IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO; 14 OF 2014

(Originating from Criminal Case No; 805 of 2002 in the Resident Magistrates' Court of Dar es salaam, at Kisutu).

EVA MHANDO.....APPELLANT.

Versus;

REPUBLIC.....RESPONDENT

JUDGMENT

08/09/2014 & 24/11/2014

Utamwa, J.

In this appeal the appellant EVA MHANDO challenges the judgement of the Resident Magistrates' Court of Dar es salaam, at Kisutu (trial court), dated 20th of September, 2005. The impugned judgment had the effect of convicting her (the appellant) of one count of being found in unlawful possession of radioactive materials contrary to section 41 (1) of the Protection From Radiation Act, No. 5 of 1983 (Cap. 188, R. E. 2002) as amended by Act No. 12 of 1998.

Before the trial court, the appellant was charged with other three persons who are not parties in this appeal. It was alleged before the trial court (in respect of the first count) that on the 26th day of October, 2002, at or about 23.00 hours, at Magomeni Quarters in Minaki Street within Kinondoni District of Dar es salaam Region, one Makumbo s/o Mayunga (who posed as the first accused) and the appellant (who stood as the second accused), were jointly found in unlawful possession of radioactive materials namely three Earthen Pitchers (containers) of Uranium 238 (U-238) suspected to have been stolen or wilfully possessed without licence. Moreover, in the second count, one Mussa s/o Rajabu Mapusa and Saidi

Nassoro Ally (who were positioned as third and fourth accused persons respectively) stood charged with the same offence. The allegation against them was that, on the 31st day of October, 2002, at or about 18. 00 hours, at Kigamboni area within Temeke District of Dar es salaam Region, the two were jointly and together found in possession of radioactive materials suspected of having been stolen or wilfully possessed without licence. The appellant and all other accused persons pleaded not guilty before the trial court, and five prosecution witnesses testified. The accused persons accordingly made their respective defences, hence convicted and each of them was sentenced to serve two years in prison. The appellant was aggrieved by both the conviction and the resulting sentence, hence this appeal.

Before I go far, I must make some facts related to this appeal clear. According to the records, initially all the convicts mentioned above had appealed against the impugned judgement of the lower court. The appeal was registered as No. 137 of 2005 in this same registry of the High Court. It was however struck out for some reasons. The convicts applied for the restoration of the appeal. But latter, the parties agreed and the court (Mwakipesile, J) ordered the application to be withdrawn with the leave to re-file the appeal. This appeal was thus re-filed on the 4th day of February, 2014. It must further be noted that, when this appeal was re-filed the petition of appeal indicated again that all the four convicts were appealing against the judgment of the lower court. However, Eva Mhando (the current appellant) appeared to be the only active appellant in pursuing the appeal, the other convicts were no nowhere to be seen. When Eva Mhando was examined by the court on 31/3/2014 as to who were the actual appellants, she confessed that she re-filed the appeal herself through her advocate, and she was in fact the only appellant in this matter. She also said that the whereabouts of the other convicts were not known to her and she had not seen them since the matter was determined before the trial court. They were not thus concerned with the re-filed appeal. She also informed the court that the names of the other convicts were inadvertently included into the title of the re-filed petition of appeal only because they appeared in the title of the lower court records.

The court then ordered her (on the 31st day of March, 2014) to amend the petition of appeal so that it could reflect her (Eva Mhando) as the true and sole appellant instead of including the names of the other convicts who did not intend to

re-file the appeal. The order resulted to the amended petition of appeal filed on the 1st day of April, 2014 indicating that Eva Mhando is the only appellant. The rationale for this course is that, the law could not permit a person to appeal on behalf of others without their consent, for an appeal may end up against their interests, and that may result into complaints against injustice since those other convicts would have been judged unheard. This would be a course against the doctrine of fair trial which is enshrined, as one of the fundamental rights under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002. I will thus proceed to consider Eva Mhando as the sole appellant in this appeal thought in their respective written submissions, the counsel for both sides had an impression that all the convicts are parties to this appeal.

According to the amended petition, the single appellant (Eva Mhando) prefers the following three grounds;

1. That the learned Principle Resident Magistrate erred in law and fact by trying and convicting the appellant in the absence of credible or sufficient evidence of possession of the earthen pitchers of radioactive materials.
2. That the circumstantial evidence adduced left doubts in the prosecution case and the proved facts did not justify the inference that the appellant possessed any earthen pitcher of radioactive material.
3. The sentence imposed is excessive in the circumstances of this case.

For these grounds the appellant urged this court to quash the conviction and set aside the sentence. The respondent Republic supported the appeal. It was represented by different State Attorneys at different times, but lastly Ms. Rachael, State Attorney represented it. The appellant was advocated for by R. K. Rweyongeza and Co. Advocates. It was ordered that the appeal be disposed of by way of written submissions, and both sides accordingly filed their respective written submissions unanimously supporting the appeal.

I now test the grounds of appeal. As rightly submitted by the learned State Attorney for the republic, the three grounds of appeal can safely be condensed to two only in the sense that the first and second grounds can be merged. The first ground of appeal can thus be couched thus; that the trial court erred in law in convicting the appellant against the weight of evidence, and the second ground can

read as the trial court erred in imposing an excessive sentence against the appellant. In my adjudicating plan, I will test the first ground of appeal and if need will arise, I will also test the second.

The pertinent and main issue regarding the first ground of appeal is *whether or not there was sufficient evidence before the trial court proving the offence of unlawful possession of radioactive materials by the appellant*. Upon the enactment of the amending Act No. 12 of 1998, the offence at issue became established under s. 41 (3) of Cap. 188 and not under s. 41 (1) as the trial court took it. My research however, shows that Cap. 188 of the Revised Editions 2002 did not include the amendments made to the Act No. 5 of 1983 by the amending Act No. 12 of 1998. It further shows that, Cap. 188 itself was repealed by the Atomic Energy Act, No. 7 of 2003 which was assented by the former President of the United Republic of Tanzania, Benjamin W. Mkapa on the 23rd May, 2003 and came into force on the 1st day of July, 2004, see Prof. Juma, I. H, Index to The Laws of Tanzania Mainland In Force Up to 18 June, 2011, MPJ Publishers, Dar es salaam, 2011, at pages 25 and 310 read together with Audax Kahendaguza Vedasto, Auda's Index to the Laws of Tanzania, From 1920 to 2010, Volume 3, Alphabetical Index, Idea International Publishers, Dar es Salaam, 2011, at page 44. I must be clear here that, despite the above pointed out changes of the law, I will determine this appeal basing on the former law since the offence charged was allegedly committed before Cap. 188 was repealed.

The provisions that established the offence (after the amendments of Cap. 188 by Act No. 12 of 1998) read thus and I quote for a readymade reference;

> "S. 41 (3); Any person who unlawfully possesses any radioactive material commits an offence and on conviction is liable to a fine of not less than one hundred thousand shillings or to imprisonment for a term not less than three years or to both"

In my view, and from the phrasing of these provisions, the following three essential ingredients of the offence at issue had to be cumulatively, and not alternatively, established before an accused person could be found guilty;

i. That the stuff found with the accused was in fact radioactive material.
ii. That the accused in fact possessed the said radioactive material.
iii. That the possession of the same by the accused was unlawful.

I now test whether or not the three ingredients were established cumulatively in the case at hand. I will first test the ingredient numbered i) herein above. The sub-issue to be decided here is therefore, *whether or not the prosecution evidence proved that the substance allegedly found in possession of the appellant was actually radioactive material*. The phrase "radioactive material" was defined under s. 2 of Cap. 188 thus, and I paste the definition for a quick reading;

> "...any matter or substance containing one or more radionuclides the activity or concentration of which is sufficiently intense to entail a significant risk of disability or disease to anybody or organ in exposure, whether external or internal, and whether continuous or total."

The only prosecution evidence regarding the identity of the material at issue (i.e. the four containers admitted in evidence as exhibit P. 3 collectively, two weighing approximately 40 kilograms and two 30 kilograms) is that given by the prosecution witness (PW) No. 1 (Ebeneza Kimaro) who posed himself as an expert of radioactive materials from the then National Radiation Commission (NRC). He testified that he performed the laboratory test of the materials. The other relevant evidence is that contained into the two reports made by PW. 1 and his team showing the laboratory test results for the materials at issue. The two reports were admitted in evidence as exhibits P. 1 and 2.

According to the charge and the prosecution evidence the appellant and Makumbo s/o Mayunga were found with three containers while the two other convicts were found with one container. The exhibit P. 1 relates to three containers while the exhibit P. 2 relates to a single container. In my view, and as rightly argued by the learned counsel for both sides, the evidence of identification of the four containers as radioactive materials leaves a lot to be desired for the following grounds.

In the first place PW. 1 testified that the laboratory test for three containers was performed between 28-29 October, 2002. The test for one container was done after it had been delivered in the NRC laboratory on the 7th day of November, 2002. He further, testified that among the four containers only one proved to be containing radioactive materials and the rest three were not proved so. However, according to the exhibit P. 1 (laboratory test report related to the three containers) and exhibit P. 2 (laboratory test report related to the single container) all the four

containers were found with radioactive materials. The exhibit P. 1 for example, at the last paragraph of page three titled "Recommendation" shows that, and I quote for easy of reference;

> "...The nature of packaging and the materials used for the package together with the information written on the labels of the two packages (I and II) clearly indicate that they contain radioactive materials inside. In the case of the third package presence of radioactive material has been confirmed/detected by an elevated radiation dose rate which are above the background dose rate"

Again, from the exhibit P. 2, at the fourth paragraph in page 3 also titled "Recommendations" the following finding is reported, and I will also quote for a swift reference;

> "(i)...The nature of packaging and the materials used for the package together with the information written on the label of the package IV clearly indicate that it contain radioactive materials inside...(ii) Considering the potential radiological risks associated with improper handling of radioactive materials, **the package IV will be detained by the NRC for further investigations and future safe disposal after the investigations are closed**" (bold emphasis is provided).

The term "package" as used in the two reports represents "container". It follows therefore that, from the two passages just quoted herein above there are serious and material contradictions in the prosecution evidence as follows; while PW. 1 testified that only one container (among the four) was tested positive (as containing radioactive materials) and the rest three were tested negative (as containing no radioactive materials), the exhibits P. 1 and 2 suggest differently. They are to the effect that all the four containers (packages) were positive. Another contradiction is that, while PW. 1 suggests that the laboratory test in respect of all the four containers was completed and the respective reports were made through exhibits P. 1 and 2, the exhibit P. 2 itself (especially in the provided bold emphasis phrase in the lastly quoted passage), clearly shows that the investigative test in respect of the single container that was delivered at the NRC laboratory on the 7th of November, 2002 was still ongoing and had not been completed when the exhibit P. 2 was made and signed. The prosecution evidence does not also tell if at all that investigation was completed thereafter, and does not disclose the date of its completion (if any). Furthermore, from the prosecution evidence it is not certain as to when the single container was subjected to the laboratory test and when the report in its respect (exhibit P. 2) was made. This follows the fact that the exhibit

P. 2 (in respect of the single container) is not dated at all, though exhibit P. 1 (in respect of the three containers) is dated Tuesday, October 29, 2002 (at the bottom in last page).

The above demonstrated discrepancies between the evidence by PW. 1 on one hand and exhibits P. 1 and 2 on the other are serious and go to the root of this case as far as the identification of the alleged radioactive materials at issue is concerned. The discrepancies thus greatly weakens the prosecution case in law. In the case of **Mohamed Said Matula v. Republic [1995] TLR 3** the Court of Appeal of Tanzania (CAT) held that such material contradictions in the prosecution evidence negatively affects its case.

Even if the PW.1's evidence was taken as true, that only one of the four containers was tested positive (though I do find it so), that would not be a helpful piece of evidence because, there was no atom of evidence on record showing that the said positively tested single container was among the three allegedly found in the possession of the appellant, as opposed to the one found in the possession of the other two convicts. In fact, it is not clear as rightly argued by the learned State Attorney for the respondent, as to why the appellant and Makumbo Mayunga on one hand had to be charged together with the two other convicts who were found with different suspected materials, at a different place and on a different date. I thus agree with the learned State Attorney for the respondent Republic that this was a mis-joinder of counts that led to the above pointed out confusion in collecting relevant and material evidence in support of the charge sheet.

There was yet another puncture in the evidence of PW. 1. He testified in cross-examination that he is not a fully skilled expert in matters related to radioactive materials; he only acquired his skills from in-job experience. He added that his office does not have sufficient experts of radioactive materials and tools for the laboratory test of such materials. The office depends on foreign experts. But in this matter at hand, his office got assistance from the International Atomic Energy Agency which gave similar results to what his office gave. He however, said that he did not see the report by the said International Atomic Energy Agency himself. He further added that the working instruments in his office do not sometimes detect the radioactive materials properly. From this piece of evidence, it was not safe for the trial court to rely upon the evidence of PW.1 and the reports (exhibits

P. 1 and 2) being made by confessing semi-experts who also worked with doubtful instruments. The fact that there was a report from the International Atomic Energy Agency supporting the exhibits P. 1 and 2 added no weight to the prosecution evidence because, neither the report was tendered in evidence nor the maker of that report testified. The omissions rendered the contents of the said report (by the International Atomic Energy Agency) hearsay because, PW.1 did not make or see it himself. The law is trite that hearsay has no any evidential value in judicial proceedings and cannot thus support any conviction, see s. 62 of the Evidence Act, Cap. 6 R. E. 2002 which requires oral evidence, in all cases whatever, to be direct, see also the case of **R. v. Mathew Andrew [1967] HCD. 105.**

Moreover, it is conspicuously shown in the two reports (exhibits P. 1 and 2) that more than one person conducted the laboratory test of the suspected materials and prepared the reports. The exhibit P. 1 for example was signed by seven persons including PW.1 while exhibit P.2 was signed by four persons, again the PW.1 inclusive. However, the two reports do not disclose the levels of the expertise of their signatories. The PW.1 did not also disclose the same in his testimony except for his own low level of expertise as indicated earlier. One cannot thus be sure if the signatories indeed had the requisite expertise to perform the test or they were just like the PW. 1.

Again, the PW.1 testified that the laboratory test performed and reported in exhibit P. 1 and 2 was not a scientific one. The contents of the containers were not tested. The report was based on the labels affixed on the containers which are made especially for keeping radioactive materials. But the container with radioactive material had no any label. The labels of the containers could be removed. This evidence could not form a conclusive proof that the contents of the containers were actually radioactive materials. It thus added doubts to the prosecution case as rightly argued by the learned State Attorney for the respondent Republic. I will also agree with the learned counsel for the appellant that if at all the appellant and others were found with such containers, that might have been a case of attempting to obtain money by false pretences. This follows the fact that according to the prosecution evidence the appellant and Makumbo Mayunga were allegedly found possessing the materials in the course of selling them, following a trap-arrangement designed by the police investigators upon being tipped by their informers.

Additionally, it is lucid from the exhibit P. 2 that the then Registrar and Executive Secretary of the NRC dully signed it in endorsing that it was authorised for issue to the concerned authorities. But he did not make a similar endorsement on the exhibit P. 1 and he did not sign it at all. The meaning of this omission is not clear. But one may be justified to interpret it as meaning that the exhibit P. 1 was not authorised by the Registrar and Executive Secretary of the NRC for issue to the concerned authorities, hence not useful as evidence. This interpretation was supported by the law which by then guided matters related to the functions of the NRC and proof of documents issued by it. The law by then provided that any document purporting to be under the hand of the Registrar as to any resolution of the NRC or as having been issued on its behalf, had to be receivable in all courts or tribunals or other bodies authorised to receive evidence and was, unless the contrary was shown, deemed, without further proof, to be sufficient evidence of what was contained in the document, see s. 5 (2) of the repealed Cap. 188 read together with paragraph 10 of the first schedule to it. It was therefore, unsafe for the trial court to rely upon the exhibit P. 1 which was not signed by the Registrar as the law required by then.

Lastly, I must remark here that even if it was true that the PW.1 was an expert on which the then NRC depended much in testing radioactive materials, the above pointed out weakness of the prosecution evidence would not make this court rely upon his testimony. The law of the land is to the effect that courts of law are not bound to accept expert's evidence if there are good reasons for not doing so, see the CAT decision in the case of **Hilda Abel v. Republic [1993] TLR 246.**

From the above weaknesses of the prosecution evidence, I am convinced that the prosecution did not prove in the required standard of "beyond reasonable doubts" that the material alleged found with the appellant were in fact, radioactive materials as defined by the law by then. It is more so considering the defence evidence by the appellant which was to the effect that she was not found with such materials which were in possession of some Congolese boys who run away before they were arrested. In fact, even if her defence was not strong enough, that would not implicate her for, the law is clear that the prosecution has to prove its case beyond reasonable doubts without depending on the weaknesses of the defence case. The law further guides that the accused person in criminal proceedings does not bear any onus to prove his/her innocence unless the statute provides otherwise,

which is not the case in the matter at hand. It is also the law that doubts in criminal proceedings are decided in favour of an accused person, see the decision of the CAT in the case of **Katemi Ndaki v. Republic [1992] TLR 297**. I therefore, answer the sub-issue posed above negatively.

Having determined the sub-issue negatively, I feel not legally bound to test the other two ingredients of the offence under discussion for, that exercise will be superfluous as long as I have found that all the three ingredients of the offence had to be proved cumulatively and not alternatively as per the law in force by then. It follows thus that once one of the ingredients was not established, the offence could not be proved even when the other two ingredients ware proved. I am thus compelled to also find the main issue in respect of the first ground of appeal negatively to the effect that there was no sufficient evidence before the trial court proving the offence under which the appellant was charged, and the trial court therefore, erred in convicting the appellant on such evidence as rightly argued by the counsel for the appellant and supported by the learned State Attorney for the respondent Republic. Furthermore, having found the main issue in respect of the first ground of appeal negatively, I find myself relieved from testing the second ground of appeal related to excessiveness of the sentence since the above finding has the effect of quashing the conviction, which said course will automatically extinguish the sentence, whether excessive or not.

For the above grounds, I find the appeal full of merits and I allow it in its entirety. I consequently quash the conviction against the appellant Eva Mhando and set aside the sentence imposed against her, though from the time lapse it is obvious that the sentence of two years imprison has been completed. The four containers of the suspected materials may be destroyed as no one is currently claiming ownership of the same. It is accordingly ordered.

JHK. UTAMWA

JUDGE

24/11/2014

24/11/2014

CORAM; Hon. Utamwa, J.
For; Appellant; Present in person.
For Respondent; Mr. Paul Makanja, State Attorney.
BC; M/s. Chema Omary.

Court; Judgement delivered in the presence of Mr. Paul Makanja, State Attorney for the respondent Republic and the Appellant, Eva Mhando in court, this 24th day of November, 2014.

JHK. UTAMWA

JUDGE

24/11/2014