

IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC CRIMINAL APPEAL No. 102 OF 2022

(Originating from Misc. Criminal Application No. 18 of 2022 at Sumbawanga District Court)

ALOYCE PAUL @ LYIMO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

The appellant is aggrieved by the decision of the trial court where he had filed an application in which he was seeking for orders that;

- i. That the trial court be pleased to order restitution of the appellant's properties which were seized during the arrest in Criminal Case No. 197 of 2017*
- ii. Costs of the application be provided for,*
- iii. Any other reliefs and direction as the trial court may deem necessary to grant in the interest of justice.*

The said application was dismissed by the trial court for the reasons that the ownership of the said properties (which were human medicines) was not established and that the appellant was acquitted in his Criminal Case No. 197 of 2017 due to variations to his names which means his case was not heard on merits.

The appellant then framed five (5) grounds of appeal and filed them in this court to challenge the said decision of the trial court. The grounds are as there are herein, that;

- 1. That, the trial court erred in law by refusing the restitution of exhibit on ground that there was no order for the restitution while the laws allow it even if there is no order.*
- 2. That, the trial court erred in law and fact by refusing the restitution of exhibit to the appellant while the he has the right and is entitled to them.*
- 3. That, the trial court erred in law by ordering the appellant to pay costs in criminal case without cogent reasons and legal justification.*

4. That, the trial court erred in law and fact by refusing the restitution of exhibit on ground that the same had expire, prohibited, and stored in dangerous environment while there was no proof of the same.

5. That, the trial court erred in law by basing its decision on matters of facts which were not set out in counter affidavit which is illegal and unprocedural.

From the grounds above, the appellant prayed for this court to allow this appeal, and quash the decision of the trial court and the order thereto to be set aside, and that this court may order the restitution of the said exhibit to the appellant.

On the 23rd day of October, 2023 when this matter was scheduled for hearing, the appellant was represented by Mr. Peter Kamyalile learned advocate while the respondent was represented by Mr. Mathias Joseph learned State Attorney. The learned State Attorney prayed for leave of this court for this matter be heard by way of written submissions, in which Mr. Kamyalile did not object and this court granted leave as prayed.

Mr. Kamyalile submitted first, on the 1st and 2nd grounds together. He submitted that, in the present case, the appellant has rights to the restitution of the whole or part of his properties because he is entitled to it by virtual of Section 357(a)(b) of the Criminal Procedure Act, [CAP 20 R.E 2022]. He added that, the reason for the restitution is, **First**, the medicine was tendered and admitted as Exhibit P2 collectively, **Second**, the appellant was not convicted and sentenced therefore there is no confiscation/forfeiture order; **Third**, there is no proof that the said medicine were expired, prohibited, not safe for use, stored in dangerous environment, and the owner was not identified, **Fourth**, the said exhibits have never been sold, destroyed or otherwise disposed of in such a manner as to be pursuant to any court order or direction.

He added that, it is trite law that, where there is no conviction and sentence, there cannot be confiscation/forfeiture order on property tendered in evidence as an exhibit, because the confiscation/ forfeiture order is linked to the conviction and sentence.

In support of his argument, the learned Counsel cited the case of **Director of Public Prosecutions vs Malimi Sendama & 3 Others**, Criminal Appeal

No. 92 Of 2018, CAT, at Tabora (Unreported) where at page 14 the Court quoted its decision of **Ex.F.7153D/C Dickson Muganyizi vs Republic**, Consolidated Criminal Appeal Nos.261 and 264 of 2013 (unreported) which held that: -

"The confiscation and/or forfeiture order is linked to the conviction and sentence. In the instant case the High Court having quashed the conviction against the appellant, the forfeiture order was thereby discharged."

Mr. Kamyalile proceeded that, it is also trite law that, the trial court has power and jurisdiction at any stage of the proceedings or at any time after the final disposal of such proceedings to order the return of the properties tendered as exhibits to the one who appears entitled to such properties. That, this position was laid down by the Court of Appeal in the following cases below: First is the case of **Barnabas William Mathayo vs Republic**, Criminal Appeal No. 254B OF 2020, the Court of Appeal of Tanzania at Mwanza (Unreported) at page 15 where it was held that: -

"The court can only order a return of an item to a person who appears entitled to it where that item or property was tendered in

evidence as an exhibit as provided under section 353 (3) of the Criminal Procedure Act."

Second, in the case of **Director of Public Prosecutions vs Kilo Kidang'aiand 2 Others**, Criminal Appeal No. 340 of 2017, Court of Appeal Of Tanzania At Tabora (Unreported) at page 21 where it was held that:-

*"... In term of the provisions of sections 353 and 358 of the Criminal Procedure Act, **the trial court and this court has the power and jurisdiction to order the return of the properties tendered as exhibits to the person who appears entitled to such properties.**"*

Third, in the case of **Director of Public Prosecutions vs Peter Kibatala**, Criminal Appeal No. 4 Of 2015, Court of Appeal of Tanzania at Dar Es Salaam (Unreported) at page 18, where it was held that:

"In terms of the provisions of Section 353(3) the court is vested with powers to return anything, at any stage of the proceedings or at any time after the final disposal of such proceedings to the person who appears to be entitled thereto."

He then concluded on the first ground that, based on the above provision and cases cited the appellant has the right to the restitution of exhibits P2 and that, the trial Court erred in law to refuse restitution.

Submitting in support of the 3rd ground, the learned counsel for the appellant submitted that, the trial court erred in law in awarding costs in Criminal Case which is not provided by the law. That, costs in Criminal Cases under Section 345(1) are awarded only when the accused person is convicted. That, it was wrong for the trial court to award costs.

Coming to the 4th ground of appeal, that the trial court refused the exhibits to the appellant on the ground that the said drugs were expired and the owner was not identified.

He added that, the grounds used to refuse the restitution of exhibits to the appellant were not proved because they were not raised in the counter affidavit and are not evidence, it is a mere statement from the bar which cannot be acted upon since it is an afterthought. That, if the grounds for objection to reconstitute the exhibits is not proved then the court is required to reject such objection and reconstitute the exhibits to the person entitled to it.

The learned counsel added by citing the case of **Director of Public Prosecutions vs Kilo Kidang'aiand & 2 Others**, Criminal Appeal No. 340 of 2017, the CAT at Tabora (unreported) at page 22 where it was held that:-

".....we find ourselves obliged to, albeit briefly comment on Mr. Rwegira's assertion that the forfeited livestock were already sold by the government at the time the High Court made an order for the return of the same to the respondents was made hence there was nothing to be returned. With respect, there is nothing on the record showing or supporting that argument and, in our considered views, it was an assertion from the bar not supported by any proof".

Submitting for the last ground of appeal, Mr. Kamyalile submitted that, it is trite law that, affidavits which are statements made on oath, are the basis upon which applications are decided. That, any statement not raised in affidavit is always disregarded as a mere statement from the bar or it is an afterthought.

He proceeded that, in the present case the trial Court wrongly considered and acted on matters of facts; such facts were that drugs were **expired, prohibited, is not safe for use, stored in dangerous environment, and that the owner was not identified.**

The learned counsel then supported his argument by citing the case of **The Republic vs Sumni Ama Weda, Criminal Application No. 65/02 of 2020**, the Court of Appeal of Tanzania at Arusha (unreported) at page 12 where it was held that: -

*"The learned State Attorney needs to be reminded that **affidavits which are statements made on oath, are the basis upon which applications are decided. Any statement not raised in affidavit is always disregarded as a mere statement from the bar as stated in Richard Mchau vs Shabir F. Abdulhussein, Civil Application No. 87 of 2008 (unreported).**"*

As he concluded, Mr. Kamyalile submitted that basing on the submissions he had made and plethora of relevant authorities pinned in, it is the appellant's prayer before this Honourable Court that this appeal be allowed, the decision

of the trial Court be quashed and set aside, and order for the restitution of exhibits to the appellant.

In response, the learned State Attorney representing the Republic Mr. Jackson Komba argued against the grounds of appeal as raised by the appellant that, as the appellant filed at trial court an application for restitution, but the law is very clear if the exhibits have been expired they are regarded to be dangerous to the health of human beings if the court will allow to retribute to the appellant even though he was not convicted in the main case. The counsel referred to **Section 115 (2) of the Tanzania Medical and Medics Devices Act, Cap 20 R. E. 2019**, which provides that if the drugs had problems they cannot be returned to the owner because it will endanger the life of the people even though the law allow the restitution. Hence, under this juncture, the appellant's appeal lacks merit since some of the medicines have been expired and can cause health problems to the users if the court will retribute to the appellant who will return the same to the market as explained at page No. 07 of the proceedings of the trial Court.

Submitting against the 2nd ground of appeal, Mr. Jackson Komba, State Attorney submitted that the appellant filed his application at the trial court under Section 357 (a) of the Criminal Procedure Act, Cap 20 R. E. 2022 for the trial court to grant an order of restitution, and for easy of reference he prayed to reproduce the said provision herein below: -

*"Where upon the apprehension of a person charged with an offence, a property is taken from him the **Court before which he is charged may order: -***

(a). That, the property or part thereof be restored to the person who appears to the court is entitled thereto and if he is the person charged that it be restored either to him or such other person as may be directed."

Submitting against the 3rd ground of appeal, the counsel stated that this ground does not hold water since the law does not avoid to order costs in the application which are criminal in nature as said by the appellant, that the trial Court was proper to issue costs because the nature of the application, the respondent took trouble for the said application. Therefore, he insisted that this ground of appeal is baseless.

Coming to the 4th ground of appeal, Mr. Jackson Komba, State Attorney submitted that the trial court was right not to grant the order sought by the appellant on ground that the exhibits had expired and prohibited. That the affidavit by the appellant did not adduce as whether the exhibits which are medicine had not expired. He added that it is the practice of the court that every case has to be determined according to its circumstances. He also submitted that the case of the **Director of Public Prosecution vs Kilo Kidang'ai & 2 Others** (supra) cited by the counsel for the appellant, is very distinguishable with the case in hand, that with reasons that the exhibits involved into the cited case were livestock while in this case the exhibit in dispute is medicine which may cause harm to the society, he insisted further that, facts which were considered by the trial court by regarding Section 353 (3) of CPA and the case of **Barnabas William Mathayo vs Republic**, (supra) cited by the counsel for the appellant, that it their submission that the trial court was not moved with satisfaction by the appellant as to why he is entitled to the exhibit subject to trial, therefore, the respondent prayed that this ground of appeal be dismissed for lack of merits.

Submitting against the last ground of appeal, the respondent submitted that, this 5th ground is also baseless as it lacks merit. He added, that for the

interest of justice, the trial court was justified to base its decision on matters of facts not set out in the counter affidavit and the appellant has failed to establish how he was affected by the same. The learned State Attorney added that the case cited by the counsel of the appellant in **The Republic vs Sumni Ama Aweda** (Supra) is distinguishable.

In concluding, Mr. Jackson Komba, State Attorney submitted that in contention with the submissions he has made as he objects this appeal, it is his side's view that the grounds of appeal as raised by the counsel for the appellant are baseless and they lack merits before this Court. That, circumstantially he invites this court to dismiss this appeal entirely and uphold the decision of the trial court.

In rejoinder, Mr. Kamyalile submitted that his side reiterates their earlier submission. He clarified that, the trial court has power to order for restitution of exhibit return if the to the appellant if he appears to be entitled to the items tendered in court as exhibit. The issue that the exhibit has expired, and can cause harm to the health of a human being is unfounded because that was not the issue before the trial court.

He added further that, it was not the duty of the court to declare the items that they were not fit for human use. That, there are other authorities that are empowered to do so for the purpose of protecting the public health by assuring the safety, efficacy and security of human, the particular authorities are as TFDA and others. He proceeded that exhibit P2 can be returned to the appellant but its use by public should first be approved by the relevant authorities responsible.

Mr. Kamyalile insisted that, the position he submitted above has been laid down in another case with the same parties which is **Aloyce Lyimo vs Republic, Criminal Appeal No.108 of 2022**, HC at Sumbawanga (unreported) at page 6-7 where the court held that: -

"Under Section 353(3) of Criminal Procedure Act, the trial court has power to order return of the exhibit to a person who appears to be entitled thereto. In this case there is no doubt that the appellant appears to be entitled to the items tendered in court as exhibit P2. The holding of the District Court that the exhibit may be harmful and

endanger the society was unfounded because that was not the issue before the court.

It was not the duty of the court to declare that the items were not fit for human use. There are other authorities that are mandated to do so for the purpose of protecting the public health by assuring the safety, efficacy and security of human and even veterinary drugs, biological products, medical devices etc. One of such authorities is TFDA. That being the case I find that the District Court was wrong to refuse to restore Exhibit P2 on the ground that it was unfit for human use. It ought to have left that question to other government authorities like TFDA etc.

I thus allow the appeal and order exhibit P2 be returned to the appellant as he is apparent owner thereof. As to its consumption or use that should be subjected to approval by relevant authorities. That said, I do find the appeal to have merits and is hereby allowed. Exhibit P2 should be returned to the appellant and its use by the public should

first be approved by the relevant authorities as stated above."

In winding up, Mr. Kamyalile stated that basing on his submission as he rejoined above and plethora of relevant authorities pinned in, appellant prays before this Honourable Court this appeal be allowed, the decision of the trial court be quashed and set aside, and order for the restitution of exhibits to the appellant.

I have read over and over again the entire records of this appeal and the grounds of appeal as filed by the appellant, and the written submissions as filed by both sides. I think it is prudent to clear the air that this matter should not detain much of this court's precious time as ***this appeal is meritorious*** from the start. I will explain on this, and in doing so I will have touched every ground of appeal, one after the other.

It is the general rule in criminal cases that, the burden of proof **rests throughout with the prosecution**, and there are plenty of authorities which have emphasized this principle. In **Selemani Makumba vs Republic** (Criminal Appeal 94 of 1999) [2006] TZCA 96 (21 August 2006), it was the view of the Court that: -

"It is, of course, for the prosecution to prove the guilt of an accused person beyond a reasonable doubt and an accused person does not assume any burden to prove his innocence. It means, therefore, that failure by an accused person to say anything at the trial in his own defence does not imply admission of guilt."

[Emphasis is Mine]

This appeal at hand emanates from the Application filed by the appellant at the trial court numbered 18 of 2022. That Application is the outcome of a dismissed case No. 197 of 2017 in which the appellant was the accused person and he had human medicines found in his possession being seized and tendered in exhibit as evidence which were admitted and marked Exhibit P2.

The main case (No. 197 of 2017) was dismissed after it was realised that, the names of the appellant differed, in which it means, he was never convicted in that case, and there was no any case that was instituted in place of the dismissed case.

In my view, the appellant was correct to apply for the reinstatement of his seized human drugs, because in the case where they were tendered as exhibit, they were not declared as neither harmful nor illegal as the matter was dismissed, and there was no any suit in place thereof, in which in the eyes of the law it means, the prosecution side had never proved their case against the appellant and hence, the appellant deserved to be handed back his human drugs.

Therefore, the trial court in Application No. 18 Of 2022 typically erred in law to determine the said drugs as being illegal and harmful as they were not tendered in the very court. The fact as to whether the human drugs were harmful or illegal, was to be determined in suit that requires the appropriate authority to claim the said drugs as either illegal or harmful and in this, it was not for the trial court to do so in an Application for reinstatement of the said human drugs (Exhibit P2).

I do agree with the submission in chief made by the appellant's counsel as he quoted the holdings in **Barnabas William Mathayo vs Republic, Director of Public Prosections vs Kilo Kidang'aiand 2 Other** and **Director of Public Prosecutions vs Peter Kibatala** (*supra*), that: -

"The court can only order a return of an item to a person who appears entitled to it where that item or property was tendered in evidence as an exhibit as provided under section 353 (3) of the Criminal Procedure Act".

In this matter at hand, only the appellant appeared to be the person entitled to exhibit P2 which were tendered in court as evidence. Therefore, all that has been done by the trial court was typically contrary to the law, and its decision that the exhibit may be harmful and dangerous to the society was unfounded because, it was not the issue that it was required to deal with.

In addition to that, the Application in question only required the court to retribute Exhibit P2 to the appellant for it is vested with such powers, meaning it was not its duty to declare that Exhibit P2 were not fit for human use. As rightly argued by the learned counsel for the appellant that, there are authorities such as TFDA that are mandated to determine the genuine of Exhibit P2 for the purpose of protecting the public health by assuring the safety, efficacy and security of human and even veterinary drugs, biological products, medical devices etc.

At this juncture, it is undisputed that the District Court was wrong to refuse to restore Exhibit P2 on the ground that it was unfit for human use. The learned trial Magistrate ought to have dealt with the matter before him alone rather than determining aspects which were not brought before him.

Consequently, I proceed to allow this appeal and order exhibit P2 be returned to the appellant as he is the apparent owner thereof. As to its consumption or use that should be subjected to approval by relevant authorities.

It is so ordered.

Dated and delivered this 03rd day of June, 2024.



T. M. Mwenempazi

T. M. MWENEMPAZI

JUDGE