IN THE HIGH COUR OPHT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 06 OF 2020

(Originating from Criminal Case No. 128 of 2017, in the District Court of Babati at Babati)

BEATRICE JUMA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

08/04/2020 & 13/05/2020

BEFORE: GWAE, J

In the District Court of Babati at Babati ("the trial court"), the appellant, **Beatrice Juma** and another person one Abel Julius Samwel whose record is not clear as how he escaped from lawful custody stood charged with an offence termed unlawfully possession of the narcotic drugs, cannabis sativa" commonly known as 'bhangi' contrary to section 11 (1) (d) of the Drugs Control and Enforcement Act, 2015.

The prosecution case was heard in its conclusion however after the closure of the prosecution case, following the appellant's absence in the trial court's sessions from 12.03.2019, 27/3/2019, 23/4/2019 and 7/5/2019 when three prosecution witnesses (PW6, PW7 and PW8) vividly testified and on

30/05/2019 when the prosecution case was closed, the trial found the appellant guilty as charged and sentenced her to the term of **thirty (30)** years imprisonment. She was sentenced in her absentia on the date the trial court judgment was delivered on 1st July 2019

On 22/7/2019 the appellant was brought to the trial court and the prosecutor addressed the court that the appellant should show cause as why the sentence should not be imposed against her. On her reply before the learned trial Resident Magistrate, she told the trial court that she did not escape except that she was sick and she informed the trial court clerk to that effect, she then sought for an imposition of a lenient sentence be imposed against her.

After the appellant's explanation as intimated above, the trial court ordered that the 2nd accused now appellant should start serving her sentence of thirty years jail effectively from that day (22/07/2019), for clarity the trial court order is herein under reproduced;

> "The 2nd accused mitigation have been heard and determined. However, the sentence of thirty yeas jail is hereby pronounced to start be counted immediately for now."

Sgd N.S. Gasabile-RM

22/7/2019

Aggrieved by the trial court decision, the appellant filed her notice of appeal on 29/07/2019 and this appeal on 14th January 2020. The appellant's appeal is consisted of four grounds of appeal however in essence there are only three grounds of appeal, notably;

1. The learned trial magistrate erred in law and fact to convict the appellant while the charge was defective.
2. The learned trial magistrate erred in law and fact for contravening mandatory provision of the law, section 226 (2) the Criminal Procedure Act, Cap 20, Revised Edition, 2002
3. The learned trial magistrate erred in law and fact in sentencing the appellant for the term of thirty years

On 8th April 2020, this appeal was called on for hearing, the appellant fended herself while the DPP was duly represent ended by the learned Senior State Attorney, **Miss Adelaide Kasala.**

In support of her appeal, the appellant complained that the trial Court decision was wrongly entered as she was not given a right to defend. She then sought for release from prison custody so that she can be able to smoothly take care of her children whose biological father had passed away.

Miss Kasala strongly supported the appellant's appeal, particularly ground no. 2 and 3 of appeal. She focusedly argued that to S. 226 (2) of CPA was not complied with as a result the ex-parte hearing proceeded prematurely as the appellant absented herself for only two days adding that she was not properly addressed.

The learned counsel for the Republic was further of the view that, the irregularity in question cannot be cured under S. 338 CPA since the evidence on record is questionable particularly, quantity of drugs, bhangi as adduced by PW3 and that there are contradictions of the prosecution evidence

According to subsection (2) of section 226 of the CPA, the trial court in my view, ought to have made an inquiry as to consider or make inquiry on the advanced reasons by the appellant for her non-appearance taking into account that the appellant had raised a serious allegation that she informed the court through the trial court clerk that she was sick and that on return she surrendered herself to police force when she was informed that she had been traced following her alleged escape. For easy of understanding provisions of law under sub (1) and (2) of section 226 CPA are here below quoted;

> "(1) If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and acquit the accused with or without costs as the court thinks fit.
>
> (2) If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit".

According to the record of the trial court, initially, the learned trial magistrate is found to have properly convicted and sentenced the appellant after her long absence during court's sessions however in the circumstances of the case, particularly the appellant's reasons for her failure to appear and given the evidence on record, I am of the considered view, that the appellant was to be availed an opportunity to be being heard as rightly complained of and conceded by the appellant and the DPP's representative respectively.

I have further ascertained the evidence on the trial court's record and manner the documents were rendered and admitted for evidential value and came up with the following observations;

i. That, the 1st accused's cautioned statement (PE3) was admitted without the appellant being given any opportunity to either object or give any comment

ii. That, the prosecution side alleged to have apprehended the appellant and that other person while in unlawfully possession of bhangi in a house at Maisaka 'B' while the testimony of the PW6, E. 8080 D/CPL Immy is to the effect that the appellant was found in such possession in the police station ("Therefore, we apprehended the accused person at police station together with 314 rolls of bhang"

iii. The prosecution evidence is contradictory and therefore not tenable narcotic drugs alleged found in unlawfully possession (314 rolls of bhang were not tendered but only 310 rolls of bhang were tendered).

iv. The criminal case against the appellant and another was prematurely prosecuted as the investigation was said to have been incomplete as the 4 rolls of bhang were sent to the office of the Government Chief Chemist for further investigation and the same were seemingly not returned, I deem it appropriate to quote part of the PW6's testimony herein under;

> "Yes if I see then (sic) I may identify them
> Yes there are 310 rolls of bhangi and for rolls remained at the Chief Chemists Office for further investigation"

According to the above observed contradictions and anomalies on the prosecution case, an order of trial denovo, to my firm will on one hand re-building up a case for the prosecution and on the other hand will amount to a prejudice on the part of the appellant. A proper order to make in the given circumstance is not therefore a re-trial. My finding is legally guided by the decision of the defunct East African Court of Appeal in **Manji v Republic** (1966) EA 343 where it was correctly held;

> "In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill in the gaps in its evidence at the first trial ...each case must depend on its own facts and in order for the re-trial should only be made where the interest of justice requires..."

In our instant case, if an order of retrial is made, that will obviously be advantageous to the prosecution as it will be able to fill the gaps. Henceforth, the order of retrial is not preferable in the circumstances of this particular criminal case

That, said and done, the trial court decision and imposed sentence thereof are quashed and set aside. The appellant shall henceforth be released from prison custody as soon as possible unless withheld therein for different lawful cause (s).

It is so ordered.

M. R. GWAE
JUDGE
13/05/2020