**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MJASIRI, J.A., MUGASHA, J.A., And LILA, J.A.)**

**CRIMINAL APPEAL NO. 448 OF 2015**

**FRED WILLIAM CHONDE.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**

**(Mkasimongwa, J.)**

**dated the 2nd day of September, 2015**
**in**
**HC. Criminal Session Case No. 20 of 2015**

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## JUDGMENT OF THE COURT

**26th February & 8th March, 2018**

## MUGASHA, J.A.:

In Criminal Session Case No. 20 of 2015 before Mkasimongwa, J. the appellant and another person were arraigned as hereunder:

"***STATEMENT OF OFFENCE***

***TRAFFICKING IN NARCOTIC DRUGS****: Contrary to section 16(1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drug Act [Cap. 95 R.E. 2009].*

***PARTICULARS OF OFFENCE***

***FREDY WILLIAM CHONDE*** *and* ***KAMBI ZUBERI SEIF****, on or about the 21st day of February, 2011 at Jogoo Street, Mbezi Beach area within Kinondoni District in Dar es Salaam Region, jointly and together trafficked into the United Republic of Tanzania 175411.39 grams of Narcotic drugs, namely; Heroine Hydrochloride or Diacetylmorphine Hydrochloride valued at Tanzanian Shillings Five Billion Two Hundred Sixty Two Million Three Hundred Forty One Thousand Seven Hundred Only (Tshs. 5,262,341,700/=)".*

After a full trial, the appellant was convicted and given a jail term of twenty (20) years with an order to pay a fine of Tshs. 15,787,025,100/=. The other accused person was acquitted.

Aggrieved, the appellant has preferred an appeal to the Court raising seven grounds of complaint as follows:

"1. THAT, the learned trial Judge erred in law and fact by admitting and considering Exh. P1 via PW.1's evidence adduced un-procedural.

2. THAT, the learned trial Judge erred in law and fact by admitting and considering Exh. P.4, P.5, P.6, P.7, P.8, P.9 and P.10 via PW.5's evidence adduced un-procedurally.

3. THAT, the learned trial Judge erred in law and fact by admitting and considering Exh. P.3 via PW.4's evidence and incompetent witness and adduced un-procedurally.

4. THAT, the learned trial Judge grossly erred by holding that the Prosecution proved their Case where no proper paper trail of Ex.P.1 (Chain of Custody) was recorded as per rules and regulations of P.G.O.

5. THAT, the learned trial Judge erred by finding the appellant guilty where no Conformity test results evidence was led.

6. THAT, the learned trial Judge erred by ignoring the appellant's defence case without assigning sufficient or convincing reasons.

7. THAT, the learned trial Judge erred by holding that the Prosecution proved the appellant guilty with no any reasonable doubt as charged.

When the appeal was called on for hearing on 26/02/2018, the appellant was represented by Mr. Majura Magafu learned counsel whereas the respondent Republic was represented by Mr. Timon Vitalis and Dr. Zainab Mango, learned Principal State Attorneys.

When the appellant's counsel started to argue the appeal commencing with the seventh ground, there cropped up a pertinent issue on a point of law regarding the propriety of the charge laid

against the appellant. Thus, Mr. Magafu submitted that, the appellant was tried on the charge preferred under section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act Cap 95 RE. 2009, which does not exist rendering the charge defective. The learned counsel further pointed out that, notwithstanding that on 4/5/2015, the prosecution sought and obtained leave to amend the particulars of the offence; it never bothered to seek requisite leave to amend the charge. In this regard, Mr. Magafu argued that, since the charge was preferred under a non-existent law, the appellant was not accorded a fair trial and he could as well have pleaded to a different offence. (He cited to us the cases of **ALBANUS ALOYCE & ANOTHER VS REPUBLIC** Criminal Appeal No. 283 of 2015 (unreported) and **REPUBLIC VS KARIM TAIBALE** (1985) TLR 196.

In addition, Mr. Magafu pointed out another anomaly prevalent in the trial court's judgment whereby, the appellant was convicted on the basis of the holding charge which was a subject of the committal proceedings at the subordinate court instead of the information filed in the High Court which also suffers the predicament of having been preferred on a non-existent law.

In view of the said shortfalls, Mr. Magafu argued that, the stated irregularity is incurable and the trial was vitiated including the conviction and the sentence. As such, the learned counsel urged us to nullify the entire trial proceedings and the judgment of the High Court, set aside the sentence and release the appellant who apart from not being accorded a fair trial, has been incarcerated since 2011 on the basis of null proceedings and judgment. To support his proposition, he cited to us the case of **MASHAKA PASTORY PAUL MAHENGI @ UHURU** and **5 OTHERS vs REPUBLIC** Criminal Appeal No. 61 of 2016.

On the other hand, Mr. Vitalis for the respondent Republic submitted that, since the amended particulars of the charge were read over to the appellant without any objection being raised by his legal counsel, raising the complaint on appeal is an afterthought and not compatible with the dictates of section 276 (1) of the Criminal Procedure Act **[CAP 20 RE.2002].** He pointed out that, the trial was not based on the holding Charge which was subject of committal. Instead, the trial was based on the information filed before the High Court which preferred the charge under section 16 (1) (b) (i) of the Drugs

and Prevention of Illicit Traffic in Drugs Act Cap 95 RE. 2009. He insisted that, the Revised Edition 2009 was printed by Law Africa under the Authority of the Attorney General. Besides, he added that citing either of the Revised Editions does not matter because no miscarriage of justice was occasioned and the defect, if any, is curable under section 388 (1) of the CPA. However, Mr. Vitalis did not cite any authority to support his propositions. Furthermore, the learned counsel submitted that, the office of the Director of Public Prosecutions has all along preferred several criminal charges relying on the Revised Laws Edition of 2009 and as such, the charge in question preferred under the 2009 Revised Laws Edition is not a new phenomenon.

Regarding the amendment of the particulars of the offence which is not reflected in the trial court's judgment, Mr. Vitalis argued that, since the elements of the offence remained intact the amendment had no effect whatsoever.

On the way forward, on a bit of a serious reflection the learned Principal State Attorney concluded that, if the Court finds the charge

under scrutiny to be defective, the consequential effect is that, the appellant was never tried. However, he urged us to hold that, the defect cannot be remedied by an acquittal because the conviction, the sentence and the proceedings are vitiated and thus, not in existence. He finally urged the Court to leave the appellant's fate at the mercy of the DPP.

Mr. Magafu rejoined by submitting that, it was incumbent on the trial court to satisfy itself on the propriety of the charge regardless of whether or not the appellant had legal representation. He as well attacked the trial judge's reliance on the particulars contained in the holding charge. The learned counsel argued that, the incurably defective charge cannot be salvaged by section 388(1) of the CPA because the error is on the law under which the charge was preferred and not the particulars of the offence. He concluded by reiterating his earlier prayer that, the appellant be released since he has been in custody since 2011.

After a careful consideration of the submission of learned counsel and the record of appeal, the point for our determination is

the propriety or otherwise of the charge levelled against the appellant. Before embarking on that task, at the outset we have deemed it pertinent to resolve the issue of existence or otherwise of section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act Cap 95 RE. 2009.

We are fully aware, that under the authority vested in the Attorney General under section 4 of the Law Revision Act, No 7 of 1994 Cap 4 RE.2002, there was a consolidation of all amendments to the Drugs and Prevention of Illicit Traffic in Drugs Act (DIPT Act) up to and including 31st July, 2002 in the Revised Edition 2002. In this regard, we wish to state that, the correct manner of tracking amendments to any legislation in our jurisdiction is to cite the amendment Acts subsequent to the consolidation of the Revised Edition of 2002.

In the circumstances, having not spotted any 2009 Revised Edition of the laws of Tanzania, we are satisfied that, there is nothing like the Drugs and Prevention of Illicit Traffic in Drugs Act Cap 95 RE. 2009 as suggested by Mr. Vitalis. It is not the official version of the Revised Edition by the Attorney General mandated under the Law

Revision Act, to prepare, publish Revised Edition of the Laws of Tanzania, and make a continuous revision, update and maintenance.

We now turn to address the propriety or otherwise of the charge laid against the appellant.

It is not in dispute that, the holding charge dated 23rd February, 2015 and subject of committal reads as follows:

*"**STATEMENT OF OFFENCE***

***TRAFFICKING IN NARCOTIC DRUGS:*** *Contrary to section 16(1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act Cap 95 RE. 2002.*

***PARTICULARS OF THE OFFENCE***

***FREDY WILLIAM CHONDE*** *and* ***KAMBI ZUBERI SEIF****, on about 21st day of February, 2011 at Jogoo Street, Mbezi Beach area within Kinondoni District in Dar-es-salaam region, jointly and together trafficked into the United Republic of Tanzania 175411.39 grams of Narcotic Drugs namely: Heroine Hydrochloride or Diacetylmorphine Hydrochloride valued at Tanzanian Shillings Five billion Two hundred and sixty two million three hundred and forty one thousand seven hundred only (Tshs. 5,262,341,700)."*

Apparently, in the trial court's decision at page 236 of the record of appeal, there is a replication of the cited particulars of the offence

appearing in the holding charge instead of the information filed at the High Court whose particulars were amended. This was an unfortunate situation and we shall comment later in view of what we are about to decide.

It is not in dispute as well that, the information filed in the High Court was preferred under Revised Edition of 2009 which we reproduced at the beginning. Furthermore, it is not in dispute that on 4/5/2015 during the preliminary hearing, with leave of the High Court, the prosecutor was granted leave to amend the particulars of the charge. Three months later that is on 5/8/2015 the trial commenced before Mkasimongwa, J. He handed down the judgment on 2/9/2015.

What is in dispute is whether or not the appellant was arraigned on a properly crafted charge sheet.

We begin with the position of the law. The mode in which a statement of offence has to be framed is clearly articulated under section 135(a) (ii) of the Criminal Procedure Act [CAP 20 RE.2002] which provides:

> *"The following provisions of this section shall apply to all charges and informations and, notwithstanding any*

*rule of law or practice, a charge or an information shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this section–*

*(a) (i) A count of a charge or information shall commence with a statement of the offence charged, called the statement of the offence;*

*(ii) the statement of offence shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and,* ***if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence;"***

[Emphasis supplied]

The underlined expression in its plain meaning says it all, that is, the statement of the offence must contain a reference and, for that

matter, a correct enactment creating the offence. We are alive to the principle that, not every defect in the charge sheet would vitiate the trial or rather invalidate it. The resultant effect would depend on the particular circumstances of each case the overriding consideration being whether or not the infringement worked to the prejudice of the person charged. The Court was confronted with a similar problem in **ABDALLA ALLY VS. REPUBLIC**, Criminal Appeal No. 253 of 2013 (unreported), whereby the appellant was tried and found guilty on the basis of a defective charge sheet. Thus, the Court said:

> *"being found guilty on a defective charge based in wrong and/or non- existent provisions of the law, it cannot be said that the appellant was fairly tried in the Court below....In view to the foregoing shortcomings, it is evident that the appellant did not receive a fair trial in Court. The wrong and/or non-citation of the appropriate provisions of the Penal Code under which the charge was preferred, left the appellant unaware that he was facing a serious charge of rape...."*

Corresponding remarks were made by the Court in **MAREKANO VS. THE REPUBLIC,** Criminal Appeal No. 251 of 2014. **KASTORY LUGONGO VS. REPUBLIC,** Criminal Appeal No. 12 of 2015, **CHRISTIAN SANGA VS REPUBLIC,** Criminal Appeal No.512 of 2015. In all these decisions, the Court held that the defective charge unduly prejudiced the respective appellants.

We fully subscribe to the said decisions. In this regard, in the matter under scrutiny, the charge preferred against the appellant ought to have been preferred under the section and enactment creating the offence. However, the charge was preferred under a non-existent law and it is surprising that the prosecution, in a serious offence at hand but they did not invoke section 276 (4) of the CPA to apply for an amendment considering that, the law gives the prosecution a wide avenue of amending the charge sheet at any stage of the trial. Having failed to utilise the opportunity to amend the charge by inserting the correct enactment of the section creating the offence in order to give it life, in our considered view, the prosecution in fact fell on its own sword.

We are as well in agreement with the appellant's counsel that, it was incumbent on the trial judge to satisfy himself on the propriety of the charge sheet before embarking on the trial by making requisite orders in terms of section 276(2) of the CPA.

In the light of what we have endeavoured to explain, it is clear that, the appellant was charged, tried and convicted on a non-existent enactment. This is a fatal irregularity which adversely impacts on the principles of fair trial and as such, it cannot be salvaged under section 388(1) of the CPA as proposed by Mr. Vitalis. We say so because it is the charge sheet which is the foundation of the trial because the principle has always been that an accused person must know the nature of charges facing him before making his defence. On account of an incurably defective charge preferred under a non-existent law, it cannot be safely vouched that the appellant was fairly tried. In this regard, the trial was a nullity and before us no appeal lies.

In view of the aforesaid, we therefore invoke the provisions of section 4(2) of AJA and hereby nullify the entire proceedings and judgment of the trial Court in Criminal Session Case No. 20 of 2015.

We order trial *de novo* with immediate effect based on a proper charge in accordance with the law. The appellant shall remain in custody pending re-trial. In the event of conviction, the period spent by the appellant behind bars should be considered in imposing sentence.

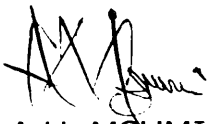
**DATED** at **DAR ES SALAAM** this 6th day of March, 2018.

S. MJASIRI
**JUSTICE OF APPEAL**

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

S. A. LILA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



A.H. MSUMI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**