

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.87 OF 2022

(Appeal from the Judgment and Sentence of Kibaha Resident Magistrate Court at Kibaha dated 14th March, 2022 Hon. J. J. Mkhosi-SRM in Criminal Case No. 37 of 2021)

IDD OMARI KAWALA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 29/09/2022

Date of Judgment: 31/10/2022

POMO, J

On 6th May, 2021 the Appellant was arraigned before Kibaha Resident Magistrate Court (the trial court) charged with a count of trafficking in narcotic drugs contrary to section 15A (1) and 2(a) of the Drugs Control and Enforcement Act, 2015 as amended by section 9 of the Drugs Control

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and Enforcement Act [Cap 95 R.E.2019]. It was the facts of the charge that on 2nd day of June, 2020 at Kwa Mfipa area within Kibaha District in Coast Region the appellant was found trafficking in narcotic drugs namely, Heroin Hydrochloride weighing 5.44 grams. The charge was substituted on 18th May, 2021 by making changes to the charging section only to read section 15A (1) and 2(a) of the Drugs Control and Enforcement Act [Cap 95 R.E.2019]

Briefly to the background is that, on the midnight of 2/6/2020 the police on patrol at Kwa Mfipa area in kibaha District in Coastal region were informed by the informers that the appellant is involving himself in narcotic drugs trafficking. Acting on the information, the police in the said patrol led by PW2 Ass. Insp. Juma Buringa went to search the appellant's house Kwa Mfipa area in Kibaha district at the very night hours and found sixty (60) dices suspected to be narcotic drugs in his house. Seizure certificate was issued and witnessed by two independent neighbours, among them one is PW6 Kudra Selemani. The seized sixty dices of the suspected narcotic drugs together with the appellant were taken to Kibaha police station and on 9/6/2020 the suspected narcotic drugs were taken to the Government

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Chemist for examination who in turn alleges to have confirmed the same to be Heroin

The Respondent republic paraded seven witnesses in court to prove the charge against the appellant (see pp.8 – 38 of the typed trial court proceedings) while the appellant side two witnesses testified (see pp.42 – 49 of the typed trial court proceedings). In the end, the trial court was satisfied with the prosecution evidence to have proved the charge beyond reasonable doubt against the appellant henceforth convicted and sentenced him to serve ten (10) years jail sentence.

Aggrieved with the trial court decision, the appellant have appealed to this court with three (3) grounds of appeal he lodged on 13/05/2022.

The grounds of appeal as follow: -

- 1. That, the learned Senior Resident Magistrate grossly misdirected herself in fact and law in conviction of the appellant based on wrong assumption that the Appellant was duty bound to prove that he did not commit the offence*
- 2. The learned Senior Resident Magistrate grossly misdirected herself in fact and in law for failing to discover that the procedural law in arresting and searching the Appellant was not observed*

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3. The learned Senior Resident Magistrate grossly misdirected herself in fact and in law for believing that the Prosecution had proved their case beyond reasonable doubt while there are so many doubts that warrant acquitting the accused.

When the appeal came for mention on 29/08/2022 the Appellant was represented by Nickson Ludovick and Esther Simon, the learned advocates while the respondent republic enjoyed the service of Hezron Mwasimba, the learned senior state attorney. The court ordered the appeal hearing be by way of written submission the order both side of the appeal complied with. Their industrious and researched submissions are high appreciated. The submissions will be considered, if need be, in due course of determining the grounds of appeal raised

This being the first appellate court is therefore vested with the power to re-evaluate and consider the evidence on the trial court record and come up with its own findings, if need be, basing on the available evidence. I am guided by the court of appeal decision in **The Registered Trustees of Joy in the Harvest vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017 where it was stated:

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*"The law is well settled that **on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand** (Peters v Sunday Post, 1958 EA 424; William Diamonds Limited and Another v R, 1970 EA 1; Okeno v R, 1972 EA 32)".* End of quote

In determining the merit or otherwise of the appeal, I will consolidate and determine the 2nd and 3rd grounds of appeal which alleges that the respondent republic did not prove the case beyond reasonable doubt to ground the conviction against the appellant and failure to observe procedural law in arresting and searching.

The charge the respondent republic had a duty to prove against the appellant is that of trafficking in narcotic drugs contrary to **section 15A(1) and 2(a) of the Drugs Control and Enforcement Act [Cap 95 R.E.2019] (The Act)**. The provision reads as follows:

"S. 15A.-(1) Any person who traffics in narcotic drugs, psychotropic substances or illegally deals or diverts precursor chemicals 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.

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(2) For purposes of this section, a person commits an offence under subsection

(1) if such person traffics in-

(a) **narcotic drugs, psychotropic substances weighing two hundred grams or below;**

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

(c) Cannabis or khat weighing not more than fifty kilograms.

And according to the interpretation which is section 3 of the Act, narcotic drugs is defined thus: -

"Narcotic drug" means any substance specified in the First Schedule or anything that contains any substance specified in that First Schedule to this Act, and;

"trafficking" means the importation, exportation, buying, sale, giving, supplying, **storing, possession**, production, manufacturing, conveyance, delivery or distribution, **by any person of narcotic drug** or psychotropic substance any substance represented or **held out by that person to be a narcotic drug** or psychotropic substance or making of any offer

Proof of the charge the appellant faced before the trial court called for exhibits tendering by the respondent republic. These exhibits are the

sixty dice suspected to be narcotic drugs found in the appellant's house, the seizure certificate; the paper tray on movements of the said suspected narcotic drugs from the time of seizure until tendering them in court, and lastly is the report by the government chemist on the findings of the suspected narcotic drugs. While there were an attempt by the respondent republic to tender them as exhibits but none of them was admitted by the court as exhibit. Let the trial court proceedings speak for themselves:

PW1 Gabriel J. Gabriel is a person who wanted to tender the examination report allegedly proving the seized sixty dice were heroin. (see page 9 paragraph 3 – 5 of the typed proceedings)

"PP: I pray to show the witness the exhibit he is talking about for ID purpose

Court: Prayer granted

PW1: it is the one, hence I wrapped it and seal with the Government Chemist Office, my signature is there. I pray to tender it (the exhibit of sixty dices as an exhibit)

PP. we pray to tender it as my witness prayed

Defence counsel: no objection

Court: Delivered and marked P1"

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Again at page 10 paragraph 4 – 11 of the typed proceedings, this is what transpired:

PP: I pray to show my witness the report for ID purpose

Court: Prayer granted

PW1: it's the one, hence it has my signature, name and the seal of the Chief Government Chemist office. I pray to tender it to the court as an exhibit

PP: I pray before the court to receive the exhibit as prayed by my witness if there is no objection

Defence Counsel: No objection

*Court: Prayer granted; **delivered it and marked as P2.**"*

At page 14 paragraph 3 – 8 of the typed proceedings, again this is what transpired:

PP: I pray to show my witness the report for ID purpose

Court: Prayer granted

PW2: it's the one, hence I can see my handwritings, signature and the date I did the search. I pray the court to receive it as exhibit

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PP: As my witness prayed, we pray the court to receive it if there is no objection

Defence Counsel: No objection

*Court: **Delivered and marked as P3.***

At page 18 paragraph 2 – 9 of the typed proceedings, also this is what transpired:

PP: I pray to show my witness the form for ID purpose

Court: Prayer granted

PW2: it's the one, hence it has my name, number of Police Force Army, handwriting and signature. I pray to tender it to the court as exhibit

Defence Counsel: No objection

*Court: **Delivered and marked as P4.***

And lastly; at page 18 last paragraph to page 19 paragraph 1 of the typed proceedings, this is what is on record:

PP: I pray to show my witness the form for ID

Court: Prayer granted

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PW3: It's the one, hence there is my name, signature and the Police Force Army Number. I pray to tender to the court as an exhibit

Defence Counsel: No objection

*Court: **Delivered and marked as exhibit P4.***

What can be discerned from the above reproduced trial court record is that nothing was ever admitted by the court as exhibits. What is seen on court record are the words "**delivered**" and "**marked**". Exhibits must be **admitted** and then **marked as exhibits** by the court.

In my further view, the documents which are found in the trial court case file purportedly marked as exhibits can not be taken to be exhibits of the court. This is because the marking is contrary to the above reproduced order of the trial court which is that "**Court: Delivered and marked P1; Delivered and marked P2; Delivered and marked P3, etc.**" Thus, in absence of order of the court **admitting** and **marking** those documents this court is left wondering as to why and how those purported exhibits got to be so marked as exhibits. In **Robinson Mwanjisi and three others vs Republic [2003] TLR 218** the court of appeal had this to state at page 226 paragraph 4:



*'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.'*

Guided by the above authority of the court of appeal, I hereby expunge from the court record the purportedly exhibits P1; P2; P3; P4; P5; P6 and P7 because it is not known how did they find way in trial court record while the court order is that of "**delivered**" and "**marked**" and not that of being "admitted" and "**marked as exhibit...**"

Having expunged out of court record the purportedly exhibits, then the evidence left on record is insufficient to sustain conviction meted against the appellant because the nature of the charge the appellant faced called for tendering exhibits in proof of it

Again, having so allowed the grounds No. 2 and 3 of appeal, I find no need to determine the remaining ground of appeal

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Consequently, the appeal is hereby allowed, conviction is quashed and the sentence is set aside. The appellant be released from prison forthwith unless is held therein for another justifiable cause.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 31st day of October, 2022



A handwritten signature in blue ink, appearing to read "M.K. Pomo".

Musa K. Pomo

Judge

This Judgment is delivered on this 31st October, 2022 in presence of the Appellant and Dorothy Massawe, Principal State Attorney, for the Respondent republic



A handwritten signature in blue ink, appearing to read "M.K. Pomo".

Musa K. Pomo

Judge

31/10/2022