THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA.

CRIMINAL APPEAL NO. 197 OF 2019.

(Arising from Criminal Case No. 90 of 2019, in the District Court of Momba District, at Chapwa).

FELIX BRACKSON MWANDEPU.....APPELLANT

Versus;

THE REPUBLIC .....RESPONDENT.

JUDGEMENT

26/05 & 10/08/2020.

Utamwa, J.

In this first appeal the appellant FELIX BRACKSON MWANDEPU is challenging the Judgement (impugned judgement) of the District Court of Momba District, at Chapwa (the trial court) in Criminal Case No. 90 of 2019.

Before the trial court, the appellant was charged jointly and together with other two persons (not parties to this appeal). They stood charged with two counts. In the first count they were charged with the offence importing prohibited cosmetics into the United Republic of Tanzania (URT) contrary to sections 3, 86, 88 and 91 of the Tanzania Food, Drugs and Cosmetics Act No. 1 of 2003 hereinafter called the TFDCA. It was alleged

under this count that, on the 28th of June, 2019, at about 17: 15 hours, at Mpemba area of Tunduma Township within Momba District of Songwe Region, the appellant and the two others were found by a one No. F. 6862 Cpl. Christian, a police officer, importing into the URT the following items; betasol lotion 30g one dozen, Movate Cream Tube 30g 01 Dozen, Lemon Top Plus 50g 01 Dozen, Cocopulp Oil 05 Dozen, Carolightcream 120 Ml.01 Dozen, Cocoderm 300ml. 01 Dazan, Princess Claire 500ml Half Dozen, Ecloircissante Crème 330 Ml, Carotone Serum B.S.C 12X30 Ml. 01 Dozen, Crème Bronz Tone 125 Ml.4.4 Fl.02 01 Dozen, Citrolight Crème 120 Ml. 01 Dazan, Bio Claire 130 Ml. 4.4 Fl 02 01 Dozen, Clairmen 120 Ml.01 DAZAN, COCOPULP 150 150 Ml. One Tin and cocopulp 500 Ml. one tin, all valued at Tanzanian shillings (Tshs.) 860, 000/= by using a vehicle with registration numbers T. 641 CEK make Toyota Coaster, property of Full Dose Company (the motor vehicle).

Regarding the second count, the appellant and the two others were charged with the offence of unlawful importing unaccustomed goods into the URT contrary to sections 2 read together with sections 200 (d) (iii) and 201 of the East African Community Customs Management Act, of 2004 (the EACCMA). I will quote the particulars of the offence verbatim for the reasons to be seen latter. They read thus:

> "That FELIX s/o BRAKSON MWANDEPU, ANNA D/O LAMSON KALINGA and TUMAIN D/O ADAMSON MWAKAJONGA are joint and together charged on 28th Day of June, 2019 at about 1715hrs at MPEMBA Area Tunduma Township within Momba District in Songwe Region was (*sic*) found by Police Officer one F.6862 CPL CHRISTIAN importing 35 SOFT DRINK namely KUNG FUU APPLE MAX one CARTON and one CARTON of JUICE namely CERES TROPICAL all Valued at Tsh.932,000/=, by using vehicle

REG.NO.T.641 CEK make TOYOTE COASTER the Property of FULL DOSE COMPANY."

The appellant and the two others pleaded not guilty to both counts. Upon a full trial, the trial court convicted the appellant and one of the two other persons of both counts. Each was sentenced to serve in prison for two months regarding the first count. As to the second count, each of them was sentenced to pay a fine of Tshs. 500, 000/= or to serve in prison for five years in default thereof. The trial court further forfeited to the Government of the URT the motor vehicle and items involved under the second count. Regarding the items mentioned under the first count, the trial court ordered them to be destroyed.

Aggrieved by the entire impugned judgment and its orders, the appellant preferred this appeal. The appeal is based on three grounds. However, they can be improvised into six grounds as follows:

1. That, the trial court erred in law in basing the conviction against the appellant on a defective charge sheet.
2. That, the trial court erred in convicting the appellant though the prosecution did not prove the charge beyond reasonable doubts.
3. That, the trial court erred in denying the appellant of the opportunity to be heard.
4. That, the trial court erred in law for imposing unjustified sentences against the appellant.
5. That, the forfeiture order regarding the motor vehicle was unjustified.
6. That, the trial court erred in law in failing to consider the appellants defence.

Owing to these grounds of appeal, the appellant urged this court to grant him the following reliefs: to order that the charge sheet was defective and denied him the opportunity to be heard, the conviction be quashed, the sentence, payment of fine and forfeiture orders be set aside, the forfeited motor vehicle be remitted to the appellant, the fine paid by the appellant be remitted to him. The respondent resisted this appeal.

The appellant was represented by Mr. Simon Mwakolo, learned counsel while the respondent was represented by different learned State Attorneys at different times, but lastly, by Mr. Michael Shindai, learned State Attorney. The appeal was disposed of by way of written submissions.

In deciding this appeal, I will firstly consider and determine the first improvised ground of appeal on the propriety of the charge sheet. In case need will arise, I will also test other grounds of appeal. This plan is based on the understanding that, in case this ground will be upheld, it will dispose of the entire appeal without testing the rest of the grounds. This follows the fact that, the ground touches the competence of the entire trial before the trial court.

The major issue regarding the firs ground of appeal is whether the charge sheet at issue was incurably defective. In supporting this issue through his written submissions in chief, the appellant's counsel challenged all the sections of law cited in the first count. He argued that, the first count was incurably defective for the following grounds: that, section 3 of the TFDCA cited in the first count is a mere interpretation section which does not create any offence. Section 86 of that Act as well, does not create

any offence. Regarding to section 88 of that Act, the appellant's counsel contended that, it is too wide. It envelopes three subsections namely (a), (b) and (c). However, the charge sheet did not specify the subsection under which the appellant was charged. He further submitted that, section 91 (a) and (b) of the said Act only provide for sentences. As to the second count, he submitted that, section 2 of the EACCMA is also a mere interpretation section which does not create any offence under that Act.

The appellant's counsel further contended that, the two counts in the case at hand offended the law. The law guides that, a valid charge sheet must be drawn according to section 132 and 135 of the Criminal Procedure Act, Cap. 20 R. E. 2019 (the CPA). It must thus, contain a statement of offence and particulars of the offence. The statement of offence must show the section or specific sub-section or paragraph of the law creating the offence charged. He supported his arguments by a decisions of the Court of Appeal of Tanzania (CAT) in the case of **Bop s/o Mrisho @ Nunda v. Republic, Criminal Appeal No. 16 of 2013, CAT at Dar es Salaam** (unreported).

It was also the contention by the appellant's counsel that, since the charge sheet in both counts was incurably defective, this court cannot order any retrial. He supported the contention by another decision of the CAT in the case of **Mayala Njigailele v. Republic, Criminal Appeal No. 490 of 2015** (unreported).

The appellant's counsel thus, contended that, for the incurable defects in both counts, the appellant was deprived of his right to be heard.

The remedy for this irregularity in the charge sheet is therefore, to nullify the proceedings and the judgment, quash the conviction, sentence and orders for forfeiture and direct that the forfeited vehicle and paid fine be returned to the appellant.

In his replying submissions, the learned State Attorney for the respondent readily conceded that the first count was in fact incurably defective for the reasons stated by the appellant's counsel. He however, argued that the second count was proper in law since the charge was based under sections 2 and 200 (d) (iii) of the EACCMA. The provisions of section 200 (d) (iii) of that Act in fact, creates the offence with which the appellant was charted. The charge under this count contained the statement of offence and sufficient particulars that gave sufficient information to the appellant on the nature of the offence charged. It thus, complied with sections 132 and 135 of the CPA read together with the decision in the case of **Mussa Mwaikunda v. R [2006] TLR. 387**. The substance of the charge was also read and clearly explained to the appellant as required by section 228 (1) of the CPA.

The learned State Attorney for the respondent further argued that, the citation of section 2 of the said EACCMA which deals with interpretation of some terms did not prejudice the appellant. It follows thus that, if the charge under this count was defective, it was curable under section 388 of the CPA. He thus, concluded that, the conviction, sentence forfeiture orders under the second count were proper in law.

I have considered the arguments by the parties, the record and the law. In my view, the parties rightly agreed that the charge in respect of the first count was incurably defective. This was for the above reasons adduced by the appellant's counsel.

Regarding the second count, I am of the view that, the arguments by the appellant's counsel carry sense according to the circumstances of this case. This view is based on the following reasons: in the first place, as shown above, the charge under the second count was based on three sections namely: section 2 read together with sections 200 (d) (iii) and 201 of the EACCMA. I will discuss one section after another. Section 2 is a mere definition section that does not create any offence as rightly argued by the appellant's counsel.

As to section 200 (d) (iii), I am settled in mind that, it was misconceived by the prosecution. This section does not create any offence of importing uncustomed goods. It only creates an offence against any person who acquires, has in his or her possession, keeps or conceals, or procures to be kept or concealed, any goods which he or she knows, or ought reasonably to have known, to be uncustomed goods. The term "import" is defined under section 2 of the EACCMA as to bring or to be brought into the Partner States from a foreign country. I do not thus, see any act among those mentioned under section 200 (d) (iii) which amounts to importing uncustomed goods.

Furthermore, even if it is presumed (without deciding) that section 200 (d) (iii) created an offence related to importing uncustomed goods, the

charge under the second count cannot be considered as proper. This is because, the particulars of the offence (as quoted above) did not indicate that the goods found with the appellant were in fact uncustomed. Again, both the statement of offence and the particulars of the offence in the second count did not mention any act, among those listed by the provisions of section 200 (d) (iii) as being committed by the appellant in the case under consideration. Besides, one of the important ingredients for an offence under section 200 (d) (iii) of the EACCMA is that, the accused might have committed the acts mentioned under that section or any of them, while he or she knew or ought reasonably to have known, that the goods were in fact uncustomed. Nonetheless, this ingredient, related to the knowledge of the accused did not feature in the particulars of the offence under the second count in the case at hand.

Regarding the provisions of section 201 of the EACCMA, the same does not also create any offence. It merely guides that, where on conviction for an offence under the EACCMA, a person is liable to pay a fine, that person shall, unless the goods are prohibited goods or are ordered to be forfeited under the Act, pay duty on the goods in addition to the fine.

Owing to the above grounds, I agree with the appellant's counsel that, the charge under the second count was incurably defective since it did not disclose all the important ingredients of the offence. Under the circumstances of the case at hand, it cannot also be argued that the appellant was not prejudiced by the defects in the charge sheet. It is more so considering the fact that, he was not legally represented at the trial. I

thus, agree that, the entire charge sheet, in both counts, offended the provisions of section 132 and 135 of the CPA and cannot be cured under section 388 of the same Act. I thus, answer the issue posed above affirmatively that, the charge sheet at issue was incurably defective. I consequently uphold the first ground of appeal.

I further agree with the appellant's counsel that, the remedy for an incurable defects in the charge sheet is, in law, to nullify and quash the proceedings. This will result to quashing the conviction and setting aside the sentence and orders for forfeiture.

The findings I have made herein above, are capable enough to dispose of the entire appeal without testing the rest of the grounds of appeal. I will not thus, examine them.

In fact, I also agree with the appellant's counsel that, under the circumstances of the case no retrial can be ordered since the charge sheet has been declared incurably defective: see the **Mayala case** (supra). Indeed, the law further provides that, a retrial can be ordered where justice requires so and it cannot be ordered where there is no evidence: see the decision by the CAT in the case of **Kaunguza s/o Machemba v. Republic, Criminal Appeal No. 157B of 2013, at Tabora** (unreported) following the case of **Fatehali Manji v. R [1966] EA 343.**

In the case at hand, and as rightly argued by the counsel for the appellant, there was no evidence to prove that the goods were in fact prohibited cosmetics as alleged in the first count. No any instrument that carries the prohibition was mentioned, let alone being produced before the

trial court. Again, there was no any proof that the goods involved under the second count were "uncustomed goods." This phrase, is defined under section 2 (1) of the EACCMA as including dutiable goods on which the full duties due have not been paid, and any goods, whether dutiable or not, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the Customs laws. There was however, no evidence showing under which category of the definition shown above the goods at issue did fall. This is because, there was no evidence from a relevant authority that the goods were in fact dutiable or from which country they had been imported.

Again, the cautioned statement exhibit P. 5 allegedly made by the appellant does not constitute any sufficient evidence against him. This is because, it did not amount to any confession since he did not admit the commission of the offence and all its ingredients. He only stated that, all the goods involved into the two counts belonged to the other person with whom he had been charged. He carried them into his (appellant) commercial motor vehicle for payment unknowingly that they were offensive goods. He did so upon being assured by the owner of the goods that the goods were lawful. This piece of evidence cannot thus, implicate him, but rather, it exculpates him.

Owing to the above reasons, I make the following orders: I allow the appeal to the extent shown above. I nullify the proceedings of the trial court in relation to the appellant and quash them. I also quash the conviction against him. Consequently I set aside the impugned judgment of the trial court, the sentence and the order for forfeiture of the motor

vehicle. I further direct that, the motor vehicle and the fine paid by the appellant, i. e. Tshs. 500, 000/= be returned to him or to any deserving person. Other goods involved in the charge sheet may be dealt with by the relevant authorities according to law. I do not order any retrial. It is so ordered.

JHK. UTAMWA

JUDGE

10/08/2020.

10/08/2020.

CORAM; Hon. JHK. Utamwa, J.

For Appellant: Mr. Simon Mwakolo, advocate.

For Respondent; Ms. Xaveria Makombe, State Attorney.

BC; Mr. Kibona, RMA.

Court: Judgment delivered in the presence of Mr. Simon Mwakolo, learned counsel for the appellant and Ms. Xaveria Makombe, learned State Attorney for the respondent, in court, this 10th August, 2020.

JHK. UTAMWA.

JUDGE

10/08/2020.