoting the exhibits reaching the exhibit room prior to the appellant being taken to the police station. The testimonial evidence on record shows that PW1 received the exhibit, to wit, the narcotic drugs and the motorcycle at 11:20 in the evening. PW1's testimony was corroborated by PW2 who testified to have handed the said exhibits to PW1 at 11:20 in the evening. On the other hand, PW4 testified to have received the case file and thereafter went to the exhibit room whereby he saw the exhibits then went on to record the appellant's cautioned statement between 17:07pm and 18:30pm. Ms. Mkayala however, did not respond to this argument. To clear the air, I took the trouble to check on the record, that is, the Court Exhibits Register "Exhibit P3" and the allegedly appellant's cautioned statement "Exhibit P5". Exhibit P3 shows that the exhibits were received at the exhibit room by PW1 on 08.05.2023 at 17:20hrs. Exhibit P5 shows that the cautioned statement started to be recorded at 17:07hrs and finished at 18:30hrs. In these circumstances, I agree with the appellant's counsel that the testimony of the prosecution witnesses is implausible or rather sending a different message as to whether the alleged narcotic drugs were indeed found in possession of the appellant. If indeed PW5 saw the Page 17 of 18 exhibits before recording the cautioned statement, then it is evident that he saw the exhibits earlier than 17:07hrs. Taking into consideration the fact that both PW1 and PW4 must have looked at their watches to record the time in Exhibit P4 and P5, respectively, it is my observation that the discrepancy in time, as appearing in this matter, creates doubt as to whether the narcotic drugs and the motorcycle "Exhibit P1 and P2" respectively, were indeed the ones seized from the appellant. In that respect, the question of time cannot be considered as

minor. It goes to the root of the case at hand thereby affecting the prosecution evidence. From the foregoing observation, the prosecution is found to have not proved its case beyond reasonable doubt. As such, the conviction is hereby quashed and resulting sentence against the appellant is hereby set aside. The appellant should be released from prison custody forthwith, unless held for some other lawful cause. X L. M. MONGELLA
JUDGE Signed by: L. M. MONGELLA Page 18 of 18

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