IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: SEHEL, J.A., KENTE, J.A. And MASOUD, J.A.)

CRIMINAL APPLICATION NO. 42/01 OF 2021

ANNA MOSES CHISANO ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Lila, Korosso And Kente, JJ.A.)

dated the 14th day of September, 2021
in
Criminal Appeal No. 273 of 2019

.....

RULING OF THE COURT

14th Feb. & 6th March, 2024

SEHEL, J.A.:

This is an application for review filed under section 4 (4) of the Appellate Jurisdiction Act (the AJA) and rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules (the Rules). The applicant is moving the Court to review its own decision in Criminal Appeal No. 273 of 2019 on the following grounds:

> *"1. The decision was based on a Manifest error on the face of the record resulting in the miscarriage of Justice as;*

(a) the Court wrongly quoted section 15 (1) (b) of the Drug Control and Enforcement Act No. 5 of 2015 (the DCEA) hence occasioning miscarriage of justice when dealing with Ground No. 5 lodged on 12/09/2019.

(b) the Court mistakenly upheld the sentence of life imprisonment based on a section of law that was amended after the Applicants arrest, hence not applicable in her circumstance.

2. A party (Applicant) was wrongly deprived of an opportunity to be heard as;

(a) the Applicant was denied her Constitutional right for a fair hearing founded under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time (the Constitution) since the Court failed to impose an appropriate and lenient sentence and misdirected to hold that section 15 (1) (b) of DCEA stipulates a statutory sentence of life imprisonment.

(b) the Courts misquoted section 15 (1) (b) of the DCEA hence denied the applicant her fundamental right to a lesser sentence considering that her mitigation was a first offender."

The application is supported by an affidavit sworn by the applicant, Anna Moises Chissano. On the other hand, the respondent Republic fiied an affidavit in reply to oppose the application.

The background of the matter is brief. The applicant was arraigned before the High Court of Tanzania, Corruption and Economic Crimes Division sitting at Dar es Salaam (the trial court) with an offence of Trafficking in Narcotic Drugs contrary to section 15 (1) (b) of the Drug Control and Enforcement Act No. 5 of 2015 (the repealed section 15 (1) (b)) read together with paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 (the EOCCA). She was alleged to have trafficked in narcotic drug, namely, cocaine hydrochloride weighting 3.03 kilograms on 16th November, 2016 through Julius Nyerere International Airport (JNIA).

After a full trial, the applicant was found guilty as charged. Consequently, she was convicted and sentenced to life imprisonment. Dissatisfied, the applicant appealed against both conviction and sentence. In her fifth ground of appeal, the applicant complained that she was charged under two different laws, to wit, the DCEA and EOCCA, which provide for different sentences. Relying on the decision of this

Court in the case of **Yanga Omari Yanga v. The Republic** (Criminal Appeal No. 132 of 2021) [2021] TZCA 220 (1 June, 2021; TANZLII), she beseeched the Court to give her a lesser penalty. The respondent Republic conceded to the complaint that the sentence was improper and illegal. Therefore, the learned State Attorney prayed to the Court that the applicant be sentenced to a lenient punishment provided under section 60 (2) of the EOCCA. The Court considered the submissions made by the counsel for the parties, and observed that, in terms of section 15 (1) (b) of the DCEA, the only sentence to be imposed on a person who traffics in narcotic drugs is life imprisonment. It thus held that, in terms of the proviso to section 2 of section 60 of the EOCCA, the trial court had no choice but to impose the most severe sentence which is life imprisonment stipulated by section 15 (1) (b) of the DCEA. The appeal was therefore dismissed in its entirety. The applicant has now come to this Court seeking for a review on the grounds as earlier on stated.

At the hearing of the application, the applicant appeared in person, unrepresented, whereas, the respondent Republic was represented by Ms. Jenipher Massue, learned Principal State Attorney

assisted by Ms. Edith Mauya and Mossie Kasima, both learned State Attorneys.

When the applicant was invited to argue her application, she opted to adopt the notice of motion, affidavit in support of the motion and wished to first hear the reply submission from the respondent, while reserving her right to rejoin, if there would be need to do so.

Ms. Massue together with Ms. Mauya replied to the application on behalf of the respondent. At the outset, it was admitted that the Court wrongly cited section 15 (1) (b) of the DCEA. The learned State Attorney pointed out that the repealed section 15 (1) (b) was amended in 2017 vide section 8 of the Drug Control and Enforcement (Amendment) Act No. 15 of 2017 (the Amendment Act) by deleting section 15 (1) (a) and renumbered the repealed section 15 (1) (b) to read section 15 (1) (a) of the DCEA. Further, she said, the amendment changed the sentence from maximum sentence of life imprisonment to a mandatory sentence of life imprisonment. Nonetheless, she argued that the Court properly upheld the life imprisonment sentence. She elaborated that, having heard the aggravating and mitigating factors, the sentencing court found it appropriate to impose the maximum sentence upon the applicant. She therefore contended that the error apparent on the face of record did

not result in the miscarriage of justice. Responding to the second complaint on the right to be heard, Ms. Massue contended that the applicant was afforded an opportunity to submit on her fifth ground of appeal concerning sentence. She referred us to page 24 of the impugned judgment. At the end, she prayed that the application be dismissed.

When probed by the Court on whether the Court would have reached to a different conclusion if it properly referred to the repealed section 15 (1) (b), Ms. Massue insisted that the Court would have reached to the same conclusion. To support her submission, she referred us to the case of **Islem Shebe Islem v. The Republic**, Criminal Appeal No. 187 of 2020 where the Court enhanced the sentence from thirty years imprisonment to life imprisonment after considering the provisions of section 60 of the EOCCA and section 15 (1) (a) of the DCEA.

The applicant had nothing material to rejoin rather than asking for the mercy of the Court as she argued that she had been imprisoned for almost eight years.

Having carefully considered the application and the submissions by the learned State Attorney the central issue for our determination is the

sentence of life imprisonment imposed on the applicant by the trial court and later on, upheld, on appeal, by the Court.

In her first ground for review, the applicant complains that there is a manifest error on the impugned judgment. In order to establish manifest error as envisaged under rule 66 (1) (a) of the Rules, the applicant must show three things. **First** that, there was an error. **Secondly**, such error must be manifest on the face of record. **Lastly**, the error must have resulted in miscarriage of justice. By manifest error we mean that the error is so obvious such that it strikes one's eyes immediately after looking at the records and it does not require a long-drawn process of reasoning on points where there may be possibly two opinions. It is an error which is patently clear and self-evident which does not require any extraneous matter to show its existence. We stated this position in **Chandrakant Joshubhai Patel v. The Republic** [2004] T.L.R. 218.

We wish to start by assessing whether there is an error and whether such error is manifest on the face of the record. The applicant claimed that the Court wrongly applied section 15 (1) (b) of the DCEA to uphold her life imprisonment sentence while the offence was committed in 2016. There is no dispute that the applicant was charged and

convicted of an offence of trafficking in Narcotic Drugs contrary to the repealed section 15 (1) (b) read together with paragraph 23 of the First Schedule to the EOCCA; upon conviction, she was sentenced to life imprisonment. The repealed section 15 (1) (b) which the applicant was charged and convicted of read as follows:

> *"15- (1) Any person who;*
> *(a) not relevant*
> *(b) traffics in narcotic drug or psychotropic substance, commits an offence and upon conviction* ***shall be liable to*** *life imprisonment; and*
> *(c) not relevant"* [Emphasis added]

The bolded words *'shall be liable to'* do not mean that the trial court is mandatorily required to impose the stipulated penalty of life imprisonment but rather bestow upon the trial court a discretionary power to impose, depending on the circumstance of each case and upon considering the mitigating and aggravating factors, any appropriate sentence up to the maximum limit of life imprisonment.

The erstwhile East Africa Court of Appeal in the case of **Opoya v. Uganda** [1967] E.A. 752 originating from Uganda defined 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."

The above was quoted with approval by this Court in the cases of **Anthony Samwel v. The Republic** (Criminal Appeal No. 48 of 2010) [2012] TZCA 140 (8 May, 2012; TANZLII), **Faruku Mushenga v. The Republic** (Criminal Appeal No. 356 of 2014) [2015] TZCA 292 (18 February, 2015; TANZLII), **Nyamhanga s/o Magesa v. The Republic** (Criminal Appeal No. 470 of 2015) [2017] TZCA 232 (12 December, 2017; TANZLII), **Bahati John v. The Republic** (Criminal Appeal No. 114 of 2019) [2022] TZCA 407 (11 July, 2022; TANZLII) and **Sokoine Mtahali @ Chimongwa v. The Republic** (Criminal Appeal No. 459 of 2018) [2022] TZCA 575 (23 September, 2022; TANZLII). In the latter case, the Court said:

"The ... phrase "shall ... be liable to imprisonment for a term of thirty years" ...

does not impose the custodial term of thirty years as the mandatory penalty. *It gives discretion to the trial court, subject to its sentencing jurisdiction, to sentence the offender up to the maximum of thirty years' imprisonment depending upon the circumstances of the case after considering all mitigating and aggravating factors." [Emphasis added].*

In that respect, the provision which the applicant was charged with provided for a maximum sentence of life imprisonment. In the appeal, subject of this review, the Court cited the provisions of section 15 (1) (b) of the DCEA in sustaining the sentence of life imprisonment which reads as follows:

"15- (1) Any person who;
(a) not relevant
(b) traffics, diverts or illegally deals in any way with precursor chemicals, substance used in the process of manufacturing of drugs; and
(c) not relevant
commits an offence and upon conviction ***shall be sentenced to life imprisonment."*** [Emphasis added]

Reading through the above provision of the law, the Court rightly interpretated that the only sentence provided for a person convicted of an offence of drug trafficking is life imprisonment but it erred when it referred to the law which was not yet in place at the time when the applicant committed the offence. Therefore, we entirely agree with the submissions made by the parties that there is an error which is clear and patent on the face of the record as it does not require a long-drawn process of reasoning to establish.

We now move to the third ingredient, that is, whether the error occasioned a miscarriage of justice. The learned Principal State Attorney was of the strong view that there was none, because, she argued, the trial court imposed the maximum penalty of life imprisonment after considering the mitigating and aggravating factors. On the other hand, the applicant argued that had the Court considered life imprisonment was not the only sentence it would not have affirmed it.

Having revisited the impugned judgment we observed that, after the Court had made reference to section 15 (1) (b) of the DCEA, it went on to consider the sentencing provisions provided under section 60 of EOCCA. For ease of reference, we reproduce the Court's discussion as hereunder:

*"... **the DCEA provides for only one sentence, life imprisonment.** While that is the case, the EOCCA, read closely and with sober minds, gives various options. These are, first, the Court, where a person is convicted of an economic offence, is enjoined to impose a sentence provided by the EOCCA except where either it or the statement of offence provides otherwise. We think, by "the statement of offence" reference is made to any other law cited in the statement of offence which also imposes a certain penalty/sentence. And, in the present case is the DCEA. Secondly, even where another law provides for a different sentence but more severe than that provided by EOCCA, in the determination of the appropriate sentence, the Court should take into considerations factors set out under subsection (7) of EOCCA. Third, and most important, where another law provides for a more severe sentence, then the Court is imperatively required to impose that sentence. As the proviso came later after the provisions of section 60 (2) of EOCCA and in case where the other law provides for more severe penal measure than that provided under EOCCA, we think, the requirement to pay due regard to the*

provisions of subsection (7) of EOCCA does not apply.

Having laid down the above legal foundation, we now revert to our present case. As demonstrated above, the appellant was charged and convicted of the offence of trafficking in drugs under the DCEA and EOCCA. Under the EOCCA, the sentence stipulated is imprisonment for a term of not less than twenty years but not exceeding thirty years. It still permits the Court to consider the appropriate sentence in terms of the factors set out under subsection (7) of EOCCA. ***The DCEA, on the other hand, provides for only one sentence, life imprisonment. So, in terms of the proviso to section 2 of section 60 of EOCCA, the trial court has no choice but impose the most severe sentence which is life imprisonment as provided by section 15 (1) (a) of the DCEA."***

[Emphasis added].

At the end, the Court held:

"In our case, life imprisonment as stipulated under section 15 (1) of DCEA is the most severe penal measure to a person convicted of trafficking in drug than that provided under

section 60 (2) of the EOCCA. The trial court was, accordingly, obligated to impose that sentence notwithstanding that the appellant was a first offender. In that accord, we hold that the appellant was properly sentenced."

It follows that, in affirming the sentence of life imprisonment meted out to the applicant, the Court had in mind the mandatory sentence of life imprisonment, whereas, the prevailing law at the time of the commission of the offence stipulated a maximum penalty of life imprisonment. We strongly believe that if the Court had considered the repealed section 15 (1) (b) which prescribed maximum penalty, it would not have held that the trial court had no any other option than to impose the most severe sentence. Definitely, it would have appreciated that the trial court had other alternative sentences set out under section 60 of the EOCCA. In that respect, we are satisfied that the applicant was prejudiced as she was subjected to a maximum sentence while the trial court had discretionary power to impose any other sentence, subject to the consideration of mitigating and aggravating factors, including the fact that she was the first offender.

The facts in the cases of **Islem Shebe Islem** (supra) cited to us by the learned Principal State Attorney and **Yanga Omari Yanga**

(supra) are distinguishable from the present application. In those appeals, the offence of drug trafficking was committed in 2018, after the introduction of a mandatory sentence of life imprisonment. It was in that respect, the Court rightly held that had the Court, in the case of **Yanga Omari Yanga** (supra), been adverted to the provisions of the proviso to subsection (2) of the EOCCA which was introduced into the EOCCA in the year 2016, it would not have declined the invitation to enhance the sentence from thirty (30) years imprisonment to life imprisonment. In contrast to the present application, as stated earlier on, the applicant committed the offence prior to the introduction of a mandatory penalty of life imprisonment. Therefore, we strongly believe that, given the circumstance of the present application, if the Court had considered life imprisonment was the maximum sentence which the trial court could imposed on the applicant, it would have allowed the fifth ground of appeal. Consequently, we find merit in the applicant's application for review.

Since the first ground for review suffices to dispose the whole application, we find no need to determine the second ground for review.

In the end, we grant the application for review. We invoke our powers under section 4 (4) of the AJA and rule 66 (1) (a) of

the Rules. We reverse the sentence of life imprisonment which was upheld by the Court in its judgment dated 7th July, 2021 and substitute for the sentence of imprisonment of a term of thirty (30) years which is prescribed by section 60 (2) of the EOCCA.

DATED at **DAR ES SALAAM** this 5th day of March, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Ruling delivered this 6th day of February, 2024 in the presence of the applicant appeared in person and Ms. Edith Mauya, learned State Attorney for the respondent, is hereby certified as a true copy of the original.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL