IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A, And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 187 OF 2020

ISLEM SHEBE ISLEM.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Luvanda, J.)

dated the 8th day of May, 2020

in

Economic Case No. 11 of 2019

.....

JUDGMENT OF THE COURT

18th July, 2022 & 18th September, 2023

MAKUNGU, J.A.:

The appellant, Islem Shebe Islem, was charged and convicted of trafficking in narcotic drugs in the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es Salaam contrary to section 15 (1) (a) of the Drug Control and Enforcement Act, 2015 (Cap 95 R.E. 2019) ("the DCEA") read together with paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act, Cap. 200

R.E. 2002 (now R.E. 2022) (EOCCA). He was sentenced to thirty years imprisonment.

Believing that justice was not done, he now appeals to this Court against both conviction and sentence.

The prosecution case was that the appellant on 20th July, 2018 at Magomeni Usalama Street within Kinondoni District in Dar es Salaam Region, trafficked in a narcotic drug, namely, heroin hydrochloride weighing 306.32 grammes.

To prove the accusation, the prosecution mainly relied upon the testimonies of Inspector Lupambe Kanyumbu (PW2), a Police Officer from the Drug Control and Enforcement Authority ("the Authority") who was in charge of the search at the appellant's home and Omary Ally Makingida (PW3), a local leader who witnessed the search as an independent observer. Also present were Assistant Inspector Emmanuel, who could not be produced at the trial; Assistant Inspector Francis and Assistant Inspector Johari, a Police Officer in charge of the Exhibits Room who took initial custody of the seized substances from PW2; and Samwel Justine Mollel (PW6), a Police Officer who took the substances

to the Government Chemist Laboratory Agency ("the GCLA") for analysis. There were two other witnesses: PW7 Inspector Brown who took the statement of the appellant (cautioned statement); and finally PW1 Theodori Erasto Ludanha, a chemist from the GCLA, who analyzed the suspected substances.

According to PW2, on 20/07/2018 they arrived at Usalama Magomeni to the residence of one Islem Shebe Islem, the appellant. He went there with his colleague officers, from DCEA for purposes of conducting a search, after they had got information that the appellant was involved in narcotic drugs. They then set upon the appellant's home arriving there in the wee hours at about 2:00 am. Before they got into the home, they managed to enlist one local leader, PW3 to witness the search as an independent witness.

Having entered into the house and after PW2 had introduced the contingent and explained the purpose of the intended search to the appellant, the house was wholly searched until 5:00 am. The search started in the room of the appellant. At the end of the exercise, many items were allegedly seized from the house. These include a passport of

the appellant, No. A0406662, driving licence, two mobile phones make Samsung which are Smart phone, ATM Card of Stanbic Bank, Motor Vehicle card with registration number T 599 CMW Make Toyota Brevis, a copy of card for that car, all these were seized from the room of the appellant. In other rooms they recovered nothing. They were recorded in a certificate of seizure (Exhibit P3) that PW2 filled and signed. The certificate was counter signed by the appellant and the independent observer. Of relevancy to the charge at hand was a pink nylon bag which inside it had a black plastic bag containing flours of "chenga chenga" (Exhibit P2) suspected to be narcotic drug. PW3's evidence materially supported PW2's testimony on the search, seizure of suspected substances and the apprehension of the appellant at his home.

In his judgment, the learned trial judge found it established that exhibit was seized from the appellant's room on the fateful day and that it was proven to be a narcotic drug known as heroin hydrochloride. He reviewed the chain of custody of the said exhibit and held that the integrity of the said substance was beyond reproach. The appellant's common defence was considered but rejected.

Through his memorandum of appeal and supplementary memorandum of appeal, the appellant lodged six grounds of appeal which we condensed into five grounds of complaint as follows: **one**, that the charge sheet was incurably defective. **Two**, that the search into the appellant's home was illegal; **three**, that the chain of custody of the alleged illegal substance was broken raising questions over the integrity of the said substance; **four**, that exhibit P2 was improperly tendered and admitted in evidence; and **finally** that the prosecution case was not proved beyond reasonable doubt.

Before us Messrs. Aliko Harry Mwamanenge, Ipilinga Panya and Nehemia Nkoko, learned advocates, represented the appellant. Appearing for the respondent/Republic Ms. Veronica Matikila, learned Principal State Attorney, Mr. Pius Itillala and Ms. Clara Chorwe, learned Senior State Attorneys and Ms. Diana Lakondo and Ms. Amina Mawaka, learned State Attorneys resolutely opposed the appeal.

We begin with the first complaint. On this, Mr. Mwamanenge submitted that the charge was fatally defective due to being laid under repealed law. Elaborating, he argued that the appellant was charged

under the repealed law which created the offence of possession with the punishment of 30 years in prison. In the premises, he submitted that the charge was incurably defective as it ought to have been laid under the new law which provides the offence of trafficking with the punishment of life imprisonment. He bemoaned that the defect prejudiced the appellant in preparation of his defence and that it caused a miscarriage of justice because he did not fully appreciate the nature of offence facing him. Reliance was placed on **Ernest Jackson @ Mwandikapesi & Another v. The Republic**, Criminal Appeal No. 408 of 2019 and **Hamis Mohamed Mtou v. The Republic**, Criminal Appeal No. 228 of 2019 (both unreported). He thus urged us to nullify the trial proceedings and the judgment thereon and proceed to quash the appellant's respective conviction and set aside the sentence.

Responding, Ms. Matikila urged the Court to dismiss this ground contending that it has no merit. She argued that the complaint is grounded on misapprehension of the law in view of the fact that section 15 of DCEA was amended by Act No. 15 of 2017 which came into force in 2018 and not repealed as alleged by the appellant. The section was

amended to enhance the punishment of life imprisonment instead of 30 years, she added. She argued further that since the offence charged against the appellant was committed in 2018 when the said Act was already in operation, by omitting the words *"as amended by Act No. 15 of 2017"* in the statement of offence in the charge sheet, it did not render the charge defective since the omission is curable under section 388 of the CPA especially considering that the charge sheet for all intent and purpose is in line with section 132 of the CPA. To bolster this stance, she cited the decision of this Court in **Samwel Paul v. The Republic,** Criminal Appeal No. 312 of 2018 (unreported).

We agree with Ms. Matikila that the defects complained of is misconceived being founded on misapprehension of the context of what was introduced by the Written Laws (Miscellaneous Amendments) Act No. 5 of 2017. We are aware that, it is a practice in such situation to add *"as amended by Written Laws (Miscellaneous Amendments) Act No. 5 of 2017"* in the statement of offence, but we find failure to do so is not fatal and does not go to the substance of the charge to warrant this Court to find the charge wanting for the following reasons.

First, section 15 (1) (a) of the DCEA was amended not repealed by Act No. 5 of 2017 and the amendment came into force on the 28th November, 2017. The offence charged against the appellant subject to the present appeal is said to have been committed in 2018, invariably when the amended provision was already in operation. Thus, citing the provision was proper. Nevertheless, we are alive to the fact that sections 132 and 135 (a) (ii) of the CPA govern the contents of charges and prescribes the manner and format they should be framed and there is a requirement for the statement of offence to refer to the correct section of law which creates a particular offence alleged to have been committed. Another requirement is that the charge sheet is in general to conform, as nearly as possible, to the forms set out in the second schedule to the CPA, specifically part 8 of that schedule. We are of the firm view that the charges against the appellant complied with the dictates of the said provisions and the format aforementioned.

Second, it is important to also consider section 27 of the Interpretation of Laws Act Cap 1 R.E. 2019 (the ILA), as pointed out by the Principal State Attorney which states:

> *"Where one Act amends another Act, the amending Act shall, so far as it is consistent with the tenor thereof and unless the contrary intention appears be construed as one with the amended Act".*

Recently, this Court had the opportunity to discuss the same situation in **Karimu Jamary @ Kesi v. Republic**, Criminal Appeal No. 412 of 2018 (unreported). In that case, the appellant faulted the trial and first appellate courts for convicting him based on a charge that cited section 287A of the Penal Code without acknowledging the amending Act which introduced the provision, that is, the Written Laws (Miscellaneous Amendments) Act No. 3 of 2011. The Court found this argument to be misconceived and to lack merit having regard to the provision of section 27 of ILA stating that:

> *"...the prosecution has no obligation to indicate that the appellant was charged under section 287A of the Penal Code as amended by Act No. 3 of 2011".*

Therefore, guided by the above principles undoubtedly the complaint is misconceived since there is no requirement to cite the

amending Act. In any case, in the instant case, we find, the particulars of offence were clear in terms of what the appellant was being charged with.

Third, as rightly argued by Ms. Matikila, there is nothing which can be said to be irregular or improper in the way the statement of offence is framed and the particulars of offence. We are satisfied that they fully informed the appellant of what he was being charged with to enable him to understand the nature and seriousness of the offence, that is; trafficking in narcotic drugs. We therefore, find no merit in the first complaint.

Mr. Nkoko, then, argued with force the ground in the supplementary memorandum of appeal, where the complaint is centred on admissibility of exhibit P2 which he argued that it was not mentioned and listed during committal proceedings as being among the physical exhibits intended to be tendered during trial by the prosecution as required by section 246 (2) of the CPA. He argued further that the contents of that exhibit was not read over to the appellant which rendered the omission incurable as he was greatly prejudiced to the

extent of failing to prepare his defence properly for not knowing the contents therein. To support his contention, he referred the Court to the decision of **Remina Omary Abdul v. Republic**, Criminal Appeal No. 189 of 2020 (unreported). Essentially, he contended that the trial judge failed completely to comply with the mandatory requirement of the law. Ultimately, he urged the Court to expunge it from the record of appeal with the consequences that, in its absence, the charge cannot stand.

In response to the above ground of appeal, Ms. Matikila submitted that the Economic and Organised Crime Control (The Corruption and Economic Crimes Division (Procedure) Rules GN. No. 267 of 2016 (henceforth "*the CECD Rules*") provides for the procedure governing search and seizure involving drugs and Rules 2 and 8 deal with committal proceedings in which naming or mentioning the exhibits, whether physical or documentary is not a requirement hence failure to list exhibit P2 during committal proceedings could not bar production and admission of it during the trial. She distinguished the procedure of conducting committal proceedings under section 246 of the CPA and that under the CECD Rules arguing that the former requires all exhibits to be

listed and not the latter. In the alternative, she argued that in the event the Court is to find otherwise, then it should consider the contents of the letter at page 1 of the record forwarding the information to the trial court which stated that "*physical exhibits will be tendered during trial of the case*". She accordingly beseeched the Court to hold that the appellant was not prejudiced since the infraction is curable under section 388 of the CPA. She urged the Court to treat the contention as an afterthought following the appellant's failure to object the admission of that exhibit. She relied on the holding by this Court in the case of **Joseph Charles Bundala v. Republic**, Criminal Appeal No. 15 of 2020 (unreported) to augment her assertion. Otherwise, she was of the view that the cases cited by the appellant's counsel are distinguishable.

Mr. Panya, learned counsel, argued ground 3 of the appeal, where he submitted that the search was executed in contravention of sections 38 (1) and (3) and 40 of CPA. He elaborated that whereas section 38 (1) of the CPA requires that a search be conducted by or under the written authority of an officer in charge of a police station, the search at the scene was conducted by PW2 who was not an officer in charge of a

police station nor did he have any written authority to execute the search. He added that absence of authority was aggravated by the fact that the search was carried out in the early hours of the morning in violation of express provisions of section 40 of CPA requiring a search to be conducted only between the hours of sunrise and sunset unless requisite leave of the court is obtained. It was further contended that the search was not conducted as an emergency measure as the police had ample time to make arrangements within the dictate of the law. Referring to recent decisions of the Court in **Shaban Said Kindamba v. Republic**, Criminal Appeal No. 390 of 2019; **Director of Public Prosecutions v. Doreen John Mlemba**, Criminal Appeal No. 694 of 2020; and **Ayoub Mfaume Kiboko and Another v. The Republic**, Criminal Appeal No. 359 of 2019 (all unreported), where the Court discounted the evidence obtained from illegal searches. Mr. Panya urged us to expunge the prohibited substance (exhibit P2) allegedly seized from the appellant's bedroom along with the certificate of seizure (exhibit P3) and, as a result, find the charge against the appellant unproven.

In her response to Mr. Panya's contention in ground 3 above, the learned Principal State Attorney was emphatic that search and arrest in drug cases is effected in accordance with the DCEA and under that Act, section 48 does not require an officer from DCEA to have a search warrant before effecting search. Since those who formed the search team were from DCEA, she submitted that, then there was no need to have search warrant which is applicable to police officers who conduct search in accordance with the provisions of the CPA.

Effecting search at night did not pose any issue to Ms. Matikila who argued that it was not clear when the informer informed PW2 the incidence but the latter revealed the information at about 2:30 am. Search was conducted at 2:50 am during which time the search team had no time to obtain a search warrant or permission from the Magistrate because the courts do not work at night. She added that, PW2 because of his rank did not need a search warrant required by the law. She, all the same, urged the Court to treat the contention as an afterthought following the appellant's failure to cross examine the witnesses on the issue of search warrant. The case of **Yanga Omari**

Yanga v. The Republic, Criminal Appeal No. 132 of 2021 (unreported) was relied on to augment that assertion. Otherwise, she was of the view that the cases cited by the appellant's counsel are distinguishable.

Mr. Panya's another attack was on the chain of custody and non-summoned of some material witnesses which complaints are comprised in grounds 2 and 4 of appeal which he opted to argue together. He submitted that the trial judge misdirected himself in convicting and sentencing the appellant basing on believing the testimony of PW2 only while discounting the testimony of an independent witness PW3 who witnessed the search and signed exhibits P2 and P3. He argued that by discounting the testimony of PW3 means that the search was conducted without an independent witness, which was illegal. On ground 4, he submitted that failure for the prosecution to call Inspector Emmanuel as a witness, who first saw the alleged drugs during the search in the appellant's room, raised another doubt in this case. He pointed out that there was an allegation that Inspector Emmanuel was the one who planted the said drugs in the appellant's room, but that allegation was answered by PW2. To eliminate Inspector Emmanuel means that the

chain of custody of exhibit P2 was broken. He referred us to a foreign decision in **Mary Hutten Martin Or Lees v. Her Majesty's Advocate**, [2012] HCJAC 57.

In reply Ms. Matikila argued that to be a witness in the process of search and the evidence to be disregarded during the trial are two different things. She elaborated that PW3 witnessed the whole process of search and signed both exhibits P2 and P3 but his demeanour during the trial that disqualified his evidence. She referred the case of **Yanga Omari Yanga** (supra). She added that there is no mandatory requirement in this case to have an independent witness.

Responding specifically on the contention by Mr. Panya that Inspector Emmanuel was material witness but was not called to testify, Ms. Matikila shortly opposed that contention. She submitted that Inspector Emmanuel was not incharge of the search but he was just participating in the process of search. She disagreed with the appellant's counsel on the issue of Inspector Emmanuel 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,

Ms. Matikila submitted that the learned trial judge was justified to admit exhibit P2 as it passed the test of relevance, materiality and competence. She maintained that the chain of custody was intact. She accordingly urged the Court to find that grounds 2 and 4 of appeal unmerited and dismiss them.

The last complaint was in ground 5 of appeal which Mr. Panya faulted the trial judge in failing to properly analyse the evidence given by the appellant and respondent and shifted the burden of proof to the appellant especially when he convicted and sentenced the appellant basing on the weakness of defence case. He referred us to page 228 of the record of appeal where the trial judge stated that: "*therefore an argument by DW1 and DW2 that what was seized from accused's bedroom was an incense, is a concoct*". Ultimately, he urged the Court to re-evaluate the entire evidence adduced at the trial, make its own findings on facts, allow the appeal and set the appellant at liberty.

In reply to the above ground, it was Ms. Matikila's argument that the case was proved beyond reasonable doubt and not for the weakness of the defence. She pointed out that the trial court properly analysed

and evaluated the prosecution case and satisfied that the case was proved beyond reasonable doubt. Finally, she 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 the DCEA was properly invoked and the appeal is not merited deserving dismissal.

At the end the learned Principal State Attorney urged the Court to enhance the sentence of life imprisonment which is in accordance with the provisions of section 15 (1) (a) of the DCEA.

In rejoinder, the learned counsel for the appellant opposed the above prayer and argued that the learned trial judge properly exercised discretion to impose a minimal sentence as prescribed under EOCCA under which the appellant was also charged.

Having carefully considered the grounds of complaint, submission 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, PW4, PW5, PW6 and PW7. 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 v. Republic** [2006] TLR 363 and **Mathias Bundala v. 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 house at Magomeni Usalama street was searched on 20th July, 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 the 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.

It was the appellant's complaint raised in the 3rd ground of appeal and elaborated by Mr. Panya that while section 38 (1) of the CPA requires that a search be conducted by or under the written authority of an officer in charge of a police station, the search at the scene was conducted by PW2 who was not an officer in charge of a police station. Ms. Matikila responded that search and arrest in drug cases is effected in accordance with DCEA where section 48 does not have such requirement. We begin with the dictates of the provisions of section 48 (2) (a) (ii), (2) (b) and (d) which stipulates 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) Investigates 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;

ii) take every measure necessary for discovery and impound every article which may potentially be used as evidence;

iii) 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 necessary delay and subject to the provisions relating to bail, take or sent the arrested person before a subordinate court in the area where he has been arrested;

c) Seizes, searches for an article 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;

iii) evaluate and determine size, volume, quantity, quality and value of estimated value of article seized;

iv) keep safe custody of article seized from possible act of loss, theft, shrinkage, depreciation of quality or value".

A close examination of the said provisions and the evidence on the record of appeal 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. In this regard, we find Mr. Panya'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 v. Republic,** Criminal Appeal No. 67 of 2010 and **Jibril Okash Ahmed v. 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.

At this juncture it is opportune to address the appellant's complaint raised on the 1st ground of appeal in the alleged irregular admission of exhibit P2 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 page 226 of the record of appeal. We say so because having acknowledged that relevance, materiality and competence are the

prerequisites of admissibility as stated in the case of **DPP v. 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 P1 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 exhibit P2 considered its relevance, materiality and

competence which we think missed the eyes of Mr. Nkoko or else he would not have raised the complaint of this nature. This renders the ground in the supplementary memorandum of appeal without merit.

Since what was retrieved from the appellant's room was confirmed to be narcotic drugs, next for consideration is whether the appellant had knowledge of the presence of the drugs in his room which is the gist of his complaint in the 2nd and 4th grounds of appeal. While the appellant's counsel argued that his knowledge on the presence of drugs was not established because the appellant claimed that it was planted by the police who conducted the search, the learned Principal State Attorney's response was to the effect that the appellant's behaviour on his arrest suggests that he had knowledge of 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 Court 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;

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 possessive case is likely to be circumstantial, and although circumstantial evidence can be just 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 what the defendant knew about an item not in his actual possession is challenging. Constructive possession may be established by evidence of acts, statement 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 often relied upon axion 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 last 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".

In our jurisdiction, the principle which recognises that drugs the commodities or 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 v. Republic** [1987] TLR 134 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 albeit in his presence, at his invitation and arrangement".

Similarly, in the case of **Nurdin Akasha alias Habab v. 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 trailors. 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 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 out 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".

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 room in question where the drugs were found. 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 room in question.

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 his room. Thus, in the wake established appellant's knowledge the case of **Mary Hutten Martin Or Lees v. Her Majesty's Advocate** (supra) which was cited to us by the appellant's counsel is distinguishable and thus the 2nd and 3rd grounds of appeal are not merited.

Next for consideration is the chain of custody. The appellant challenged the chain of custody in his 4th ground of appeal. The appellant faulted the prosecution for the failure to call Inspector Emmanuel as a witness, who first saw the alleged drugs during the search. He claimed that to eliminate the said witness means that the chain of custody of exhibit P2 was broken because he was a material witness. We agree with the learned Principal State Attorney that he was not incharge of the search but he was just participating in the process of search, therefore he was not a material witness in this case. Thus, in our considered view, the omission to call the said witness was not fatal and it did not adversely impact on the chain of custody or impeach the credible oral and documentary account of PW1 and PW2. This renders the 4th ground of appeal not merited.

As to the last complaint raised in ground 5 of appeal which faulted the trial Judge in failing to properly analyse the evidence given by the appellant and respondent and shifted the burden of proof to the appellant, we think it has no merit. On the basis of cumulative evidence of the prosecution, it was proved beyond a speck of doubt that, the

appellant was actually found in his room in possession of the narcotic drugs which were seized by PW2, placed under control of PW4, examined by PW1 who tendered them at the trial. Besides, the respective exhibit was at the trial identified by PW1, PW2, PW4 and PW6. Thus, we agree with the learned Principal State Attorney that the case was proved beyond reasonable doubt and not for the weakness of the defence. We are satisfied that the trial court properly analysed and evaluated the evidence of both sides and satisfied that the case was proved beyond reasonable doubt.

Pertaining to the sentence of 30 years meted on the appellant, the learned Principal State Attorney argued the same to be illegal and she 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 that the learned trial Judge properly exercised discretion to impose a minimal sentence as prescribed under EOCCA under which the appellant was also charged. We think we should reproduce the relevant sentencing provisions under the two laws.

We shall begin with section 15 (1) (a) of DCEA. It provides:

"15 (1) Any person who-

(a) ***Traffics in narcotic drug*** *or psychotropic substance;*

(b) N/A

(c) N/A

Commits an offence and upon conviction shall be sentenced to iife imprisonment*".*

(Emphasis added)

Under this provision, it is obvious that the only sentence stipulated for a person convicted of drug trafficking is life imprisonment.

On the other hand, the sentencing provision for a person convicted of an economic offence is provided under section 60 of EOCCA. The relevant subsections (1), (2) and (7) of that section. They provide that:

"60 (1) ***Except where a different penaity, measure or penal procedure is expressly provided In this Act or in the statement of an offence****, upon conviction of any person of an economic or other offence failing under the penal jurisdiction of the Court, the Court may impose in relation to any person, in addition to any order respecting property, any of the penal measures prescribed by this section, but not any other.*

(2) ***Notwithstanding provision of a different penalty under any other law and subject to subsection (7),*** *a person convicted of corruption or economic offence shall be liable to imprisonment for a term not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act;*

Provided that, ***where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence****". (Emphasis added)*

And, subsection (7) referred to above provides:

"(7) In considering the propriety of the sentence to be imposed, the Court shall comply with the principle that:

(a) a proved offence which is in the nature of an organized crime or public property, in the absence of mitigating circumstances, deserves the maximum penalty;

(b) any other economic offence may be sentenced with a sentence that is suitably deterrent; and

(c) ... not applicable".

Having laid down the above legal foundation, we now revert to our present case. As demonstrated above, the appellant was charged and convicted of the offence of trafficking in drugs under the DCEA and EOCCA. Under EOCCA, the sentence stipulated is imprisonment for a term of not less than twenty years but not exceeding thirty years. It still permits the Court to consider the appropriate sentence in terms of the factors set out under subsection (7) of EOCCA. The DCEA, on the other hand provides for only one sentence, life imprisonment. So, in terms of the proviso to subsection (2) of section 60 of EOCCA, the trial court has no choice but impose the most severe sentence which is life imprisonment as provided by section 15 (1) (a) of the DCEA.

We think, after convicting the appellant under section 15 (1) (a) of the DCEA, the trial court should have sentenced the appellant by imposing a sentence of life imprisonment and not of thirty years.

In the upshort of what we have said above, we are inclined to exercise our powers of revision under section 4 (2) of the AJA, we nullify the sentence of thirty years imprisonment imposed by the trial court.

We proceed to enhance the sentence to mandatory life imprisonment in consonance with the dictates of section 15 (1) (a) of the DCEA.

Otherwise, we find no merit in this appeal. We accordingly dismiss it.

DATED at **DAR ES SALAAM** this 13th day of September, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 18th day of September, 2023 in the presence of Mr. Ipilinga Panga, learned counsel also holding brief for Mr. Nehemiah Nkoko, Mr. Aliko Harry Mwamanenge, learned counsels for the Appellant and Mr. Tuly Helela, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL