IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: LILA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 454 OF 2019

MSANIF RAMADHAN MSANIF ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from the Judgment of the High Court of Zanzibar at Vuga)

(Sepetu, J.)

dated the 17th day of July, 2019
in
Criminal Appeal No. o6 of 2019

JUDGMENT OF THE COURT

30th May & 16th June, 2022

LILA. JA.:

MSANIF RAMADHAN MSANIF the appellant, stood charged before the Regional Court of Zanzibar at Vuga with the offence of being found in unlawful possession of narcotic drugs to wit; heroin contrary to section 15 (1) (a) of Act No. 9 of 2009, as amended by section 11 (a) of Act No 12 of 2011 of the laws of Zanzibar. He was convicted and sentenced to serve a five years term at the Offender's Educational Centre (Chuo cha Mafunzo). Protesting his innocence, he preferred an appeal to the High

Court where it was not successful as both the conviction and sentence were found to be according to evidence and law hence were sustained. Undaunted, he has approached the Court to challenge the High Court decision.

In the charge, it was alleged by prosecution that the accused was found unlawfully possessing in his left hand twenty packets of heroin. That was on 7/10/2016 at around 07:30 pm at Kundemba within Urban District, in Urban West Region of Unguja. The appellant disassociated himself with the said accusation.

Since determination of the appeal is confined within a narrow legal shortcoming, we find it unnecessary to provide a detailed account of what transpired. Suffice it to state that while on his evening errands at Kundemba, the appellant came upon a number of policemen who were on patrol, amongst them were F. 6325 D/Cpl Said (PW3) and F. 491 D/Cpl Kombo (PW4). Well aware of the appellant's background that he was a famous user of drugs and suspicious of what he was holding on his hand, PW4 approached him, arrested him and, upon checking at his left hand, 20 packets of what was suspected to be narcotic drugs were found. The 20 packets were wrapped in a brown envelope and marked ANSZ/IR 59/2016 and was later on taken to an exhibit keeper at the police station

one D. 5074 D/SSgt Mussa (PW2) for safe custody. Fadhil Moshi Fadhil (PW1), chemical analyst of the laboratory of Government Chief Chemist whom the suspected substance was taken to by E. 3511 D/Cpl Mgeni (PW5) from the Anti-Narcotic Drugs Department, tested it and confirmed that it was heroin after which process they were returned to PW2. The appellant was then charged as told above.

The prosecution's story was not accepted by the appellant who, in his affirmed defence claimed that he was, on the material time, at his residence selling fruits. He then attacked the prosecution witnesses' testimonies for various reasons but as the same are not relevant here, we shall not recite them. All the same, he was, at the conclusion of the trial, convicted and sentenced as above. His attempt to have the verdict overturned by the High Court met a snag as it wholly concurred with the findings and sentence meted out by the trial Regional Court. That decision prompted institution of the present appeal.

In his five point memorandum of appeal, the appellant now seeks to fault the High Court decision. He added three more grounds when the case was called on for hearing thereby adding them to eight grounds. These are:-

" 1. *That, the trial court was a nullity because the indigent appellant was denied his right to free legal Aid payable by the state nor were they informed of their right to engage counsel at their own expenses.*

2. *That the judgment of the High Court lacks the essential requirement of true judgment*

3. *That the High Court erred in not analyzing the evidence properly*

4. *That the case against the appellant was not established beyond reasonable doubt because there was a possibility of tempering with the exhibit*

5. *That the total whole judgment is not a judgment at all, because the evidence is not a judgment no reason for decision even points for determination."*

The additional grounds are:

"*1.No independent witness witnessed when he was being searched.*

2. *The letter of hand over between the secretary and PW1 was not produced as evidence in court during trial*

3. *While the allegation in the charge and evidence was that he was found in possession of 20 packets*

of heroin, the ones tendered in court were torn pieces."

At the hearing of the appeal, the appellant had no legal representation. On the other side were Mr. Ali Rajab Ali, learned Principal State Attorney and Mr. Said Ali Said, learned Senior State Attorney. After the additional grounds of appeal were taken up by the Court, the appellant adopted all the grounds of appeal and elected for the respondent to respondent to them before he could rejoin if anything arises therefrom.

Initially, Mr. Said eloquently argued against all the grounds of appeal and gave reasons for resisting them. While supporting his assertions by citing various Court's decisions, he was forthcoming that all the grounds of appeal are without merit and deserved being dismissed.

Mr. Said declined to agree with the appellant that he was entitled to being informed of his right to have legal representation and provision of the same as complained in ground one of appeal. He referred the Court to section 196 and 197 of the Criminal Procedure Act, No. 7 of 2004 which he said does not impose any legal duty to the trial magistrate to either inform or provide the appellant (then accused) with a lawyer to represent him because the word used is "may". He also relied on the Court's decision in the case of **Maganga Udugali vs. Republic**, Criminal Appeal No. 144

of 2017 (unreported) where, he argued, the Court, faced with an identical complaint, interpreted the provisions of section 310 of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA) which is *pari materia* with section 196 and 197 of Act No. 7 of 2004, held that the trial judge had no duty to inform and or provide the accused with legal services.

Arguing conjointly grounds two, three and five of appeal, Mr. Said submitted that the first appellate judge's judgment was proper as it complied with the requirements of section 302(1) of Act No. 7 of 2004. While referring to pages 70 to 74 of the learned judge's judgment, he argued that the issues for determination, analysis and reasons for the decision thereon are vividly shown hence no justification to fault the learned judge. Otherwise, and citing the cases of **Amir Mohamed vs Republic** [1994] TLR 218 and **Miraji Malumbo Malumbo vs Republic**, Criminal Appeal No. 229 of 2008 (unreported), he submitted that judgment writing is a style and that what is important is that all the requisite ingredients should be reflected. The Court was thereby asked to dismiss all the three grounds.

The chances of exhibit P2 being tempered with in the process of handling it was seriously disputed by Mr. Said. He took the Court through the trial court record in trying to show the manner it was handled right

away from the time it was seized from the appellant during the appellant's arrest by PW4, taken to PW2 for safe custody, taken by PW5 to the Government Chemist (PW1) who examined it and later produced it in court during trial. For that reason, he urged the Court to dismiss ground four for want of merit.

Absence of an independent witness during the appellant's arrest and search could not find substance in Mr. Said's view. As opposed to a search conducted in a dwelling house which is in most cases preceded by prior preparations which gives chance to look and find an independent witness, he argued, search, in circumstances that obtained in the present case does not require presence of an independent witness. In supporting his argument, he referred us to section 17 of Act No. 7 of 2004 and the case of **Emanuel Lyabonga vs Republic**, Criminal Appeal No. 257 of 2019 (unreported).

The complaint regarding production in court of gashed pieces instead of 20 packets of heroin (exhibit PE2) which was taken up as an additional complaint by the appellant was equally dismissed by Mr. Said who argued that it was simply due to poor storage facilities coupled with weather changes which caused them to tear out as was explained by PW4. He was, however, insistent the exhibit remained, intact.

In his last additional ground of appeal, the appellant had complained that a hand over letter between PW1 and the secretary in the Government Chemist's office of exhibit PE2 was not produced in court during trial hence breaking the chain of custody. Mr. Said countered it that as it was a movement of exhibit PE2 in the same office, a hand over letter was not required.

The above arguments notwithstanding and amidst his arguments, we wanted to satisfy ourselves as to whether his standpoint would remain the same given the pertinent point we had noted in the trial court's proceedings of 13/09/2017 when PW1 gave his testimony appearing at pages 7 to 13 of the record of appeal regarding the manner the brown envelope containing 20 packets of heroin (exhibit PE2) the subject matter of the charge was tendered and admitted as exhibit by the trial court. Accordingly, we extended our invitation to him and the appellant to address us on the propriety or otherwise of the procedure adopted by the learned trial magistrate to admit it.

Responding to the Court's disquiets, Mr. Said, although reluctantly, readily conceded that the record reveals that tendering of exhibit PE2 suffers from three ailments. **One**, it was tendered by the Public Prosecutor who was not a witness. **Two**, it was tendered after the recording of PW1's

evidence had been already concluded. He added that it was produced when the prosecutor had already indicated to the court that there were no other witnesses to call. He was, however, initially, of the view that the ailments did not occasion any injustice hence curable under section 394(1) of Act No. 7 of 2004 which is *pari materia* with section 388 of the CPA. He could, however, not defend his position when we engaged him whether the appellant had an opportunity to challenge exhibit PE2 after it was admitted by way of cross-examination. He succumbed and urged the Court to hold that the trial magistrate erred procedurally and, exhibit PE2 should be expunged from the record of appeal as a result of which the charge could not stand. As for a way forward, he prayed to the Court to invoke the revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 to quash the proceedings and judgment of the trial court as well as those of the High Court and set aside the sentence followed by the appellant being set free.

Being a lay person, the appellant did not comment anything on the point raised by the Court and he sought the Court's indulgence on them and decide the appeal in his favour.

We propose to first consider the appellant's additional grounds of appeal which we think should not detain us. And, we begin by presence

of an independent witness during the time the appellant was arrested and searched. The record is vividly clear that the appellant was arrested by the police who were on patrol. There is no indication that they had expected to find and arrest the appellant. As per the charge, the offence was allegedly committed on 7/10/2016 and the applicable law is Act No. 7 of 2004. Under it, the procedure for conducting search and seizure by police in any building, vessel, carriage, box, receptacle or place is governed by the provisions of sections 146, 147, 148 149 and 150. This is more so because section 148(1)(2)(3) puts it as a mandatory requirement that the search should be witnessed by two or more respectable inhabitants of the locality in which the building or other place to be searched is situate and also an occupant of the building or other place to be searched or some person on his behalf, if present, be permitted to attend during the search and thereafter sign on the list of all things seized during the search. Such was the Court's interpretation of section 114(1)(2) of the Criminal Procedure Decree, Chapter 14 of the Laws of Zanzibar which is a replica of section 148(1)(2)(3) of Act No. 7 of 2004 in the case of **Malik Hassan Suleiman vs S. M. Z.** [2005] T.L.R. 236 at 237. As rightly argued by the learned Senior State Attorney, that requirement is not applicable in the present case because the search was

not conducted in a building or any other place but on the person of the appellant. The complaint crumbles, therefore.

Equally unfounded is the appellant's second additional ground of appeal. Much as its worthiness is subject to discussion at a later stage, exhibit PE2 was tendered and admitted as exhibit on 13/09/2017 and the appellant did not complain that it was not the same as the one he was found in possession of when he was accorded opportunity to comment before its admission. The record shows that he expressed his non-objection to its admission. To our surprise, the complaint arose when PW4 testified which, in our view, was an afterthought. The explanation by PW4 that it was due to storage problem, we think, is highly probable and commands logic and common sense. This ground fails too.

The need to produce a letter of handover between the secretary and PW1 within the same office of the Government Chemist as exhibit is no doubt a strange demand in proving the chain of custody, we would overrule it. We shall end there and dismiss the ground of appeal.

We now turn to consider ground one of appeal. The complaint is that he was denied by the trial magistrate the right to know and provision of free legal aid. It was Mr. Said's argument that the law does not impose such duty. Although the appellant was unable to pinpoint the provisions

of the law on which his complaint rested, like the learned State Attorney, we have no doubt that they were based on sections 198 and 199 of Act No. 7 of 2004. Those sections provide:-

> *"198. In the absence of any provision in any other law to the contrary, a person accused before any criminal court, or against whom proceedings are instituted under this Act, in any such court may of right be defended by an advocate.*
>
> *199. Where in any Criminal trial involving a capital punishment, the accused is not represented by an advocate, and where it appears to the High Court that the accused has not sufficient means to engage an advocate, the court may assign an advocate for his or her defence at the expense of the State."*

This complaint need not hold us much. As a starting point, the two provisions are, contextually, the same as the provisions of section 310 of the CPA which states:-

> *"310. Any person, accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court subject to the provisions of any*

written law relating to the provision of professional services by advocate."

As to how, when and under which circumstances such right is exercisable, the Court had an occasion to provide a lucid elaboration in the case of **Samwel Kitau vs Republic** (supra), where it categorically stated that:-

> *"...However for other cases, legal assistance can be obtained upon request and only when the certifying authority considers that there is a need. It is therefore not automatic. There has been a number of situations where an accused person has been granted legal aid after putting in a special request.*
>
> *However, this position only apply to free legal aid, otherwise an accused person is at liberty to engage an advocate."*

Besides, the Court had an occasion to consider at length the provisions of section 198 of Act No. 7 of 2004 on the right to be informed the right to a legal service and provision of it in the case of **Moses Muhagama Laurence vs The Government of Zanzibar** Criminal Appeal No. 17 of 2002 (unreported). In that case, Mr. Patel, learned advocate, who acted for the appellant both before the High Court and the Court, unsuccessfully argued an identical ground before Dourado, J. On appeal to the Court and

in supporting his assertion, Mr. Patel referred the Court to decision in the case of **Thomas Mjengi vs R** [1992] TLR 157 in which Mwalusanya J, as he then was, held that the right to be legal representation implies the right to be informed of that right and that failure to do so rendered a trial a nullity. In its judgment, the Court, stated that:-

> *"We understand judge Mwalusanya to be saying that the poor who are entitled to free legal aid should be informed by the court that they have such a right.*
> *The appellant in this appeal did not claim to be indigent and, therefore, in need of free legal aid. In fact he engaged an advocate in both the High Court and in this Court. We do not think, therefore, that the omission by the trial court to inform him that he had a right to engage an advocate, if he wanted to, had the effect of nullifying the whole trial. We dismiss that ground of appeal."*

Eventually, given the stance of the law, we are constrained to agree with Mr. Said that it is at the trial court's discretion not only to inform but also to provide legal assistance and on the authority above and that of **Maganga Udugali vs Republic** (supra) rightly cited to us by Mr. Said, the appellant should establish that he is indigent and should ask for such

service and, of importance, failure by the court to inform and provide free legal service is not fatal. This complaint also fails.

In grounds two and five of appeal, the attack is directed to the learned judge's judgment and the contention is that it lacks essential ingredients of a proper judgment rendering it not a judgment at all. The impugned judgment is found at pages 70 to 74 of the record of appeal. We have seriously examined it. It is evident that the learned judge, apart from addressing and considering each and every ground of appeal, he considered the trial court's findings in relation to the evidence on record, made his own evaluation of the evidence before he aligned himself with the findings made by the trial court. He went further to even quote the relevant parts of the trial court's judgment in which the evidence by both sides was analyzed and a finding made. This is normally the duty of an appellate court because a judgment simply means a statement of a judge or magistrate giving reasons for a decision. Looked that way, we hasten to hold that the judgment under attack met the test of a proper judgment. No matter how he did that, that is the style he opted to follow to which this Court has occasionally refrained from making it a ground for faulting a judgment [see **Miraji Malumbo Malumbo vs Republic** (supra)]. Unhesitatingly, we hold that what we see in the judgment under attack is

exactly the opposite of what the appellant wants us to believe and find. We accordingly find no justification to fault the judgment.

Grounds three and four of appeal, in essence, boil down to a complaint that the charge was not proved beyond doubt. Proof of a charge requires production of oral, documentary and physical evidence. In that accord, we cannot avoid linking our discussion on the two grounds with the discussion on the concern raised *suo motu* by the Court regarding admission of exhibit PE2. We shall begin our discussion with admission of exhibit PE2. To appreciate the Court's concern and Mr. Said's argument on it, we take the pain of reproducing the trial court's proceedings dated 13/09/2017 subsequent to examination of PW1 by the court thus:-

> "***P/P:***
>
> *Today we don't have another witness, but I pray to tender the exhibit to the court.*
>
> *Sgd: Valentina A. Katema (RM)*
>
> *13/09/2017*
>
> ***Accused:***
>
> *I have no objection.*
>
> *Sgd: Valentina A. Katema (RM)*
>
> *13/09/2017*

Court:

The exhibit marked ANSZ IR 59/2016 which is small brown envelope with 20 packets of brown powder kept in foil paper is admitted as exhibit named PE2.

Sgd: Valentina A. Katema (RM)

13/09/2017

Order:

-Hg on 10/10/2017"

Upon a glance of what had transpired, Mr. Said, as hinted above, was not hesitant to concede that exhibit PE2 was not only tendered by the Public Prosecutor but also it was tendered and admitted after the trial court had concluded recording PW1's testimony. Indeed, that was faulty. Exhibits forming part of the prosecution evidence should be produced and tendered by a witness and during examination in-chief so as to afford opportunity to an accused person to challenge it by way of cross-examination. The court has consistently pronounced itself that a prosecutor is not a witness and cannot therefore be cross-examined. To mention few are; **Thomas Ernest Msungu @ Nyoka Mkenya vs Republic**, Criminal Appeal No. 78 of 2012 and **Frank Massawe vs Republic**, Criminal Appeal No. 302 of 2012 (both unreported). That

stance was reiterated in the recent Court's decision in the case of **Amos Alexander @ Marwa vs Republic**, Criminal Appeal No. 513 of 2019 (unreported) where, dealing with an identical scenario, the Court stated that:-

> *"A public prosecutor is not a witness sworn to adduce evidence and cannot assume the role of a witness; he is not competent to tender exhibits because he cannot ride two horses at the same time, be a prosecutor and a witness at the same time. This course of action is fatal [see **Thomas Ernest Msungu @ Nyoka Mkenya vs Republic**, Criminal Appeal No. 78 of 2012, **Sospeter Charles vs Republic**, Criminal Appeal No. 555 of 2016, **Tizo Makazi vs Republic**, Criminal Appeal No. 532 of 2017, **DPP vs Festo Emanuel Msongaleli and Nicodemu Emmanuel Msongaleli**, Criminal Appeal No. 62 of 2017 (all unreported)."*

We also entirely agree with the learned Senior State Attorney that by tendering exhibit PE2 and the court admitting it as such was improper for the appellant could not exercise his right to challenge or contradict it. Section 153 of the Evidence Act, 2016 (Act No. 9 of 2016) of the Laws of Zanzibar, provides for the manner of taking evidence in court during trial

beginning with examination in-chief by the party calling a witness followed by examination by an adverse party called cross-examination and examination by the party calling the witness subsequent to cross-examination termed as re-examination. In essence, cross-examination is intended to contradict the witness's testimony given during examination in-chief [see **Kulwa Makomelo and Two Others vs Republic**, Criminal Appeal No. 15 of 2014 (unreported)]. It therefore follows that, by failure to accord an opportunity to cross-examine a witness who would have tendered exhibit PE2, the appellant was denied the right to challenge it. The bottom line here is that the above explained shortcomings in the reception of exhibit PE2 the subject matter of the charge was flawed and occasioned injustice to the appellant. Accordingly, as proposed by Mr. Said, we expunge it from the record of appeal. In the absence of the subject matter of the charge (exhibit PE2), the charge cannot stand. This seriously affects the prosecution case with the effect that the prosecution was unable to prove the charge against the appellant beyond doubt as complained in ground four of appeal. Unfortunately, such a serious and obvious anomaly escaped the attention of the first appellate judge.

In the event, we allow the appeal. Accordingly, we quash the judgment of both courts below and set aside the sentence meted out by

the trial court and sustained by the High Court. If not held behind bars on account of another lawful cause, the appellant should be released forthwith.

DATED at **ZANZIBAR** this 15th day of June, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June 2022 in the presence of the Appellant in person and Mr. Said Ali Said, Principal State Attorney, for the Respondent, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL