IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A, And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 150 OF 2019

RASHID SHABANI.....1st APPELLANT
HEMED HAMIS BAKARI.....2nd APPELLANT
FATUMA RASHIDI MUSHI @ ANNA NDEWINGIA KWEKA
@ MAMA MAYOO.....3rd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Amour, J.)

dated the 23rd day of April, 2019

in

Criminal Sessions No. 15 of 2016

.....

JUDGMENT OF THE COURT

14th & 25th August, 2023.

FIKIRINI, J.A.:

The appellants, Rashid Shabani, Hemedi Hamisi Bakari and Fatuma Rashidi Mushi @ Anna Ndewingwa Kweka @ Mama Mayoo, brought this appeal after being aggrieved by the High Court decision in Criminal Sessions Case No. 15 of 2016. In its decision dated 23rd April, 2019, the trial court found guilty, convicted and sentenced the appellants, who shall respectively be referred to as the 1st, 2nd and 3rd appellants in this appeal, to life imprisonment. The genesis of it all is that the appellants were jointly charged, convicted and sentenced with one count of Trafficking in

Narcotic Drugs contrary to section 16 (1) (b) of the Drugs and Prevention of Illicit Drugs Act, (Cap. 95 R. E. 2002) as amended by the Written Laws (Miscellaneous Amendments Act No. 6 of 2012).

It was stated in the particulars of the offence that, on 1st October, 2014 at Bondeni Street within the Municipality of Moshi in Kilimanjaro Region the appellants were found trafficking 30 Kg of Khat (Catha Edulis) commonly known as "Mirungi," valued at TZS. 1, 500,000/=. All the apellants refuted the charge and it led to a full hearing.

At the trial, the prosecution, in proving its case, listed thirteen (13) witnesses and tendered ten (10) exhibits while the defence case consisted of the appellants as sole witnesses and one (1) tendered exhibit. The prosecution version runs as follows; that on 1st October, 2014, F.4454 D/Cpl Menson (PW3), WP 5317 D/Cpl Mwajabu (PW6), E. 5589 D/Cpl Ramadhani (PW10), F.7740 D/Constable Goodluck (PW11) and WP 4146 D/Cpl Angela (PW12) were on patrol in Pasua Area. In the course of their patrol on reaching Manyema area they met the 1st and 2nd appellant riding a motorcycle in an opposite direction.

Suspicious of the motorcycle manned by the 1st appellant and 2nd appellant as a passenger carrying a polythene bag on his lap, the patrol group decided to pursue them. The motorcycle stopped at a house along Manyema street. PW10 quickly dropped from the patrol vehicle, went and

confiscated an ignition key and placed the 1st appellant who was still sitting on the motorcycle under arrest. While this was taking place, PW3 went after the 2nd appellant who darted to the house, only to meet him at the doorstep of one of the rooms in the house. PW3 proceeded to the room, in which he found the 3rd appellant. The 2nd and 3rd appellants were both put under arrest and PW3 proceeded to interrogate the 2nd appellant who admitted carrying "mirungi."

Based on the information, PW3 and his team had to conduct a search in the house. In accomplishing the task, PW12 had to go and look for independent witnesses of which he managed to secure two (2) witnesses. Even though these two witnesses could not appear in court during the trial but their recorded statements were tendered under section 34B (2) (a) of the Evidence Act, Cap. 6 R.E. 2019, that they witnessed the search of the polythene bag held by the 2nd appellant in which two (2) khaki envelopes were found. Upon opening those envelopes, PW3 found fresh leaves suspected to be "mirungi." The search continued and two (2) more parcels, were retrieved one had twelve (12) portions and the other had eight (8) portions, from under the bed. Each of the portions was stated to be one (1) kg, so in total the impounded "mirungi" weighed thirty (30) kgs. A search warrant and certificate of seizure were prepared.

While PW3 arrested the appellants and took them to remand custody, PW11 handled the impounded "mirungi", which he handed to F.1157 D/Ssgt Hashim (PW9). PW8 after verifying the seized "mirungi" to be thirty (30) portions each weighing one (1) kg, in total thirty (30) kgs, he recorded in the PF16 - exhibit register the exhibit number as 33 of 2014 in file number MOS/IR/8883/2014. Almost a month later and to be specific on 7th November, 2014, PW9 handed the exhibit to PW8 for taking it to the Government Chemist Laboratory Agency (GCLA)- Northern Zone – at Arusha for sampling and further transmission to Chief Government Chemist headquarters in Dar es Salaam (CGC). At the CGC office, Kaijungu Brassy (PW1) received the exhibit from which he extracted samples he took to the CGC on 28th November, 2014. Elias Zacharia Mulima (PW4) received and examined the samples and the results were that the seized leaves were khat "mirungi." The "mirungi" and the polythene bag were admitted as exhibit P2, the CGC report as exhibit P3, a motorcycle as exhibit P4 and a search warrant as exhibit P5.

The trial court contented that the prosecution has established a *prima facie* case against the appellants, the Court called upon them to mount their defence. In their defences, the 1st appellant testified as DW1, the 2nd appellant as DW2 and the 3rd appellant as DW3. Fending for himself, DW1 testified that on a fateful day, he was sent to buy vegetables by his mother, which made him proceed to Manyema market. While at the

market he was arrested by PW10 when on phone call with his mother and taken to a nearby house where he found the 2nd appellant had also been arrested. Both were taken to a house and in one room they found the 3rd appellant sitting on the bed naked. Meanwhile, the 3rd appellant was ordered to dress up, while they waited outside the room. From there they were taken to a Police vehicle parked outside the house and headed to Central Police Station, Moshi. This was followed by him being remanded in custody from 1st October, 2014 to 7th October, 2014 when he was forced to sign a search warrant. Later he was charged in court.

The 2nd appellant who testified as DW2, following in the 1st appellant's footsteps, also denied the charge. His narrative was that before his arrest along Manyema street, he was working at a car wash place. On the material day, he was arrested while at the local food stall (mama ntilie) for his lunch. He was arrested by PW11 when coming from the restroom and taken to the controversial house. Inside the house, he met the 1st and 3rd appellants, all three (3) were taken to the Police vehicle and driven to the Central Police Station. Denying that he was involved in committing the alleged offence, DW2 stated to have seen the polythene bag for the first time in the Police vehicle. And that he did not know the contents of papers he was forced to sign which he did and found himself charged before the court.

The 3rd appellant who featured as DW3 also refuted the charge. Her account was that on the 1st October, 2014, while in her room at 2.45 p.m., a group of people invaded her room, finding her not dressed. They ordered her to dress and arrested her and together with the 1st and 2nd appellants were taken to Police Station. She was taken to the female remand custody not knowing where the other two suspects were taken to. She as part of her evidence stated that she was forced to sign some papers, and later she was charged before the court with the offence she stood charged.

After a full trial, the court was satisfied that the case against all the appellants had been proved beyond reasonable doubt to the standard required in criminal charges, proceeded to convict and sentenced the appellants to a compulsory sentence of life imprisonment. Disgruntled by the decision, the appellants jointly appealed the decision vide a Memorandum of Appeal lodged on 14th August, 2019 comprising twenty one (21) grounds, followed by two Supplementary Memoranda of Appeal, one lodged on 26th June, 2023 having eleven (11) grounds and the other one lodged on 24th July, 2023 containing one (1) ground of appeal. In total, the appellants had thirty-three (33) grounds of appeal.

At the hearing of this appeal, Mr. Majura Magafu learned advocate appeared for all the appellants. Ms. Cecilia Mkonongo, learned Principal State Attorney assisted by Ms. Rose Sulle, learned Senior State Attorney

and Mr. Henry Chaula, learned State Attorney appeared for the respondent/Republic. Before submitting on the appeal, Mr. Magafu opted to drop grounds number 14, 15, 16, 17 and 21. For the remaining grounds from the initial Memorandum of Appeal and the two Supplementary Memoranda, he was of the submission that they were mainly based on four (4) areas which he addressed us on after adopting the appellants' written submissions filed on 28th June, 2023. The coined grounds read as follows:

1. *Whether the prosecution case was proved beyond reasonable doubt (which came from the 19th ground in the Memorandum of Appeal).*
2. *Whether the defence case was considered (which came from the 20th ground in the Memorandum of Appeal).*
3. *That there was a variance between the charge and the evidence led in court (which came from the 1st ground in the 1st Supplementary Memorandum of Appeal).*
4. *Failure to comply with the requirement under section 246 (2) of the Criminal Procedure Act, Cap. 20 R. E. 2019 by not listing exhibits P2 and P4 during the Committal* Proceedings *and Preliminary Hearing (from the 2nd Supplementary Memoranda of Appeal).*

Starting his submission with the 4th ground, Mr. Magafu contended that section 246 (2) of the CPA was not complied with as exhibit P2, which is the "mirungi" and exhibit P4, the motorcycle, were not listed during the Committal Proceedings or the Preliminary Hearing, even though, exhibit P4

(a motorcycle) was later listed, as reflected on page 22 of the record of appeal, as part of the intended exhibits to be tendered. He argued that compliance with section 246 (2) of CPA was a must and that included listing physical exhibits. He referred us to two (2) decisions of this Court emphasizing on that point. The cases were **Remina Omary Abdul v. R,** Criminal Appeal No. 189 of 2020 (unreported), in which the Court interpreted the provision of section 246 (2) on whether physical exhibit/s have to be listed and concluded that they should be. The Court traced its reasoning from the case of **DPP v. Sharif Mohamed @ Athumani & 6 Others**, Criminal Appeal No. 74 of 2016 (unreported), in which real, demonstrative, documentary and testimonial evidence were listed as four (4) types of evidence, which in **Remina** case (supra) the Court underscored that all exhibits should be listed, placing emphasis on the listing of physical exhibit/s which was the borne of contention.

Expounding on what was decided in the case of **Saidi Shabani Malikita v. R,** Criminal Appeal No. 523 of 2020 (unreported), the decision following **Remina** (supra), Mr. Magafu referred to the submission by the Republic that the application of the provision was not a legal requirement then, and the Court negated the assertion when it clearly stated on page 13 of the judgment that compliance with section 246 (2) of the CPA was inescapable therefore non-disclosure of part of the evidence must not be taken lightly. Consequently, the Court rejected the submission that the

omission was not fatal and likewise, failure by the Republic to apply section 289 (1) of the CPA, the omission could not be cured under section 388 of CPA.

The learned counsel further contended that tendering of both exhibits P2 and P4 was objected to but overruled. Probed by us if he was still contesting the admission of exhibit P4 since that was listed during the preliminary hearing, his response maintaining his stance, was that this was the requirement which could not be dispensed with, simply because the item was listed at some stage. On an ending note, he prayed for the two exhibits to be expunged from the record. And if the Court agrees to his submission obviously the prosecution case would collapse as there would be no evidence to support the prosecution case, he highlighted. Based on the submission he urged us to allow the appeal, quash the conviction, set aside the sentence and set the appellants at liberty.

Ms. Mkonongo prefaced her submission by opposing the appeal. On compliance with section 246 (2) of the CPA, the learned Principal State Attorney conceded, that has been the position currently after the decision in **Remina** case (supra). In that decision the Court emphasized on the requirement to list physical exhibits. The rationale being the accused to be put on notice on the nature of the charge and would be evidence against him/her. However, from the established principle pronounced in March,

2022, in **Remina** (supra) as reflected on page 33 of the judgment, the Court did not give a grace period as to when should the requirement become operational. Although, she contended not to challenge the principle but raised concern on its impact, especially on the already decided cases on the one hand and substantive justice on the other.

Particularly addressing the situation in the present appeal, she submitted that the Committal Proceedings were conducted on 10th April, 2018, when that was not the requirement at the time. Admitting that the **Remina** case (supra) traced its rationality from the **DPP v. Sharif Mohamed @ Athumani** (supra), it nevertheless did not state what should happen to those already decided cases. Beseeching us to consider or relax the principle in the interest of justice, Ms. Mkonongo invited us to get inspiration from the case of **Farijala Shabani Hussein & Another v. R,** Criminal Appeal No. 274 of 2012 (unreported), in which the Court gave a grace period before the principle became applicable. Otherwise, the Republic was in dilemma on what to do, but since she was aware that the Court can depart from its previous decision, she urged us to consider doing that.

In that sense, she maintained that section 246 (2) of the CPA was complied with. Besides, there was a certificate of seizure stating the appellants were found in possession of the "mirungi." She thus implored

upon us to weigh the interest of both the prosecution behind who are a number of victims affected by the use of those drugs and the accused person who was charged with trafficking them. As for the motorcycle which was listed during the preliminary hearing, the learned Principal State Attorney, had no qualms arguing that it was not a subject matter therefore even if expunged would not affect the prosecution case to the extent of making it collapse.

In rejoinder, Mr. Magafu controverted Ms. Mkonongo's submission that the principle was recently established in the case of **Remina** and **Malikita** (supra), by contending that the provisions of section 246 (2) of the CPA was in place long before the decision in the two cases. What the two cases did was to interpret the provision and accommodate the position in the **DPP v. Sharif Mohamed @ Athumani** case (supra) in which the Court in its decision discussed on types of exhibits, physical included extensively.

Daunting the invention by the learned Principal State Attorney requesting the Court to suspend the application of the requirement, meaning to review its decision, Mr. Magafu submitted the Court did not have such powers, since the conditions provided under rule 66 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) warranting a review have not been met. Moreover, under the rules of interpretation, there is a

procedure for that. On this he invited us to look at the cases of **Govindji Mulji Dodhia v. National & Grindlays Bank Ltd & Another** [1970] 14 EACA and **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa** [1988] T. L. R. 146. According, to him what could be done by the Court at this juncture is only to distinguish the two cases **Remina** of 2022 and **Malikita** of 2023. He further argued that the exercise should not end with those two mentioned cases only, as there is **DPP v. Sharif Mohamed @ Athumani a** decision of 2016 which the Republic ought to know since they were the ones who preferred the appeal.

Whereas the Republic was trying to buy Court's sympathy, it has to be remembered that the Court is guided by the law, reckoned Mr. Magafu.

Taking into account that counsel for the parties were not at variance with the position in the **Remina** case (supra) which traced its logic from the **DPP v. Sharif Mohamed @ Athumani's** case, the issue for our determination is whether guided by the decision in **Farijala** case (supra), we can grant the request by the learned Principal State Attorney.

Even though what was before the Court in the **DPP v. Sharif Mohamed @ Athumani's** case, was the admissibility of the documentary evidence, the Court had the opportunity to expound on the types of evidence. Therefore, the decision in the **Remina** case was essentially, interpreting with clarity the provision of section 246 (2) of the CPA, that all

the evidence be it physical or documentary must be listed during committal proceedings, lest the other party be caught off guard. In case the implementation has not been observed, then the application of section 289 (1) of the CPA could have taken effect. Otherwise, the latter provision would be superfluous, which we do not see the reason why it should be so.

The position taken in **Remina**, was echoed in **Malikita** (supra) and **Mussa Ramadhani Magae v. R,** Criminal Appeal No. 545 of 2021 (unreported) and in the most recent decision of **Kristina Biskasevskaja v. R,** Criminal Appeal No. 65 of 2018 (unreported).

Whilst, we appreciate and can reason with the learned Principal State Attorney, that the decision had an impact on the already decided cases and of course on the other cases that shall follow, we are of a different view. Our reason for the stance stems from the following: as rightly and correctly argued by Mr. Magafu, we have no mandate to review our previous decision in the **Remina** and other cases that followed. This is due to the fact that powers to review our own decision are regulated by section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and rule 66 (1) (a) – (d) of the Rules. And looking at what is before us presently, we think it does not fall within the ambit or scope of review.

More so, the nature of the decision we are entreated to review or act upon could be more detrimental than helping. This is because the situation

faced in the case of **Farijala** (supra) relied on by the learned Principal State Attorney, does not befit the issue before the Court currently. In that case, the issue before the Court raised by way of a preliminary point of objection was that there was a *lacunae,* as the provision was silent on how the intended written notice of appeal should be titled or in what format it should be given, under section 361 (1) (a) of the CPA. Persuading the Court in the above cited case the Republic referred the Court to the case of the **DPP v. Sendi Wambura & 3 Others**, Criminal Appeal No. 480 of 2016 (unreported), in which the Court had to wrestle with almost the same concern on how the DPP's notice of intention to appeal under section 379 (1) (a) of the CPA should be titled or formatted. Admitting there was a gap or omission by the legislature, the Court resolved the issue by adopting the prescription provided under section 379 (1) (a), for the sake of consistency and certainty in the procedural requirement.

Similarly, in the case of **Boniface Mathew Malyango @ Shetani Hana Huruma & Another v. R,** Criminal Appeal No. 358 of 2018 (unreported), faced with the same predicament, the Court relying on Overriding Objective Principle already in place at the time, was able to overrule the objection raised on the jurisdictional issue challenging the competence of the appeal before it, since the notice of appeal was filed in the High Court contrary to section 361 (1) (a) of the CPA.

It was practical to order the suspension or allow the appeal to be considered as correctly filed or give grace period for the filing of the said notices of the intended appeal or illustrate how the notices of the intended appeal be formatted, in the circumstances of those cases, unlike in the present appeal. Although the irregularities in both instances were procedural, the consequences were different. We think, even though the irregularity was on jurisdictional issue, but no injustice would have been caused by filing the notice of the intended appeal in the wrong court or with the wrong title, since, *one*, the rectification of the said notices would have been possible without interfering with any party's right. And *two*, the Court would have the room as it did by overlooking the problem by invoking the Overriding Objective Principle in which substantive justice is mainly the focus. In another instance the Court permitted the suspension of the requirement based on the nature of the problem, that there was a *lacunae*. It was possible to order for the requirement to become operational after six (6) months under the circumstances of the above cited cases, which we contemplate would not have been conceivable in another situation. This is due to the fact in **Remina** and other cases that followed, *first and foremost*, there was no *lacunae* and as intimated earlier in this judgment, what the Court did was to interpret the provision of section 246 (2) and elaborately expressed that physical exhibits being one type of evidence if involved should be listed during the committal proceedings. This

was different with what occurred in the **Farijala, DPP v. Sendi Wambura** and **Boniface Mathew Malyango @ Shetani Hana Huruma** (supra). *Secondly,* it was not possible to order otherwise, knowing with certainty the provision has not been complied with. By so doing it would in our view be blessing violation that interfered with the right of the adverse party to know the evidence intended against him/her. For the cases falling within the realm of section 246 (2) of CPA, we sense the approach would be problematic and more detrimental.

Moreover, overlooking or ignoring the application of the provision of section 246 (2) as well illustrated in the case of **Mussa Ramadhani Magae** (supra) will in our strong view, betantamount to sidestepping and making superfluous section 289 (1) of the CPA. Noteworthy, to say at this point that the **Farijala, DPP v. Sendi Wambura** and **Boniface Mathew Malyango @ Shetani Hana Huruma** (supra) cases referred to and discussed above, though relevant but do not suit the present situation.

This one ground of appeal, in our view suffices to dispose of, entirely, the appeal before the Court.

In light of what we have discussed above, we find Ms. Mkonongo's submission though conceivable, impractical. We thus allow the appeal, quash the conviction, and set aside the sentence. We order that the

appellants are to be released from prison immediately unless otherwise held for other lawful reason.

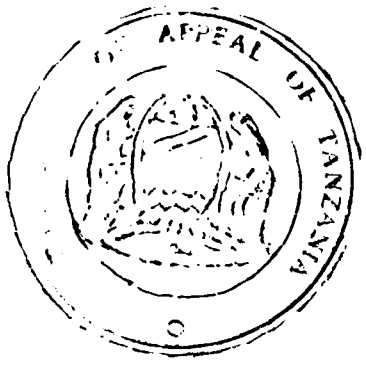
DATED at **MOSHI** this 24th day of August, 2023

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of August, 2023 in the presence of the Appellants who appeared in person, Mr. Philbert Mashurano and Mr. Innocent Exavery Ng'assi both learned State Attorneys for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL