IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO 126 OF 2023

(Originating from Criminal Case No 7 of 2023 of Babati District Court)

HADIJA ABDALAH.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

23rd February and 22nd March 2024

MIRINDO, J.:

On 27th December 2022, three police officers were on their normal operations along the Arusha-Babati Highway at Minjingu, Babati District, in Manyara Region. One of the vehicles they inspected was a passenger bus named *Ruth Trans* with registration number T 146 DRU. The mini-bus was travelling from Arusha to Kondoa. Inside the bus, they noticed a restless woman at seat number 34 and suspected a bag she was holding. A female police officer, WP 12983 PC Theresia took her out of the bus and inspected her sulphate bag popularly referred in Kiswahili as "shangazi kaja". Twenty-five bundles of fresh leaves suspected to be of a narcotic drug were found inside the bag. The woman, whom the police officers soon found out to be Hadija Abdalah was taken to Babati Police Station while the bundles of leaves were taken to the Government Chemist Laboratory Authority in Arusha. Upon examination the leaves were

found to be a narcotic drug known as *khat* (*catha edulis*) which are famously referred to as "mirungi" weighing 10.65 kilograms.

Before Babati District Court, Hadija was charged with and convicted of the offence of trafficking narcotic drugs contrary to subsections (1) and (2) (c) of section 15A of the Drugs Control and Enforcement Act [Cap 95 RE 2019] as amended by section 19 of the Written Laws (Miscellaneous Amendments) (No 5) Act 9 of 2021. She was sentenced to a term of imprisonment of twenty years. She has appealed against her conviction and sentence. Before this Court, Hadija was represented by Mr Kuwengwa Ndonjekwa, learned Advocate, while the Respondent Republic had the service of Ms Blandina Msawa, learned State Attorney.

On her first three grounds of appeal, she complained that her conviction is against the weight of evidence adduced at the trial court. Mr Ndonjekwa, learned Advocate, argued that it was wrong for the trial court to rely on the cautioned statement in convicting Hadija. Drawing the attention of this Court to page seven of the judgment of trial court where the learned trial Senior Resident Magistrate stated that the cautioned statement was made "in heat of passion," the learned Advocate invited this Court to hold that there was doubt in the prosecution case.

The learned State Attorney Msawa argued that the prosecution case was proved beyond reasonable doubt. There was ample direct evidence of Hadija being arrested in possession of "Mirungi". The prosecution duly proved the chain

of custody in light of the principles established in *Paulo Maduka and Others v R* (Criminal Appeal 110 of 2007) [2009] TZCA 69 (28 October 2009) and that the cautioned statement was not the main evidence. In any case, she argued, issues as to the admissibility of the cautioned statement should be given at the trial and not at the appellate stage.

I have had some difficulty in comprehending the expression "in heat of passion" in relation to the making of the cautioned statement. After close analysis of the judgment of the trial court, I have come to the firm conclusion that the trial magistrate was expressing the situation in which Hadija was at the time when the police officers came to inspect her inside the bus and arrested her. In other words, the trial magistrate intended to state that Hadija was apprehensive or anxious when police officers came for inspection. How far this may have affected the cautioned statement she subsequently made will be addressed shortly.

The learned Advocate questioned the number of bags with which Hadija was found in view of the fact that the judgment of the trial court at page nine refers to two bags. On account of this discrepancy, the learned Advocate argued that Hadija did not give a statement at Babati Police Station or that the statement was given involuntarily. The learned Advocate further pointed out that Hadija was not given opportunity to call a relative or advocate when she was being interrogated at Babati Police Station. For these reasons, the learned Advocate

concluded that the there was great doubts in the prosecution case and the cautioned statement should not have been relied on.

As correctly argued by the learned State Attorney, there was ample direct evidence from three prosecution witnesses that Hadija was found in possession of the sulphate bag. The first piece of direct evidence was from the second prosecution witness who was the bus conductor of *Ruth Trans*. The bus conductor testified that Hadija refused to put the bag at the bus carrier and chose to stay with it because it contained "glass items". Again, there is direct evidence of the first and third prosecution witnesses, being police officers who were at the scene of the crime. In particular, the evidence of the third prosecution witness, WP 12983 PC Theresia, who personally arrested Hadija and inspected the items inside the bag, is clear that there was only one sulphate bag. Reference to two bags in the judgment of the trial court was a clear oversight of the prosecution evidence that does not advance further Hadija's complaint.

I take note that while the charge referred to the plate number of the passenger bus in which Hadija was found to be T 146 DRM, the evidence is that it was T 146 DRU. I consider this variation to be insignificant and it was not an issue before the trial court nor this Court.

I will now proceed to examine more closely the cautioned statement as its admissibility and weight appears as a general complaint from Mr Ndonjekwa's arguments.

When the fifth prosecution witness, G 539 D/CPL Tumaini, prayed to tender Hadija's cautioned statement towards the end of his evidence, Hadija stated that "I was forced to sign this statement." The prosecution successfully asked the trial magistrate to overrule the objection because "The objection is not according to our law. It needs evidence to prove it." At the hearing of this appeal, I asked parties to address me on the propriety of this part of the proceedings.

The learned Advocate Mr Ndonjekwa argued that the statement was not freely made and there should have been a ruling to determine the admissibility of the cautioned statement. In response, Ms Msawa, learned State Attorney argued that there was no need for inquiry because Hadija never denied making the statement. The learned State Attorney concluded that if this Court were to rule that the enquiry was necessary, the omission was cured by Hadija's cross examination to G 539 D/CPL Tumaini who recorded the cautioned statement and tendered it in court. There was no need for inquiry because the appellant did not deny giving the statement. The appellant was not beaten.

It is clear to this Court that Hadija's cautioned statement amounted to a confession and it was the duty of the trial court to satisfy itself as to its admissibility. Under section 27 (3) of the Evidence Act [Cap 6 RE 2019], a confession is inadmissible when it is made under threat. In *Morris Agunda and two others v R* [2003] TLR 449, there was no objection regarding the cautioned statement of the first appellant. In his defence, the appellant testified about being

forced to sign the statement and alleged being tortured. The Court of Appeal held that it was upon the trial court to investigate into the voluntariness of the appellant's confession.

Under the circumstances, the trial court was bound to conduct an enquiry to investigate the voluntariness of Hadija's confession contained in the cautioned statement. The duty to conduct enquiry to ascertain by way of evidence the voluntariness of a confession was reaffirmed in *Emmanuel Joseph alais Gigi Marwa Mwita v R*, Criminal Appeal 57 of 2002, Court of Tanzania at Mwanza (2004) (unreported)

> ... [I]t is to be observed at the outset that unlike the practice applicable in the High court, where a trial within a trial is held in order to establish the voluntariness of a disputed statement, in the subordinate courts, no such practice is applicable. In that case, where a situation arises say, in the district court...., an enquiry on the voluntariness or otherwise of the statement can be ascertained from the evidence on the record...

It was a misdirection to overrule Hadija's objection merely because the objection needed evidence. The need to introduce evidence is the essence of the enquiry as was stated by the Court of Appeal in *Dickson Elia Nsamba Shapwata and Another v Republic* (Criminal Appeal 92 of 2007) [2008] TZCA 17 (30 May 2008):

> In order to effectively challenge a confession, a person is practically obliged to give evidence. An appellant must give evidence to show how the threat,

> inducement, or promise caused him to make the confession as their mere existence is not enough to make the confession involuntary. One should be able to say that without it, the person would not have made a statement. In the instant case, the learned trial judge correctly conducted a trial within a trial in respect of each disputed statement, evaluated the evidence adduced before him and concluded that the statements were made voluntarily...

Hadija was denied this opportunity but fortunately she detailed in her defence how she was forced to sign the cautioned statement. In her repudiation of the cautioned statement, she stated a police officer called him from outside of the window of a bus and asked her to come out of the bus. After she came outside the bus, the police officer told him that someone had a problem with her. They left with a tri-circle famously known as "Bajaj" and went to Babati town. She was told to drop from the Bajaj and a male person came with a paper and told her to sign. She refused to sign and she was told to go to Babati Police Station where she "will know it latter". At Babati Police Station she was shown a sulphate bag by the fifth prosecution witness and told to take it. She refused but was forced to sign things that were written on the paper. She asked the Police Officer to read what was written in the paper but he refused. He told her "Atanikomesha." She concluded that it was under these circumstances that she signed the document prepared by the fifth prosecution witness.

Since Hadija complained being forced to sign the statement, her argument is that she never made the statement. The question is not about the voluntariness

of the statement made rather its existence. This distinction was restated by the Court of Appeal in *Amiri Ramadhani v R*, Criminal Appeal 228 of 2005:

> .... To repudiate a statement is to deny ever to have made it. In our view, to repudiate a statement is different from retracting a statement. In the latter one is not denying that one made a statement but that what was said was not true or that one was forced to say what is in the statement, or one is revoking or unsaying what one previously said.

In the present appeal, there is a repudiated cautioned statement of Hadija. The cautioned statement details the married life of Hadija, and furnishes a detailed account of who procured her to go to Arusha to take the package of the narcotic drugs, the location of the package inside the bus before she entered, her journey back to Kondoa, and her arrest at Minjingu. In view of detailed nature of the cautioned statement, I am satisfied that the cautioned statement was made by Hadija.

The next question is whether cautioned statement was voluntarily made. Besides the complaint of being forced to sign the cautioned statement, Hadija complained in her defence that the fifth prosecution witness unsuccessfully approached her and that is why she was prosecuted. Given that Hadija cross-examined the fifth prosecution witness without raising the issue of being by such witness, it is clear that her complaint at this appellate stage is simply a lame attempt to escape liability. I am of the view that the cautioned statement was

voluntarily made. Even if the cautioned statement were to be discarded, there is ample direct evidence to support the charge.

On the third ground of appeal, Hadija complains that she was not given an opportunity to cross-examine prosecution witnesses, specifically, the third, fourth and sixth witnesses. The learned Advocate, pointed out different pages in the proceedings of the trial court where the trial magistrate recorded on the accused side the word "nil" after those prosecution witnesses have been examined in-chief. The learned Advocate argued that there was a significant breach of the rules of natural justice and decision of the trial court be quashed and Hadija be set free. The learned State Attorney argued that the learned advocate misapprehended the proceedings of the trial court. She emphasized that Hadija was given opportunity to cross-examine, defend herself, and the word "nil" in the proceedings means that Hadija had no question.

According to dictionaries, the term "nil" is a short form of the Latin word "nihl" which translates in English as "nothing." The word "nihl" has different expressions in judicial proceedings. In Greenberg D (ed), *Jowitt's Dictionary of English Law*, 3rd edn, Vol 2: J-Z, London: Sweet and Maxwell, 2010, the expression "nihil dicit" literally means "he says nothing". A similar description is found in the American dictionary, Garner, BA, (ed) *Black's Law Dictionary*, 9th edn, St Paul: West Publishing, 2009.

It is clear from the record of the trial court that whenever there was no cross-examination or re-examination, the learned trial Senior Resident Magistrate noted that fact by recording "NIL" and whenever there was cross-examination or re-examination, the record contains direct responses of the witnesses. More specifically, Hadija cross-examined the first, second, and fifth prosecution witnesses, and there was no re-examination by the prosecution. She equally cross-examined the sixth and seventh prosecution witnesses and there was re-examination by the prosecution. She did not cross examine the third and fourth prosecution witnesses and the trial Senior Resident Magistrate recorded "NIL". I would therefore dismiss the third ground of appeal

The last ground of appeal is that the trial court acted contrary to the law in that Hadija was not given an opportunity to look for defence counsel in terms of section 310 of the Criminal Procedure Act [Cap 20 RE 2022]. The learned Advocate sought to impress upon this Court Hadija's right to legal representation as discussed in *Almasi Kalumbeta v* R [1982] TLR 329 and *Petty v Grey Racing Association Ltd* [1969] 1QB 125 at 132. He argued that as the trial court did not address Hadija on her right to have defence counsel, there was no fair trial and the decision of the trial court should not be allowed to stand.

The learned State Attorney disagreed and emphasized that the provisions of section 231 of the Criminal Procedure Act were duly complied with by the trial court. She pointed out that it was the duty of Hadija to look for defence counsel, if

she wished to do so. She concluded that if this Court were to rule that Hadija's right was violated, the omission was a curable irregularity under section 388 of the Criminal Procedure Act [Cap 20 RE 2022].

The duty to inform an accused person of the right to legal representation came for consideration before the Court of Appeal in *Moses Muhagama Laurance v Government of Zanzibar* (Criminal Appeal 17 of 2002) [2003] TZCA 3 (31 October 2003). The accused who was unrepresented was convicted of unlawful possession of a narcotic drug commonly referred to as "Bhang". He was sentenced to fifteen years imprisonment by a Regional Magistrate at Vuga, Zanzibar. He unsuccessfully appealed to the High Court of Zanzibar. His first ground of appeal on a second appeal to the Court of Appeal was that he was not informed by the trial court of his right to engage an advocate under section 162 of the Criminal Procedure Decree. It was his argument that on this ground the High Court should have nullified the proceedings, judgment and his conviction by the trial court. Section 162 of the Criminal Procedure Decree provided that:

> In the absence of any provision in any other law to the contrary, any person accused before any criminal court and against whom proceedings are instituted under this Decree in any such court may of right be defended by an advocate."

The Court of Appeal held that the appellant had misconstrued the provisions of section 162 of the Criminal Procedure Decree:

> In our considered view, the section merely declares the right of a person who is charged in any criminal court to be defended by an advocate where he chooses to have such services. It does not impose an obligation on the court to inform an accused person that he has such right.

Addressing the provisions of section 310 of the Criminal Procedure Act, 1985, the Court of Appeal held that they impose a right to legal representation and no obligation to the trial court. The Court of Appeal held that proceedings are not a nullity simply because the accused was not informed of his right to engage an advocate.

The principle articulated in *Moses Muhagama Laurance* is relevant to the present appeal and I hold that Hadija was not denied her right to engage an advocate. I dismiss this ground of appeal.

For these reasons, Hadija was duly convicted of the offence of trafficking in drugs as defined under section 2 and created under section 15A (1) and 2 (c) of the Drugs Control and Enforcement Act [Cap 95 RE 2019] as amended in 2021. Having held that Hadija was properly convicted, there is a question regarding the legality of sentence imposed on Hadija. Section 15A (1) of the Drugs Control and Enforcement Act [Cap 95 RE 2019] before its amendment in 2021 provided that an offender "shall be liable to imprisonment for a term of thirty years." Subsequent to its amendment through section 19 (a) of the Written Laws (Miscellaneous Amendments) (No 5) Act 9 of 2021, the subsection states that the offender "shall be liable to imprisonment for a term of "not less than" thirty

years. As the question of legality of the sentence imposed arose in the course of preparing this judgment I resummoned the parties to address me. The learned Advocate Ndonjekwa argued that should the Court dismiss the appeal, the sentence imposed by the trial court was appropriate. The learned State Attorney, Msawa took the same view on the ground that the word "liable" means that it is at the discretion of the trial court to impose the appropriate sentence. So, the sentence of twenty-years was duly imposed.

The meaning of the phrase "not less than" has been dealt with by the Court of Appeal. In *Amosi Lesilwa v Republic* (Criminal Appeal 411 of 2015) [2016] TZCA 958 (14 April 2016), the accused was convicted of his own plea of guilty of the offence of incest by male contrary to section 158 (1) (a) of the Penal Code, Cap 16 and was sentenced to 30 years imprisonment. The provisions of section 158 (1) (a) provide in part that:

> (1) Any male person who has prohibited sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, commits the offence of incest, and is liable on conviction–
>
> (a) if the female is of the age of less than eighteen years, to imprisonment for a term of not less than thirty years;

He unsuccessfully appealed against sentence to this Court. On a further appeal to the Court of Appeal, it was held "that the sentence of thirty years imprisonment which the trial court imposed is the mandatory minimum as prescribed by section 158 (1) of the Penal Code."

For this reason, I invoke the revisional powers of this Court under section 373 (1) (a) of the Criminal Procedure Act [Cap 20 RE 2022] and quash the

sentence of twenty years imposed on Hadija. Instead, I sentence her to a mandatory minimum imprisonment term of thirty years in light of the provisions of section 15A (1) (a) and (2) (c) of the Drugs Control and Enforcement Act [Cap 95 RE 2019] as amended by section 19 of the Written Laws (Miscellaneous Amendments) (No 5) Act 9 of 2021. The sentence of twenty years imprisonment is enhanced to thirty years imprisonment.

Except for this variation, I affirm the decision of Babati District Court and dismiss the appeal. It is so ordered.

DATED at BABATI this 22nd day of March 2024

F.M. MIRINDO

JUDGE

22/3/2024