IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWARIJA, J.A., KENTE, J.A And MGONYA, J.A.)

CRIMINAL APPEAL NO. 432 OF 2019

JOACHIM IKECHUKWU IKE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlacha, J.)

dated the 4th day of November, 2019

in

Criminal Session Case No. 40 of 2014

JUDGMENT OF THE COURT

11th & 19th March, 2024

MWARIJA, J.A.:

The appellant, Joachim Ikechukwu Ike was charged in the High Court of Tanzania at Moshi with the offence of trafficking in narcotic drugs contrary to s. 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Chapter 95 of the Revised Laws as amended by Act No. 6 of 2012. It was alleged that, on 11/5/2013 at KIA area within Hai District in Kilimanjaro Region, the appellant was found trafficking 6969.38 grams of Heroine Hydrochloride valued at TZS 313,622,100.00.

Having heard the evidence of nine prosecution witnesses and that of the appellant, who was the only witness for the defence, the trial court (Mlacha, J. as he then was), was satisfied that the prosecution had proved its case beyond reasonable doubt. Upon conviction, the appellant was sentenced to life imprisonment. He was aggrieved by the conviction and sentence hence this appeal which is predicated on sixteen grounds of appeal, seven grounds raised in the memorandum of appeal filed on 13/7/2020 and nine grounds contained in his supplementary memorandum filed on 10/11/2023.

It is noteworthy to state here that, the proceedings and judgment giving rise to this appeal followed a retrial of the appellant after the proceedings in the first trial in Criminal Sessions Case No. 40 of 2014 were nullified by the Court in Criminal Appeal No. 272 of 2016.

The background facts leading to the appellant's arraignment, conviction and sentence in the subsequent proceedings may be briefly stated. The appellant, a Nigerian national was in Tanzania, having arrived for the second time in the country on 9/5/2013 aboard Ethiopian Airline. His first visit was in 2012. His destination in Tanzania was Moshi where he stayed at a guest house known as Newcastle for two days. On 11/5/2013,

he checked out of the said guest house at about 1:00 a.m. and went to Kilimanjaro International Airport (KIA) intending to travel to Ouagadougou, Burkina Faso via Addis Ababa, Ethiopia using his electronic air ticket No. 71208614511. He used a taxi driven by one Fadhili Mohamed from the guest house to KIA where, upon suspicion, his luggage was searched by the Airport officials in collaboration with police officers including E 2017 D/Sgt Abdul (PW8). As a result of the search, he was arrested on allegation of having been found in possession of illicit drugs.

According to the evidence of PW8, he was informed by a secret agent that a certain person of Nigerian nationality, suspected to have in his possession illicIt drugs was going to KIA to board a plane. On that information, PW8 got out of the departure lounge and went to wait at the main entrance. Shortly thereafter, while with another police officer, Cpl Janeth, he saw a taxi which was being driven by one Fadhili Mohamed and the passenger who disembarked from it was quarrelling with the driver of another taxi. That driver was demanding to be paid because the said passenger had earlier on request the former to collect him from the guest house but when he went there, he found that the passenger had hired Fadhili Mohamed's taxi. PW8 suspected the passenger to be the one who

was referred to by the informer. The witness ordered the suspected person, who turned out to be the appellant, to pay the taxi driver and proceeded to check the appellants travelling documents; the air ticket and passport. He found that the appellant was a Nigerian travelling to Ouadougou via Addis Ababa. It was PW8's further evidence that he took the appellant together with his two big bags, a grey one and the other one which was brown in colour to the scanner machines area where they were scanned by Edson Magoro (PW3), the Aviation Security Officer, Kilimanjaro Airport Development Company (KADCO).

The result of the scanning showed that there were suspicious images in the grey bag and thus the same had to be opened for inspection. Upon inspection, it was found that another bag had been bound therein and that other bag contained six small sponge pillows which, upon being opened, had suspicious floury substance. After that discovery, a search warrant (exhibit P14) was prepared.

The containers found in the bag were taken to the office of the Regional Crimes Officer (RCO) by D 2205 D/Sgt Adson (PW9) who handed them over to F. 1157 D/Sgt Hashim (PW1), the exhibits keeper for storing them in the strong room.

According to PW1's evidence, later on 21/5/2013, he packed the suspicious substance in two envelopes in the presence of the RCO, SACP Ramadhani Nganzi (PW7) and took the same to the Anti Drugs Unit (ADU), Dar es Salaam so that the same could be taken to the Chief Government Chemist (CGC) for examination. In the company of *inter alia*, the ADU officials, PW1 took the suspicious substance to the CGC and handed the same to a Chemist, one Ziliwa Peter Machibya (PW6) for examination. According to him, the substance, which weighed 6,969.38 grams was found to be heroine. The same was valued by Christopher Joseph Shekiondo (PW5) who was at the material time the Commissioner, National Coordination of Drugs Control Commission. According to his evidence, the drug was worth TZS 313,622,100.00. PW1 tendered in Court three bags including the grey bag alleged to have been owned by the appellant and in which was another bag containing the suspected illicit drugs. The three bags were admitted in evidence as exhibition P7 collectively.

The allegation that the grey bag belonged to the appellant was also testified to by Monica Paul Kilinga, the receptionist of Newcastle Guest House. Her evidence was to the effect that the appellant arrived with a grey bag which he left with when he checked out.

In his evidence, PW6 contended that, he made laboratory tests on the floury substance which was contained in six small sponge pillows marked A, A1, A2, A3, A4 and A5 and found that the same was narcotic drugs known as heroine Hydrochloride. He tendered the report of examination which was admitted in evidence as exhibit P12.

There was further evidence by PW7 that, after the first trial had been concluded, the trial court ordered disposal of the narcotic drugs which had been tendered in court as exhibit. He averred that, the same was destroyed in a furnace at the KCMC [Hospital] in the presence of the first trial Judge, the appellant and the team of other officials including himself and the defence counsel. The witness tendered the final disposal order form as an exhibit and the same was admitted in evidence as exhibit P13.

In his defence, the appellant testified that, he arrived in Tanzania on 9/5/2013. His mission was to obtain a visa from the Netherlands Embassy as he intended to travel to Europe. He went on to state that, he arrived via KIA with one big travelling bag brown in colour and a small hand bag in which he kept his passport and other travelling documents as well as ATM cards. He did not succeed to obtain a visa from the Netherlands. While in Moshi, on the first day, he stayed at a hotel which he did not remember its

name but on the next day, he shifted to Newcastle Guest House. On 11/5/2013 in the night at about 1:00 am, he checked out and went to KIA to board a plane. While at the check-in counter, he was approached by a policewoman who introduced herself to him as Janeth. She checked his passport and searched his two bags, the big brown bag and the small handbag by removing their contents. Thereafter, she asked him to follow her to a place behind the screening machine where PW8 was standing near a big grey bag. Having arrived there, he was required to sign a blank search order form. The form did not have anything listed on it. He also signed a handing over certificate (exhibit P1) in which was a list of the properties taken from him; money, passport, air ticket, ATM Cards, two mobile phones (blackberry and Nokia) and three bank cards.

He disputed the evidence that he was in possession of the grey bag which he came to learn in the trial court that it contained six small sponge pillows in which was the substance found to be heroine hydrochloride. He contended that, failure by the prosecution to produce a CCTV footage supports his defence that he did not arrive at the departure lounge with any grey bag.

As stated above, having been dissatisfied with the conviction and sentence, the appellant lodged this appeal raising a total of seventeen grounds. For reasons to be apparent herein however, we do not intend to consider all grounds of appeal because, as some of them are based on points of law, if followed, will have the effect of disposing of the appeal.

At the hearing of the appeal, the appellant was represented by Mr. Majura Magafu, learned counsel while the respondent Republic was represented by Ms. Jenipher Massue, learned Principal State Attorney assisted by Ms. Veronica Moshi, learned State Attorney.

Starting with ground 4 of the appeal, the appellant contends as follows:-

> *"That, the learned trial Judge erred both in law and fact in declaring the appellant guilty in the ruling on whether the prosecution evidence had established a prima facie case by holding that the appellant had committed the offence with which he was charged despite being unheard, hence his defence would serve no purpose before the trial Judge."*

Submitting in support of that ground of appeal, Mr. Magafu argued that, by his ruling "*that the accused, Joachim Ikechukwu Ike committed*

the offence with which he is charged", the learned trial Judge was biased because the appellant had not, at that stage, given his defence. Citing the case of **Mussa Daud v. Republic**, Criminal Appeal No. 135 of 2019 (unreported), the learned counsel submitted that, the appellant was for that reason, not accorded a fair hearing and in effect, the proceeding were a nullity.

In response, Ms. Massue opposed the arguments made by Mr. Magafu on the 4th ground of appeal that the words used in the ruling on a case to answer had imputation of bias on the part of the learned trial Judge. It was her submission that, the words used were in conformity to the provisions of s. 293 (2) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA). With regard to the case of **Mussa Daud** (supra) cited by the appellant's counsel, Ms. Massue argued that, the same is distinguishable because in that case, the learned trial Resident Magistrate concluded his ruling on a case to answer by stating that the prosecution had proved its case beyond reasonable doubt.

In our considered view, determination of this ground need not detain us much. The ruling from which this ground of appeal arose was made pursuant to s. 293 (2) of the CPA which provides as follows:-

"293-(1) ....

(2) When the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, ***if it considers that there is evidence that the accused person committed the offence or any other offence*** *of which, under the provisions of section 300 to 309 he is liable to be convicted, shall inform the accused person of his right:-*

(a) to give evidence on his own behalf; and

(b) to call witnesses in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights."

[Emphasis added].

In the ruling, the learned trial Judge stated that, the evidence tendered by the prosecution showed that the appellant had committed the offence, meaning that a *prima facie* case had been established. The words used are not different from the bolded ones above used in the cited provision of the CPA. The same do not have the meaning that the offence had been proved. – See the case of **Muhonyiwa Mhonyi @ Kitunguru and Another v. Republic**, Criminal Appeal No. 357 of 2021 (unreported). In that case, in which a similar situation arose, the Court held that, since the words used in the ruling on a case to answer were akin to those used in s. 293 (2) of the CPA, it cannot be said that the trial Court had pre-determined the appellants' conviction. Relying on the earlier decision in the cases of **Samo Sadiki and Another v. Republic**, Criminal Appeal No. 623 of 2021 and **Mohamed Ally @ Sudi v. Republic**, Criminal Appeal No. 274 of 2017 (both unreported), the Court dismissed the contention that the appellants were not afforded a fair trial.

With regard to the case of **Mussa Daud** (supra), we agree with Ms. Massue that the same is distinguishable. In that case, the learned trial Resident Magistrate ruled as follows:-

"In this case prosecution side did bring four witnesses. Having seen the evidence adduced by the said witnesses, then ***I am satisfied that the prosecution side proved their case beyond reasonable doubt.*** *Hence there is prima facie case against the accused person"*

[Emphasis added]

It is obvious that, in the passage which has been reproduced above, by holding that the prosecution had proved its case beyond reasonable doubt, the trial court denied the appellant a fair trial because it predetermined the case without hearing the appellant's defence. That was not the position in the case at hand. For these reasons, we do not find merit in this ground of appeal and thus hereby dismiss it.

The other grounds of appeal which raise some points of law are the 1st and 2nd grounds of the supplementary memorandum of appeal. In those two grounds, the appellant contends as follows:-

"(1) That, the trial Judge erred in law and fact in convicting the appellant believing [the evidence] that he was found with heroine drug [while] the said drug had not been part of the case [as] it was never mentioned or listed

during committal proceedings c/s 246 (2) of the CPA and exhibit P 13 (Final Disposal of Exhibit Form) which was tendered in lieu of the drug ... was admitted in contravention of section 246 (2) of the CPA

(2) That, the trial Judge erred in acting on exhibit P7 collectively (three bags) believing [the evidence] that they belonged to the appellant despite [having been] admitted contrary to s. 246 (2) of the CPA and despite [having been proved] beyond reasonable doubt that those bags belonged to the appellant."

Arguing the two grounds together, Mr. Magafu submitted that, during the committal proceedings, the prosecution indicated that, it would call a total of twelve witnesses and eight real and documentary exhibits. He submitted further that, the three bags which were tendered and admitted in evidence at the trial and marked as exhibits P7 collectively were not among the exhibits listed at the committal proceedings. He added that, the same applies to the Final Disposal of Exhibit Form which was tendered at the trial and admitted in evidence as exhibit P13.

According to the learned counsel, since those items were not listed during the committal proceedings, the same were admitted in evidence in

contravention of s. 246 (2) of the CPA and could not, for that reason, form the basis of the appellant's conviction. He contended that, the said exhibits could have been tendered after the prosecution had given to the appellant, a notice of intention to tender them by following the procedure which is provided under s. 289 of the CPA, in the same manner as that of a witness who was not listed at the committal proceedings. Since that was not done, Mr. Magafu went on to argue, the exhibit should be expunged from the record. To bolster his argument, he cited the cases of **Director of Public Prosecutions and Others v. Sharif Mohamed @ Athumani and 6 Others**, Criminal Appeal No. 74 of 2016, **Remina Omary Abdul v. Republic**, Criminal Appeal No. 189 of 2020 and **Said Shababi Malikita v. Republic,** Criminal Appeal No. 523 of 2020 (all unreported).

It was Mr. Magafu's further submission that, if the two exhibits are expunged, being the most crucial evidence in proving the charge, the prosecution case would lack the leg to stand on and would thus crumble. In the circumstances, he urged us to allow these two grounds and consequently, quash the appellant's conviction, set aside the sentence and set him at liberty.

On her part, at the outset, Ms. Massue informed the Court that the respondent was supporting the appeal on the basis of the prosecution's failure to comply with the provisions of s. 246 (2) of the CPA. She agreed with Mr. Magafu that, exhibits P7 and P13 were inadmissible because the same were not listed during the committal proceedings as part of the exhibits which were intended to be tendered at the trial. In that regard, she submitted that, exhibits P7 and P13 should be expunged from the record and if that is done, the remaining evidence becomes insufficient to prove the case.

We have duly considered the submissions of the learned counsel for the parties on the two grounds of appeal. The two grounds arose out of the application of s. 246 (2) of the CPA which states as follows:-

> *"246–(1) ....*
>
> *(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."

[Emphasis added].

The section requires the committal Court to read and explain to the accused person the substance of the statements or documents containing the evidence of the witnesses intended to be called by the prosecution. That requirement has been interpreted to include the duty of informing the accused person not only documentary but also real exhibits. Real exhibits must thus also be listed at the committal proceedings as the evidence which the prosecution intends to rely upon at the trial. For instance, in the case of **Said Shabani Malikita** (supra) cited by the appellant's counsel, we relied on the principle as stated in the case of the **DPP v. Sharif Mohamed @ Athuman** (supra) also cited by the appellant's counsel and observed as follows:-

*"Although the context in the decision in **Sharif Mohamed's** case is a document or documents, we want to believe that it extends to the listing of physical exhibits, where the accused will be informed of [such exhibits] expected to be evidence against him or her."*

Furthermore, making reference to the case of **Remina Omary Abdul** (supra), in the case of **Grace Teta Gbatu v. Republic**, Criminal Appeal No. 84 of 2019 (unreported), we stressed that:-

> *"Taking into consideration the purpose of section 246 (2) of the CPA, that is; to let the accused person know before hand the substance, kind and nature of the evidence the prosecution intends to lead against him at the trial, the Court interpreted the provision in question and insisted that, under that provision, it is not only documentary exhibits which are required to be listed or mentioned during committal proceedings but also physical exhibits."*

That being the position of the law, we agree with both the learned counsel for the appellant and the learned Principal State Attorney that, the prosecution's failure to list and bring to the attention of the appellant, at the committal proceedings, exhibits P7 and P13 in terms of s. 246 (2) of the CPA, was a fatal omission. For that reason, we hereby expunge those exhibits from the record. As a result, since the exhibits were central to the prosecution case, the remaining evidence is insufficient to sustain the appellant's conviction.

In the event, we allow the appeal, quash the appellant's conviction and set aside the sentence. The appellant should be released from prison forthwith unless he is held for other lawful cause.

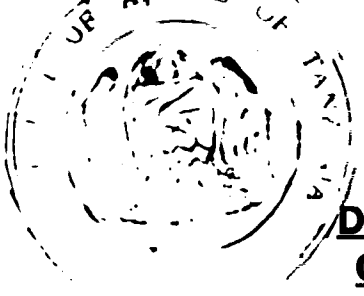
DATED at **MOSHI** this 18th day of March, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 19th day of March, 2024 in the presence of the Appellant in person, Ms. Jenipher Massue, learned Principal State Attorney and Ms. Veronica Moshi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL