IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: WAMBALI, J.A., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 515 OF 2020

ABASI S/O KASIAN @ KILIPASI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Iringa)

(Matogolo, J.)

dated the 25th day of September, 2020
in
RM. Criminal Appeal No. 11 of 2020

.....

JUDGMENT OF THE COURT

17th & 22nd March, 2023

SEHEL, J.A.:

The Court of the Resident Magistrate of Njombe at Njombe convicted the appellant, Abasi Kasian @ Kilipasi, with an offence of unlawful trafficking of narcotic drugs contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act, (Amendment) No. 15 of 2017 (Cap. 95 R.E. 2019) and sentenced him to thirty (30) years imprisonment. The appellant was aggrieved and unsuccessfully appealed before the High Court of Tanzania at Iringa (the first appellate court).

Briefly the facts relevant to the present appeal are such that; after the appellant was arraigned before the trial court, a charge comprised of

two counts was read over to him and he pleaded not guilty to both counts. Thus, a full trial ensued whereby the prosecution called a total of four witnesses and the appellant called three witnesses.

It is on record that after three prosecution witnesses had testified, the charge was substituted and a new substituted charge comprised of one count was read over to the appellant. The said three prosecution witnesses were; a woman police officer with police force number 7581, Detective Constable (DC) Furaha (PW1) who testified on 19th February, 2019. The evidence of PW1 was to the effect that she interrogated the appellant on 24th May, 2019 and recorded the appellant's cautioned statement. The said cautioned statement was tendered in evidence as Exh. P1.

On that same date, the Officer in Command from the Criminal Investigation Department (OC-CID) at Makambako Police Station, Superintendent of Police (SP) Yesaya Sudi (PW2) testified. According to PW2, on 23rd May, 2019 at around 00:40 hrs he went to the residence of the appellant at Mtulingala village in Makambako to conduct a search because he had been earlier on informed that the appellant was dealing with narcotic drugs. Upon reaching there he found the appellant who showed them the narcotic drugs that were hidden in the kitchen. Thus,

he seized 500 grams of Cannabis Sativa (commonly known as "bhangi") from the appellant's kitchen and uprooted ten (10) plants of bhangi from the appellant's shamba. PW2 tendered certificate of seizure, Exh. P2 and the seized bhangi, Exh. P3.

The case was then adjourned to 25th February, 2019 where it was again adjourned to 28th February, 2019. On that date, Assistant Inspector of Police Nyauni (PW3) who claimed to have taken the seized bhangi to the Chief Government Chemist (CGC) for examination testified. He also tendered the CGC's Report, Exh. P4. After, PW3 had testified, the case was adjourned to 3rd March, 2019.

On 3rd March, 2019, when the case was called on for continuation of the prosecution case, the charge was substituted. Here, we wish to reproduce the extract of the proceedings of the trial court to depict what exactly transpired on that date:

> *"**Date:** 03/3/2019*
> ***Coram:** I. Msacky, RM*
> ***Prosecutor:** Mpagama S/A*
> ***C/C :** Mwamwile, RMA*
> ***Accused:** Present*
> ***S/A**: This matter is coming for hearing. I have one witness. We are ready.*

Accused: *I am ready too.*

I. Msacky, RM

03/03/2019

S/A: *Your honour we pray to amend the charge as per section 234 of the CPA, Cap. 20 R.E. 2002*

Court: *Prayer granted.*

I. Msacky, RM

Court: *Charge read over and explained to the accused person in the language understood to him and asked to plea.*

Accused Plea*: It is not true.*

Court: *EPNG to the charge.*

I. Msacky, RM

03/03/2019

S/A: *I pray to proceed with the case.*

Court: *Prayer granted.*

I. Msacky, RM

03/03/2019"

Thereafter, the prosecution proceeded to call its fourth witness, one Shabani Rafael Ndumbula (PW4), a village Chairman at Mtulingala village who witnessed the search and seizure of the said bhangi.

In his defence, the appellant (DW1) admitted that on 23rd May 2019 at 11:00 hrs, the police officers arrived to his house at Ihawaga

village, Mufindi but denied to have been found in possession of the bhangi. He also paraded his son, Gerson Abasi Kilipasi (DW2) to corroborate his defence that he was not found in trafficking bhangi. He further called a ten-cell leader of Ihawaga, Mufindi, Aloyce Simangwa (DW3) to prove that he resides at Ihawaga village and not at Mtulingala village.

As intimated earlier, the trial court found credence on the prosecution case hence it found the appellant guilty as charged, convicted and sentenced him to thirty years imprisonment. Aggrieved, the appellant appealed to the first appellate court but his appeal was dismissed for lacking merit. He has now come to this Court with five grounds of appeal that; **One,** there is a variance between the charge and evidence. **Two,** PW3 who tendered Exh. P3 was not a maker of the exhibit, hence, he was not a competent witness to tender it. **Three**, the search was illegal as it was conducted during night hours and there was no search warrant. **Four**, cautioned statement was not voluntarily made because it was recorded in the unfavourable conditions, in the presence of other police officers. **Five**, the prosecution failed to prove the case against the appellant beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas Mr. Tito Ambangile Mwakalinga, learned State Attorney, appeared for the respondent Republic.

When the appellant was given a chance to submit on his grounds of appeal, he being a layperson, not very well conversed with the legal issues, he opted to adopt the memorandum of appeal with nothing more to submit. He simply urged the Court to consider his grounds of appeal and set him free.

On his part, Mr. Mwakalinga supported the appeal on an account that after the charge was substituted, the provisions of section 234 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (the CPA) was not complied with by the trial court. He explained that it is on record that the charge was substituted and the appellant pleaded to the new substituted charge but the trial court did not inform him of his right to require any of the witnesses who had testified to be recalled either to give evidence afresh or for further cross-examination as per the dictates of section 234 (2) of the CPA. It was his submission that the omission was fatal and vitiated the proceedings from where the charge was substituted. To fortify his submission, he cited to us the case of **Omary Juma**

Lwambo v. The Republic, Criminal Appeal No. 59 of 2019 [2021] TZCA 463; [03 September, 2021, TANZLII]. He thus implored us to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) to revise the proceedings of the two lower courts, nullify the said proceedings, quash the conviction and judgements of the two courts below and set aside the sentence.

Mr. Mwakilinga argued that, ordinarily, an order of the retrial of the case would be made for the case to start from the stage where the charge was substituted but given the circumstance of the present appeal, it will be unjust to make such an order as the prosecution will have a chance to fill in the gaps.

The learned State Attorney mentioned the said flaws which he believed the prosecution will have an opportunity to rectify. That, the charge was at variance with the evidence on three aspects. **First**, he submitted, the charge alleged that the appellant was found in possession of 4.26 kilogram of bhangi, while the seizure certificate indicates that the appellant was found with 500 grams of bhangi. **Secondly**, the evidence of PW2 and PW4 suggests that the appellant was found with ten plants of bhangi which is a different offence from unlawful trafficking of narcotic drugs. **And thirdly**,

the charge date on which the offence was committed differs, the charge allege that the offence was committed on 23rd May, 2019 but the evidence of the police officer (PW2) who arrested the appellant suggests that the offence was committed on 24th May, 2019. It was therefore his submission that the charge laid before the appellant at the trial court was not proven.

Mr. Mwakalinga further argued that the search was illegal because it was conducted without a search warrant which is contrary to section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2022, and it was conducted during night hours while it was not an emergency search. On this aspect, he referred us to the case of **Joseph Charles Bundala v. The Republic**, Criminal Appeal No. 15 of 2020 [2021] TZCA 3532; [21 December, 2021, TANZLII].

The learned State Attorney added that there is unexplained delay of three months from the date the bhangi was seized to the time the said exhibit was taken to the CGC for examination thus raising a question how was the said exhibit was preserved for all that time. He also pointed out that Exh. P4 shows that the sample was taken to the offices of CGC by Assistant Inspector of police Gregory contrary to the evidence of PW2 and PW3 that it was PW3

who took the sample to the office of CGC. It was the submission of the learned State Attorney that the contradiction goes to the root of the case thus casts doubt on the credibility of the evidence of PW2 and PW3.

The appellant being a layperson had nothing much to say other than joining hand with the submission of the learned State Attorney and beseeched us to set him free from prison custody.

Having heard the submission and reviewed the record of appeal, we entirely agree with Mr. Mwakalinga that the proceedings of the trial court was vitiated by non-compliance with the provisions of section 234 (2) of the CPA.

We have indicated that the appellant was first charged with two counts and in order to prove that charge, the prosecution commenced to call its witnesses. However, after three prosecution witnesses had testified, the charge was substituted. The substituted charge had one count of unlawful trafficking of narcotic drugs. Of course, the substituted charge was read over to the appellant and he pleaded not guilty. Hence, a plea of not guilty was entered. Then, instead of the appellant being explained his right that he has a right to recall the three witnesses who

had testified to either give evidence afresh or be further cross examined, the prosecution proceeded to call its fourth witness. This is contrary to the dictates of section 234 (2) of the CPA that provides:

> *"234 (2) Subject to subsection (1), where a charge is altered under that subsection*
>
> *(a) The court shall thereupon call the accused person to plead to the altered charge;*
>
> *(b) The accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross examination; and*
>
> *(c) The court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice."*

In the case of **Ezekiel Hotay v. The Republic**, Criminal Appeal No. 300 of 2016 [2018] TZCA 205; [01 October, 2018, TANZLII], the Court reiterated the compliance of the above provision that:

> *"According to the preceding cited provision, it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant case, having substituted the charge, the five prosecution witnesses who had already testified ought to have been re-called for purposes of being cross examined. This was not done..."*

The above holding was followed in the case of **Balole Simba v. The Republic**, Criminal Appeal No. 525 of 2017 [2021] TZCA 380; [17 August, 2021, TANZLII], where after two prosecution witnesses testified on a charge of robbery, the said charge was substituted and another count of indecent assault was added. The appellant was not addressed on his rights to have the witnesses who had testified be recalled for either to give evidence afresh or for further cross examination. On that omission, the Court said:

> *"...although the substituted charge was read over to the appellant, he was not subsequently addressed on his right to have the two prosecution witnesses who had already testified*

be recalled so as to give fresh evidence or be further cross examined... Given the short comings in the procedure regulating substitution of charge which with respect, missed the eye of the High Court, it cannot be safely vouched that the conviction of the appellant was without blemishes."

The rationale behind that requirement was stated in the case of **Ramadhan Abdallah v. The Republic** [2002] T.L.R. 45 that:

".. we wish to state that the rationale for section 234 is easy to discern. A new charge sheet is introduced after some witnesses have already testified. The new offence charged may ... consist new ingredients and or may attract different consequences."

It is the position of this Court that an omission to comply with the provisions of section 234 (2) of the CPA renders the proceedings which followed after the date of substitution of the charge, a nullity -see: the decisions of this Court in the cases of **Omary Juma Lwambo v. The Republic** (supra); **Godfrey Ambros Ngowi v. The Republic,** Criminal Appeal No. 420 of 2016 [2019] TZCA 42; [11 April, 2019, TANZLII] and **Omary Salum @ Mjusi v. The Republic,** Criminal

Appeal No. 125 of 2020 [2020] TZCA 574; [27 September, 2022, TANZLII].

It follows then that, since the appellant was not explained his right in terms of section 234 (2) of the CPA, the proceedings of 3rd March, 2019 that followed after the substitution of the charge, were a nullity. We therefore invoke our revisional powers under section 4 (2) of the AJA to nullify the proceedings, quash the conviction by the Court of the Resident Magistrate of Njombe and set aside the sentence. Likewise, we quash the appeal proceedings and set aside the judgment of the High Court as they originated from a nullity.

Having nullified the proceedings, the next issue for consideration is whether or not a retrial should be ordered. Mr. Mwakalinga submitted that as there are flaws, a retrial of the case would not be in the interest of justice. On our part, having closely considered the circumstances of the present appeal, we agree with the learned State Attorney that given the peculiarity of the present appeal that there was illegal search; there is a variance between the charge and the evidence on date of the commission of the crime; the volume of bhangi seized and that there is a contradiction as to who sent the sample to the CGC, then the interest of justice is not in favour of a retrial.

Consequently, we order the immediate release of the appellant **Abasi s/o Kasian @ Kilipasi** from prison unless his continued incarceration is related to other lawful cause.

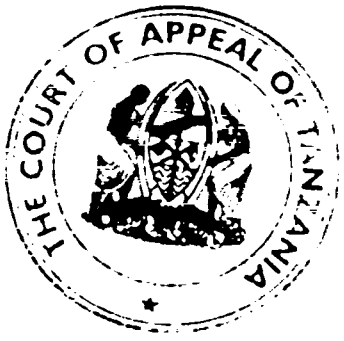
DATED at **IRINGA** this 22nd day of March, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This judgment delivered this 22nd day of March, 2023 in the presence of appellant in person and Ms. Piensia Nichombe, learned Senior State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL