IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 146 OF 2022

(Arising from Criminal Case No.23 of 2022 at Babati District Court of Manyara Region)

HAIBA ALLY.....APPELLANT

Vs

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 25-4-2023

Date of judgment:21-6-2023

B.K.PHILLIP,J

The appellant herein was arraigned at the District Court of Babati at Manyara Region on the offence of trafficking narcotic drugs contrary to section 15A (1) (2) (C) of the Drug Control and Enforcement Act (Cap 95, R.E 2019) as amended by section 19 of the Written Laws (Miscellaneous Amendment) Act No.5 of 2021. The trial Court found him guilty on the offence of Trafficking Narcotic Drugs contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act, (Cap 95 R.E 2019) as amended by section 19 of the Written Laws (Miscellaneous Amendment) Act No.5 of 2021 and sentenced him to twenty (20) years imprisonment.

Aggrieved by the aforesaid conviction and sentence, through the assistance of his advocate the appellant lodged this appeal on the following grounds;

i) *That, the trial magistrate erred in law and in fact in convicting and sentencing the appellant on offence charged by relying on the single lined evidence of the prosecution witnesses.*

ii) *That, trial magistrate erred in law and fact in convicting and sentencing the appellant on offence charged in absence of independent witnesses who participated in seizing the alleged exhibit and who according to the arresting officer signed certificate of seizure, to name them bus conductor and the passenger seated at seat number 22 by the name of Robbery Crispin.*

iii) *That, the trial magistrate erred in law and in fact in holding that the appellant had case to answer without giving the fit ruling which constitute decision and the reasons for the decision and consequently went on convicting and sentencing the appellant on offence charged with.*

It was the prosecution's case that on 30th day of January 2022 at Mdori area within Babati District while the police officers were in their normal patrol, stopped one minibus which was heading to Kondoa. Thereafter, Inspector Kandola instructed a police officer No. G2508 CPL Mahali and his colleagues to search the said minibus. In course of conducting the search they found the appellant sitting on seat no.25 with small bag pink in colour. In that bag there was one small envelope covered with sole tap. They opened it and found what they suspect to be cannabis twists. They counted them and found out that there were 180 cannabis twists.They seized them and certificate of seizure was filled in by Asp. Kandola, and it was signed by the appelant. In proving its case

the prosecution paraded four witnesses, namely; ASP Emanuel Kandola (PW1), H.5871 PC Godfrey (PW2), G.1761 D/CPL Lushita (PW3) and G. 539 D/CPL Tumaini (PW4). PW1's testimony was to that effect on 31st January 2022 at 16:40pm he was on normal patrol at Mdori Area doing searches in vehicles which was passing at Mdori. He stopped one motor vehicle- Minibus coaster was coming from Arusha heading to Kondoa. He entered into the motor and found appellant in sitting on seat no.21 with a small bag which had an envelop inside sealed with sole tape. He told the appellant that he wants to see what was inside his bag. The appellant opened that bag in presence of the bus conductor and one passenger who was sitting at seat no.22 named Robbery Crispin. Inside that bag there were 180 items which he suspected to be Cannabis twists. He seized them and certificate of seizure was filled in and signed by appellant , and the witnesses who were present. The appellant was taken to police station.

PW2's testimony was to the effect that he is a storekeeper at Babati Police station. On 31st January 2022 at 18:00pm he received an exhibit, to wit; 180 items packed together suspected to be Cannabis twists. That exhibit was given to him by PW1. It was registered and given number 39/2022. On 11th February 2022 at 08: 00 am the said exhibit was given to 539 DC. Tumaini for further investigation and later on it was returned to him at 19:00pm with a seal of Government Chemistry. Thereafter, that exhibit was taken to Court. Furthermore, he testified that there was proper hand over of the exhibit to maintain the records for keeping clear chain of custody.

On the other hand, PW3's testimony was to the effect that on 31st January 2022 he was on duty and was assigned to investigate a case involving an offence for transportation of narcotic drugs. The case file was assigned to him at 17:00pm. The appellant (accused) was arrested at 16:30pm.Before recording the appellant's statement, he told him his rights. The process of recording the statement started at 17:30pm and was finished at 18:30pm.The accused signed the statement. He further testified that in the case file there were 180 cannabis twists folded together in a paper. The exhibit was checked and weighed by the Government Chemistry. It was 400grams.

PW4 testified that on 11th February 2022 at 08:00am he was on duty. He was directed to take exhibit to the Government Chemistry at Arusha. He filled in the required forms, DCEA001 which was given to him by PW2 in order keep clear chain of custody of the exhibit. The exhibit was kept in pink bag. In Arusha he handed over the exhibit to the Government Chemistry office. It was received by Mr. Erasto Laurence and registered as no. NZL 167/2022, its weight was 400 grams. Mr. Erasto took the sample and sealed the remaining items and gave them back to him. After some time, he prepared a report and gave him. He took that report to Babati Police Station and handed over the same to PW2.

On the other side, upon being called to defend the case the appellant told the trial court that he had nothing to say.He decided to leave everything to the court to decide.

In this Appeal the learned advocate Richard Manyota appeared for the appellant whereas the learned State Attorney Alice Mtenga appeared for

the respondent. Mr. Manyota's submission in support of appeal was as follows;With regard to the 1st ground of appeal, Mr. Manyota submitted the that trial court erred to convict the appellant by relying on a single lined evidence of the prosecution on the reason that it is not correct to convict the appellant on the single lined evidence of the prosecution case. He further argued that it is trite law that an accused person can be convicted only if there is heavy evidence on the prosecution side. Mr. Manyota referred this court to page 4 of the impugned judgment where the records indicate that the trial magistrate remarked that the appellant's demeanor showed that he is a drug addict. Mr. Manyota contended that trial magistrate convicted the appellant relying on the remarks he made on the appellant's demeanor. He added that the aforesaid remarks made by the trial magistrate were made in contravention of section 212 of the Criminal Procedure Act.(Henceforth the "CPA").The law requires the trial to record the remark if any including the demeanor of the witness during the hearing. He insisted that the trial magistrate misdirected himself by making such remarks in the judgment while the same is not reflected in the proceedings. To support his argument, he cited the case of **Sophia Emmanuel Vs R, Criminal Appeal No. 443 of 2017**, (unreported)

With regard to the 2nd ground of appeal, Mr. Manyota submitted that the appellant was convicted in the absence of any independent witness who witnessed the seizure of the drugs alleged to have been found in the possession of the appellant. It is Mr. Manyota's contention that the people allegedly to have witnessed the seizure of the drugs ,namely; the bus conductor and a passenger who was sitting at seat no.22,one Robbery Crispin were not called in court to testify. That those

independent witnesses would have helped to prove that the alleged drugs were really seized from the appellant. He insisted that the court was supposed to form adverse inference against the prosecution case for failure to call the aforesaid independent witnesses. To bolster his argument, he cited the case of **Azizi Abdallah Vs R (1990) TLR .71** in which the Court of Appeal insisted on the importance of having independent witnesses. Mr. Manyota maintained that in this case there was no justification for failure to call the independent witnesses.

With regard to 3rd ground of appeal Mr. Manyota submitted that the trial court erred to hold that the appellant has a case to answer without giving a reason for such ruling in contravention of section 231 of CPA. He contended that the law requires the trial court to address the accused in terms of section 231 of CPA if it finds that a *prima facie* case has been established by the prosecution. He referred this court to page 18 and 19 of the proceedings and continued to submit that the trial court did not state whether there was sufficient evidence which required the appellant to defend himself. He insisted that it was not correct for the trial court to order the appellant to defend himself in the absence of evidence that a *prima facie* case had been established against him. Moreover, Mr. Manyota pointed out that the proceedings show that the trial magistrate just recorded that section 231 of the CPA was complied with but no explanation was recorded to show that the appellant was addressed in terms of section 231 of the CPA. Expounding on this point Mr. Manyota argued that since the trial magistrate said that the appellant was quiet, then he was supposed to act as an umpire to assist the appellant to know his rights. To cement

his argument, he cited the case of **Ndemeshule Ndoshi vs The Republic, Criminal Appeal No.120 of 2005** (unreported).

Ms. Alice was in support of the appellant's conviction. With regard to the 1st ground of appeal she submitted as follows; that the judgment of trial court clearly indicates that the trial magistrate relied on the testimony of PW1, PW2, PW3 and PW4 as well as exhibits PEV1, PEVII and PEIII in convicting the appellant thus, the conviction of the appellant was not based on a single lined evidence of the prosecution.

With regard to the 2nd ground of appeal, Ms. Alice conceded the bus conductor and the other passenger who witnessed the search in the bus which lead to the arrest of the appellant were not called to give evidence in court. However, s

he was of the view that the evidence adduced by the prosecution was heavy enough to convict the appellant. She further added that the said evidence was not challenged by the appellant in any way either by way of defence or cross examination.

Moreover, Ms Alice admitted that it is important to have independent witnesses but she contended that the circumstances under which the appellant was searched arrested and should be considered. She submitted that the appellant was arrested in a bus which was heading to Kondoa thus, there was no permanent address of the bus conductor and the other passenger which could enable the prosecution to call them to testify in court in support of the prosecution case.

With regard to the 3rd ground of appeal Ms. Alice submitted that the trial magistrate in its ruling ruled out that the appellant had a case to

answer and stated that he took into consideration the evidence brought by prosecution including exhibits and he was satisfied that the appellant had a case to answer.Ms. Alice was of the view that the ruling on case to answer was in order and it met condition stipulated in section 230 of the CPA. She insisted that that the law neither provides for a formality/style of writing a ruling in case to answer nor requires a magistrate/judge to give reasons whenever he/she rules out that there is a case to answer. In conclusion of her submission, she was emphatic that the prosecution proved its case to the standard required by the law.

In rejoinder, Mr. Manyota reiterated his submission in chief and added that the State Attorney did not make a reply on the concern he raised pertaining to the trial magistrates' remarks found in four (4) of the impugned judgment. On Ms. Alice's response on the failure to summon in the independent witnesses who were in the bus, Mr. Manyota pointed out that the excuse alleged by Ms. Alice is not reflected in the proceedings. He insisted that there is nothing in the proceedings showing that the appearance of the aforesaid independent witnesses was not possible. He further contended that Ms. Alice did not cite any case or provision of the law that authorizes the prosecution to do away with the requirement of calling the key witnesses. He insisted that the adverse inference ought to have been drawn against the prosecution.

I have dispassionately considered the rival arguments made by Mr. Manyota and Ms. Alice as well as perused the court's records. I will start by dealing with the 1st ground of appeal, in which Mr. Manyota

argued that it was wrong for the trial magistrate to rely on a single lined evidence made by the prosecution to convict appellant and that the trial magistrate convicted the appellant by relying on the remarks he made on his demeneour in contravention of section 212 of the CPA.The court records reveal that the remarks on the appellant's demeanour made by the trial magistrate in his judgment are not reflected in the proceedings. That is contrary to section 212 of the CPA which provides as follows;

> *"When a magistrate has recorded the evidence of a witness, he shall also record such remarks, if any as he thinks material respecting the demeanour of the witness whilst under examination".*

In the case of **Sophia Emmanuel vs The Republic, Criminal Appeal No.443 of 2017, CAT at Shinyanga,** the Court of Appeal was confronted with a similar situation to the case at hand where by the trial Magistrate made negative remarks against the accused person in his ruling on a case to answer and judgment which were not reflected in the proceedings. The Court reproduced the provision section 212 of the CPA in its judgment and had this to say on the application of section 212 of the CPA;

" The above provision provides for the procedure to be followed while recording evidence. This means that, it is only during hearing of the case that the witness may have an opportunity to respond on any issue or observation raised against him or her by the trial court .At times the court may misinterpret a certain behavior or reaction of an accused during hearing and the only opportune time to seek for clarification is at that particular time and not otherwise. When the court sits to compose judgment , parties are not there and therefore there is a great danger of

arriving at an erroneous conclusion which may end up affecting a party to the case. The procedure stipulated in the above provision must be adhered to so as to ensure that the court arrives at affair and just decision .....

Following what we have endeavored to discuss above, it is our finding that ***it cannot be safe to conclude that the trial magistrate was free from bias while composing his judgment****. For that reason we hold that the first ground of appeal is merited. Ordinarily, we would have quashed the proceedings of the trial court and order a retrial. However, in view of the argument of the parties in the following ground on sufficiency of evidence, we think , we need to evaluate the evidence on record.."*

(emphasis added)

In this case as correctly submitted by Mr. Manyota the trial magistrate made negative remarks on the appellant's demeanor in relation to the offence he was charged with, for ease of reference, let me reproduce the relevant part of the impugned judgment hereunder;

"....PEVI is an accused caution statement at the police station. At page two and three of that handwritten statement there is (sic) the following words.....in this statement there was a very clear sentence from the accused that;

'.....binafsi huvuta kete moja kila siku moja'

If that will be the truth, the present accused had been addicted with such drugs. I am not a doctor to say so, but he appears in court as addicted person in both talking and be silent in all time as he did in this case during the hearing. In other words I believe that statement was made by him, within short time after his arrest by the police.."

I have dispassionately considered the competing arguments made by Ms. Alice and Mr.Mnyota on the effect of the aforesaid remarks in the decision of the trial magistrate. I am inclined to agree with Mr. Manyota that on the face of the impugned judgment the aforesaid remarks

which were not recorded in the proceedings as required by the law have a bearing in the decision of the trial magistrate and sends a negative message on the trial magistrate's fairness in his analysis of the evidence adduced. Reading part of the impugned judgment quoted herein above, it is clear that the trial magistrate believed and gave great weight to the contents of exhibit PEVI because he was connecting it with his observations on the appellant's demeanor. He said in his judgment clearly that due to the appellant's demeanor he was convinced that PEVI was made by the appellant.

From the foregoing, on the strength of the findings made by the Court of Appeal regarding the failure to adhere to the requirement of section 212 of the CPA, it is the finding of this court that the trial magistrate's error in recording the remarks he made in his judgment is fatal and it is not safe for this court to rule out that the trial magistrate was not biased since his remarks made in the judgment shows clearly that in his findings he had in mind the appellant's demeanor he had observed during the hearing and formed opinion that the appellant is a drug addict. It is noteworthy that the fairness in trial is crucial and the same has to be seen to be done even by just looking at the way the proceedings were conducted . I am afraid , in this case , with the remarks made by the trial magistrate fairness was not reflected in the proceedings as well as the judgment.

From the foregoing and guided by the decision of the Court of Appeal in the case of **Sophia Emmanuel** (supra), I hereby quash the proceedings of the trial court and set aside the impugned judgment. In the circumstances of this case , I am of a settled opinion that I cannot

proceed with the determination of the remaining grounds of appeal on the analysis of the evidence adduced thus, I hereby order *trial de novo* of this case before another Magistrate.

Dated this 21st day of June 2023

B.K.PHILLIP

JUDGE