IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 92 OF 2023

(Originating from Criminal Case No. 111 of 2021 in the Resident Magistrate Court of Manyara at Babati)

FADHILI OMARY.....1ST APPELLANT

SAID MUSA @ JUMANNE.....2ND APPELLANT

VERUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

23rd & 8th May, 2024

Kahyoza, J.:

Fadhili Omary and **Said Musa @ Jumanne** (the appellants) were charged with an offence of trafficking narcotic drugs contrary to section 15A (1) of **the Drugs Control and Enforcement Act** [Cap 95 R.E 2019] (the DCEA). They were tried, convicted and sentenced to serve thirty years' imprisonment each.

Aggrieved, the appellants appealed against the conviction and sentence. The contended that they were wrongly convicted as they did

not comprehend the technical terms in the charge sheet, that the certificate of seizure was irregular, that, it could not support their conviction, the magistrate erred to convict them in the absence of an independent witness, they were not informed as to change of magistrate, the chain of custody was broken and lastly, that the prosecution did not prove the case beyond reasonable doubt.

The background to this appeal is that, allegedly on the 20th day of June 2020 in Tarangire National Park within Babati District in Manyara region, Fadhili Omary and Said s/o Musa @ Jumanne did traffick in narcotic drugs namely *Catha edulis* commonly known as "mirungi" weighing 6.65 kilograms on a motorcycle with registration Number MC 552 CNE make Kinglion.

It was in the testimony of **ASP Gregory**, **(Pw1)**, that on the material date, at about 08:30hrs, he was on road patrol with his fellow police officer one CPL Edwin, where they saw a motorcycle with two people, the rider and the passenger, coming from Arusha heading to Babati. They attempted to stop the rider but failed. They pursued them, but they diverted from the main road towards Tarangire Reserve area, they failed to trail them as there was no specific road.

At 12:00hrs, they arrived at Tarangire offices in a bid to get help to find the escapees. They were joined with two rangers, namely; Hamis Kachale and Emmanuel Goshashi. They were also supplied with a motor vehicle.

At 15:00hrs, inside the Tarangire National Park, they managed to apprehend two people with a motorcycle with registration No. MC 552 CNE Black in colour, make Kinglion. They identified as Fadhili Omary, the rider and Said Musa, the passenger. And when they were inspected, they had drugs wrapped on their stomach and on the back with sol tape.

They took the suspects and the motorcycle to Minjingu police station, where they opened and found that Fadhili had 10 bundles and Said also had 10 bundles of narcotic drugs – "Mirungi". He filed the certificate of seizure for each of the suspect, where Hamis Kachala signed that of the former, and Emmanuel Goshashi signed that of the later. The accused persons also signed them. And that they did not sign the certificate of seizure at Tarangire National Park since they did not search them. A police case file MGG/IR/607/2020 was opened. The exhibits were handed to CPL Steven. And the accused persons were kept in police custody. He identified them at the doc.

Two certificates of seizure, were admitted without objection as exhibits **P1** and **P2**, respectively.

Hamis Kachala (Pw2) and **Emmanuel Goshashi**, (**Pw3**), confirmed that, indeed on the material date they joined force with police officers in the pursuit of the escapees who entered the National Park. That they apprehended them inside the national park and they had no permit whatsoever. They deposed that Fadhili Omary as a rider and Said Musa, the passenger. They took them to Minjingu police post, when searched by Gregory, each of them had 10 bundles. And they all signed the respective certificates of seizure, referring to exhibits P1 and P2.

Michael Sairorie Bernard, PW4, Government chemist, confirmed that on the 25th day of June 2020 he received a letter from the OC CID, DCEA 001, 20 bundles of fresh leaves suspected to be Mirungi, tied in a newspaper "gazeti" and rolled with a sol tape, belonging to MGG/IR/607/2020 and a chain of custody form and he registered them with Lab number NZL 4477/2020 and weighed them. The material weighed 6.65 Kgs. After all the laboratory procedures being carried out he confirmed that the said leaves were identified to be "mirungi" and he dispatched his report. The DCEA 001, GCLA 01 and the GC report, were admitted without objection as exhibits **P3, P4** and **P5**, respectively.

H. 5871 PC Godfrey, **PW5**, the then exhibit keeper at Babati police station testified to have received 20 bundles of leaves rolled in a newspaper and sol tape from one Steven from Minjingu police post on 21.06.2020. Also, received a motorcycle with registration number MC 552 CNE, all belonging to MGG/IR/607/2020. And that the handing over was through the signing of a chain of custody form. He registered the exhibits and stored them in the exhibit room. On the 25.06.2020 the 20 bundles were taken to the government chemist at Arusha by DC Joseph. He returned them, and they were taken to court as they were perishables. All the transactions were governed by a chain of custody form.

A motor cycle with registration number MC 552 CNE and a chain of custody were admitted without objection as exhibit **P6** and **P7**, respectively.

Janet Amos Mafie, **(Pw6)**, testified and claimed to be the owner of the motorcycle with registration number MC 552 CNE make Kinglion. She deposed that she had given the motor cycle to Fadhili Omary for hire purchase agreement to ferry people, commonly known as "bodaboda". As Fadhili was not reachable, on 9.7.2020 she went to Babati police station where she found her motorcycle and Fadhili. She tendered the agreement deed and the motorcycle registration card, which were admitted without

objection as exhibit **P8** and **P9**, respectively.

E. 8171 D/SGT Steven, (**Pw7**), exhibit keeper at Minjingu police post, confirmed that on the 20.6.2020 he received 20 bundles of leaves suspected to be narcotic drugs, rolled in newspaper with white sol tape and a motorcycle with registration number MC 552 CNE exhibits in police case file No MGG/IR/607/2020. He registered them and stored them in exhibits room.

On 21.06.2020 **E. 8171 D/SGT Steven**, (**Pw7**) prepared the exhibits and delivered them at Babati police station to PC Godfrey, through the signing of the chain of custody form. On 26.06.2020, and in a company of PC Joseph they took the exhibit to court for the disposal. He added that the exhibits were destructed in the presence of the accused persons and the officer of the court. The inventory was admitted without objection as exhibit **P10**. He identified the motorcycle and the chain of custody.

The appellant defended themselves on oath

Fadhili Omary, **DW1**, testified under oath, that on the alleged date and in a company of Said, his friend one Ally gave them 20 bundles of mirungi and asked them to take them to Galapo. He assured them that

there will be no problem. They took the bundles and tied them on the stomach and back of their bodies with a tape. Each of them having 10 bundles. That he was the rider of the motorcycle that belonged to one woman that he was working with on "bodaboda" basis.

They left to Gallapo. They were apprehended by park rangers and taken to Minjingu police, later to the Babati police station.

Said Mussa, (**Dw2)**, testified under oath, that, Fadhil is his friend. On the alleged date, he was picked by him and told that they were to go to Arusha to collect a parcel. They went and met one guy, who gave them 20 bundles of mirungi. While on their way, they met people and stopped them, Fadhili refused to stop and diverted to the bush, and they got lost. They were later apprehended by park rangers and they were taken to Minjingu police, the Babati police station. He was aware that he carried mirungi and that it was an offence to carry mirungi. That he was not forced to carry them.

Given the evidence of this case, I find it that there is no dispute that the appellants were court transporting the substance they knew that it was mirungi. In their defence they admitted that they carried mirungi. The prosecution established through **Michael Sairorie Bernard**,

(Pw4), a Government chemist analysist that, the substance submitted for laboratory analysis were mirungi khat or *catha edulis*. Although, the appellant complained in their grounds of appeal that the chain of custody was broken, the complaint is baseless. There is ample oral evidence to show that the exhibit moved from one person to another, not only that but also the appellants do not dispute that they were found in possession of narcotic drugs, known as "mirungi". If the exhibit was tempered with the laboratory analysis would have proved something else.

I did, also, not find any merit for the appellant to complain that they did not comprehend that contents of the charge sheet as it contained technical language. The record shows that the charges were read in Kiswahili, the language the appellants understood. Not only that but also, they knew why they were before the trial court and that is why they narrated what they were carrying and how they were arrested.

The appellants complained further that magistrate erred to convict them in the absence of an independent witness. This complaint is as well baseless. The appellants deposed that they were apprehended in the bush by park rangers. Where did they expect an independent witness to come from? National Parks are no go area. Even if, there was a need for an independent witness, I would not find it fatal the appellant to have been

arrested and searched in the absence of an independent witness. The appellant did not dispute that they were trafficking in "mirungi". The independent witness is summoned to give credibility to a search and clear chances fabricating the outcome of the search. The appellant admitted to have been found with mirungi. For the reasons stated above, I am of the view that, there was no need of an independent witness.

The appellants complained that they were not informed as to change of magistrates. It is true that there was a change of the trial magistrates. The case commenced before learned magistrate Mushumbusi and continued later before Hon. Lusewa. Section 214(1) of the Criminal Procedure and case laws provide that in case of change of magistrate reason for the change must be recorded and the parties notified. It is settled as decided in **Abdi Masoud @Iboma and Three others v. The Republic**, Criminal Appeal No. 116 of 2015 (unreported) that: -

> *"In our view, under section 214(1) of the CPA it is necessary to record the reasons for reassignment or change of trial's court magistrates. It is a requirement of the law and it has to be complied with. It is prerequisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have no authority or jurisdiction to try the case."*

As the record bears testimony, the change of magistrate in this case took place before the commencement of trial. It is on the record that it is learned resident magistrate Hon. Lusewa who conducted the preliminary hearing on 3.3.2022 and tried the case from the beginning to the end. I am of the firm view that the appellants were not prejudiced by the change of magistrates that took place before the trial commenced. I anchor my findings on the decision of the Court of Appeal in **Salma Mohamed Abdallah vs Joyce Hume** (Civil Appeal No. 149 of 2015) [2019] TZCA 637 (21 March 2019), which applies to this case that, the reason for taking over is given for continuation of trial. Since, the change of magistrates took place before trial, the successor magistrate had no duty to disclose the reason for change.

The Court of Appeal held in **Salma Mohamed Abdallah vs Joyce Hume** that-

> *"In this regard, we have no hesitation to state that a close reading of the above quoted provision leads us to the understanding that the successor judge or magistrate assigns reason for taking over the continuation of trial after the trial has started and evidence heard partly by his predecessor who has been prevented from concluding the trial."*

I, therefore, find no merit in the complaint that the magistrate took over

the case without assigning the reason.

Lastly, the appellant complained that the prosecution did not prove the case beyond reasonable doubt. This complaint is baseless. The prosecution witnesses deposed how they arrested, searched the appellants, and found with them two bundles of fresh leaves suspected to be narcotic drugs; to wit mirungi. They gave evidence on how they submitted the exhibit to the Government chemist for laboratory analysis. There is evidence from **Michael Sairorie Bernard, (Pw4)**, a Government chemist analysist that, the substance submitted for laboratory analysis were mirungi khat or *catha edulis*.

In addition, the appellant did not dispute to have been arrested transporting mirungi form Arusha to Galop Babati. **Said Mussa, (Dw2),** testified further that he knew that transporting "mirungi" was an offence. I find that there was ample evidence on record to prove the offence, the appellant stood charged of trafficking narcotic drugs contrary to section 15A (1) of **the Drugs Control and Enforcement Act** [Cap 95 R.E 2019].

In the end, I find that the prosecution proved beyond reasonable doubt and uphold the conviction of the appellants with the offence of

trafficking narcotic drugs contrary to section 15A (1) of **the Drugs Control and Enforcement Act** [Cap 95 R.E 2019].

As to the sentence, I do not find the sentence justifiable. The appellants were charged and convicted with the offence under section 15A (1) of **the Drugs Control and Enforcement Act** [Cap 95 R.E 2019]. The sentence provided is not the minimum sentence but the maximum sentence. It was wrong for the trial magistrate to impose to the appellants the maximum sentence of thirty years' custodial sentence without assigning reasons. It is on record that the appellants were first offenders, thus, there was no justification for imposing the maximum sentence. Section 15A (1) of **the Drugs Control and Enforcement Act** [Cap 95 R.E 2019] read that-

> *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.***
>
> *(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 kilogram**. (Emphasis added)*

I am alive of the fact that the Court of Appeal has held in cases without number that the phrase "*shall be liable to ...(a given sentence)*" does not imply the sentence is the minimum sentence but rather that sentence is a maximum one. For that reason, a sentencing court may apply its discretion to determine a proper sentence. I wish to associate myself with the holding of the Court of Appeal in J**afari Juma vs R.,** (Criminal Appeal 252 of 2019) [2023] TZCA 216 (3 May 2023), where it was held that-

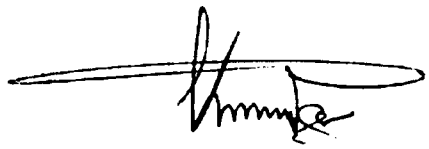
> ***"Sokoine Mtahali @ Chimongwa v. Republic**, Criminal Appeal No. 459 of 2018 (unreported) in which we drew inspiration from the decision by the erstwhile Court of Appeal for East Africa in **Opoya v. Uganda** [1967] E.A. 752 on an appeal originating from Uganda in which the court interpreted the phrase "shall be liable to' as follows:*
>
> > *"It seems to us beyond argument that the words **"shall be liable to"** do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a*

maximum sentence only and while the liability existed the court might not see fit to impose it "[Emphasis added]

I find the maximum sentence imposed was not justifiable as the appellants were first offenders and admitted to commit the offence even though, at the conclusion of the trial. I set it aside the sentence of thirty years and impose a custodial sentence of five years. The sentence shall commence to run from the date of the appellants' conviction. The appeal is partly allowed.

It is ordered accordingly.

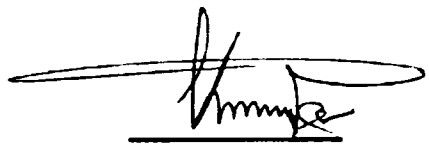
Dated at Babati this 9th day of May, 2024.



J. R. Kahyoza

Judge

Court: Judgment delivered in the presence of the appellants and Ms. Blandina Msawa S/A for the respondent. B/C Ms. Fatina haymale (RMA) present.



J. R. Kahyoza

Judge

09/05/2024