IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: KWARIKO, J.A., LEVIRA, J.A. And MDEMU, J.A.)

CRIMINAL APPEAL NO. 65 OF 2018

KRISTINA BISKASEVSKAJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Sumari, J.)

dated the 21st day of February, 2018

in

Criminal Sessions Case No. 01 of 2014

JUDGMENT OF THE COURT

03rd & 20th July, 2023

KWARIKO, J.A.:

This appeal is against the decision of the High Court of Tanzania at Moshi (the trial court) which convicted the appellant, Kristina Biskasevskaja, a Lithuanian national of the offence of trafficking in narcotic drugs contrary to section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act [CAP 95 R.E. 2002] as amended by Act No. 6 of 2012; now the Drugs Control and Enforcement Act [CAP 95 R. E. 2019] and was sentenced to life imprisonment. Being aggrieved by that decision, the appellant has come to this Court on appeal.

The particulars of the offence were that, on 28th day of August, 2012 at Kilimanjaro International Airport (KIA) within Hai District in Kilimanjaro Region, the appellant was found trafficking in 3775.26 grams of heroin hydrochloride valued at TZS. 169,886,700.00.

In order to prove the charge against the appellant, the prosecution paraded a total of seven witnesses and tendered nine exhibits. The material facts from the prosecution evidence which led to the appellant's conviction can be recapitulated as follows: On 28th August, 2012, the appellant was travelling to Brussels via Addis Ababa by Ethiopian Airlines where at about 2:00 pm while at KIA, she approached a baggage screening section which was being attended by airport security officer one Michael Odisha Mrutu (PW6). While in the process of screening the baggage, PW6 detected an unidentified greenish substance in one black bag. Being suspicious, he called the shift in-charge one Donat Mnuka and informed him of the matter. The name tag on the bag was that of the appellant and she positively responded when it was called out for identification. She also admitted that the bag (exhibit P10), belonged to her and she was the one who had packed it.

At that stage, the appellant was informed of PW6's suspicion and she was asked to open the bag which she complied. She took a key from

her handbag and opened it. Upon search, nothing suspicious was found. The bag was emptied and it was again placed on the machine, but still the unidentified image was seen. Thereafter, the manager of security department one Kisusi Justine Makomondi (PW7), police officers, including Adson Almoni Mwasenga (PW3), No. F 3607 Detective Corporal Cleopa (PW5) and officers from the Tanzania Revenue Authority (TRA) were called to witness the inspection. The bag was cut open, where in its linings, a parcel wrapped in black cello tape (exhibit P2) was retrieved having unusual smell. Officers present suspected the substance to be narcotic drugs. The appellant was formally arrested, searched and a certificate of seizure (exhibit P5) was prepared and signed by the said officers and the appellant. During all these formalities, the appellant who by then did not know Swahili language was communicating in English with PW7.

Thereafter, the appellant was kept under police custody at KIA police station and the bag (exhibit P10) was kept in PW3's office. On the following day, the appellant was taken to the Regional Crime Officer's office (RCO) at Moshi where PW3 handed over exhibit P10, exhibit P2, appellant's ticket and passport (exhibit P7 collectively) and a tag to No. F.

1157 Detective Sergeant Hashim (PW4), who kept the same in the RCO's strong room and entered the same in the exhibit register.

On 3rd September, 2012, PW4 took the alleged narcotic drugs to the Chief Government Chemist at Dar es Salaam for forensic drug analysis. The substance was examined by a chemist named Machibya Ziliwa Peter (PW1). He found the substance weighing 3775.26 grams and it was proved to be narcotic drugs namely, heroin hydrochloride. The findings were posted in the report which was admitted in evidence as exhibit P3. The drugs were handed over to PW4 who returned it to Moshi. The then Commissioner of the Anti-drug Commission, one Christopher Shekiondo (PW2) certified that the market value of exhibit P2 was TZS. 169,886,700.00 and the certificate of value dated 4th September, 2012 was admitted in evidence as exhibit P4.

In her defence, the appellant denied the charge and disassociated herself from exhibit P2. According to her, she had come to Arusha-Tanzania on 19th August, 2012 on a request by her Lithuanian friend to collect her bag with curios package. That, on 27th August, 2012 she received the bag which was not locked from a certain man named Giedeius introduced to her by the said friend. Thereafter, on 28th August, 2012 she was at KIA intending to travel abroad and while she was queuing

for immigration formalities, a certain man touched her shoulder while asking if her name was Kristina and she replied in the affirmative. Subsequently, she was taken to a small room and found a bag on the table. She opened it and found various items belonging to her together with ornaments, bracelets, beads and all things of her friend Giedeius. Later on, she was put under arrest on the ground that her bag was suspected to contain narcotic drugs. She was thereafter taken to KIA police station and later to RCO's office at Moshi.

Having considered the evidence from both sides, the learned trial Judge concurred with the opinion of assessors that, the prosecution case was proved beyond reasonable doubt against the appellant. She was accordingly convicted and sentenced as indicated earlier.

Aggrieved by that decision, the appellant is before this Court on eight grounds of appeal whose memorandum was lodged on 17th July, 2018. However, when the appeal was called on for hearing on 03rd July, 2023, through her counsel, the appellant prayed and was granted leave in terms of rule 81 (1) of the Tanzania Court of Appeal Rules, 2009 to argue an additional ground of appeal making a total of nine grounds as follows:

1. *That, the Honourable trial Judge misdirected herself for admitting exhibit P2, the alleged narcotic drugs which was not listed or mentioned during the committal proceedings contrary to section 246 (2) of the Criminal Procedure Act Cap. 20 R.E. 2002 as revised and during preliminary hearing."*
2. *That, the learned trial Judge erred in law and in fact for failure to evaluate properly the evidence on record as a result arrived at a wrong conclusion.*
3. *That, the learned trial Judge erred in law and in fact in holding that the charge against the appellant was proved to the required standard.*
4. *That, the learned trial Judge erred in law and in fact in holding that the appellant signed the seizure certificate, exhibit P5 acknowledging the seizure of the drugs exhibit P 2 and exhibit P10.*
5. *That, the learned trial Judge misdirected herself in holding that the prosecution witnesses were credible merely on the ground that they testified on the possession of exhibit P10 and that the same belonged to the appellant.*
6. *That, the learned trial Judge having made a finding that there were contradictions, discrepancies or inconsistencies as addressed by the defence and conceded by the prosecution misdirected herself in holding that the nature of contradictions, inconsistencies, discrepancies and non-compliance of some procedures in the PGO are trivial matters or issues to be adjudicated by the court and that the same did*

not affect the roots of the case of the prosecution without pointing out and analyzing them.

7. *That, the learned trial Judge erred in law and in fact for failure to take into consideration and/or ignoring the appellant's evidence.*
8. *That, the learned trial Judge erred in law and in fact in holding that the chain of custody was not broken.*
9. *That, the learned trial Judge erred in law and in fact in convicting the appellant and sentencing her to life imprisonment.*

At the hearing of the appeal, Mr. Majura Magafu, learned advocate represented the appellant, whereas the respondent Republic had the services of Mr. Juma Sarige, learned Senior State Attorney who was assisted by Mr. Henry Chaula, learned State Attorney. It is noteworthy that, the hearing of the appeal was conducted in Swahili language since the appellant as well as her counsel informed the Court that the appellant was now conversant with that language having been in custody for more than ten years.

When he was invited to take the stage, Mr. Magafu argued the first ground to the effect that on 7th February, 2014, committal proceedings were conducted by the District Court of Moshi in respect of the charge levelled against the appellant. He submitted that, in terms of section 246

(2) of the Criminal Procedure Act [CAP 20 R.E. 2002; now R.E. 2022] (the CPA), the prosecution listed a total of eleven intended witnesses and six documentary exhibits without any mention of physical exhibits. The learned counsel argued further that, the prosecution did not indicate their intention to tender narcotic drugs namely, heroin hydrochloride. That, even during preliminary hearing which was conducted by the trial court on 14th May, 2014, the prosecution did not mention the narcotic drugs as one of the exhibits they intended to tender during the trial.

It was Mr. Magafu's contention that, despite the foregoing, at the trial, the prosecution introduced in evidence the alleged narcotic drugs whereas the defence raised an objection to the effect that, it contravened section 246 (2) of the CPA since that exhibit was not among the prosecution exhibits listed during the committal proceedings. The objection was overruled and the narcotic drugs were admitted in evidence as exhibit P2 which was contrary to the law and therefore the same ought to be expunged from the record. To amplify his contention, the learned counsel cited the decisions of the Court in the case of **Said Shabani Malikita v. Republic,** Criminal Appeal No. 523 of 2020 and **Remina Omary Abdul v. Republic,** Criminal Appeal No. 189 of 2020 (both unreported).

Going forward, Mr. Magafu argued that, if exhibit P2 is expunged from the record there shall not be any evidence to support the charge against the appellant and thus there is no pressing need to deal with other grounds of appeal. On that account, he urged us to allow the appeal, quash conviction, set aside the sentence and order release of the appellant from prison.

On his part, in response, Mr. Sarige stated his stance of not supporting the appeal. As regards the first ground, he argued that the trial court did not contravene section 246 (2) of the CPA as it gave reason when it overruled the objection to the effect that, the omission was not fatal. He contended that, since the certificate of seizure (exhibit P5) mentioned exhibit P2, the appellant was not taken by surprise when exhibit P2 was tendered in evidence. He distinguished the decision of **Said Shabani Malikita** (supra) in the sense that, in that case, the appellant was not informed through the certificate of seizure that the narcotic drugs would be tendered in evidence.

In rejoinder, Mr. Magafu argued that, the holding by the trial Judge to the effect that contravention of section 246 (2) of the CPA was not fatal related to exhibit P10 which was the bag that allegedly contained exhibit P2. He maintained that, exhibit P2 was not mentioned during the

committal proceedings and it cannot be saved by the certificate of seizure, exhibit P5 on the following two reasons: One, since the certificate was printed in both Swahili and English languages, then there is no proof to show that, it was interpreted to the appellant as she was only conversant with English language at the time of her arrest. Two, the appellant signed the certificate of seizure as a witness and not as a suspect.

We have considered the submissions by the learned counsel for the parties and the issue which calls for our determination is whether, the admission of exhibit P2 in evidence contravened the provisions of section 246 (2) of the CPA. For ease of reference, this provision is reproduced as follows:

> *"(2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial."*

According to this provision, when the accused is brought before the court during committal proceedings, the court is required to read and explain to him the information levelled against him together with the statements or documents containing the substance of the evidence of

witnesses whom the Republic intends to call during the trial. Although this provision does not mention physical exhibits, we do not think that the legislature intended to exclude them from being mentioned at that stage. It cannot be overemphasized that the intention of listing the exhibits, statements or documents containing the substance of the evidence of intended witnesses during the stage of committal proceedings is to afford the accused an opportunity to know what evidence is intended against him so that he can properly prepare his defence.

From the foregoing, it is our considered view that all the evidence whether physical or documentary which the prosecution intends to tender at the trial against the accused should be listed during the committal proceedings. In the case of **The Director of Public Prosecutions v. Sharif Mohamed @ Athuman & Six Others,** Criminal Appeal No. 74 of 2016 (unreported), the Court listed the types of evidence which the party should make the opposing party be aware of. It stated thus:

> *"It is relevant to point out that, there are four types of evidence, that is to say, real, demonstrative, documentary and testimonial...."*

The Court went on to explain the meaning of real evidence and it stated thus:

"Real evidence is a thing whose characteristics are relevant and material. It is a thing that is directly involved in some event in the case...."

Among the four types of evidence, exhibit P2 falls under the category of real evidence. It is directly involved in the case and thus it was imperative for the prosecution to mention it during the committal proceedings to give notice to the appellant of its existence. Even if the prosecution omitted to mention it during that stage, they could have mentioned it during preliminary hearing, or else, tendered it as additional evidence under section 289 (1) of the CPA.

In the case of **The DPP v. Sharif Mohamed @ Athuman & Six Others** (supra), when interpreting the provisions of section 246 (2) of the CPA, the Court observed thus:

"Our understanding of this provision is that, it is not enough for a witness to merely allude to a document in his witness statement, but that the contents of that document must also be made known to the accused person(s). If this is not complied with the witness cannot later produce that document as an exhibit in court. The issue is not on the authenticity of the document but non-compliance with the law. We therefore agree that unless it is tendered as additional

evidence in terms of s. 289 (1) of the CPA, it was not receivable at that stage."

In that decision, the disputed exhibit was a document but since all types of evidence should be made known to the accused during the committal proceedings, physical exhibits should not be exempted. That decision was also relied upon by the Court in the case of **Said Shaban Malikita** (supra) where the crux of the matter was the exhibit in the form of narcotic drugs, just like it is in the present case. The Court stated thus:

"Although the context in the decision is a document or documents, we want to believe it extends to the listing of physical exhibits, where the accused will be informed of the expected to be evidence against him or her. Again, the application of section 289 (1) was underscored."

Likewise in the case of **Remina Omary Abdul** (supra), the Court stated thus:

"...during committal proceedings, it is now established practice that courts not only read and list potential prosecution witnesses, but also read/explain the contents of documents and then list documentary and physical exhibits the prosecution would rely on during trial."

-See also the case of **Mussa Ramadhan Magae v. Republic,** Criminal Appeal No. 545 of 2021 (unreported).

Further, in a bid to save the omission under discussion, the learned Senior State Attorney argued that, the appellant was made aware of exhibit P2 through the certificate of seizure, exhibit P5. What we can say about this assertion is that, it is not backed up by any law. The two exhibits are distinct from each other and therefore each ought to have been mentioned during the committal proceedings. After all, exhibit P2 was tendered ahead of exhibit P5, hence, it cannot be said that the appellant was made aware of exhibit P2 through it.

Following the cited decisions, we are settled in mind that exhibit P2 was admitted in evidence contrary to section 246 (2) of the CPA, hence it lacks evidential value and we therefore proceed to expunge it from the record. With exhibit P2 being expunged from the record, the question which follows is whether the remaining evidence is sufficient to ground conviction against the appellant.

The charge against the appellant is trafficking in narcotic drugs namely, heroin hydrochloride which was received in evidence as exhibit P2. With the expungement of this exhibit, it goes without saying that the remaining evidence is not sufficient to prove the charge against the

appellant beyond reasonable doubt. It follows therefore that; the first ground of appeal has been answered in the affirmative.

Since the first ground is sufficient to dispose of the appeal, we find no pressing need to deal with the remaining grounds. We consequently allow the appeal, quash the conviction and set aside the sentence meted out against the appellant. Further, we order the release of the appellant from custody unless her continued incarceration is related to other lawful cause.

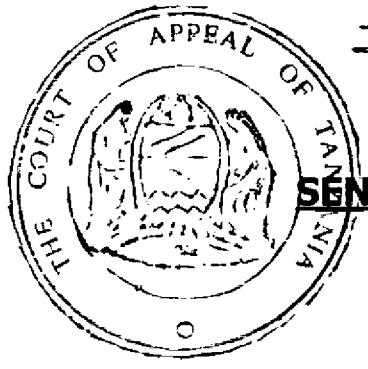
DATED at **MOSHI** this 19th day of July, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 20th day of July, 2023 in the presence of Mr. Patrick Paul, learned counsel for the appellant and Mr. Innocent Exavery Ng'assi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL