IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MKUYE, J.A., LEVIRA, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 407 OF 2021

ERICK SAID @ KINUMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of Resident Magistrates' Court of Tabora at Tabora)

(Kato, SRM-Ext. Jur.)

Dated the 5th day of July, 2021

in

Criminal Appeal No. 33 of 2021

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JUDGMENT OF THE COURT

25th September & 4th October, 2023

MKUYE, J.A.:

The appellant was charged and convicted by the Resident Magistrate's Court for Tabora at Tabora for trafficking in narcotic drugs contrary to section 15A (1) and 2 (c) of the Drugs Control and Enforcement Act, No. 5 of 2015 (the DCEA) as amended by the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017. Upon conviction, the appellant was sentenced to fifteen years imprisonment and his appeal to the Resident Magistrates' Court (Kato, SRM-Ext.Jur.)

was unsuccessful. Still undaunted, he has filed this second appeal to this Court.

Before embarking on the merit of appeal, we find it appropriate to narrate albeit briefly, the background of the matter leading to this appeal as follows:

On 25/5/2017, at 09:00hrs the appellant was in a train travelling between Kazulamimba Station in Uvinza District and Kaliua District in Tabora Region heading to Morogoro. Meanwhile, F. 4439 DC Mageta, (PW1) was escorting the train from Kigoma to Dar Es Salaam and in the course, he conducted routine checks of passengers' luggages and tickets. When he approached the appellant, he noted that he looked worried, which irked him. PW1 then insisted to the appellant to show him his luggage and he readily pointed to an almost empty bag. This made PW1 to be even more suspicious of the appellant having paid for an almost empty bag.

PW1 proceeded with the search and pounced on another bag which the appellant acknowledged that it belonged to him. Upon inspecting the contents of the bag, there were leaves that were

suspected to be narcotic drugs (bhang). Yet, in another wagon another bag resembling the first one was recovered.

The appellant was placed under arrest. The suspected narcotic drugs were taken to the weights and measures offices where they weighed 42.65 kilograms and tests by the Chief Government Chemist (CGC) revealed that the specimens taken for examination were narcotic drugs of type Tetrahydrocannabinol (bhang).

Aggrieved by the decision of the Resident Magistrates' Court, the appellant has appealed to this Court on eight grounds of appeal which can be extracted as follows:

"1. *The prosecution case was not proved beyond reasonable doubt.*

2. *Exhibits P1, P3, P4, P5, P6, P7, P8, P9, P10 and P12 were not read out in court after being cleared for admission.*

3. *Exhibits P11 and P12 were wrongly admitted in evidence in the trial court.*

4. *The sampling of the alleged narcotic drugs for submission before the Chief Government Chemist for analysis contravened section 39 (1) of the Drugs Control and Enforcement Act, No. 5 of 2017 and regulations 17, 18 and 20 of the Drugs Control and Enforcement (General) Regulations 2016.*

5. *The chain of custody of the narcotic drugs impounded from the appellant was broken.*

6. *There was no evidence to show that PW1 and PW2 were independent witnesses at the time of seizure of the narcotic drugs.*

7. *Section 26 (2) (a) – (e) and (3) (a) of the Drugs Control and Enforcement Act No. 5/2017 was not complied with.*

8. *PW3, PW4 and PW5 did not identify Exh. P2 to show that the same was the one they kept in custody and that it was the one the appellant was found in possession having been disposed of by the trial court in contravention of the law."*

When the appeal was called on for hearing, the appellant appeared in person without any representation, whereas the respondent Republic had the services of Ms. Wampumbulya Shani and Mr. Enosh Gabriel Kigoryo, both learned State Attorneys.

On being invited to expound his grounds of appeal, the appellant sought to adopt his memorandum of appeal and opted to let the learned State Attorney respond first, while reserving his right to rejoin later, if need would arise.

On her part, Ms. Shani commenced her submission by declaring their stance that they were supporting the appeal, mainly on one ground

of appeal that, the prosecution did not prove its case beyond reasonable doubt. She submitted that, for an offence involving being found in possession of drugs, the suspected substance of drug must be proved. To fortify her argument, she referred us to the case of **Omary Said @ Athumani v. Republic**, Criminal Appeal No. 58 of 2022 (unreported), where the Court stated as follows:

> *"For the offence under the above provision [section 15A (1) and (2) of the DCEA] to stand, it must be proved beyond reasonable doubt that **first**, the substance suspected to be drugs are as such. **Two**, the weight of the substance is not more than fifty kilograms. We agree with the learned State Attorney that the weight of the substance is crucial in establishing the offence in as much as it is in determining the court jurisdiction. We also agree with him and indeed it is the law that, the weighing of substances suspected to be narcotic drugs is within the domain of the CGC ..."*

Ms. Shani went on to submit that, PW1 and PW2 arrested the appellant with the contraband of narcotic drugs in two bags (Exh. P2). They issued the certificate of seizure (Exh. P1). Then the contraband was taken to the Weights and Measures Office where it weighed 42.65

kilograms (Exh. P5). However, she said, the sample which was taken to the CGC for examination was 5kgs which was in contravention of regulation 18 of Drugs Control and Enforcement (General) Regulations, 2016 (G.N. No. 173 of 2016) considering it was not known as to which among the two luggages the sample was retrieved. To buttress her argument, she referred us to the case of **Omary Said @ Athumani** (supra) where it was stated that:

> *"Besides, PW3 claims to have taken samples from each of the bundles. The rationale behind, it would appear to us, was to establish if each of bundles constituted narcotic drugs. His evidence is silent on how each of the samples was packed. It is not known if the same were packed separately or together. The CGC's report, however, provides a general finding. It does not, as the prescribed form requires, make a finding for each of the samples. This offends the procedure under regulation 18 of the Regulations which requires the sampling officer to draw one sample in duplicate from each package..."*

The learned counsel contended further that, although the CGC Report (Exh. P7) shows that the suspected drug weighed 50 grams when packaged and 43.5 grams without packaging, it did not show from

which luggage the 50 grams were taken. Failure to do so, she said, is as good as if the suspected drugs were not established, hence, it could not prove the offence of being found in possession of narcotic drugs.

The issue for our determination is whether the suspected drugs were established to be narcotic drugs of the type of bhang. It is without question that the appellant was charged with an offence of trafficking in narcotic drugs contrary to section 15A (1) and (2) (c) of the DCEA as amended by Drugs Control and Enforcement (Amendment) Act, No. 15 of 2017. The provision under which the charge was predicated reads:

> *"15A (1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precussor chemical or substances with drug related effects or substances used in the process of manufacturing drugs of the quantity specified under this section, commits an offence and upon conviction shall be liable to imprisonment for a term of thirty years.*
>
> *(2) For purposes of this section, a person commits an offence under subsection (1) if such person traffics in-*
>
> > *(a) narcotic drugs, psychotropic substance weighing two hundred grams or below;*

(b) precussor chemicals or substance with drug related effect weighing 100 litres or below in liquid form or 100 kilogram or below in solid from;

(c) ***cannabis or khat weighing not more than fifty kilograms.***"

[Emphasis added]

From the above excerpt, it is crystal clear that the substance to which the accused is charged has to be proved that it is a narcotic drug. Also, for an offence involving cannabis or khat, the weight thereof must be not more than 50 kilograms.

Apart from that, regulation 18 (1) of the Drugs Control and Enforcement (General) Regulations, 2016 provides for the manner of extracting a sample. It stipulates as follows:

"*(1) Subject to regulation 14, one sample in duplicate shall be drawn in case substances are found in a single package or container.*

(2) Where the seizure is more than one package or container, one sample in duplicate from each package shall be drawn.

(3) Where –

(a) the packages or containers seized together are of identical size, weight, markings;

(b) the contents of each package are of similar in colour, texture and give identical results on colour test;

(c) the drawing samples from individual package or container unreasonably lengthy exercise; and

(d) the packages or containers may be carefully bunched in lot of 40 packages or containers, in case of cannabis and in lots of 10 packages or containers, in case of other drugs.

(4) The lots under sub regulation (3) shall be considered as a unit during sampling.

(5) A small quantity of substance shall be taken out from each of the member package of the particular lot, mixed thoroughly to make the mixture homogeneous from which two representative weigh the prescribed quantity of 5 gms, 5 mls or 24 gms, as the case may be, shall be drawn.

(6) The seized substance in the packages or containers shall be well mixed to make it homogeneous before the samples is drawn."

According to the above cited provision of the law, the sampling officer is required to draw one sample in duplicate from each package or container. This position was also taken in the High Court decision in the case of **Republic v. Maulid Hamisi and Another**, Economic Case No. 3 of 2021 (unreported) in which the High Court found it to be irregular when a witness lumped together into one mass all the samples which were taken from ninety-four (94) small packaging bags. It was found to be irregular as the law requires the sampling officer to draw one sample in duplicate from each package.

In this case, as was rightly argued by the learned State Attorney, according to PW1 and PW2 two bags (Exh. P2 collectively) with similar features, properties of the appellant, were seized. They had some similarities which the appellant admitted to belong to him. PW3, Cpl. Aman, the investigator of the case, testified in court on, among others, that he took a sample of drugs weighing 5 kgs to the CGC for investigation. According to regulation 18 (2) of the Drugs Control Enforcement (General) Regulations, PW3 ought to have extracted one

sample in duplicate from each luggage. However, despite the fact that, there were two similar bags, PW3 did not explain from which out of the two bags he extracted the said sample. In other words, he did not explain if he extracted the samples in accordance with the requirements set out under regulation 18 of the Drugs Control Enforcement (General) Regulations.

But again, according to exhibit P7, the CGC received one envelop containing 50 grams when packaged and 43.5 grams without packaging. So, it is not clear if the sample received by the CGC was the same one sent by PW3 since in his testimony, he said he took 5 kgs of the sample to the CGC. Be it as it may, as there was no indication as to where the sample was extracted, it led the CGC to give a general observation on the sample she received which was not sufficient to establish if the whole suspected drug was bhang. In this regard, we agree with the learned State Attorney that the findings of the CGC could not with certainty prove that the appellant was found in possession of drugs. In the circumstances, therefore, we agree with Ms. Shani that the substance the appellant was found with was not proved to be narcotic drugs.

Next is the issue concerning improper admission of exhibits. It was Ms. Shani's contention that about ten (10) exhibits which were tendered by the prosecution were not properly admitted in the trial court. She mentioned such exhibits to include; the certificate of seizure (Exh. P1), receipts for luggages (Exh. P3), Occurrence Book (OB) (Exh. P4), letter from Weights and Measures with Ref. No. WMA/TBR/VOL I dated 26/5/2017 (Exh. P5), letter from Police remitting the sample to the Chief Government Chemist (Exh. P6), the results letter from the CGC to the Police (Exh. P7), letter from OCS to Weights and Measures Authority (Exh. P8), letter from Weights and Measures Authority (Exh. P9), letter from OCS to the CGC (Exh. P10) and statement of Justice of Peace Sarah Nyamonge under section 34B (2) (c) of the Evidence Act (Exh. P12). The learned State Attorney elaborated that, after these exhibits were cleared for admission, they were not read out to the appellant so that he could know their contents. She was of the view that, this denied him the right to know their contents to enable him prepare his defence. She added that, such omission amounted to the denial of a fair trial to the appellant. While relying on the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported), she submitted that failure to read the said exhibits in court rendered their evidence to

have no evidential value. She, therefore, prayed to the Court to expunge them from the record.

The learned State Attorney went on arguing that, if the said exhibits are expunged, there remains no other evidence to support the case against the appellant. Ultimately, she beseeched the Court to allow the appeal and set the appellant free.

The requirement of reading out the document to the accused which has been cleared for admission and admitted in court has been pronounced by this Court in numerous cases including **Robinson Mwanjisi and 3 Others v. Republic**, [2003] TLR 218, **Huang Qin and Another v. Republic**, Criminal Appeal No. 173 of 2018 and **Ngasa Tambu v. Republic**, Criminal Appeal No. 168 of 2018 (both unreported). The purpose of reading the contents of an exhibit is to enable the accused and other parties to understand its contents. For instance, in the case of **Robison Mwanjisi and 3 Others** (supra), it was stated that:

> *"Whenever, it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out."*

In our numerous decisions we have held that, the omission to read out the exhibit after its admission is fatal as it is a settled position of the law that whenever an exhibit is cleared for admission and eventually is admitted in evidence, such exhibit has to be read out in court. (See **Thomas Pius v. Republic**, Criminal Appeal No. 245 of 2012 and **Jumanne Mohamed and 2 Others v. Republic**, Criminal Appeal No. 534 of 2015 (both unreported). Otherwise, the omission to read it is fatal because it has the effect of denying the appellant to know the contents or what it is all about which constitutes unfair trial. This is what was emphasized in the case of **Issa Hassan Uki** (supra) while relying on the case of **Sunni Amman Awenda v. Republic**, Criminal Appeal No. 394 of 2013 (unreported) where the Court stated that:

> *"We need to point out that both, the cautioned and extra judicial statements had a lot of details and immensely influenced the decision of the court ... to have not read those statements in court deprived the parties, the assessors in particular, the opportunity of appreciating the evidence tendered in court. Given such a situation, it is obvious that this omission too constituted a serious error amounting to miscarriage of justice and constituted a mistrial."*

Besides that, failure to read out the document renders the exhibit invalid which is liable to be expunged – See **Emmanuel Kandrad Yosipati v. Republic**, Criminal Appeal No. 296 of 2017 (unreported).

In the matter at hand, the documents mentioned earlier on constituting exhibits P1, P3, P4, P5, P6, P7, P8, P9 and P10 were admitted but were not read out in court. It is obvious that, failure to read such documents in court denied the parties, particularly the appellant, the opportunity to understand the evidence adduced in court. There is no doubt, that the omission led to a fatal irregularity which amounted to miscarriage of justice and a mistrial. We are, therefore, settled in our mind that on the basis of the authorities we have cited above, the omission was fatal. Hence, as was prayed by the learned State Attorney, we expunge all the listed exhibits from the record of appeal.

We are mindful that the learned State Attorney argued that if the said exhibits are expunged, there would be no remaining evidence to support the case against the appellant. She, therefore, urged the Court to find that the case was not proved beyond reasonable doubt. Ultimately, she prayed that the appeal be allowed, the conviction be

quashed and the sentence set aside and order for an immediate release of the appellant from custody be given.

Ordinarily, where the document is expunged for being wrongly admitted, the oral evidence of the witness who tendered it cannot be used to prove the case or rather to sustain the conviction unless the witness who tendered it accounted for its contents in his/her oral evidence in court. The basis for such stance was stressed in the case of **Ngasa Tambu** (supra) that:

> *"... it depends on the evidential value relevance or weight that the expunged document was contributing to the oral account of the witness that remains on record. For instance, if a document was tendered and its contents were not recounted in the oral evidence received, chances are that the expunged document would go with the substantial amount of weight of that witness evidence. Conversely, if a witness who tendered a document which has been expunged, captured or accounted for the contents of the document in his oral evidence, which remains on record, chances are that expunging the document would not affect that witness's evidence on record from his oral testimony. That*

is to say, it all depends, and each case must be decided according to the facts before the court and the content of the dispute subject of the resolution."

In this matter, having gone through the oral testimonies of PW1, PW3, PW4 and PW5 who tendered the expunged exhibits, we have been unable to see their account on the contents of the documents expunged. In which case, we hasten to say that the expunged documents went with the substantial amount of weight of the respective witness's evidence.

Conversely, considering our finding that there was no proof of the substance found in possession of the appellant to be bhang and the expungement of most of the exhibits supporting the existence of the said drugs, we do not find any remaining evidence to support the conviction against the appellant. Therefore, we agree with both parties that the case against the appellant was not proved beyond reasonable doubt.

In the event, we allow the appeal, quash the conviction, set aside the sentence meted out against the appellant. We further order that the

appellant be released forthwith from custody unless held for some other lawful reason(s).

It is so ordered.

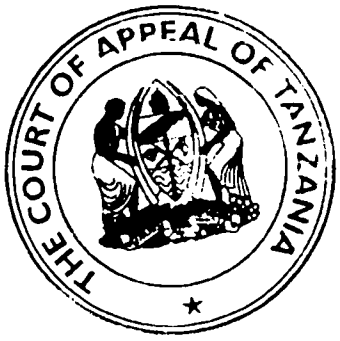
DATED at **TABORA** this 3rd day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 4th day of October, 2023 in the presence of the appellant in person and Mr. Dickson Swai, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL