IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A, KOROSSO, J.A And KENTE, J.A.)

CRIMINAL APPEAL NO. 273 OF 2019

ANNA MOISES CHISSANO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mashaka, J.)

dated 11th day of December 2019

in

Economic Case No. 6 of 2018

.....

JUDGMENT OF THE COURT

30th June & 14th September,2021

LILA, JA.:

Before the High Court of Tanzania (Corruption and Economic Crimes Division), the appellant **ANNA MOISES CHISSANO** was charged with and convicted of Trafficking in Narcotic Drugs contrary to section 15 (1) (b) of the Drug Control and Enforcement Act No. 5 of 2015 (the DCEA) read together with paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200 R.E 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 (the EOCCA). She was, consequently, sentenced to life

imprisonment in terms of section 15(1)(b) of the EOCCA. Both the conviction and sentence aggrieved her, hence the present appeal.

It was alleged that on 16th day of November, 2016 at Julius Nyerere International Airport (JNIA) within Ilala District in Dar es Salaam Region, the appellant trafficked in narcotic drug namely cocaine hydrochloride weighting 3.03 kilograms.

It may be desirable to set out, albeit briefly, the background facts of this appeal which are definitely not complicated. Acting on an instruction from the Head of Investigation One Inspector Dickson Haule that a passenger by the name of Ana Moises Chissano (the appellant) suspected of trafficking in drugs would arrive at JNIA aboard Ethiopian Airline at 1.00 of 16/11/2016, Assistant Inspector Sophereth Masatu (PW2), WP 5081 Sophia (PW3) and G 1782 D/C Peter (PW4) were set on guard at JNIA ready to arrest her. As to what transpired thereafter, from the evidence by both sides, it seems clear to us that a substantial part of the prosecution case was not disputed by the appellant in her defence. It was common ground that the arrival of the plane was delayed a bit and the appellant arrived at the JNIA on 17/11/2016 at 01.30am aboard Ethiopian Airways flight ET 827 from Ethiopia and after clearing all the immigration issues, she was arrested by four police

officers who testified in court while in possession of two bags, a hand bag and back bag. She was taken to Anti-Drug Unit (ADU) office at the airport. Two independent witnesses namely Etines Msowera from the Immigration and Asha Ngemera (PW5) from Tanzania Revenue Authority (TRA) were called by PW2 to witness the search. PW3 conducted a physical search on the appellant who was found with nothing suspect. A search in the black bag by PW2 led to the discovery of two blankets which, even after their removal, the bag still remained heavy suggesting that there was something in it which prompted the search team led by PW2 and the appellant to resort to an x-ray machine for further check. The machine revealed that there was something in it. The team and the appellant went back to ADU office for further check where PW2 used a knife to dismantle the underlying part of the bag in which a black plastic envelope was found covered with spongy materials. PW3 retrieved it and by using a knife, PW2 cut a certain end part of the envelope in which they found a white powder with a stinking smell. PW3 prepared a certificate of seizure Form No. DCEA 003 (exhibit P5) which was signed by Etines Msowera, PW2, PW3, PW4 and PW5 on the one side and the appellant on the other side who also appended her right thumb print. PW2 bought a brown envelope in which the black

plastic envelope containing the white powder was kept. The envelope was then sealed and the search team and the appellant signed on it. PW3 and PW4 sent the envelope to the Government Chemist Laboratory Agency (GCLA) for testing and it was found by PW1 to be cocaine hydrochloride (exhibit P3). Of relevance to us is that, the appellant admitted in her defence that the black envelope with cocaine hydrochloride (exhibit P3) was retrieved from the black bag as reflected at page 95 of the record when she was cross-examined by the learned State Attorney.

In her defence, the appellant vehemently disputed being associated with the black bag from which exhibit P3 was retrieved. According to her, she was on her study tour expedition and arrived at the JNIA having two bags which she described as being a brown bag and a pink back bag. In the former bag she had kept her mobile phone and make ups while in the later she had kept her clothes and books. In actual fact she disowned both the black bag and the contents thereof. In turn, she stoutly claimed back her pink bag and her clothes.

The High Court (Mashaka, J. as she then was) formulated six issues for its determination. The issues were: **one**, whether the accused was arrested on 16/11/2016, **two**, whether she was found in possession

of black envelope suspected to be narcotic drug in her bag on 16/11/2016, **three**, whether the black envelope with white powder admitted as Exhibit P3 collectively contained cocaine hydrochloride as charged, **four**, whether chain of custody was not broken from point of arrest, seizure, analysis to tendering in court, **five**, whether the charge against the accused person has been proved by the prosecution beyond doubt, and **six**, whether the defence by the accused person raised any doubt to the prosecution case.

In view of the undisputed facts, we hasten to state here that it was unnecessary for the trial court to raise and consider issues number one and three above. The trial court ought to have had right away treated them as conceded hence undisputed. Not surprising therefore, the learned judge determined issue number one in the affirmative. We however do not think that she was right. As per the evidence by PW2, PW3, PW4 and PW5, the appellant arrived at JNIA on 17/11/2016 early in the morning at 1.30am. It appears there was a confusion of the date for, while the arrangements to arrest the appellant were set on 16/11/2016 at night time, the appellant arrived at 1.30am the following day that is on 17/11/2016. All the same, the appellant, as was rightly held by the learned judge, admitted being arrested in connection with

the present case at the JNIA right away during the preliminary hearing and in her defence. The anomaly is, for that reason, inconsequential.

Addressing itself on the second and crucial issue whether exhibit P3 was found in a black bag which belonged to the appellant, the learned judge relied on the testimonies by PW2, PW3 and PW4 who participated in the appellant's arrest who told the court that the appellant arrived with two bags, one hand bag and a black bag which could be pulled by wheels or carried on the back. And, as the appellant admitted exhibit P3 having been retrieved from the black bag, the admissibility of the black bag as exhibit P6 not being objected to by the appellant, the claim that she was forced to sign the seizure certificate (exhibit P5) being brought at the defence stage hence an afterthought coupled and it being undisputed fact that it was her first time to meet the four police officers who arrested her, the learned judge was convinced that the black bag belonged to the appellant.

On the third issue, the trial judge was convinced that PW3 and PW4 took exhibit P3 to the GCLA where PW1 conducted laboratory test, both preliminary and confirmatory tests and found it to be cocaine hydrochloride as provided under section 2 of the DCEA.

While appreciating and taking into consideration the principles on chain of custody set out in the Court's decision in **Paulo Maduka and Others v. Republic**, Criminal Appeal No. 110 of 2017 (unreported), the learned judge indicated how exhibit P13 was handled right away from the time the appellant was arrested, retrieved, stored by PW6, taken to GCLA by PW3 and PW4, examined by PW1 and prepared the report thereof (exhibit P2) and presented in court, led to her finding that the handling of exhibit P3 was not compromised so as to allow any interference hence affect its credibility.

Further to the above uncontroverted facts, the prosecution evidence is to the effect that the white powder was sent to the GCLA for examination of the weight, contents and effects by PW3 who was accompanied by PW4. Thereat, they were received by Elias Zakaria Mulima (PW1) who weighed it found it to be 3.03 kilogrammes. He conducted both preliminary and confirmatory tests which revealed that it was cocaine hydrochloride. The results were posted on a Laboratory Analytical Report (exhibit P2).

Finally, after considering the totality of the prosecution evidence the learned judge was left in no doubt that the charge was proved at the required standard and was not persuaded that the defence evidence

was able to discredit the prosecution evidence. The appellant was found guilty of the offence charged and was sentenced as indicated above.

The conviction and sentence aggrieved the appellant. She lodged two substantive memoranda of appeal, one on 12/9/2019 and another on 30/09/2019, each comprising five grounds of appeal. However, Mr. Hassan Ruhwanya, learned advocate, who represented the appellant at the hearing of the appeal abandoned the later memorandum of appeal and remained with the former one that is to say the one lodged on 12/09/2019 which had these grounds of appeal: -

> *"1. That the trial court erred in law and in fact by holding that the prosecution had proved their case beyond reasonable doubt.*
>
> *2. That the trial court erred in law and in fact for failure to consider glaring discrepancies evident in the prosecution case.*
>
> *3. That the trial court erred in law and in fact for failure to clearly show the reasoning for reaching decision in its judgment.*

4. That the trial court erred in law and in fact by failure to adequately analyse and evaluate the evidence tendered before it.

5. That, the trial court erred in law and in fact for failure to consider the first offender and imposed manifestly excessive sentence."

As hinted above, Mr. Hassan S. Ruhwanya, learned advocate, who represented the appellant at the trial, also represented her at the hearing of the appeal before us. The appellant also entered appearance in person. As she was not conversant with either English or Kiswahili languages but Portuguese, we employed the services of Mr. Steven Mosses to diligently translate from English and Kiswahili to Portuguese and vice versa. He was duly sworn before he assumed his responsibility. On the other side, Ms. Veronica Matikila, learned Senior State Attorney, Ms. Elizabeth Mkunde and Ms. Batilda Mushi, both learned State Attorneys, teamed up to represent the respondent Republic.

Mr. Ruhwanya opted to argue grounds 1 to 4 jointly then ground 5 separately. More so, at a certain stage, he argued ground 3 somehow separately, we think, he did so for the purposes of supplying more

emphasis on it. We shall also consider the parties' arguments in the same manner they submitted.

The main focus of Mr. Ruhwanya's arguments in respect of grounds 1 to 4 was on failure by the trial court to analyze and properly evaluate the evidence by both sides. To be specific, in those grounds, three areas of grievances emerge. **One**, failure to resolve the discrepancies in the prosecution case. **Two**, failure to accord a deserving weight on the defence evidence and **three**, the judge's finding on the colour of the substance retrieved.

Beginning with the alleged discrepancies on the prosecution evidence, Mr. Ruhwanya submitted that while the white powder retrieved (exhibit P3) was sent to the GCLA and weighed by PW1 to be 3.03 Kgs, the substance and report thereof returned to PW3 and tendered in court showed the weight to be 3.0354 Kgs as per exhibit P7. He argued that the difference was not accounted for and the discrepancy was not addressed and resolved by the trial judge. That difference, according to him, suggested that the substance retrieved and the one tendered in court were not only different but also there was a possibility that it was tempered with. He referred us to our decision in the case of **Siza Patrice v. Republic**, Criminal Appeal No. 19 of 2010

(unreported) which insisted that failure to address the inconsistences leads to an improper conclusion.

Linked to the above issue is the complaint that PW1 and PW2 told the trial court that the substance retrieved was white powder but the one tendered in court (exhibit P3) was not white but brown in colour. He faulted the judge for holding that it was white.

Another discrepancy complained of was in respect of the way the sample was taken by PW1 for testing. Mr. Ruhwanya argued that while PW1 said he took the samples randomly from various parts of exhibit P3, PW3 said he (PW1) took sample from only one part of exhibit P3.

Mr. Ruhwanya concluded that these inconsistencies were serious and material going to the root of the case which should not have been taken by the trial judge as being minor. Serious as they were, he submitted, they discredited the prosecution case with a result that a valid conviction could not be grounded on them. By treating the discrepancies as minor, he lamented, the learned judge arrived at wrong findings. On this point, he relied on the case of **Ridhiwan Nassor Gendo v. Republic**, Criminal Appeal No. 201 of 2018 (unreported) in which the case of **Dickson Elia Nsamba Shapwata and Another v.**

Republic, Criminal Appeal No. 92 of 2007 (unreported) where it was held that material discrepancies corrode the credibility of the prosecution case.

Ground 5 of appeal touches on the propriety of the sentence meted out to the appellant. Elaborating on it, the learned advocate argued that the appellant was charged under two different laws to wit, the DCEA and EOCCA which provide for different sentences. The former provides life imprisonment as the mandatory sentence while the later provides for a term of between thirty years and twenty years imprisonment as the appropriate sentence. Putting reliance to this Court's decision in the case of **Yanga Omari Yanga vs Republic**, Criminal Appeal No. 132 of 2021 (unreported) which has been included in the list of authorities filed by the respondent Republic, he argued that the appellant ought to have been sentenced in accordance with the law providing for a less severe penalty which, in the present case, was the EOCCA.

In resisting the appeal, Ms. Matikila, first dealt with the issue concerning the weight of exhibit P3 and was emphatic that there was no any material and substantial difference. She was insistent that PW3 witnessed PW1 weigh exhibit P3. PW1 found it to be 3.03 Kgs. She

contended, further that, PW1 being a Government Chemist from GCLA, his finding was final and conclusive in terms of the Court's decision in **Yanga**'s case (supra) as he is the only person mandated to determine the nature and weight of drugs. She asserted that the indication of 3.0354 Kgs in the handover certificate (exhibit P7) prepared by PW3 and handed to PW6 was a mere typographical error. She hurriedly argued that since the difference in weight is small and PW3 admitted at page 64 and 65 of the record that she wrongly recorded 3.0354 Kgs in exhibit P7, the discrepancy is minor and did not prejudice the appellant hence it may be ignored. Further to that, she conceded that exhibit P7 was not read out after it was admitted as exhibit hence ought to be expunged from the record. She heartedly discounted Mr. Ruhwanya's contention that the difference is not minor and is an indication that there was tempering with exhibit P3.

The complaint on the colour of exhibit P3 was, according to the learned State Attorney resolved by the judge in her ruling dated 18/9/2018 that the substance retrieved was white in colour. That finding, Ms. Matikila went further to argue, was based on her physical observation hence she cannot be faulted.

The appellant's denial that she was not arrested having a black bag (exhibit P6) from which exhibit P3 was retrieved did not find merit in Ms. Matikila's mind. Elaborating her position, she contended that the appellant was arrested by PW2, PW3 and PW4 who told the trial court that she had a hand bag and a black back bag. She argued further that the trio are police officers and the search was conducted by PW3 and PW2 and witnessed by two independent persons, PW5 being among them. These witnesses were not doubted by the trial court, she added. On the appellant's defence that she only had a brown hand bag and a pink bag, the learned State Attorney agreed with the learned judge that contention was an afterthought for the reason that it was raised during defence, the prosecution witnesses were not cross-examined on the colour of the bags and, worse still, no objection to the tendering of the black bag as exhibit was raised by the appellant during trial. She accordingly urged the Court to find, like the trial court, that the defence evidence was properly analyzed and the finding that it was an afterthought was justified.

Ms. Mushi, arguing in respect of the sentence meted out to the appellant, readily conceded to the complaint that it was improper and illegal. She was brief that the appellant deserved to be sentenced under

the EOCCA which provide for a lenient sentence. She accordingly urged us to allow this ground of appeal and reduce the sentence so as to accord with the law.

There was nothing added by Mr. Ruhwanya in his rejoinder submission. He simply reiterated his earlier submission and implored us to allow the appeal, quash the conviction, set aside the sentence and finally set the appellant free.

We have dispassionately gone through the record and we have discerned therefrom the fact that the white powder taken by PW3 and PW4 to the GCLA and weighed by PW1 was found to be 3.03 Kgs. It is also clear that PW3 posted 3.0354 Kgs as the weight of the white powder in exhibit P7. It is indisputable therefore that there was a difference in weight from that found by PW1 and that posted in exhibit P7 by PW3. Based on that difference, the appellant is questioning the credibility of exhibit P3. The crucial issue for our determination is, therefore, whether the difference is minor and was sufficiently accounted for? It is our view that the determination of this issue depends, as was rightly submitted by Ms. Matikila, on the manner exhibit P3 was handled right from the appellant's arrest, seizure, storage

and sending to the GCLA for weighing and lastly, tendering in court as exhibit P3.

The learned State Attorney gave a brief detail on the way exhibit P3 was handled as borne out by the record of appeal. That, after the appellant's arrest, the black bag was searched by PW2 in which two pieces of blankets were found. But the weight of the bag did not show that it was empty which fact compelled PW2, PW3, PW4 and PW5 together with the appellant to seek assistance of the x-ray machine. The machine indicated existence of a certain substance beneath the underlying cover which, upon being torn by PW2 using a knife, a black plastic envelope was found. PW2 further cut it and a white powder was seen. The record further tells that PW2 bought a brown envelope from the nearby shop in which the black envelope was kept. Then, PW2, PW3, PW4, PW5 and the appellant signed on it before it was sealed and handed to PW3 for taking it to the GCLA for weighing and examination of its contents. PW1 received from PW3 a brown envelope in which there was a black envelope containing the white powder. PW3 and PW4 witnessed the weighing by PW1 and it was found to be 3.03 Kgs. Thereafter, PW1 packed and sealed it with a special seal and signed on it. The record shows, the brown envelope was handed back to PW3 who

later handed it to the store keeper (PW6) which handover was reduced in writing by PW3 (exhibit P7). Exhibit P3 was later produced in court by PW1 while intact. The appellant's objection to its (exhibit P3) admissibility was founded on the colour not weight. The learned judge relied on the principle laid down in **Paulo Maduka**'s case (supra) in the determination of this issue. We wish to remind the trial courts and the prosecution that in that case the Court insisted on presence of paper trail because it was about handling of money which changes hands easily and quickly. In the present case, it is handling of the cocaine hydrochloride which was at issue and such substance does not change hands easily hence the absence of paper trail was not fatal provided that there is a detailed, consistent and systematic oral evidence on how exhibit P3 was handled which did not give room for any interference with it (see **Moses Mwakasindile vs Republic**, Criminal Appeal No. 15 of 2017, **ISSA HASSAN UKI v. Republic,** Criminal Appeal No. 129 of 2017, **Annania Clavery Betela v. Republic,** Criminal Appeal No. 355 of 2017, **Sophia Kingazi v. Republic**, Criminal Appeal No. 273 of 2016 (all unreported). The sequence of events as borne out by the record and demonstrated above does not suggest any chances of exhibit P3 being tempered and Mr. Ruhwanya did not attempt to suggest that

exhibit P3 was in any way and at any stage tempered with. That displaces the doubt that the white powder seized was not the one tendered in court and, in the same vein, renders the improper recording of the weight by PW3 in exhibit P7 ineffectual. Even PW3 admitted wrongly recording the weight in exhibit P7. Genuine as she was, the trial court did not doubt her credibility and we see no cogent reasons to find otherwise (see **Goodluck Kyando v. R.** [2006] TLR 363). Wrong recording in exhibit P7 was nothing but, as rightly submitted by the learned State Attorney, a human error. We are therefore convinced and we hold that the wrong recording was not fatal and did not prejudice the appellant.

Besides and without losing site, we think, it was a common ground that exhibit P7 was not read out after it was received and admitted as exhibit by the trial court. That fact is beyond question. The same suffers the usual wrath of being expunged from the record of appeal (see **Robinson Mwanjisi & Others v. Republic** [2003] T.L.R. 218). That exhibit is hereby accordingly expunged from the record.

There is also a complaint on how the sample was taken by PW1 for chemical analysis. According to Mr. Ruhwanya, PW1 told the trial court that he took the samples randomly from various parts of exhibit P3

while PW3 said PW1 took sample from only one part of exhibit P3. The two witnesses contradicted each other, he complained. Unfortunately, we had no privilege of getting any input from the other side on this complaint as Ms. Lwila did not address us on this complaint. We have, however, seriously examined the record of appeal. We let the record tell what PW1 told the trial court. At page 30 of the record, PW1 is recorded to have said that

> *"After the results of the preliminary test, I took a little sample of the powder and placed it in a special utensil and labeled it to read 1990/2016. The remaining powder I packed it and sealed with a special seal and signed it."*

And at page 45, PW1 told the trial court that: -

> *"...When I conduct a test at the laboratory I do a sampling technique where I take specimen for testing on various areas of the powder in the envelope. I tested sample of the white powder brought for testing, I did not test the whole sample."*

PW3, on the other hand, told the trial court at page that: -

> *"After PW1 received the brown envelope, he opened the sealed envelope and took out the*

black envelope where tore a small part of the black envelope and took some sample which he placed on a slide or tile he used in the laboratory. PW1 weighed the envelope before taking the sample and found it weigh 3.03 kilograms. After taking the sample he sealed the black envelope and placed it back into the brown envelope and sealed it."

We do not think that there is any material discrepancy in the testimonies by PW1 and PW3 on how the sample was taken from exhibit P3. PW1 did not expressly state that he took sample from various parts of exhibit P3. He, instead, said he took a sample for testing and later told the procedure they follow in taking samples. The bottom line, however, is that both (PW1 and PW3) are clear that the sample for testing was taken from the same envelope (exhibit P3). It would appear that he was not examined on how he took the sample in this particular case hence her response was a general one on the procedure. All the same, since the sample was taken from the same envelope, we do not see how this would have affected the results and hence prejudiced the appellant. The discrepancy was accordingly minor. The complaint is baseless and we dismiss it.

As for the complaint about the colour of exhibit P3, first, the sequence of events explained above explains away the doubt about the substance retrieved from the appellant being white powder. PW1, PW2, PW3, PW5 and PW6 were all clear in their respective testimonies that the substance was white powder. As if that was not enough, the learned judge observed it physically and, in her ruling rendered on 18/9/2018 in respect of an objection on the colour of the substance, she ruled out that it was white. Colour is a question of fact and as a presiding judge she had an opportunity to see the substance and come up with her own observation or finding. There was nothing wrong with that. We see no reason to disbelieve her. It therefore remains a fact that the substance was white in colour as was rightly contended by the learned State Attorney. The complaint is therefore unfounded and is dismissed.

In the light of our above finding, it is clear that the discrepancies in the weight and how the sample for testing was taken are not only minor but also not substantially going to the root of the case. There is a string of decisions of this Court where we have insisted that minor discrepancies, like the present ones, cannot cause the prosecution case to flop (see **Ridhiwan Nassor Gendo v. Republic**, Criminal Appeal No. 201 of 2018 (unreported) in which the case of **Dickson Elia**

Nsamba Shapwata and Another v. Republic, Criminal Appeal No. 92 of 2007 was cited and **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 (all unreported). In the last case which was quoted in **Vuyo Jack v. Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (unreported) the Court reiterated that stance of the law that:

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled"*

Another complaint is the trial court's failure to accord due weight to the defence evidence. We shall discuss this ground while alive of the constitutional right of an accused to be afforded an opportunity to be heard before his rights are determined by the courts as enshrined in article 13(6)(a) of the Constitution of the United Republic of Tanzania. That provision in plain and clear words declares that all persons are equal before the law. It imposes a duty on the court to hear both sides before passing a judgment. The rule operates as a guard against being condemned unheard. In giving effect to the clear dictate of the Constitution, the legislature enacted sections 294 and 295 of the

Criminal Procedure Act, Cap. 20. R. E. 2019 (the CPA). Under that section it is imperative that upon closure of the prosecution case, the accused person shall be called upon to enter defence either in person or led by an advocate and has the right to call witnesses. We entertain no doubt that such right will be illusory if after presenting his defence no due weight is accorded to it. We have be laboured to state the above cognizant of the fact that one of the appellant's complaint is banked on the trial court's finding that his defence was an afterthought. Much as appreciate the above legal position yet it cannot be forgotten that there are other basic and settled legal positions providing the procedure on its presentation. One such principle is that a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped challenging it at an appellate stage (See **Cyprian A. Kibogoyo v R** Criminal Appeal No. 88 of 1992, **Paul Yusuf Nchia v National Executive Secretary, Chama cha Mapinduzi and Another,** Civil Appeal No. 85 of 2005 (both Unreported). The point here is that an accused is expected to challenge a witness's testimony by way of cross-examination or object to the tendering of a documentary or physical exhibit during the trial. Once certain evidence goes into the record unchallenged it is, in law, taken to have been

admitted by the accused. The rationale for this position is that a witness does not have an opportunity to give elaboration or provide further explanation when such crucial issues and challenges are raised during defence evidence.

The propriety or otherwise of sentence meted out by the trial court is our last ground for our determination. The appellant was sentenced under section 15(1)(b) of the DCEA which stipulates that the statutory sentence is life imprisonment. Both the learned State Attorney and the learned advocate were in agreement that the sentence rendered to the appellant is improper. According to them, since the appellant was charged under two different laws which provide for different sentences, in terms of the Court's decision in **Yanga Omari Yanga** (supra), the appropriate sentence is that which is lenient or less severe. It was their common view that the sentence should be reduced to thirty years in accordance with the EOCCA which provides for lesser sentence of between twenty and thirty years. We entirely agree with learned counsel that the appellant was charged under two laws. That is, trafficking in narcotic drugs contrary to section 15(1)(b) of the DCEA read together with paragraph 23 of the First Schedule to the EOCCA as amended by Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. Before we

have an eye to the cited **Yanga Omari Yanga'** case, we think we should reproduce the relevant sentencing provisions under the two laws.

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

> *"15. -(1) Any person who-*
>
> *(a) Traffics in narcotic drug or psychotropic substance;*
>
> *(b)* ***Traffics,*** *diverts or illegally deals in any way with precursor chemicals, substance used in the process of manufacturing of drugs; and*
>
> *(c) .....(not relevant)*
>
> ***Commits an offence and upon conviction shall be sentenced to life imprisonment."***
>
> (Emphasis added)

Under this provision, it is clear 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 are subsections (1), (2) and (7) of that section. They provide that: -

> *"60. -(1)* ***Except where a different penalty, 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 falling 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 one that is endangering the national economy 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) a child shall be sentenced in accordance with the provisions of the Law of the Child Act."

(Emphasis added)

We have purposely bolded parts of the quoted provision to show their significance in the determination of appropriate sentence to a person convicted of trafficking in drugs. As hinted above, the DCEA provides for only one sentence, life imprisonment. While that is the case, the EOCCA, read closely and with sober minds, gives various options. These are, **first**; the Court, where a person is convicted of an economic offence, is enjoined to impose a sentence provided by the EOCCA except where either it or the statement of offence provides otherwise. We think, by "the statement of offence" reference is made to any other law cited in the statement of offence which also imposes a certain penalty/sentence. And, in the present case is the DCEA. **Second**; even

where another law provides for a different sentence but not more severe than that provided by EOCCA, in the determination of the appropriate sentence, the Court should take into considerations the factors set out under subsection (7) of EOCCA. **Third**; and most important, where another law provides for a more severe sentence, then the Court is imperatively required to impose that sentence. As the proviso came later after the provisions of section 60(2) of EOCCA and in case where the other law provides for more severe penal measure than that provided under EOCCA, we think, the requirement to pay due regard to the provisions of subsection (7) of EOCCA does not apply.

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 the 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 section 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.

Reverting to the concurring arguments by counsel of both sides, we think, had they properly considered and comprehended the import of the above cited provisions, they would have arrived at a different view. It is obvious that they were so inclined by the Court's pronouncement in the case of **Yanga Omari Yanga** (supra) which was cited to us by Mr. Ruhwanya and supported by the learned State Attorney.

We have read the cited decision. With due respect, it is plain that the provisions of the proviso to subsection (2) of the EOCCA which were introduced into the EOCCA when section 60 of EOCCA was amended in the year 2016, was not brought to the attention of the Court hence not considered. The amendment had serious effects to the sentencing regime. Briefly, before the amendment section 60(2) of EOCCA had no proviso. It provided that: -

> *"(2) Subject to subsection (3), any person convicted of an economic offence shall be liable to imprisonment for a term not exceeding fifteen years, or to both that imprisonment and any other penal measure provided for in this Act."*

Section 60 of EOCCA was amended by the written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 by deleting subsections (2), (3) and (4) and substituted thereof with new subsections (2), (3) and (4). The amended (new) subsection (2) reads as quoted earlier on in this judgment and a proviso was introduced thereto as indicated above. In our view, the proviso to subsection (2) above, misapplied the provisions of subsection (2) including the requirement to consider the factors set out under subsection (7) of EOCCA in the determination of an appropriate sentence to impose in instances where the other law provides for a more severe penal measure. In essence, it enjoins the trial court to impose a sentence according to the law which provides for a severe penal measure. In our case, life imprisonment as stipulated under section 15(1) of DCEA is the most severe penal measure to a person convicted of trafficking in drug than that provided under section 60(2) of EOCCA. The trial court was, accordingly, obligated to impose that sentence notwithstanding that the appellant was a first offender. In that accord, we hold that the appellant was properly sentenced. We live it just as that. This ground of appeals fails too.

In fine, save for the appeal relating to exhibit P7 which we allowed, the appeal is devoid of merit. It is hereby accordingly dismissed in its entirety.

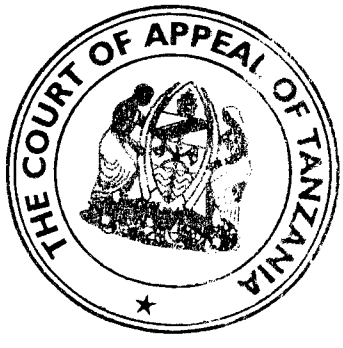
DATED at **DAR ES SALAAM** this 7th day of July, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 14th day of September 2021, in the Presence of the Appellant in person and Mr. Edith Mauya, 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