

TANZANIA / JUDGMENT

yanga omari yanga vs republic

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IN THE COURT OF APPEAL OF TANZANIA ATTANGA (CORAM: MUGASHA, 3.A., MWANPAMBO. 3.A. And KOROSSO. 3.A.) CRIMINAL APPEAL NO.132 OF 2021 YANGA OMARI YANGA..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Tanga) (Banzi. 3.1 dated the 20th day of November, 2020 in Economic Case No. 1 of 2020 JUDGMENT OF THE COURT 24th May & 1st June, 2021 MUGASHA, J.A.: This is an appeal from the High Court of Tanzania in which the appellant is challenging his conviction and sentence after being found guilty of trafficking in narcotic drugs namely 1052.63 grammes of Heroin Hydrochloride on 1/10/2018, at Bombo area within the District, City and Region of Tanga. This was pursuant to the appellant, Rahma Ally Juma and Halima Anuary being jointly and together charged with trafficking in narcotic drugs contrary to section 15 (1) (a) (3) (1) (i) of the Drugs Control Enforcement Act [CAP 95 R.E. 2019] (the Drugs Act) read together with sections 57 (i) and 60 (2) of the Economic and Organised Crime Control Act [CAP 200 RE, 2019] and paragraph 23 of the First Schedule thereto. After the charge was read over to them, they all pleaded not guilty and totally denied the accusations levelled by the prosecution. In order to prove its case, the prosecution lined up seven witnesses along with several documentary and physical exhibits. From the prosecution account it is gathered that, following tips from an informer to the Drugs Control Enforcement Agency (the DCEA) that the appellant was to import a parcel containing narcotic drugs through the Tanga coast in the Indian ocean, the matter was followed up by DCEA. Subsequently, PW7 went to Tanga on 27/9/2018, conducted a surveillance on the life style, hobbies and properties which belonged to him and concluded that the appellant's main business was dealing in narcotic drugs imported through informal ports. Another DCEA official Inspector Daniel Mtebele who testified as PW2, told the trial court to have been directed by his superior to prepare an operational plan and lead a team of DCEA officials to Tanga for the purpose of tracking the appellant. This also was subsequent to another tip from an informer that the appellant was involved in narcotic drugs. On arrival at Tanga, PW2 liaised with the informer who assured him that the 2 appellant, using motor vehicle T325 DJX, would be ferrying narcotic drugs to a certain house in Bombo area within Tanga City. Since PW2 was shown the respective house, later at around 1.30 midnight he got another tip that the appellant was heading to his house. About thirty minutes later, that is at 2.00 p.m, PW2 moved to the

appellant's house accompanied by BEATUS TUNYawe, WP CHRISTIAN and the chair of street authority, MIRIAM KIwAMBO (PW6) who joined them later. They introduced themselves as officials from DCEA to the security guard who proceeded to wake up the appellant. He surfaced with a pistol which he surrendered after PW2 and colleagues introduced themselves and he was informed to be suspected in dealing in narcotic drugs. Then, PW2 commenced the search of the house led by the appellant himself in the presence of Inspector Wanriba and PW6, an independent witness. In the course of the search, beneath the bed of Halima (DW3), was found a pink clothed bag with nylon bag inside containing crumps substance suspected to be narcotic drugs. In her wardrobe, they retrieved four packets containing crumps substance suspected to be narcotic drugs. Along the corridor towards the appellant's bedroom they searched a wooden cupboard which was affixed to the wall and found tools of water for chicken and a polythene bag containing husks. Having taken out item by item, they 3 retrieved a black sox with dots on the top and upon opening it they found a black bag with pink flowers containing powder substance suspected to be narcotic drugs. They also found a black nylon bag containing powder or crump substance suspected to be narcotic drugs. Nothing was found in the appellant's room save for the licence book of the pistol. A further search in a certain room near the cupboard unveiled the ignition switch of the appellant's motor vehicle T325 DJX. Then the search team went outside, searched the motor vehicle and its registration card and found therein TZS. 5,340,000/=, cheque books of various banks namely: CRDB, NMB, AMANA and EXIM. Thereafter, a certificate of seizure (Exhibit P5) was prepared whereby the appellant, Halima Anuary (DW3), PW2, PW6 an independent witness and A/INSP WAMBA appended their names and signatures. Also A/INSP WAMBA who witnessed the search appended his name and signed exhibit P5. Then, PW2 labelled the seized items corresponding with the name of the Region and the respective case. Thereafter, on the same day, accompanied by PW2, the appellant and Halima Anuary together with the seized items what was suspected to be narcotic drugs were taken to Chumbageni Police station and made to record statements. They were then ferried to Dar-es-Salaam with the seized items accompanied by PW2 who on arrival handed over the seized 4 items to the exhibit keeper Assistant Inspector Johari Issa Msirikale (PW3) in the presence of the appellant and Halima Anuary (DW3). PW3 in his account confirmed to have received the labelled exhibits, made respective entries in the exhibit register and placed the seized items in a store which was under his authority. Subsequently, on 2/10/2018 PW3 packaged the seized items for the purposes of onward transmission to the Chief Government Chemist, The packaging was conducted in the presence of the appellant, DW3 and an independent witness Alex Kuhanda (PW4) who all appended their names and signatures confirming to have witnessed the packaging by PW3. Then, PW3 handed over the sealed package DC Massawe (PW5) who acknowledged receipt thereof by signing the register and he transmitted the sealed package to Chief Government Chemist (CGC) offices. Thereat, Elias Zakaria Mulima (PW1) recalled to have received the sealed package from PW5 who in his presence PW1 opened each package, drew samples and conducted preliminary test which revealed that: the contents in black nylon bags marked D1 and D3 were not narcotic drugs; while contents in packs marked D2 and D4 in a transparent nylon bags were narcotic drugs namely heroine hydrochloride weighed at 1052.63 grams. After the preliminary test the package was sealed, labelled and handed over to PW5 who on the same day returned it to PW3. On

9/11/2020 the exhibits were taken to the court and were tendered at the trial as exhibit P3 (a) and P3 (b). As earlier pointed out, the appellant, DW2 and DW3 denied the allegations by the prosecution, The appellant recounted that although he had signed the seizure note, the seized items were crumps and not powdered substances as alleged by PW1. He told the trial court that, the abandoned parcel found in DW3's room and the cupboard was feeds and medicine for chicken as disclosed by DW3 and that he was aware of poultry project. He as well told the trial court that a cupboard was used to store a lot of things. On the money found in his motor vehicle, he recounted the same to have been withdrawn from the bank, He disputed the labelling of the seized items claiming the same to have been done at Dar es Salaam and he could not remember the labels. The appellant admitted to have been taken to Dar es Salaam and that on 2/10/2018, he witnessed the packaging of exhibits by PW3, on 3/10/2018 he was taken back to Tanga and arraigned in court on 4/10/2018. DW2 Rahma Aliy recalled that although the search was conducted, she neither saw what was retrieved nor signed the seizure note because she was not in any way involved in the alleged offence. As for DW3 she recalled to have been employed by Rahma and resided at their residence 6 with her son. Apart from admitting to have signed the seizure note and witnessed the packaging of exhibits at Dar-es-salaam, she claimed not to be aware of other contents and maintained that what was found in her bedroom was chicken feeds. Finally, as the learned trial Judge was satisfied that the prosecution had proved the charge against the appellant, he was convicted and sentenced to a jail term of thirty (30) years. DW2 and DW3 were both acquitted on ground that the charge was not proved against them in the absence of tangible evidence to establish that they acted jointly with the appellant to execute a common purpose with him in committing the offence of drug trafficking. In addition, Exhibits P (3) (a), P3 (b), P4 (a) and P4 (b) were confiscated with an order that they be disposed of in accordance with the Drugs Control Enforcement Act and the respective Regulations. Exhibit P7 Toyota Land Cruiser Registration No. T 325 DJX was released on ground that there was no proof that it was used as an instrumentality for the drugs and subject of the case. Aggrieved, the appellant has appealed to the Court raising the following grounds of appeal in Memorandum of Appeal dated 7/1/2021: 7

1. That, the Honourable learned trial Judge grossly erred in law and fact in holding that the prosecution side has managed to prove the case against the appellant beyond reasonable doubt
2. That, the Honourable learned trial Judge grossly erred in law and fact in convicting the appellant basing on the fact that the tip and investigation in the prelim inaries did not involve the 2nd and J d accused.
3. That, the Honourable learned triai Judge grossly erred in taw and fact in holding that the appellant stored the alleged narcotic drugs (Exhibit PS (a) and P3 (b) in the said cupboard and was in possession o f the same.

4. That, the Honourable learned trial Judge grossly erred in law and fact in holding that if Exhibit P3 (a) and P3 (b) were really medicine for such chicken it would have been easier for the 3rd accused to volunteer such information.
5. That, the Honourable learned trial Judge grossly erred in law and fact in holding that the appellant had knowledge and he was aware of the presence of drugs in the cupboard.
6. That, the Honourable learned trial Judge grossly erred in law and fact for failure to observe that the alleged controlled drugs were found in a place accessible to more than one person, therefore there must be evidence of knowledge of the appellant, 8 Z That, the Honourable learned trial Judge grossly erred in law and fact in holding that there is no evidence from the appellant to prove that trafficking was lawful as he was required by section 28 (1) of the Drugs Control Enforcement Act No. 5 of 2015 as amended by Act No. 15 of 2017.
8. That, the Honourable learned trial Judge grossly erred in law and fact in admitting Exhibit P2 (Government Chemist Analysis Report dated 03/10/2018 contrary to the law .
9. That, the Honourable learned trial Judge grossly erred in law and fact by failing to make a proper evaluation of the evidence on record as a result arrived at a wrong conclusion. On 13/5/2021 the appellant filed a Supplementary Memorandum of Appeal with additional two grounds of complaint as follows:
 1. That there was a break of chain of custody of exhibit impounded from the appellant at Tanga on 01/10/2018 by PW2 [exhibit P3 (a) & P3 (b)].
 2. That it was not cogently established by PW1 that exhibit P3 (a) & P3 (b) were narcotic drug namely heroine hydrochloride. The appellant also filed written submissions in support of the supplementary grounds of appeal. 9 At the hearing, Messrs. Richard Rweyongeza, Majura Magafu, Nehemia Nkoko and Gideon Opanda, learned counsel represented the appellant. The Republic had the services of Messrs, Saraji Iboru, Pius Hilla and Ms. Veronica Matikila, learned Senior State Attorneys and Mr. Waziri Magumbo and Ms. Donatha Kazungu, learned State Attorneys. In addressing the first ground of complaint, Mr. Rweyongeza faulted the trial court for not taking cognizance that, the appellant was earlier on predetermined by the DCEA officials to be a major drug dealer considering that, the tip relayed to them that the appellant would be using his car to ferry narcotic drugs did not materialize and instead, he was arrested at his own house. It was Mr. Rweyongeza's argument that, since the appellant's car was not intercepted and drugs found therein, then it was not established that the appellant had ferried drugs because: he arrived at his residence between 19.30 and 20.00 hours and alighted without any stuff and thereafter, he did not go out of his house thereafter. On the difference of the time when the appellant arrived at his house given by either sides, this was argued to have warranted calling a guard who was a material witness because since he had received DCEA officials he was the one who woke up the appellant. In this regard, it was argued that failure to parade the guard cast a shadow of doubt on the prosecution case, Moreover, it was contended that since according to PW7 whose evidence was rejected, had received a tip that the appellant would be receiving

narcotic drugs at an informal port and that PW7 had witnessed the same, it leaves a lot to be desired as to why PW7 did not arrest the appellant when he was allegedly receiving narcotic drugs which as well cast a shadow of doubt on the prosecution case. This he argued, shows that the arrest of the appellant was not pursuant to the tip from the informer rather prejudgment of the appellant as a major drug dealer which is the complaint in the second ground of appeal. Since the evidence of PW7 was rejected by the trial court and rightly so, we shall not make reference to it. In relation to the accusation on the narcotic drugs being found in the cupboard within the house which is the gist of the complaint in the second ground of appeal, it was the learned counsel's submission that the prosecution ought to have established that the appellant had control of the house and knowledge on the presence of narcotic drugs therein. On this, Mr. Rweyongeza submitted that, all those who resided in the house in question had access to it and that is why during the search, PW2 easily opened the cupboard. As such, it was argued, any of the residents including DW2, DW3 and the security guard could have opened that 11 cupboard and placed therein narcotic drugs. In this regard, the appellant's knowledge on the narcotic drugs could not be entirely inferred and as such, the learned trial Judge wrongly pinned down the appellant having concluded that the appellant must have been aware on the presence of drugs in the cupboard. To support the propositions, he cited to us the High Court case of Scotland in MARY HUTTEN MARTIN OR LEES VS HER MAJESTY'S ADVOCATE [2012] HCJAC 57. Moreover, it was Mr. Rweyongeza's submission that, in the event the search unveiled an assortment of items in the cupboard, it is not known as to why the DCEA officials opted not to take other packets which was preceded by a dialogue as to whether or not to collect some other packets which was altogether another doubt on the prosecution case. This submission covers as well the 3rd to 6th grounds of appeal. Pertaining to the 7th ground of appeal, the learned counsel faulted the learned trial Judge in misconstruing the provisions of section 28 (1) of the Drugs Act and shifting the burden of proof to the appellant on the assumption that he was found in possession of the narcotic drugs. Ultimately, in addressing the complaint in ground number 9, Mr. Rweyongeza urged the Court to re-evaluate the entire evidence adduced at 12 the trial, make its own findings on facts, allow the appeal and set the appellant at liberty. Furthermore, Mr. Magafu on behalf of the appellant, argued the 8th ground of appeal in the memorandum and the two grounds in the supplementary memorandum of appeal. Initially, he adopted the written submissions filed by the appellant. In respect of the 8th ground, he faulted the learned trial Judge for having wrongly admitted the Chief Government Chemist's report (Exhibit PI) on ground that it was irrelevant, immaterial, incompetent and not connected to the case. On this, he argued that the report on powder substance which was established to be narcotic drugs is not compatible with the chenga seized from the appellant's house. In this regard, it was contended that the learned trial Judge wrongly admitted Exhibit P i on the pretext of considering its weight later and she should not have acted on the exhibit to convict the appellant. Moreover, Mr. Magafu faulted the learned trial Judge's evaluation of the evidence in not considering the procedure governing the entire search, seizure and examination of the appellant by the DCEA officials contravened the provisions of section 48 (2) and (3) of the Drugs Control Enforcement Act. (the Drugs Act).

Mr. Magafu viewed this as an omission which rendered the appellant's conviction irregular. 13 Clarifying on the grounds in the Supplementary Memorandum of Appeal, Mr. Magafu submitted that the chain of custody of exhibits P3 (a) and P3 (b) impounded on 1/10/2018 was broken and in the written submissions of the appellant it was pointed out that the chain of custody started to break when the four khaki envelopes were entrusted to PW5 for the purposes of transmitting the same to the Chief Government Chemist for analysis. It was pointed out that since PW5 testified to have been handed over the exhibit by PW3 at 14.00 hrs and submitted the exhibit to PW1 around 14.44 hrs., the delay of 34 minutes was not explained and it is probable that, this was used as an opportunity to change crumps and implant narcotic drugs. In this regard, it was argued that one, the trial court should not have accepted the evidence of PW1 who though during examination in chief testified that he had received crumps, in cross-examination he said the crumps were heroin hydrochloride powder substance, two, the silence of PW5's account on the testimony of PW1 that he examined the packages in the presence of PW5; three, failure by PW1 to acknowledge that the packaged envelopes alleged to contain narcotic drugs bore names and signatures of PW3, PW4, PW5, DW1 and DW3 and that PW1's evidence showing that he merely signed and labelled letter A, B, C and D and sealed the envelopes he had received from William 14 Massawe (PW5), However, during cross-examination PW1 did not recall to remember another seal apart from his own seal. Four, after PW1 conducted the analysis of the contents of the exhibit and repacked the bags, he did not seal the envelopes which were inside and PW5 who witnessed the exercise did not testify to the same effect. Five, while PW1 handed the exhibit to PW5 for it to be returned to PW3, the register of exhibits does not indicate the time when the exhibit was returned to PW3, the exhibit keeper. Thus, it was argued that such trend of the prosecution evidence indicates that what was submitted to the CGC for analysis is not what was tendered at the trial and the chain of custody was broken and as such, the learned trial Judge ought to have acquitted the appellant. To support the propositions, we were referred to cases of ZAINAB D/O NASSOR @ZENA VS REPUBLIC, Criminal Appeal No. 348 of 2015 and PAULO MADUKA AND 4 OTHERS VS REPUBLIC, Criminal Appeal No. 110 of 2007 (both unreported). On the other hand, Ms Matikila the learned Senior State Attorney opposed the appeal and submitted that the learned trial Judge properly evaluated the evidence and was justified to convict the appellant. She condensed the complaint in the 2nd to 6th grounds of appeal to be centered on absence of knowledge on the part of the appellant on the presence of the narcotic drugs in his house. Her response was to the effect that, the appellant had constructive knowledge and that his arrest was not based on mere suspicion or blacklisting because a tip that he was dealing in narcotic drugs materialized on being arrested in possession of narcotic drugs. She also contended that what constituted the appellant's knowledge on the presence of drugs in the house in question was his behaviour when he expressed to be shocked on seeing the DCEA officials access his house; his pistol bag was found near the cupboard where the narcotic drugs were hidden; the appellant's response and lying that the contents were chicken medicine which was not consistent with DW3's evidence and as such, those lies corroborated the prosecution account that the appellant was found in possession of narcotic drugs. Moreover, she argued

that the retrieval of narcotic drugs in the appellant's house confirmed that the appellant had constructive knowledge on the presence of drugs therein. To support the propositions, she cited to us the case of MOSES CHARLES DEO VS REPUBLIC [1987] T.L.R. 134. The learned Senior State Attorney urged the Court to ignore the complaints on noncompliance of section 48 of the DCE Act being raised before the Court for the first time. That apart, it was submitted that the procedure envisaged under section 48 was complied with considering that, 16 the Drugs Act official visited the appellant's house and scene of crime and prior to his arrest the appellant was informed that he was suspected to be dealing in narcotic drugs and he was made to record his statement at Chumbageni police station which as well covered the seizure incident. Besides, in terms of section 29 (2) of the DCE Act, final determination of weight, value and volume is the domain of the Chief Government Chemist where PW1 established the same having examined the exhibit received from PW5. Furthermore, it was submitted that the law does not require the suspect to be present when the exhibit is submitted to the CGC and that the absence of the appellant during examination did not impeach the credible account of PW1 in the conduct of the scientific exercise. Then came Mr. Hilla, learned Senior State Attorney, who in response to allegations on the chain of custody being broken, relied on the strength of the credible prosecution account. He argued that the chain of custody from seizure to onward transmission to the Chief Government Chemist and tendering at the trial remained intact and it was not broken as suggested by the appellant. He argued this to be regardless of minor variations on the time of packaging in the evidence of PW4 and PW3, the alleged delay to transmit the exhibit to offices CGC and absence of the time when PW5 17 returned the exhibit to PW3 which was addressed in the oral account of PW5 that he had returned the exhibit on 2/20/2018. On the complaint on the varying contents of what was seized from the appellant's house and submitted to the CGC, it was argued, apart from PW1 acknowledging to have received crumps, upon examination, he confirmed the same to be heroine hydrochloride. Thus, the cases of ZAINABU NASSORO @ ZENA VS REPUBLIC (supra) and PAULO MADUKA AND 4 OTHERS VS REPUBLIC (supra) were argued to be distinguishable because in those cases there was no documentary account of the movement of the exhibit as opposed to the case at hand. Mr. Hilla disagreed with the appellant on the guard being a material witness in the wake of credible account of the prosecution witnesses who testified that the appellant was found in possession of narcotic drugs. Besides, Mr. Hilla submitted that the learned trial Judge was justified to admit exhibit PI as it passed the test of relevance, materiality and competence. Finally, he concluded that, there is nothing to fault the learned trial Judge who concluded that the appellant was found in possession of narcotic drugs and as such, section 28 of DCE Act was properly invoked and the appeal is not merited deserving dismissal. 18 At the end the learned Senior State Attorney urged the Court to enhance the sentence to life imprisonment which is in accordance with the provisions of section 15 (1) (b) of the Drugs Act. In rejoinder, it was pointed out that, since the charge against the appellant was preferred under section 57 (1) and 60 (1) of CAP 200, the learned trial Judge properly exercised her discretion to impose the sentence of thirty years. Finally, Mr. Rweyongeza invited the Court to make a direction on the need of the presence of the appellant during

examination of what is suspected to be narcotic drugs in order to make a rebuttal envisaged under the law practicable because of the finality of the finding by CGC on what constitutes narcotic drugs unless rebutted. Having carefully considered the grounds of complaint, submissions of the parties and the record before us, this being a first appeal, we shall re-evaluate the trial evidence and subject it to a critical scrutiny and if warranted we shall make our own conclusions. In the present case, the conviction of the appellant was based on the credible account of PW1, PW2, PW3, PW4, PW5 and PW6. It is settled law that, in so far as demeanour is concerned, the credibility of the witnesses is the domain of the trial court. However, the Court is mandated to determine the credibility by assessing the coherence of the testimony of a witness and considering it in relation to the evidence of other witnesses. It is settled law that, every witness is entitled to credence, unless his or her evidence is improbable or implausible or materially contradicted by the evidence of another witness or witnesses. See - GOODLUCK KYANDO VS REPUBLIC [2006] TLR 363 and MATHIAS BUNDALA VS REPUBLIC, Criminal Appeal No. 62 of 2004 (unreported). We shall be guided by among others, the stated principles. From the grounds of appeal in both memoranda, the submissions from either side, in the present appeal, it is not disputed that, the appellant's house at Bombo area was searched on 1/10/2018 and what was suspected to be narcotic drugs was retrieved. However, parties locked horns basically on one, whether the law was complied with during the search and seizure of what was retrieved from the appellant's house; two whether or not narcotic drugs were retrieved from the appellant's house and if so, three if appellant had knowledge on the presence of the narcotic drugs four, whether the chain of custody was intact from seizure of what was retrieved from the appellant's house to tendering it as an exhibit at the trial. 20 It was the appellant's complaint raised in the written submission and elaborated by Mr. Magafu that while section 48 of the DCE Act imposes mandatory requirements on compliance when effecting arrest and seizing items retrieved from a person suspected to be dealing with narcotic drugs, the learned trial Judge did not consider such omission in the evaluation of the evidence. Apparently, this was not brought to the attention of the learned trial Judge and neither was it raised as a ground of appeal but it being a point of law, we shall consider it. We begin with the dictates of the provisions of section 48 (2) (a) (ii), (2) (b) and (d) (ii) which stipulate as follows: " (2) For purposes of subsection (1), an officer of the Authority and other enforcement organs who-

- (a) arrests a suspect shall-
- (i) actually touch or confine the body of the person arrested unless he submits himself; (ii) inform the person arrested grounds or reasons for arrest and substance of the offence he is suspected to have committed;
- (b) investigate an offence shall-

- (i) personally go to the scene of crime to investigate and take stock of every article suspected to be used for commission of offence; 21 (ii) take every measure necessary for discovery and impound every article which may potentially be used as evidence; (Hi) examine orally every person acquainted with the facts and circumstances of the crime committed; (iv) avoid to subject the arrested person to cruelty, inhuman or degrading treatment;
- (v) if the circumstance calls for; or at the request of the arrested person, allow him access to medical treatment, give advice or render assistance in case of an illness or an injury; (vi) if the arrested person is a child, cause a parent or guardian of the child to be informed that he is under restraint and the offence for which he is under restraint; (vii) without unnecessary delay and subject to the provisions relating to bail, take or send the arrested person before a subordinate court in the area where he has been arrested;
- (d) seizes an article used or suspected to have been used in commission of an offence shall-
- (i) procure presence of and take statements of persons who will testify on an article seized. (ii) record a statement of the arrested person relating to his relationship with article seized. (Hi) evaluate and determine size, volume, quantity, quality and value of estimated value of article seized; 22 (iv) keep safe custody of article seized from possible act of loss, shrinkage, depreciation of quality or value" A close examination of the said provisions and the evidence on the record shows that before arrest, the appellant was informed about the alleged offence; involved in the search and appended his name and signature on the seizure certificate and on the same day recorded his statement at the police. Apparently, this prosecution account on the said process is cemented by the appellant's own account together with that of DW2 and DW3. In this regard, we find Mr. Magafu's argument to be an afterthought. Besides, the said provision prescribes procedural safeguards or rather a checklist on what has to be done before arrest and retrieval of what is seized from the suspect. That apart, even if the law was not complied with, PW2's account was not impeached on what transpired at the scene of crime and moreover, it is incorrect to conclude that every apparent contravention of the law automatically leads to the exclusion of the evidence in question. See - NYERERE NYAGUE VS REPUBLIC, Criminal Appeal No. 67 of 2010 and JIBRIL OKASH AHMED VS REPUBLIC, Criminal Appeal No. 331 of 2017 (both unreported). We are thus satisfied that the law was complied with during the arrest, search and seizure of what was retrieved from the appellant's house. 23 Another appellant's complaint was to the effect that what was retrieved from his house were crumps and not narcotic drugs. This was further amplified by the learned counsel for the appellant who argued that since the literal meaning of the word crumps means chenga is defined in Oxford Kamusi ya Kiswahili Sanifu (TUKI) as follows: chenga: - punje ndogo ndogo za kitu, agh, za mcheie uiiokatika. According to the seizure certificate which is at page 205 of the record, what was retrieved included: "Soksi nyeusi ndani yake kukiwa na mfuko wa naiioni wenye chenga zinazodhaniwa kuwa dawa za kulevya na mfuko wa kitambaa rangi ya pink ndani yake kukiwa na mfuko wa nailon rangi nyeusi ukiwa na chenga zinazodhaniwa kuwa dawa za kuievya." A similar reflection is found in the certificate of handing over between PW2 and

PW3 (exhibit P6) at page 208 of the record of appeal. Moreover, a similar description appears in the sample form at page 200 on what was transmitted to the Chief Government Chemist whereby PW1 acknowledged to have received the following: " KIELELEZO 'A ' Bahasha ya kaki ambayo ndani yake kuna soksi nyeusi yenye mfuko wa naiioni ukiwa na chenga zinazodhaniwa kuwa dawa za kulevya. 24 KIELELEZO 'B ' Bahasha ya kaki ambayo ndani yake kuna mfuko mweusi wenye chenga chenga zinazodhaniwa kuwa dawa za kulevya." We have taken trouble to reproduce the above to show what was seized from the appellant's house and ultimately transmitted to the Chief Government Chemist was chenga chenga and not chenga as suggested by the appellant's counsel. The two are not compatible as they do not mean one and same thing. While chenga chenga are smaller in size chenga are bigger particles and that is why in TUKI Dictionary they have been referred to as small pieces of broken rice. Furthermore, during cross-examination, PW1 clearly stated as to how he subjected the crumps to scientific examination and analysis and confirmed that they were narcotic drugs namely; heroin hydrochloride. Besides, in the course of being re-examined he sufficiently in our view, stated that the technical name of the received crumps is known as powder substance. At this juncture it is opportune to address the appellant's complaint on the alleged irregular admission of the CGC report (Exhibit PI) for the purposes of determining its weight later. Apparently, this was not the case because the reasons for admitting the exhibit are very clear at pages 28 to 29 of the record of appeal. We say so because having acknowledged that 25 relevance, materiality and competence are the prerequisites of admissibility as stated in the case of DPP vs SHARIFF MOHAMED ATHUMANI AND 6 OTHERS, Criminal Appeal No. 74 of 2016 (Unreported) and the discretion to decide on admissibility, the learned trial Judge among other things, said: "...The said report is offered to prove or disprove what has been alleged in the information. In that regard the intended exhibit is relevant and hence material as well as competent because PW1 identified it as the one he prepared before he prayed to tender the same. I have taken note about the use of word chenga chenga in exhibit P I and 'unga" in the intended exhibit and as referred by PW1 in his testimony. The difference does not make the intended exhibit to be inadmissible. With due respect to the defence counsel it is the considered view of the court that, such contradiction goes to the weight of the evidence itself which will be determined at a later stage. The same also goes to the issue of chain of custody..." We entirely agree with the learned trial Judge who, prior to admitting the CGC report considered its relevance, materiality and competence which we think missed the eye of Mr. Magafu or else he would not have raised 26 the complaint of this nature. This renders the 8th ground of appeal without merit. Since what was retrieved from the appellant's house was confirmed to be narcotic drugs, next for consideration is whether the appellant had knowledge of the presence of the drugs in his house which is the gist of his complaint in the 3rd to 6th grounds of appeal. While the appellant's counsel argued that his knowledge on the presence of drugs was not established because the occupants therein had easy access to the cupboard where the narcotic drugs were found, the Seamed Senior State Attorneys' response was to the effect that the appellant's behaviour on his arrest indicates that he had knowledge on the presence of the narcotic drugs. In an Article titled: THAT AINT MINE: TAKING

POSSESSION OF YOUR CONSTRUCTIVE POSSESSION CASE authored by H. Lee Harrel, Deputy Commonwealth's Attorney Wythe County Virginia in Volume 6, number 1/July 2011 among other things observes as follows: "In criminal prosecution for unlawful possession (or even distribution and manufacturing) of contraband, the Commonwealth may prove the case by showing either actual or constructive possession. If the Commonwealth's case is one of constructive - rather than actual - possession the following must be proved beyond reasonable doubt: 27

1. That defendant was aware of the presence and character of the contraband.
2. That the contraband was subject to defendant's dominion and control By its very nature constructive possession case is likely to be circumstantial, and although circumstantial evidence can be just as competent as direct evidence, it rarely packs the same punch.... The first prong of constructive possession is usually the most difficult to prove. Having to prove the requisite level of knowledge what the defendant knew about an item not in his actual possession is challenging. Constructive possession may be established by evidence of acts, statements or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the substance and that it was subject to his dominion and control Another oft relied upon axiom in the world of constructive possession is that folks don't just abandon their drugs. Virginia's appellate courts have recognized this time again when a defendant who tries to argue that may be somebody dropped those drugs or may be the fast person who rented this car left that cocaine in console. "Our cases recognize that drugs are a commodity of significant value, unlikely to be abandoned or carelessly left in an area. " 28 In our jurisdiction, the principle which recognizes that drugs are commodities of significant value has been embraced by the Court in determining as to whether the accused had actual or constructive knowledge. In a criminal trial, the manner of establishing knowledge on the part of the accused or not has been discussed in a number of cases including the case of MOSES CHARLES DEO VS REPUBLIC, (supra) where the Court categorically stated that: "for a person to be found to have had possession, actual or constructive, of goods it must be proved either that he was aware of their presence and that he exercised control over them, or that the goods came aibeit in his presence, at his invitation and arrangement" Similarly, in the case of NURDIN AKASHA alias HABAB VS REPUBLIC,

[1995] TLR, 227 the appellant was charged with among others, unlawful possession of dangerous drugs which were stuffed in two motor vehicle tyres kept in a room used as a store in the appellant's premises, He was the Director of the Transport Company with a fleet of ten lorries some of which had trailers. During January to February 1993 he had sent the fleet to Mombasa for repairs. The appellant visited Mombasa to make a follow up on the repairs which took about two months and the trucks were driven 29 back to Dar-es-salaam and arrived on different dates without carrying any visible luggage. The last batch arrived on 19/7/1993. On the following day, the police, acting on information, went to search the appellant's office and seized 2,100 packets of methaqualone (mandrax) drugs hidden in the

tyres stored in the appellant's premises and in metal containers fitted inside fuel tanks which had to be cut in order to be retrieved. The appellant's counsel submitted that the drugs found were hidden there by one Mohamed Abdarahaman who was in charge of the store residing in Mombasa. As such, the appellant among other things, contended that he had no knowledge of the drugs and he could not be said to have been found in possession nor could he be responsible for their importation into the country. The Court at page 238 made a following observation: "Our view is that if the drugs were introduced into the store by the said Mohamed Abdarahaman, this must have been with the knowledge and approval of the appellant. It is highly unlikely that Mohamed Abdarahaman would have risked leaving such a valuable commodity in the store at the time when he had no control over it as he spent nights elsewhere and stayed away for some days; Whether the drugs were hidden in the store by the appellant himself or by the said Mohamed Abdarahaman with the appellant's knowledge and approval, the appellant was in possession of those drugs and the learned High Court Judge rightly found so." [Emphasis supplied] Ultimately it was held by the Court that: "Whether the drugs were hidden in the store by the appellant himself or by another person with the appellant's approval, the appellant was in possession of those drugs," The said decision was followed by the Court in another recent case of SONG LEI VS DPP and DPP VS XIAO SHAODAN, CHEN JIANLIN and HU LIANG, Consolidated Criminal Appeal Nos. 16 A and 16 of 2017 (unreported). In the said case, eleven pieces of Rhinoceros horns valued at TZS. 902,888,000,000 were found in a secret chamber of the appellant's car on the border post of Kasumulu in Mbeya on his way from Malawi to Tanzania. He maintained to have no knowledge of the horns which could have been hidden thereto by one Zhang Peng who drove the car when going to Malawi or the manager of the hotel in Malawi where the car was parked. The Court held: "It is our considered view that, Song Lei was a person in charge and control of his motor vehicle regardless of having authorized Zhang Peng to drive it when the latter was travelling to Malawi from Tanzania. Also, our view is that, even if the horns were packed in the secret chamber be it by Zhang Peng or the unnamed Hotel Manager,, this must have been with the knowledge and approval of Song Lei the owner of the motor vehicle in question. It is highly unlikely that, Zhang Peng and the hotel manager would have risked leaving the valuable Rhino horns in the motor vehicle which they had no control over it." We are satisfied that the above decisions are relevant to the case at hand. We say so because, in the wake of the credible account of PW2, the appellant was in charge and control of the house in question where the drugs were found notwithstanding other occupants having access to the cupboard. Besides, it is unlikely that he would have risked leaving a kilogram of heroin hydrochloride in the cupboard of a house which he had no control. That apart, even if the narcotic drugs were put in the cupboard by DW3 as alleged, the appellant had knowledge and approved the same and that is why, he did not hesitate to sign the seizure note which signified that he was the owner of what was seized from the cupboard in question. Besides, and as correctly found by the learned trial Judge the conduct of the appellant leaves a lot to be desired as it exhibited the knowledge of the appellant on the presence of the narcotic drugs in the

house in question. We are fortified in that regard because when the packet 32 was retrieved from the cupboard, it is the appellant who was present and at page 138 of the record of appeal he responded as follows: "In our house, there is a cupboard. The cupboard is used for storing a lot of things including damaged things. It is like a public cupboard which can be used by anyone including a security, In that cupboard they also took another parcel like the one taken from the maid's room, Once again, they asked and the maid replied it is medicine for chicken." [Emphasis supplied] As neither the maid nor the security guard were present, when the packs were being retrieved, as correctly found by the learned trial Judge, the appellant's response was geared at shifting burden to the security guard and DW3. However, DW3 had a different account because at the trial he testified as follows: "After handing over my child to security guard, I entered inside up to my room and found those officers with Rahma Aliy and Yanga Omari. I opened the door to my room and the search began. There are two wardrobes in my room. In my wardrobe, they searched and did not find anything apart from my clothes. Then they removed the mattress to my bed. They found bag under the bed. It was pink bag containing crumps substance. Then, they proceeded to the wardrobe which was attached to the wall. They found black bag. I didn't know its contents. They asked me what was that and I replied it was chicken stuff. Those things in my room were food for chicken. From there the search continued to the master bedroom. I didn't enter I stayed behind the team. Then they went to the cupboard at the corridor. I didn't see who opened the cupboard because the corridor was very narrow and we were many. So after they went to the cupboard I went back near my room ... when the cupboard was opened I was near my room and from there, I didn't know what transpired. I don't recall about saying the things in the cupboard belongs to chicken. [Emphasis supplied] When cross-examined DW3 maintained her stance as reflected at page 159 of the record of appeal as follows: "It is correct that according to the analysis report, the exhibits found in my room were not narcotic drugs. The cupboard at the corridor is used to store damaged items and other things. Yes, we were raising chicken. Yes, in the cupboard there were equipment for food and water for chickens and husk. I don't recall if in that cupboard we store medicine for chickens. I was not involved in the search to the cupboard as I was behind as I stated in my testimony... Those things in my room were food for chicken. Yes, in the cupboard there were equipment for food and water for chickens and husk. I don't recall if in that cupboard we store medicine for chickens. [Emphasis supplied] It can be clearly discerned from the DW3's testimony who probably was the one attending the chicken at the appellant's residence that she was only aware about the chicken feed being kept in her room and that the cupboard was for storage of equipment for food and water for chicken and husk and thus the cupboard was not used to store medicine for chicken as propagated by the appellant. In other words, storage of chicken medicine in the cupboard was a fact known solely to the appellant and this was actual knowledge on his part on the presence of narcotic drugs. In this regard, we agree with manner in which the learned trial Judge treated evidence of the appellant and DW3 having evaluated it and concluded in terms of what is reflected at page 192 of the

record of appeal as follows: "Although he disassociated him self with exhibits P3 (a) and P3 (b) found in the cupboard claiming to be medicine for chicken, but DW3 in her defence did not remember if they stored such medicine there. Moreover, he claim ed that DW3 was asked about those exhibits and replied that, they were 35 medicine fo r chickens. Surprisingly, DW3 in her evidence denied about that fact Nevertheless, she insisted that DW1 lied when he said she saw those exhibits while she did not get opportunity to see them because during the search in the cupboard, she was standing behind, near the door to her room. Taking these facts together, it shows that the first accused had knowledge and was aware o f the presence o f the said narcotic drugs in cupboard, although he was trying to throw the burden to the third accused.,,." In the premises, as earlier intimated, in addition to the constructive knowledge, the appellant had as well actual knowledge on the presence of the narcotic drugs in the cupboard. Thus, in the wake established appellant s knowledge the case of MARY HUTTEN VS MARTIN ORLEES VS HER MAJESTY'S ADVOCATE (supra) which was cited to us by the appellants' counsel is distinguishable and thus the 3rd 4th, 5th and 6th grounds of appeal are not merited. Next for consideration is the chain of custody. The appellant challenged the chain of custody on three fronts: One, since PW2 and PW3 were together at the scene of crime, no explanation was given as to why PW3 was not entrusted of the seized items while in Tanga instead of Dar- es-salaam. Two, the appellant faulted the unexplained delay to transmit 36 the exhibit to the Chief Government Chemist and three, the missing time when PW5 returned back the exhibit from the Chief Government Chemist. Pertaining to the presence of the PW3 in Tanga, we agree with the learned Senior State Attorney that he was not among those who were at scene of crime and therefore it was justified for him to entrust with the seized packages in Dar-es-salaam for preservation and documenting receipt. As to the complaint on delayed transmission and probable tampering with the exhibits, it is on record that PW5 was handed over the exhibit by PW3 at 2.00 p.m and submitted it to the Chief Government Chemist by 14.44 hours. We have gathered on the record that, the delay complained of could have been occasioned by the procedures PW5 underwent in submitting the related correspondence and the exhibit at the reception before he handed over the exhibit to PW1. In the register it was recorded that the exhibit was returned to PW3. Thus, in our considered view, the omission to record time was inadvertent and it did not adversely impact on the chain of custody or impeach the credible oral and documentary account of PW3 and PW5 that the exhibit was indeed returned and entrusted to the exhibit keeper. Thus, as the entire process of the movement of the exhibit from seizure to tendering at the trial was documented, the cases of 37 PAULO MADUKA AND 4 OTHERS VS THE REPUBLIC, Criminal Appeal No. 110 of 2007 and ZAINAB D/O NASSOR @ZENA VS REPUBLIC, Criminal Appeal 348 of 2015 (both unreported) are distinguishable here. In those cases, as correctly submitted by the learned Senior State Attorney, there was no proper documentation of what took place from the seizure, preservation up to when the exhibits were tendered at the trial. This renders the two grounds in the supplementary memorandum not merited. On the basis of cumulative evidence of the prosecution, it was proved beyond a speck of doubt that, the appellant was actually found at his house in

possession of the narcotic drugs which were seized by PW2, placed under control of PW3, examined by PW1 who tendered them at the trial. Besides, the respective exhibit was at the trial identified by PW1, PW2, PW3, PW4, PW5 and PW6. Thus, we agree with the learned State counsel that the security guard was not a material witness and besides, the defence was not barred from calling that witness so as to challenge the prosecution account. Pertaining to the sentence of 30 years meted on the appellant, the learned Senior State Attorney argued the same to be illegal and he invited the Court to enhance it to life imprisonment as stipulated under the Drugs Act. This was opposed by the learned counsel for the appellant who argued 38 that the learned trial judge properly exercised discretion to impose a minimal sentence as prescribed under the Economic and Organised Crime Control Act under which the appellant was also charged. According to the information at page 3 of the record of appeal, the appellant was charged with trafficking in narcotic drugs contrary to section 15 (1) (a) and (3) (1) (i) of the Drugs Act read together with paragraph 23 of the First Schedule to and sections 57 (1) and 60(2) of the Economic and Organised Crime Control Act. Section 60 (2) stipulates as hereunder: 11Notwithstanding provision o f different penalty under any other law and subject to subsection (7), a person co n victed o f co rru p tio n o r econom ic offence s h a ii be lia b le to im p rison m en t fo r a term o f n o t le s s than tw e n ty ye a rs b u t n o t exceeding th irty years, or to both such imprisonment and other penal measures provided for under this A ct.fr Subsection (7) stipulates as follows: "In considering the propriety o f the sentence to be imposed, the Court shall comply with the principle that:

- (a) A proved offence which is in nature o f an organized crim e or one that is endangering the national economy or public property, in the absence o f m itigating circumstances, deserves the maximum penalty. 39
- (b) A n y o th e r econom ic offence m ay be sentenced w ith a sentence th a t is s u ita b ly d eterren t; and
- (c) not applicable....." In the light of the bolded expression, since the appellant was charged under the Economic and Organised Grime Control Act, then the sentence prescribed under DCEA which is on the higher side that is life imprisonment, is superseded by the lesser sentence prescribed under the provisions of section 60 (2) and (7) (a) and (b) of the Economic and Organised Crime Control Act. Thus, as correctly submitted by Mr. Rweyongeza, we cannot fault the learned trial Judge in imposing the sentence of a thirty years and as such, we decline the invitation to enhance the sentence. On the propriety or otherwise of giving a direction to require the presence of the accused at the CGC offices during examination, we decline to make any direction as this was neither raised before the trial court nor does it constitute a ground of appeal before us. In View of what we have endeavoured to demonstrate, we do not find cogent reasons to vary the decision of the trial court because the 40 charge were proved beyond reasonable doubt and as such this appeal is without merit and it is hereby dismissed in its entirety. DATED at TANGA this 31st day of May, 2021. S. E. A. MUGASHA JUSTICE OF APPEAL W. B. KOROSSO JUSTICE OF APPEAL L. J.

S MWANDAMBO JUSTICE OF APPEAL The judgment delivered this 1st day of June, 2021 in the presence of Mr. Majura Magafu and Mr. Werehema Kibaha, learned counsel for the appellant and Mr. Pius Hilla, learned Senior State Attorney and Mr. Waziri Magumbo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. — j*—■*— F. ∴ aA:: m MTARANIA t a r a n i a DEPUTY REGISTRAR COURT OF APPEAL 41

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