IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 228 OF 2019

HAMIS MOHAMED MTOU ....APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Dar es Salaam)

(Dyansobera, J.)

dated the 13th day of March, 2017
in
Criminal Sessions Case No. 28 of 2015

JUDGMENT OF THE COURT

17th August & 16th September, 2021

KWARIKO, J.A.:

Hamis Mohamed Mtou, the appellant was arraigned before the High Court of Tanzania, Dar es Salaam District Registry (Dyansobera, J), with one count of trafficking in narcotic drugs contrary to section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act [CAP 95 R. E. 2002; now R.E. 2019] (henceforth the Act). It was alleged by the prosecution that on 17th day of November, 2010 at Julius Nyerere International Airport (JNIA) within Ilala District in Dar es Salaam Region the appellant

trafficked in narcotic drugs namely; Heroin Hydrochloride weighing 811.54 grams valued at TZS *24,346,200.00.* He denied the charge but at the end of the trial, he was convicted and sentenced to a fine of TZS 10,000,000.00 and in addition, to twenty years' imprisonment. Dissatisfied with that decision, the appellant is before the Court on appeal.

The historical background of the case which gave rise to this appeal can be stated as follows. On 17th November, 2010 at midnight Salim Geruka (PW8), a worker at JNIA was on duty as airport security officer who worked as passengers' luggage Inspector. While he was continuing with his duty, he detected some suspicious substance in one of the passengers' bags and signaled his supervisor one Anna Myovela (PW11) to follow-up that bag. PW11 complied and waited until the bag was picked up by its owner. It was the appellant who was said to have picked the bag, and that is when PW11 intercepted and took him for proper search. Upon inspection, some sweets like objects were found in one of the trousers pockets. She handed over the appellant to a police officer

No. E. 2547 Det. Cpl. Hamis (PW7) who took him to police station where 37 pellets of drugs were found in the pockets.

As it became apparent that the appellant had swallowed drugs, he was made to defecate them in the watchful eyes of Herman Gervas (PW5) official with Tanzania Revenue Authority, Ramadhan Suleiman (PW6) Immigration Officer and Asst. Inspector Wamba (PW9) where a total of 30 pellets were defecated. A total of 67 pellets therefore were sent to the police Anti – Drug Unit (ADU) which were received by exhibit keeper Neema Andrew Mwakajenga (PW4). The pellets together with the ticket, passport and observation form (exhibit) (P6) were said to have been received by PW4. Thereafter, PW4 packed the drugs in the presence of some police officers, the appellant and a ten-cell leader one Amina Shoka (PW3) as an independent witness.

On 30th November, 2010, PW4 took the drugs to the Government Chemist Office where Bertha Fredrick Mamuya (PW1) conducted the examination. She found the drugs to be heroine hydrochloride or diacetylmorphine (exhibit P4) which were valued

by Christopher Joseph Shekiondo (PW2) and found worth at TZS. 24,346,200.00 and a certificate of value was admitted as exhibit P5.

Further, the appellant was said to have confessed to the allegations and his cautioned statement was recorded by SP Francis Sepau Duma (PW10). Though he objected it during trial, nonetheless, it was admitted as exhibit P8.

In his defence, the appellant who was the sole witness categorically disassociated himself with the allegations. He stated that police officers arrested him while coming from the Embassy of India where he had gone to apply for documents to travel to India where his father had died while receiving treatment. He complained that at the police station, he was forced to sign some papers at gun point.

At the conclusion of the trial, the High Court found that the evidence sufficiently proved the charge that the appellant was caught trafficking in narcotic drugs contrary to the law. He was convicted and sentenced as indicated earlier.

Before this Court, the appellant filed a memorandum of appeal on 1st April, 2020 containing ten grounds, followed by two sets of supplementary memoranda one with seventeen grounds filed on 28th May, 2020 and another with four grounds filed on 11th August, 2021. He also filed written statement of arguments on 5th August, 2021. We have gone through the grounds of appeal and found the same raise eight grounds of complaint as can be paraphrased as follows:

1. That, the charge was defective as it did not disclose the ingredients of the offence.
2. That, the chain of custody in respect of exhibit P4 was not proved.
3. That, the assessors did not fully participate in the trial.
4. That, the certificate of value of the narcotic drugs was improperly prepared.
5. That, the defence evidence was not considered.
6. That, the trial court did not comply with section 210 (3) of the Criminal Procedure Act [CAP 20 R. E. 2019] (the CPA).
7. That, the prosecution did not comply with section 34 of the Act.
8. That the prosecution case was not proved beyond reasonable doubt.

During hearing of the appeal, the appellant appeared in person, unrepresented whilst Ms. Cecilia Shelly, learned Senior State Attorney together with Ms. Elizabeth Mkunde, learned State Attorney represented the respondent, Republic.

When the appellant was called upon to argue his appeal, he adopted the three sets of the memoranda of appeal and the written statement of arguments. He also explained the four grounds of appeal which were filed subsequent to the written statement of arguments. For reasons which will be apparent in the course of this judgment, we wish only to reproduce the submissions of the parties in relation to the first ground of appeal.

The appellant submitted in respect of that ground that the charge contravened section 132 of the CPA for failure to disclose in the particulars of the offence the type of trafficking in drugs he was alleged to have committed as defined under section 2 of the Act. Further, he complained that the particulars of the offence did not mention the number of pellets recovered from him and the place they were found between defecation and in the bag. He argued that, failure to disclose essential elements of the offence denied him

opportunity to better understand the allegations against him so that he can properly marshal his defence. To fortify this contention, the appellant referred to us a decision in the case of **Mussa Mwaikunda v. R** [2006] TLR 387. From the foregoing, the appellant argued that the charge is neither curable under section 388 of the CPA nor by the evidence on record or facts of preliminary hearing. He added that, the trial Judge admitted that the charge was not properly drafted and quoted a Kenyan Court of Appeal case of **Madline Akoth Barasa and Another v. R**, Criminal Appeal No. 193 of 2005 [2007] eKLR but reached to a different conclusion.

In response to the foregoing, Ms. Mkunde argued that the charge was proper since it complied with section 132 of the CPA. She contended that at page 12 of the record of appeal the charge indicated in the statement of the offence, the date and place of incident and the subject matter of the alleged crime. In support of her argument, at first the learned State Attorney referred us to the decision in the case of **Alberto Mendes v. R,** Criminal Appeal No. 473 of 2017 (unreported), but upon prompting by the Court as

whether the same was similar to the case at hand, she changed her stance and withdrew it.

It is common understanding that the charge is a foundation of a criminal trial. It means therefore that, any court admitting it from the prosecution should satisfy itself that it is drawn in compliance with the law. Understanding the importance of the charge, the law gives direction on how it should be drawn together with its contents. Section 132 of the CPA which is relevant here provides thus: -

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

Likewise, section 135 (a) (i) of the CPA provides: -

> *"The statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created*

> *by enactment, shall contain a reference to the section of the enactment creating the offence."*

It can thus be gleaned from the cited provisions that, every charge should contain a statement of the specific offence, describing it in a clear language together with the particulars of the offence so as to give an accused necessary and reasonable information and a clear picture of what he is being accused of so that he can properly prepare his defence. In the case of **Mussa Mwaikunda** (supra), the Court stressed the importance of the charge disclosing the essential elements of the offence charged and it stated thus:

> *"It is always required that an accused must know the nature of the case facing him and this can be achieved if the charge discloses the essential elements of the offence charged."*

In the instant case, the appellant was charged with the offence of trafficking in narcotic drugs under section 16 (1) (b) (i) of the Act which provides:

> *"(1) Any person who-*
>
> *(a) N/A*

(b)traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance *commits an offence and upon conviction is liable.*

(i) in respect of any narcotic drug or psychotropic substance to a fine of ten million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and in addition to imprisonment for life but shall not in every case be less than twenty years." [Emphasis supplied]

The catch word in this offence is *traffics in* narcotic drug or psychotropic substance. The term trafficking has been defined under section 1 of the Act as follows:

> *"trafficking" means the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer..."*

Under this provision of the law, the modes in which trafficking in drugs can take place have been shown to include importation, exportation, manufacturing, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person. Now, in order to find out whether the particulars in support of the charge against the appellant were sufficient to inform him what the allegations were, we find it apposite to reproduce them as follows:

> *"**HAMISI MOHAMED MTOU** on 17th day of November, 2010 at Julius Nyerere International Airport within Ilala District, Dar es Salaam Region, did traffic in Narcotic Drugs namely; **HEROIN HYDROCHLORIDE** weighing 811.54 grams valued at Twenty Four Million Three Hundred Forty Six Thousand Two Hundred Only (Tshs. 24,346,200/=)."*

Looking at the particulars of the offence in comparison with the definition of trafficking, we have not found anything explaining on what the appellant is alleged to have done to be said that he was trafficking in narcotic drugs. There is no mention of any of the categories of trafficking in drugs to constitute the offence charged. The prosecution ought to have indicated in the particulars of the

offence what the appellant was doing with the narcotic drugs to constitute the offence charged so that he can well understand the allegations against him and be able to marshal his defence. The charge is therefore lacking in the particulars of the offence.

The particulars of the offence in the instant case are in contrast with the case of **Alberto Mendes** (supra), where it was clearly stated in the particulars that the appellant was trafficking in drugs from the United Republic of Tanzania as follows:

> *"Alberto s/o Mendes on the 15th day of April 2012 at Julius Kambarage Nyerere International Airport within Ilala District in Dar es Salaam Region* ***was found trafficking from the United Republic of Tanzania*** *1277.41 grams of Narcotic Drugs namely Heroin valued at Tanzania shillings fifty seven million four hundred eighty three thousand four hundred and fifty only (57,483,450)."*
>
> [Emphasis supplied]

Despite the said shortcomings in the particulars of the offence, at least, it was expected that the situation would have been cured by the prosecution evidence. However, upon examination of the evidence, we have found it not capable of

rescuing the particulars of the offence. This is so because the evidence did not show what was the mission of the appellant at the airport. The prosecution witnesses did not produce any evidence to show that he was travelling into or outside the United Republic of Tanzania and the name of the airline. There was no air ticket or boarding pass if any tendered to that effect. Had the prosecution tendered any of these items the evidence could have cured the shortcomings in the particulars of the offence. The prosecution only tendered a passport and international vaccination cards both issued in Dar es salaam in 2007 and 2009 respectively. There was no any name of the airline or flight number shown in the observation form (exhibit P6), as that portion was left blank.

We have wondered if the appellant understood the charge to be able to marshal his defence. This is because, he did not at all tackle the allegations against him, instead he claimed that he was arrested on his way back from the Indian Embassy where he had gone to apply for a visa.

Faced with similar situation in the case of **Madline Akoth** (supra), which was quoted by the trial judge in which we take inspiration, the court stated thus:

> *"It is evident from the definition of "trafficking" that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substance. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking. In this case neither the charge sheet nor the evidence discloses the dealing with the bhang which constitutes trafficking."*

In the event, we find that the particulars of the offence did not contain sufficient ingredients of the offence of trafficking in narcotic drugs to have given the appellant enough information of what he was facing so that he could properly plead to it and marshal his defence.

Consequently, it is clear therefore, that the appellant pleaded to a fatally defective charge, hence did not get a fair trial rendering the whole trial a nullity. We therefore nullify the proceedings of the trial court.

Having nullified the proceedings of the trial court, under normal course of things we would have ordered a trial de novo. However, we would not take such a move because the charge which is the foundation of a criminal trial has been declared fatally defective. There is no charge upon which a retrial would be conducted. We find support on this stance in the Court's decision in **Paulo Kumburu v. R,** Criminal Appeal No. 98 of 2016 (unreported), where it was stated that:

> *"Since in this case the charge sheet is incurably defective, implying that it is non-existent, the question of a retrial does not arise."*

In conclusion, we find the first ground of appeal meritorious. Having decided this ground in the affirmative, we find no need to deliberate on the remaining grounds. Consequently, we allow the appeal, quash the conviction and set aside the sentence. We further

order the immediate release of the appellant Hamis Mohamed Mtou from prison unless he is held there for another lawful cause.

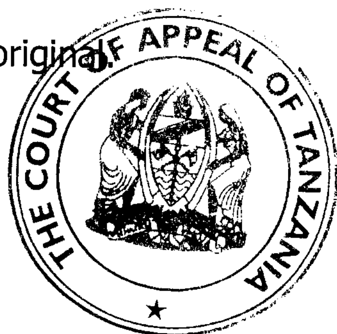
DATED at **DAR ES SALAAM** this 9th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 16th day of September, 2021 in the presence of the Appellant in person linked via video conference at Ukonga Prison and Ms. Nura Manja, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL