IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 27 OF 2023

(Appeal from the decision of the District Court of Same at Same dated 22nd February 2023 in Criminal Case no. 116 of 2023)

EXAUD THOMAS ENEZA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

12th Sept. & 10th October 2023.

A.P.KILIMI, J.:

This is an appeal from the decision of District court of Same at Same wherein the appellant being the 2nd accused together with one Msifuni Mbonea Amani (was 1st accused) were arraigned with an offence of trafficking in narcotic drugs contrary to section 15A (1) and (2)(c) of the Drugs Control and Enforcement Act Cap 95 R.E 2022 (hereinafter "DCEA").

The prosecution at the trial court alleged that both accused person on 6th day of January 2022 at Hedaru area within Same Same District in Kilimanjaro region were found trafficking 8.5 kilograms of khat (Catha edulis)

commonly known as "mirungi". Both accused pleaded not guilty at the trial. In proving the above, the prosecution paraded five witnesses to prove the case, whereas appellants defended themselves with no witnesses. At the end the verdict of the trial court found the 1st accused not guilty of an offence and proceeded to acquit him while the 2nd accused (appellant) was found guilty, convicted and sentenced to serve 10 years imprisonment. The trial court further ordered the tri cycle (exhibit P2) used as a means of transportation alleged drug be forfeited.

Aggrieved with the decision of the trial court the appellant has moved this court by way of appeal against both conviction and sentence on the following grounds; -

1. That the learned magistrate erred in law and fact in convicting the appellant without considering that the prosecution has failed to prove its case beyond reasonable doubt.
2. That the learned trial Magistrate erred in law in convicting the 2nd accused while the accused persons were not availed with the right to cross examination each other during the trial.
3. That the trial magistrate erred in law and fact by relying on exhibit P1, a certificate of search and seizure, which was not witnesses by independent witnesses.
4. That, the search and seizure were irregular as the appellant was not issued with receipt acknowledging the seizure.
5. That, the learned Hon trial Magistrate erred both in law and fact when convicting the appellant on defective charge.

When this appeal came for hearing, the appellant was unrepresented whereas the respondent was represented by Ms. Edith Msenga the learned State Attorney. I allowed appellant to bring written submission while Ms. Msenga responded orally.

Arguing in support of the first ground of appeal, the appellant submitted that the prosecution failed to prove their case beyond reasonable doubt for the reason that; first; they failed to prove that the appellant was aware of presence of the drugs and if the appellant intended to transport the said drugs from one point to another. Second; they failed to prove that the drug was in possession or control of the appellant. That it was said the drugs was transported via tricycle but failed to prove that tricycle was under control or possession of the appellant. Third; there was irregularities in admission of exhibit P3 that it was admitted without comply with the provision of the law and guidelines provided under Exhibit Management Guidelines, published by the Judiciary of Tanzania in September 2020. That the trial Magistrate admitted exhibit P3 without entertaining the appellant objection and without giving ruling on it. This act curtailed the appellant rights to be heard. To support his arguments, he cited the case of **Arobogast Augustino @ Shayo And 2 Others vs The Republic**,

Consolidated Criminal appeals No 24 & 40 of 2022 HCT at Moshi. Moreover, the appellant submitted that exhibit P3 was tendered by PW3 who was not addressee nor a maker of it, also not a custodian of exhibit P3 and has no knowledge of the contents of exhibit P3. thus, was not a competent person.

Furthermore, the appellant continued that, in the fourth reason, there was no evidence which prove that the drug was examined and weighted by the government chemist either the later was not called as witness to testify, that he was the one who made experiment, analysis and conclude that the exhibit P7 was khat weighted 8.5kgs. In fifth; there was controversial of evidence basing on colour and registration number of the tricycle in which the drugs were recovered. There were evidence shows that the tricycle with Reg No. MC 565 CDK and another evidence shows one with reg No. MC 566 CDC was used to carry the drugs. Sixth; the facts read over to the accused shows that the drugs were recovered in motorcycle while prosecution mentioned tricycle. Seventh; the appellant was sentenced without first conviction him of any offence which is contrary to section 235(1) of the CPA Cap 20 R.E 2022. The appellant in this added that the same is fatal renders the whole judgment nullity. He invited me to referrer the case of **Christopher Chacha @ Msabi and 2 Others vs Republic**, Criminal

Appeal No. 235 of 2009 CAT (Unreported). And in Eighth reason, the appellant alleged that, the trial magistrate failed to accord signature after oath or affirmation taken by witness before testifying. This is fatal because lack of it makes an evidence of a witness unauthentically. To bolster his statement referred the case of **Geofrey Raymond Kasambula vs Total Tanzania Limited**, Civil Appeal No. 320 of 2019 CAT at Dar es salaam (Unreported).

In respect to the second ground of appeal, the applicant submitted from the proceedings at page 25 and 26 the appellant was not given right to cross examine his fellow accused hence curtailed his right to be heard. He cited the case of **Gift Mariki and others vs Republic**, Criminal Appeal No 283 of 2015 and the case of **Arobogast Austino @ Shayo** (supra).

Lastly, in respect to the fifth ground, the appellant submitted that the charge does not contain sufficient particulars of offence as it does not state where exactly the alleged drugs/khat was found. This is important to establish possession or control of the said drugs by the appellant. To battle his argument, he cited the case of **Olympia Nicodemas Swai vs The Republic**, Criminal Appeal No. 53 of 2020 High Court of Tanzania at Moshi (Unreported). Either the appellant argued he was charged under wrong law

that is to say Drugs Control and Enforcement Act, CAP 95 is not revised in 2022 but in 2019 and also, he added that it was wrong to charge him with trafficking of drugs instead of possession of drugs weighted 8.5kgs because that was a small amount that can even be used for personal consumption.

Responding to the above, Ms. Msenga learned State Attorney argued that the prosecution proved that the accused person was found with khat through the evidence of PW1 and PW2 who were arresting officers, the evidence from government chemist shows the alleged leaves were khat and the same was tendered and admitted as exhibit P3, chain of custody was also proved as well as seizure and handing over certificate. Also, she added that, the prosecution witness managed to explain how they seized the exhibits, the conduct of examination at the chemist and how they become evidence in court.

In respect to issuance of receipt, she contended that the base of producing receipt is to acknowledge that the accused was arrested with things illegal therefore the certificate of seizure save the purpose hence there was no need of receipt. To buttress her argument, she cited the case of **Jidril Okash Hamed vs Republic**, Criminal Appeal No. 381 of 2017 CAT Arusha.

Responding third ground of appeal, the learned State Attorney referred the case of **Dpp vs Mussa Hatibu Sembe**, Criminal Appeal 130 of 2021 CAT Tanga where the court interpreted section 48(1)(2)(c)(ii) & (vii) of Drugs Control and Enforcement Act, and the court acknowledge the presence of witness but not necessary be independent witness as it depends on circumstances of the case.

On the second ground of appeal, Ms. Msenga acknowledged and admitted that the second accused was not cross examined after his testimony by his fellow accused, and was of the view is an error led to unfair hearing.

Lastly, she acknowledged that on ground 5 of appeal that the law cited was wrong, there is no R.E of 2022 of CAP 95 instead CAP 95 is revised in 2019. Then she agreed that this irregularity renders the charge to be defective, but, in this case this irregularity does not bar the accused to defend his case properly, because the same can be cured by section 388 of CPA, therefore she left for this court to determine.

Having gone through the rival submissions of both parties and the records of the trial court. I am aware that this court being the first appellate

court has a duty to re-evaluate the evidence of the first trial court in an objective manner and arrive at its own findings of fact, if necessary. Thus, it is in the form of a rehearing. See the decisions of the Court of Appeal in **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, and **Makubi Dogani v. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (all unreported).

The appellant in his memorandum of appeal raised five grounds of appeal but for reasons he did not state he has opted to argue only three grounds that ground 1,2 and 5 and left ground 3 and 4 undiscussed. I will also respond on the ground 1 and 2 together since the same do relate and one issue cut across is whether the prosecution proved their case beyond reasonable doubt.

To start with the first ground, one of the irregularities the appellant allege is that, when exhibit P3 was tendered it was objected and the court did not rule on it. For purpose of this contention, I find necessary to reproduce the part of the proceeding at page 16 of typed proceeding where the above transpired;

"PW3 CONTINUE:

This is the chemist report I testified on. I pray to tender it as an exhibit

ACCUSED:

1st – I have no objection.

2nd – I object because the chemist didn't testify. May she be called by the court.

COURT: Chemist report from Chief Government Chemist Laboratory-Arusha is hereby admitted and marked exhibit P3.

H.E. HOZZA-SRM

9/11/2022"

From the excerpt above, it is apparent that, the learned trial Magistrate neither did give an opportunity for appellant to submit on his objection, nor give rights for the prosecution to respond, worse enough no ruling of the trial court in respect to that objection was delivered, but the court proceeded to admit the exhibit objected.

According to Exhibits Management Guidelines, published by the Judiciary of Tanzania in September,2020 At page 10 the Guidelines

elaborates the principles for admitting or rejecting exhibits in Court as follows:

> "2.4.3. Steps in Tendering Exhibits;
>
> *Step 1: Ensure a witness has laid foundation evidence for tendering an exhibit, (i.e., witness explains how the exhibit is connected to the case and how it came in his possession).*
>
> *Step 2: Ensure the exhibit is shown to the opposing party for comment.*
>
> *Step 3: Whether or not there is an objection, the exhibit will be shown to a magistrate or judge to see and inspect.*
>
> *Step 4: **Where there is an objection, the party who seeks to tender that exhibit has to be accorded an opportunity to respond; in case a new point is raised by a party proposing to tender it, then the party objecting will re-join.***
>
> *Step 5(i): Where there is no objection, the judge or **magistrate may admit the exhibit provided it has passed the admissibility test.***
>
> *Step 5(ii): **Where there is an objection, the presiding judge or magistrate will rule on the admissibility of the exhibit.***
>
> *Step 6(i): When the exhibit is rejected, it will be returned to the party who proposed to tender it.*
>
> *Step 6(ii): When the exhibit is admitted the judge or magistrate will mark and endorse it.*

Step 7: *Once the exhibit is admitted, a person tendering the exhibit shall read out its contents in court…."*

[Emphasis supplied]

In view of the above, I am settled that the appellant right to be heard was curtailed, but also this irregularity caused unfair trial, thus occasioned failure of justice to the appellant and cannot be cured by the provision of section 388 of Criminal Procedure Act. Therefore, since the said exhibit P3 was not legally admitted, it is my considered opinion has no value in the eye of the law in this matter, consequently I proceed to expunge it from the record of the trial court.

On the second ground of appeal, also the appellant alleged that he was convicted without given right to cross examination to each other during the trial. The counsel for the respondent admitted after perusing the trial court records and found no cross examination done between the accused person therefore found that this is an error which renders to unfair hearing. The counsel for the respondent refers the right to cross examination is given under section 146 and 147 of the Evidence Act, Cap 6 R.E 2022.

I have scanned the trial court proceeding, it is true, at page 27 of the trial court typed proceedings shows that the right to cross examine by his fellow accused was not availed. In my view this is fatal and vitiated the proceeding.

I wish to support my view by referring the case of **Mariki and Others vs Republic** [2016] TZCA 70 (TANZLII) wherein the Court referred with approval the defunct Court of Appeal for Eastern Africa in **Mattaka and Others v. R** [1971] E.A 495 pp.502-503 which observed that;

> *"It is well established that where accused person gives evidence that is adverse to a co-accused, the co-accused has a right to cross-examination (See, **Ndania Karuki v,R**, (1945) 12 EA.CA 84 and **Edward Msengi v,R**, (1956) 23 EA.CA. 553)"*

and it went on to further lay down:

> *"It is well established that where an accused person gives evidence, that evidence may be taken into consideration against a co-accused, just like any other evidence, Evidence which is inconsistent with that of the co-accused may be just*

as injurious to his case as evidence which expressly seeks to implicate him, should we think, give rise to a right of cross examination

.....

that where an accused wishes to cross- examine his co accused, he should be permitted to do so as of right, subject of course, to the overriding power of the court to exclude irrelevant or repetitive questions"

I have considered the testimony of the appellant in his defence; he implicated the first accused at the trial that he knows the one who came with the said luggage is a woman. Also, he is the one who refused to carry luggage in his tri-cycle, therefore it was very necessary for the said accused to have this opportunity of crossing the appellant on his defence. By not doing so, I am settled, the trial court did not exercise its fundamental duty of right to a fair trial, therefore, the trial court caused serious prejudice to the appellant.

In the circumstances, having expunged the essential document above which I may say was the subject of the charge, and having analysed the above which indeed denied the right to be heard to both accused persons at the trial. I am satisfied that the above procedural irregularities render serious

miscarriage of justice and thus incurable. Thus, I see no need to deal with the remaining grounds of appeal since I am sure they can never overturn the above findings.

Consequently, I hereby quash the appellant conviction and set aside the sentence and orders imposed by the trial court. I thus allow this appeal accordingly. The appellant should be released from custody forthwith, unless held for other lawful cause.

It is so ordered.

DATED and delivered at **MOSHI** this 10th day of October 2023.

X

JUDGE
Signed by: A. P. KILIMI

Court: - Judgment delivered today on 10th October, 2023 in the presence of Appellant and Ms. Edith Msenga, State Attorney for Respondent present.

Sgd: A. P. KILIMI
JUDGE
10/10/2023