

A In practice, a stamp impression is always placed at the foot of an affidavit by the Notary Public and Commissioner for Oaths to show his or her official address and nothing more. In this case, the stamp impression appearing at the foot of the Applicant's affidavit was intended to show the official address of the Notary Public and Commissioner for Oath before whom it was taken, namely Mr J.K. Laswai, Advocate.

C In law, the address of the Notary Public and Commissioner for Oaths is not one of the mandatory requirements which he or she has to state in the jurat of attestation. According to section 8 of the Notaries Public and Commissioner for Oaths Ordinance, Chapter 12, which was cited by learned counsel for the Applicant, there are two things which must truly be stated by the Notary Public and Commissioner for Oaths in the jurat of attestation. One, is the place where the affidavit was taken. Two, is the date when the affidavit was taken.

E As already stated, the place where the Applicant's affidavit was taken is not stated in the jurat of attestation. The omission to do so renders his affidavit defective and incompetent. An application which is supported by a defective affidavit lacks the necessary support and it becomes incompetent. *Fares Munena v. Asha Munena* (1) which was cited by learned counsel for the Applicant is very much in point. In that case, it was held by the Court of Appeal of Tanzania that an affidavit which does not show at its foot the place where it was taken is defective and incompetent. It was also held that a Notice of Motion which is supported by a defective affidavit is incompetent.

H Applying the said authority, I find that the Applicant's application is incompetent and I hereby strike it out for being incompetent. I make no order as to costs because the omission to state in the jurat of attestation the place where the Applicant's affidavit was taken was not occasioned by the Applicant himself. It was occasioned by the Notary Public and Commissioner for Oaths before whom it was taken.

I

SHIRAZI MOH'D SHARIFF v. MKURUGENZI WA MASHTAKA (DPP) (NUMBER 1)

HIGH COURT OF ZANZIBAR
AT VUGA
(Mbarouk, J.)

CRIMINAL APPEAL No. 19 OF 2004

(From the decision of the Regional Magistrate's Court at Vuga, Kayange, RM,
dated 12 May 2005, in Criminal Case No. 154 of 2002)

Evidence – Exhibits – Mishandling of exhibits – Effect thereof.

Criminal Practice and Procedure – Drugs – Analysis of sample by Government Chemist “as soon as practicable” – whether one month and a half is a reasonable time of delay – Section 61(1) Dangerous Drugs Act Number 6 of 1986.

The appellant was charged with and convicted of possessing dangerous drugs under the Dangerous Drugs Act in the Regional Magistrates' Court. Among the grounds of his appeal were that the alleged drugs were mishandled from the time they were obtained from the appellant up to the time they were handed over to the government chemist for examination. The appellant also complained of a long delay it took the government chemist to submit his report.

Held: (i) One and a half months is a reasonable time and hence cannot be branded as undue delay by the Government Chemist in submitting his report;

(ii) Mixing up of exhibits, even if it appears as a minor defect, has to be used to the benefit of the accused person.

Appeal allowed

Cases referred to:

(1) *Malik Hassan Suleiman v. S.M.Z.*, HC – ZNZ – Criminal Appeal Number 77 of 2004 (unreported)

- A (2) *Abdulrasul Sabur v. R.* [1968] EA 126
 (3) *Celestine K. Kaziba v. R.* [1984] T.L.R. 269
 (4) *Moses M. Laurence v. Government of Zanzibar*, Criminal Appeal Number 17 of 2002 (unreported)

B Statutory provision referred to:

- (1) Dangerous Drugs Act Number 6 of 1986, sections 61(1), 25, 23, and 32(1)

C *Mr Mbwezeleni*, for the Appellant

Mrs Mwanamkaa, for the Respondent

D JUDGEMENT

(Delivered 12 May 2005)

E **Mbarouk, J.:** The appellant, one Shiraz Mohamed Sharif has filed this appeal through his Advocate Mr Mbwelezini after having been aggrieved by the judgment given by the Hon. Regional Magistrate Yesaya Kayange in the original Criminal Case Number 154 of 2004 where he was charged with the offence of Possessing Dangerous
 F Drugs contrary to section 25 and 32(1) of Act Number 6 of 1986 of the Dangerous Drugs as amended by Act Number 6 of 1991 of the House of Representatives. The appellant was sentenced to serve twenty years (20) in prison without corporal punishment. He is now appealing
 G against the conviction as well as the sentence.

H At the trial court, it has been alleged by the prosecution side that in between 7 May 2002 at 7.45 pm and 9 May 2002 at 2.30am at the Police Headquarters Zanzibar, the appellant/accused, unlawfully was found in possession of seventy three (73) pellets (pipi) which were found to be dangerous drugs of the heroine type weighing 661 August 18gm worth about TZS. 11 000 000 of which the appellant/accused released them from his stomach through his anus by way of
 I stool.

In his amended Memorandum of Appeal, the appellant through his Advocate Mr Mbwezeleni has brought the following grounds, namely:

1. That the Hon. Regional Magistrate erred in law on convicting the appellant basing the same on Government Chemist Report, the same having been reported after undue delay of over two months contrary to the present authorities on the same. B
2. That the Hon. Regional Magistrate erred in law on convicting the appellant whose identity is uncertain contrary to the laws. C
3. That the Hon. Regional Magistrate erred in law in concluding against the appellant when the alleged drugs lacks chain on its handling since allegedly the same was obtained from the appellant and finally handed over to the government chemist for examination. D
4. That the Hon. Regional Magistrate erred in law in deciding against the appellant on a charge which is not proper and on the improper definition of the law to the injury of the appellant. E
5. That the Hon. Regional Magistrate erred in law in basing his decision on what he believed of the testimony of the witness rather than basing the same on the laws applicable. F
6. That the Honourable Regional Magistrate erred in law in basing the conviction on the weakness of the defence hence shifting the burden of proof to the appellant/rather than the Prosecutor. G
7. That generally the Hon. Regional Magistrate erred in law in coming to conclusion without due regard to the procedure and the relevant law hence his conclusions are void of legal basis.

H At the hearing of this appeal, Mr Mbwezeleni, Advocate for the appellant started his submission by the analysis of their fifth ground where he said that the principle of the law is that the prosecution must prove the case beyond reasonable doubt, whereas the trial magistrate's judgment lacked analysis, and to make it worse the court itself said that there is a possibility of the mis-management of the exhibits I

A which makes this judgment to be erroneous, hence through those mistakes which have appeared, it should not be given a room in the judgment of this appeal. Quoting the trial magistrates words, Mr Mbwelezeni said that, the trial magistrate said that he do not rely on
B minor irregularities, which mean that the magistrate had some doubts and those doubts have to be used to the benefit of the accused person – He cited paragraph 2 of page 7 as the evidence showing those doubts.

C He then went on ground number 4 of their appeal where he submitted that the appellant/accused was charged with “*kupatikana na madawa ya kulevya*” whereas the law is about Dangerous Drugs which is not synonymous with “*Madawa ya Kulevya*”, hence it would have been
D proper if it was “*Madawa Hatari*”. This means that there is a problem of the language which has been used, and he does not know where the magistrate got the mandate to interpret the legislature’s words. He said that the appellant/accused was defending himself against
E the offence of “*Madawa ya Kulevya*” and not “*Madawa hatari*”. Furthermore Mr Mbwelezeni pointed out that the trial magistrate was of the view that the accused defended himself to the possession but it was the possession of what, Mr Mbwelezeni asked. Because
F of that he said that would lead to a confusion even to an ordinary person.

To worsen the situation, Mr Mbwelezeni contended that the sections which were used were wrong and it has been admitted by the court
G itself. He insisted that the words “*Kulevya*” and “*Hatari*” are two different words.

He then embarked to ground number 2 where he submitted that the court is bound to tell the prosecutor to identify the accused.
H This is because, if you look at the charge sheet, it reads Shiraz Mohammed Sharif alias Jamal Masoud Ali, whereas in a normal situation this could have been one person but ironically the prosecution went further by saying that these were two persons and they brought the Immigration
I Officer to testify to that effect. Apart from that, Mr Mbwelezeni

said that the prosecution did not believe that the accused was twenty
A five years old. Hence he argued that, what they want to submit is that there were two persons, and if that is the case, then who committed the offence was it Jamal Masoud Ali or Shirazi Moh'd Shariff?
B Furthermore he said that they never brought Jamal Masoud Ali, hence that act of non production of Jamal tantamounted on the part of the prosecution to arrest the actual man who committed the offence.

Mr Mbwelezeni then dealt with ground number 1 and number 3 together, and in so doing he submitted that there are allegations that
C the appellant/accused was caught on 7 May 2002 and brought before the Police Station where he extricated eight five pellets (pipis) some of them were found to be plainly “wheat flour” – (unga wa ngano) and some of them were Heroin. Because of that, Mr Mbwelezeni
D argued that that alone is an indicator of tempering, because no body carries “wheat flour” – (unga wa ngano) from Pakistan to Zanzibar in his Stomach.

He went further by saying that it was between 7 May 2002 and 8
E May 2002 when those 85 pellets (pipis) were produced, and there after those materials were sent to the Government Chemist on 23 May 2002 which is around two weeks and we are not being told who
F and where those materials were kept, also there were no records to show the movement of those records.

Due to that uncertainty, and as far as the police station is a busy area, where many people are going and several officers are working, this gave rise to a room for tempering with those records, either
G deliberately or something may happen to them.

He went on further by submitting that police stations do have
H Registers of keeping exhibits and safe and officers who keep those records, however the said officer who kept those records was never brought to court to testify.

Mr Mbwelezeni proceeded by pointing out that to worsen the situation those drugs were delivered to the Government Chemist on
I

- A 23 May 2005 and the report of the Government Chemist was issued on 8 July 2002 which is two months after they have been received. He also pointed out that the records do not show when the Government Chemist examined those (drugs) actually. Also PW1 the Government Chemist who analyzed those exhibits (drugs) has not said anything to show where he kept those records/exhibits and he has not given the reasons as to why he took two months to complete the examination, whereas there are numerous exhibits brought before the Government and that could have given a room for mixing up.

Furthermore, Mr Mbwelezeni pointed out that PW6 Cpl Hamza talks about 13 May 2002 as the date of arresting the accused whereas the charge sheet shows that he was arrested on 7 May 2002. On the other hand PW7 Cpl. Juma as it has been shown that he received from Cpl. Hamza the "pipis" on the 13 May 2002 and these could have been caught from the accused person on 7 May 2002. Hence he said that this brings confusion.

On the issue of tempering of the records/exhibits, Mr Mbwelezeni cited an unreported case of *Malik Hassan Suleiman v. SMZ (1)* where, at page 4 of that judgment, the court touched about the issue of the possibility of tempering between the handing over of the exhibit from Police to the Government Chemist Department. In that case, the Court of Appeal said that because there are doubts of mishandling of the exhibits, hence the benefit of that doubt was given to the appellant.

Lastly, in his submission for their seventh ground of appeal, Mr Mbwelezeni pointed out that the demand of the law of our land says that if there are any discrepancies then they should be given to the benefit of the accused person and if any mischief happens hence the court is required to direct that the Prosecution has failed to prove their case without elaborating further on this point, Mr Mbwelezeni submitted that the trial court has failed to handle this matter according to the laid procedure which is very crucial, hence he suggested that the judgment should be in their favour. He then stressed that the rules of the game should be adhered to and the law of the land should be applied.

Finally, he prayed that their appeal be allowed, sentence quashed and the appellant be released.

Then followed the reaction from Mrs Mwanamkaa, the learned state attorney who represented the respondent who started her reaction by examining ground number 5 where she disagreed with the appellant, because the Regional Magistrate based his decision by taking into consideration other things like exhibits produced before the court e.g. 'pipis' or pellets, Government Chemist Report, the passport tendered and the voluntary statements of accused which was admitted by PW8.

She then preceeded her reaction by submitting that the counsel for the appellant quoted words at page 15 of the judgment, but the fact is that the trial magistrate was referring to the issues framed in his judgment, whereas at page 14 of the judgment he tried to answer the question whether the accused in this case was found in possession of dangerous drugs, and he then analyzed the evidence from the testimony of the witness and that is why after the said analysis the trial Regional Magistrate was making a conclusion on that issue only. Hence she disagreed with Advocate for the appellant that the magistrate relied on the testimonies of the witnesses but on the contrary the said magistrate took into consideration all the facts and finally he reached to a conclusion of convicting the appellant.

Mwanamkaa, the learned state attorney for the respondent proceeded, but disagreed with what have been submitted by the Advocate for the appellant when he referred paragraph number 2 of page 17 of the Judgment which he referred to as the part of the judgment which have shown doubts in the case and the magistrate shifted the burden of proving the case from the side to the defence side. On this issue the learned State Attorney reacted by saying that actually the magistrate has not shifted the burden of proving the case, but she cautioned that we have to know that the prosecution is to prove the case beyond reasonable doubt but not to clear all the doubts, and the court is required to see whether that doubt is reasonable to clear the issue. In this case, she said that the Honourable Regional Magistrate has

A convinced himself that the prosecution has proved their case beyond any reasonable doubt.

As to the fourth ground, the learned state attorney disagreed with the contents in that ground of appeal because the charge reads as
 B “*Kupatina na Madawa ya Kulevya K/F 25 na 32 (1) cha Sheria*
numberi 6 ya 1986 kama ilivyorekebisha na sheria numberi 6
 C *ya 1991*”. Whereas the Advocate for the appellant argued that it should
 D have been “*Kupatikana na Madawa Hatari*” and not ‘*Kupatina na*
 E *Madawa ya Kulevya*’ as the real translation of being in possession
 F of Dangerous Drugs as it appears in the Act. On the other hand the
 learned state attorney argued that the difference here is that that
 was a mere translation of words in a language, whereas in a language
 one word may have different meaning and also in translating the word
 it depends upon the effect of the word as it appears here for a word
 “dangerous drug” where the people are used dangerous drugs to have
 the effect of intoxication and fortunately here “Heroin” has that effect
 of “intoxication”. Also the word “*Madawa ya Kulevya*” is the one
 which frequently used by ordinary people to refer to as Dangerous
 Drugs. Hence as far as even in the society that word is being used to
 refer Dangerous Drugs, hence the accused definitely knew that he
 was caught with “*Madawa ya Kulevya*” as Dangerous Drugs.

She proceeded further by saying that the accused has been charged
 under Act Number 6 of 1986 which has interpreted the term dangerous
 drugs and the facts in this case has shown that the accused was caught
 G with “Heroin” and according to the Legal Notice Number 17 of 1991
 it has been declared as one among the drugs listed as dangerous,
 hence she said that the appellant/accused was properly charged under
 proper law. She then added by saying that the appellant/Accused defended
 H himself properly by knowing what really was the charge against him
 even with that alleged difference. She then quoted paragraph 3 of
 page 11 of the judgment as on the point that the accused denied to
 have given through his anus any dangerous drugs.

I

In her answer to the second ground, the learned state attorney
 reacted by saying that the accused was charged under two names
 after himself has identified, into those two names. At the time of
 his arrest she said that the appellant/accused was travelling under
 the passport having the name of Jamal Masoud Ali and he identified
 himself as Jamal Masoud Ali, she then said that the prosecution tendered
 as evidence the said passport used by the applicant and it was admitted
 in court as Exhibit 4, she proceeded by saying that that passport is a
 major identity to identify a person and it had the photograph of the
 appellant. However the learned state attorney, said that later on the
 appellant/accused identified himself as Shirazi Mohamed Shariff.
 Furthermore she said that according to the witness and Exhibit 4
 (passport) it has shown that Jamal Masoud Ali and Shirazi Mohamed
 Shariff are the same as the appellant. Hence she said that there are
 no contradictions because all two names were used in the Charge
 Sheet.

The learned state attorney for the respondent also pointed out
 that all the witnesses have identified the appellant in person to be
 the one that they have arrested and the one who gave out the pallets
 mentioned in the charge sheet and the one referred in this particular
 case.

Then, the state attorney Mwanamkaa ended her response to ground
 number 2 by saying that from those arguments, the identity of the
 accused was well established and there was no contradiction on the
 part of the accused identity. This is because, the witnesses who arrested
 him and the eye witnesses had ample time to remove the possibility
 that he was another person. Also those witnesses identified the accused
 in person physically as the one they are referring to on their evidence.

As to the third ground of appeal, the learned state attorney disagreed
 with it because it does not have any base. She then went further by
 contending that the drugs were obtained from the appellant in the
 presence of PW1 Sgt. Mbarouk on 5 May 2002 and PW5 Cpl. Khamis
 Lila. Also the 85 pellets of drugs were handed over to PW6 Cpl.

- A Hamza from PW5. The drugs were counted and packed and sealed by PW6 in front of the accused and independent witness called Amour and PW5 Cpl. Khamis and D/Sgt. Juma Ameir – PW7 who was an investigator of this case received exhibit from PW6. Cpl. Hamza on 13 May 2002.

- B She continued by saying that when you look at the dates the drugs pallet were obtained from the appellant on 7 and 8 May 2002 and sealed on 13 May 2002, but the evidence shows that on 13 May 2002 the accused was sent to the Hospital for X-Ray. Hence she said that the delay was in the process of making sure that the accused has no more pallets in his stomach, whereas the 11 and 12 May were weekend days and that is why they were sealed on the 13 May 2002.
- C Furthermore she contended that the exhibits were handed to PW7 on 13 May 2002 and were sent to the Government Chemist on 23 May 2002 and at page 53 of the proceedings PW7 said that they kept the exhibits in the store. On the same issue of mishandling of the exhibits, the learned state attorney reacted by saying that PW6 has said at page 42 of the proceedings at paragraph number 1 that the handling was recorded in the Report Book (R.B.)

- F As for the point that there was a possibility of tempering, because some of those pallets contained “*ungajwa ngano*” and some are dangerous drugs, the learned state attorney responded by saying that, here the appellant is charged with the offence of the possession of dangerous drugs, and the fact that the accused was found with one pallet does not change that the accused has committed the offence.
- G After all she (the learned State Attorney) said that the accused is not charged with the offence of carrying “*unga wa ngano*” but for being in possession of dangerous drugs. Also the possibility of tempering was not there because even if some of them were found not to be containing dangerous drugs but this does not change the situation because he was caught being in possession of dangerous drugs. Hence the learned state attorney said that there was no tempering because
- H no one will carry the whole lot of “*unga wa ngano*” in his stomach,
- I

and argued that through the testimonies of PW's 1, 4,5,6,and 7 they have established that there was proper handling of exhibits. A

As on the issue of the date of arresting the accused mentioned by PW6 Cpl. Hamza as the 13 May 2002, the learned state attorney said that it should be taken as a mere forgetting of the actual date. B

In her reaction to the ground number 1, the learned state attorney disagreed, because it was not true that it has been delayed for two months. She said the exhibits were sent to the Government Chemist on 23 May 2002 and delivered after one and a half month only, which is a reasonable time to submit a report. She quoted section 61(1) of Dangerous Drugs Act number 6 of 1986 which states that the Analysts should analyze the exhibit as soon as possible. Hence she argued that, taking into consideration that the Government Chemist had other work and exhibits to be analyzed one and a half month was a reasonable time and not an undue delay as claimed by the appellant. Also PW1 has explained that the time was taken due to the work load. C D

As on the issue of the unreported case of *Malik Hassan Suleiman v. S.M.Z.* (1) she responded by saying that she wanted to distinguish it with the present case she elaborated by saying that PW7 testified at page 53 of the proceedings that the drugs were kept by a storekeeper, whereas in the cited case PW1 and PW2 have not said how and where the alleged ‘*bhang*’ was preserved before given to PW3 and PW4 for the onward transmission to PW5 who is Government Chemist in the cited case. Furthermore, the learned state attorney said that in the cited case PW5 did not mention when he examined and gave the “*bhangi*” to PW1. Neither PW1 said whether he received the “*bhangi*” if at all from PW5 and assuming when he received it. E F G

In elaborating further, the learned state attorney contended that in the present case, PW1 said that at page 19 of the proceeding he received the drugs on 23 May 2002 and gave the report on 8 July 2002 to PW7. Not only that, PW7 also stated that he did receive the report on 8 July 2002 from PW1. Whereas in the cited case, she (the learned state attorney) said that it was not mentioned at all H I

A by PW5 as to when the said 'bhang' was given to PW1, but in present case it was mentioned clearly that the report was handed over to PW17 from PW1.

B Furthermore she said that the only point in the present case as alleged by the appellant that when did the Government Chemist examine the exhibit. On that issue she responded by saying that the date of handling and giving out the report which was from 23 May 2002 – 8 July 2002, whereas in the cited case there was no date given from C handling the exhibit.

D Hence she concluded by saying that because of the reasons, this means that there was no undue delay for issuing of report of Government Chemist as alleged by the appellant, and the time was reasonable enough to deliver the report.

E As on the sixth ground, the learned state attorney, Mwanamkaa said that the Hon. Regional Magistrate has rightly convicted the appellant on the strength of the prosecutions case and has not shifted the burden of proof as alleged by the appellant. Also in convicting the appellant, the Hon. Regional Magistrate has relied on the whole evidence produced by the prosecution side and that includes the evidence of arresting F Police Officers, eye witnesses who saw the taking out from the appellant's anus drugs or pipis who are PW4,5 and PW6. The said magistrate also took into consideration the real evidence tendered in court by PW1 and PW5. She went further by saying that the Hon. Regional Magistrate had time to see the credibility of the witnesses and believed G their testimonies, and that is why he was convinced that the case was proved beyond any reasonable doubts and hence he rightly convicted the appellant.

H Lastly she opposed the seventh ground of appeal on the ground that the Hon. Regional Magistrate did not err in law, because he took due regard to the procedure and relevant law, hence she said that his conclusions were valid and have legal basis, because he used I relevant and proper law concerning Criminal Procedure and Evidence.

A On the issue of misquoting section numbers done by the Hon. Regional Magistrate, the learned state attorney reacted by saying that the accused was charged under section 25 and 32 (1) of Dangerous Drugs Act Number 5 of 1986 as amended by Act Number 6 of 1991 B whereas the proper sections were section 23 and section 32(1), hence that was a mere misquotation and that has not caused any injury to the appellant, she said that the defect was not fatal and no miscarriage of justice has been occasioned as far as the particulars of the offence C were clear and the accused knew on which offence he was charged with. She cited a case of *Abdulrasul Sabur v. Republic* (2) where it was held that there was no failure of justice because of minor mistake. She also cited a case of *Celestine Kamtambula Kaziba v. Republic* D (2) where it was held that though the accused was charged under a wrong section but the irregularity was said to be curable.

E Mr Mbwezeleni, then pointed out that the court made a serious error believing that the accused was caught with the drugs by relying on the testimonies of the witnesses which confused themselves, e.g. on the issue of dates. As to the question of reasonable doubt, Mr Mbwezeleni reacted by stressing that the burden is upon the prosecution and not to the defence to prove the case beyond reasonable doubts, F and the defence may even remain silent.

G He also argued that there is no misquotation which is acceptable in law when he was examining issue number 6. Lastly he submitted that their prayers as they have appeared in their Amended Memorandum of Appeal be awarded as prayed. C

I After having examined the submissions from both sides in this appeal let me now examine much more closely the arguments in each ground and put my decision thereon. However, instead of mixing up my examination of the grounds of appeal, I will be consistent by examining these grounds from number 1 to number 7 as they have appeared in the amended Memorandum of Appeal.

J As for the first ground of appeal which says that the Hon. Regional Magistrate erred in law in convicting the appellant basing the same

A on Government Chemist Report which has reported after undue delay
of over two months contrary to the present authorities, I am of the
view that if you examine the date to which the Government Chemist
received those exhibits (drugs) which is 23 May 2002 and the date
B to which he handed them over to PW7 which is 8 July 2002 making
approximately only one and a half months and taking into consideration
that the Government Chemist had other samples for analysis prior
to those sent by PW7 in this case, and taking into consideration
C that section 61(1) of Dangerous Drugs Act Number 6 of 1986 which
states that:

Section 61(1)

D In every case in which a sample or analysis is delivered to the Government
Analyst under section 56, the Analyst shall cause it to be analyzed as
soon as practicable and shall give to the person who request the analysis
to be made a certificate specifying the result of the form prescribed in
the Third Schedule to this Act and such certificate shall judicially be noticed.

E Due to that reason, I do not see that one and a half months as being
undue delay. I am of the view that even an ordinary, reasonable person
can interpret the term "as soon as practicable" used in section 61(1)
of the Act Number 6 of 1986 as that situation which take into consideration
F that the Government Chemist has been occupied by the analysis of
other exhibits sent for analysis prior to that sent by PW7 concerning
other cases hence one and a half months is a reasonable time and
hence cannot be branded as undue delay. Hence because of that reason
G ground number 1 fails. As for ground number 2 which says that the
Hon. Regional Magistrate erred in law on convincing the appellant
whose identity is uncertain contrary to the laws, I am of the opinion
that we have to go back to the Appellant's own testimony at the Regional
H Magistrate's Court where in his defence he said that at page 78:

I This is the passport I am talking about and it is the real picture of mine in
this passport. The name in the passport of Jamal Masoud Ali Al-Maamry
and sometimes I do use Jamal Ali Masoud Al-Maamry.

The appellant/accused did admit that he was the one who was arrested
at the airport when he was looking for a toilet. Hence as far as the
appellant/accused has admitted himself that the passport contained
his real picture and the issue that he admitted that he was the one
who was arrested at the airport, I do not see that there is a dispute
on the issue of his identity, after all the charge sheet has shown
both names, that of Shiraz Moh'd Shariff and that of Jamal Masoud
Ali by putting *alias* or alias between those two names. The fact is
that the meaning of the word 'alias' according the Oxford Student's
C Dictionary means:

a name which a person, uses to hide her or his own

Through the available sources we have in this case I am of the view
that the appellant might have been hiding his name, but I am satisfied
that there is no contradiction in the identity of the appellant/accused
in person, because the passport which one among major identity to
identify a person contained his photograph which the appellant/accused
has not denied and he himself has admitted that he was the one who
was arrested at the airport, hence I am of the opinion that the identity
of the appellant/accused was established and there was no contradiction.

As far as the third ground of Appeal which is concerning the
issue that the Hon. Regional Magistrate erred in law in concluding
against the appellant when the alleged drugs lacks chain in its handling,
I concur with Mr Mbwelezeni, Advocate for the appellant in the sense
that the existence of the drugs itself as to have been in the possession
of the appellant/accused is in great doubts. The doubts concerning
the possession began at the time when the appellant was sent to Hospital
for X-ray examination, where it has shown that PW10 and PW11
who were officers from the X-ray Department at Mnazimmoja Hospital
testified that they did an X-ray of the appellants' stomach, but the
prosecution failed to submit a doctor who wrote his report in the
sick sheet. Hence the chain started to be broken from the beginning.

The second doubt which I have noted on the alleged drugs to
have lacked chain in its existence let alone its handling was the failure

- A on the prosecution side to submit an independent witness who witnessed the appellant/accused passing out those 'pipis' or pallets containing drugs from his stomach through his anus. Even though they mentioned him as being called Amour but the prosecution failed to call that witness which could have improved the quality of proving their case beyond reasonable doubts.

- Another concerning mishandling is the failure for the prosecution side to the court Officer who kept those records, he was never brought to court to testify. If this court will assume that there were those drugs, for the reasons which have been stated above, this court too cannot rule, out the possibility of mishandling and that leads me to be convinced that a chain of events has been broken.
- D Apart from that I also concur with Mr Mbwelezeni when he said the police station is a busy area where many people are going and several officers are working, hence as far as there were no records to show the movement of the records (drugs) this gives a room for tampering either a deliberate one or something else may happen, hence it was necessary to submit in court a register concerning the movements of those Exhibits and the Officer who handled them. As it has been said by Justice of Appeal Mroso in the case of *Moses Mukangama Laurance v. The Government of Zanzibar* (4):

There is need therefore to follow carefully handling of what was seized from the appellant up to the time of analysis by the Government Chemist of what was believed to have been found on the appellant.

- G If we make a further follow up of the handling of the alleged samples at the Government Chemist, PW1 who was a Government Chemist has failed to show how they handled those drugs and his testimony does not show where he kept those records or exhibits.
- H All of the issues mentioned herein above have created doubts and I think the vital missing link in the handling of those alleged samples of drugs from the time the appellant/accused has been arrested, then sent to hospital to the time of Chemist analysis has created real doubt.

Now let me go to the forth ground of appeal which says that the Honourable Regional Magistrate erred in law in deciding against the appellant on a charge which is not proper on the improper definition of the law to the injury of the appellant. After having gone through the records at the Regional Magistrate's Court, I have noted that it is a fact that the appellant has been charged under a wrong section of the law and the learned state attorney Mwanamkaa admitted that there was a misquotation of section in the charge sheet but she said that the defect was not fatal and no miscarriage of justice has been occasioned as far as the particulars of the offence were clear and the accused knew on which offence he was charged. In support of her argument she cited the case of *Abdulrasul Sabur v. Republic* (2) where it was held that there was no failure of justice because it was a minor mistake. She also has cited a case of *Celestine Kambambula Kaziba v. Republic* (3) where Justice Msumi held that though the accused was charges under a wrong subsection but the irregularity is curable under section 346 of the Mainland Tanzania Criminal Procedure Code, but basically the accused in that case was said to have known fully the kernel of the case against him.

In view of those authorities I concur with Mrs Mwanamkaa that the misquotation is curable as far as the appellant fully understood the kernel of the case against him through the particulars of the offence which were clear and the accused knew on which offence he was charged.

As for fifth ground of appeal which says that the Hon. Regional Magistrate erred in law in basing his decision of what he believed of the testimony of the witnesses rather than basing the same on the laws applicable, I concur with Mr Mbwelezeni, advocate for the appellant when he said that it is a principle of the law that the Prosecution must prove their case beyond reasonable doubts, whereas according to the record in the judgment, the trial magistrate himself seemed to have doubts and those have to be used to the benefit of the accused person. Quoting the Honourable Regional Magistrate's word as they

A have appeared at paragraph 2 of page 17 of his judgment where he said:

B I cannot rule out completely the possibility of mixing up the exhibits, but in the absence of clear evidence, the court cannot merely rely on that omission to record as also it is the view of this court that this is the minor irregularity of which in the absence of clear evidence, the court cannot rely on it that therefore they has been a tempering with the exhibit by the police witnesses.

C Time and time again courts decisions have clearly stated that it is the duty of the prosecution side to prove their case beyond reasonable doubt and there is no way that such a burden of proving their case to be narrowed down and be imposed upon the defence. It is a fact through the records in the trial court's judgment that the trial magistrate has been convinced that he cannot rule out completely the possibility of the mixing up of the exhibits, hence even if it has appeared such a minor defect of the possibility of the mixing up, the law directs that it has to be used to the benefit of the accused person. For that reason I am in agreement with what has been stated in ground number 5 of the appeal. As for ground number 6 which says that the Honourable Regional Magistrate erred in law in basing the conviction on the weakness of the defence, hence shifting the burden of proof to the appellant rather than the prosecution, I am of the view that it should be read together with my views in my analysis of ground number 3 and number 5.

G Lastly as for the last ground which says that generally the Hon. Regional Magistrate erred in law in coming to conclusion without due regard to the procedure and the relevant law, hence his conclusions are void of legal basis, I agree with what have been said in this ground, H because as it has been established herein above there were discrepancies which have caused doubts and as far as the demand of the law of our land says that if there are any discrepancies in criminal cases then they should be used to the benefit of the accused person, and the I court is required to state without any hesitation that the prosecution

A has failed to prove their case. Hence that leads me to say that the trial court has failed to handle this matter according to the laid down procedure and hence its conclusions are void of legal basis.

B For the reasons stated herein above, I am satisfied that this appeal does have merit, and hence it is accordingly allowed, conviction quashed, and sentence set aside. It is also ordered that the appellant is to be released from the education centre unless he is held therein in connection with a lawful cause.

TATU KIUNGWE v. KASSIMU MADAI

D HIGH COURT OF TANZANIA
AT DODOMA

E (Kaijage, J.)

(PC) CIVIL APPEAL No. 6 OF 2002

F (From Singida District Court Civil Appeal No. 77 of 2000, on appeal from Ilongere Primary Court Original Civil Case No. 96 Of 1999)

*Torts – Tort of malicious prosecution – Proof of malicious prosecution –
Relevance of a criminal case in proving malicious prosecution*

G The appellant Tatu Kiungwe, complained to village authorities and later to police that her money was stolen from her. The respondent, Kassimu Madai was the suspect. He was prosecuted in a Primary Court but was later acquitted. The respondent in turn sued the appellant for TZS. 462 600 for malicious prosecution. After evaluating the evidence, the trial Primary Court dismissed the respondent's claim on finding that H it was not established that the appellant had prosecuted the respondent maliciously. The respondent appealed to the District Court which reversed the decision of the trial court and awarded the respondent TZS. 300 000 as damages. The appellant was I dissatisfied hence this appeal.