IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 53 OF 2020

(Originating from Criminal Case No. 151 of 2019, Hai District Court at Bomang'ombe)

OLYMPIA NICODEMAS SWAI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

At the District Court of Hai at Bomang'ombe, (trial court) the appellant Olimpia Nichodemus Swai was arraigned for the offence of Trafficking in Narcotic Drugs c/s **15A of the Drug Control and Enforcement Act, No. 5 of 2015** as amended by **section 9 of the Drugs Control and Enforcement (Amendment) Act No. 15 of 2017**.

The prosecution marshalled a total of three witnesses and three exhibits which illustrate the appellant was arrested by PW1 and PW2 while on patrol at Oli – Kolili Area at Arusha

highway. They alleged, they stopped a KVC Bus with Registration No. T. 261 CLR which was heading for Arusha from Moshi. They conducted the inspection and seized the alleged drugs together with the appellant who was suspected to be the owner of the bags containing the drugs. A seizure report was filed, and the appellant arrested and charged as per the charge sheet. The prosecution managed to prove its case and the court proceed to convict the appellant, sentencing her to thirty years in prison. The appellant was initially convicted in absentia after she jumped bail, however, the record shows, she appeared before the trial court three months later and the judgment was read over before her. Aggrieved by the proceeding and the decision, she preferred this appeal on the following grounds;

1. That, the trial magistrate erred in law and fact in convicting and sentencing the appellant without establishing a proper chain of custody.
2. That, the trial magistrate erred in law and fact in sentencing the appellant without giving the right to mitigate as required by the law.

3. That, the trial magistrate erred in law and fact in convicting and sentencing the appellant in her absence without giving weight the reasons of her absentia.
4. That, the trial magistrate grossly erred in law and fact in convicting the appellant without considering that the prosecution did not prove its case beyond reasonable doubt.

At the hearing the appellant was represented by Mr. Wilhad Kitaly, learned advocate whereas the respondent was represented by Mr. Omary Kibwanah, learned Senior State Attorney.

In support of the appeal, Mr. Kitaly submitting on the 1st ground stated, the chain of custody was not properly established from when she was arrested till when she was charged. It has been settled through case law that, the procedure should be properly recorded and if not done, a doubt will be casted, which will be to the advantage of the accused.

He argued that, the appellant was arrested inside a bus and per the charge sheet, she was found in possession of Narcotic Drugs namely "catha edulis" commonly known as "Mirungi".

The evidence adduced reveal there was a certificate of seizure (a vital document) which describes the date and time when the exhibit was retrieved. The said Exhibit falls within **Section 38 (3) of the Criminal Procedure Act, Cap 20 as Amended (CPA)** which provides the legal procedure to be followed. The Exhibit should in view thereof have a receipt issued and should be dully signed during the arrest.

Mr. Kitaly went on submitting that, during the arrest there was no receipt issued but following that, the appellant was arrested in a bus with many other passengers together with the bus driver, conductor who witnessed the arrest. Surprisingly the only witnesses during the trial were the police who arrested her. There was therefore no independent witness. The same policemen did prosecute the case, therefore there was a high possibility that the said Exhibit was tempered with. Further, the said Exhibit had no corresponding document to show the chronological movement of the same i.e. where she was arrested, where the police did store the Exhibit, where it was kept up to the time it reached the Government Chemist.

Thus, since there is no documentation to show the movement

of the Exhibit, there is a possibility that whatever reached the Government Exhibit is not what was found within the possession of the appellant. These anomalies should go to the advantage of the appellant. To cement his contention the learned counsel cited the cases of **Shiraz Maulid Shariff V. D.P.P [2005] TLR 387, Paulo Maduka V. Republic, Criminal Appeal No. 110/2007** and **Malumbo V. D.P.P (2011) E.A 280**.

On the 2nd ground Mr. Kitaly submitted that, before sentencing one should be allowed to mitigate, the procedure laid down in the case of **Republic V. Suleiman Said and Another [1977] LRT at page 29**. He argued that, in the proceedings it is not indicated if at all the appellant was availed an opportunity to mitigate after the judgment was read over to her.

Regarding the 3rd ground, Mr. Kitaly asserted that, the appellant under **section 226 of CPA** was convicted in absentia on allegation that, she absconded while on bail, immediately after the preliminary hearing. However, **section 226 (2) of the CPA** requires one to be given an opportunity to adduce reasons as to why she/he went missing. If one has a probable defence, the same should be considered.

However after the appellant had given her reason for non-appearance (sickness), the trial Magistrate did not consider the reason for absence which in fact was out of the appellant's control. He cited the case of **Olonyo Lemuna and another V. Republic, Criminal case [1994] TLR 54** to support his argument.

On the 4th ground of appeal, Mr. Kitaly argued that, the prosecution did not prove its case beyond reasonable doubt. Starting with the charge sheet, the same was defective. The particulars of the offence state, the appellant on 7/6/2019 at 8.05 a.m. at Holili was found in unlawful possession of 11 kilograms of "Mirungi" but in the same charge the word "possession" was not cancelled instead on top written the word "trafficking". No one signed on the alterations made. In the proceedings the said alteration were not reflected. The appellant had facts read out to her without referring as to whether the charge was "trafficking" or "possession". The foregoing apart, the evidence by the 3 prosecution witnesses did not reflect the words in the charge sheet.

The Supreme Court of this land, has laid down the principle

that, the prosecution has a duty to prepare a proper charge, to enable an accused to get an opportunity to prepare a defence. The kind of discrepancies appearing in the charge sheet is fatal in grave offences and the same should benefit the accused as held in the case of **Abdallah Ali V. Republic, Criminal Appeal No. 253 of 2013 CAT – DSM** which mentioned with approval the case **of Marikano Ramadhani V. Republic, Criminal Appeal No. 202/2013** facing a similar situation.

Moreover, PW1 stated that, they arrested the appellant with one black bag, while PW3 stated the appellant had 2 bags. PW1 also explained that the black bag had 34 bundles of "Mirungi" but PW3 stated that it was one black bag with 35 bundles, and that in the two bags one had 13 bundles and the second bag had 22 bundles as reflected at page 12 of the proceedings. More so, PW1 referred to the appellant as a man or boy by using the words "in his bag", "we took him" and "he told us" and further "he was from Moshi". The rest i.e. PW2 and PW3 referred to the appellant as "she" meaning a woman. There is a doubt created since it is not clear if the appellant was a man or woman.

Mr. Kitaly raised another doubt regarding the time of arrest

as PW1 stated it was 2:00 a.m. (night) while PW2 said 8:05 (night) and PW3 (1:00 p.m. in the afternoon). He argued that, all these contradictions go to the root of the case and the same should go to the appellant's advantage. As far as the tendered exhibit is concerned, PW2 who tendered the exhibit identified a single exhibit i.e. a certificate of seizure but in the record the court admitted two exhibits i.e. certificate of search and seizure. This also creates a doubt which should favour the appellant.

Mr. Kitaly pointed out yet another anomaly regarding PW3 taking the samples to the Government Chemist but did not clarify where he got the samples from or under which procedure and in what quantities. PW3, testified that he is the one who filled in the report yet he was not a Chemist or the custodian of the report. PW3 was shown a report from the Government Officer but the court did receive a report on investigation by the Government Chemist. Exhibit "P3" indicates that, the document admitted was different from that which was tendered. The Government Chemist was never summoned in court to verify his report or to ascertain that he received drugs as alleged. The learned advocate finally prayed, this Court allows the appeal, sets aside the

conviction and sentence and proceed to set the appellant at liberty. The major ground being, the prosecution failed to prove the case beyond reasonable doubt as held in the case of **Jonas Nkize V. Republic [1992] TLR 267**.

In reply, Mr. Kibwanah Senior Attorney replied on the 2nd and 3rd grounds that, the appellant forfeited her right after jumping bail hence the case proceeded on one side and judgment delivered in her absence. He added, when a case proceeds without an accused the procedure changes as per **section 226 of the CPA**. At page 15 of the proceedings the trial Magistrate complied with the laid down procedure by addressing the appellant in terms of the said section and after she gave reasons of her absence, the court was not satisfied by the reasons given. Therefore, since **section 226 of the CPA** was complied with, thus, the issue of mitigation does not arise. Regarding the seizure process after the appellant was arrested but no receipt issued, Mr. Kibwanah asserted that, he finds it hard to reply on this ground since the record is silent on whether there was a search done or conducted in the bus in terms of **section 38 or 42 of the CPA**.

On the first ground, Mr. Kibwanah conceded the chain of

custody was not properly established, since the prosecution side during trial, failed to show the chronological events i.e. the movement of the exhibit allegedly found in the appellant's possession from 7/6/2019, how it was stored on 12/6/2019 at the Government Chemist till the hearing of the case in court. This was neither done through parading witnesses nor tendering documents as held in the case of **Paulo Maduka's case (Supra)**. On this ground, Mr. Kibwanah prayed, the appeal be allowed considering that the chain of custody is to satisfy the court that, the Exhibit retrieved is the very Exhibit which was taken to the Government Chemist and was not tempered with.

The learned senior attorney also supported the appeal on the ground that, there was no independent witness who testified as far as the arrest of the appellant and the seizure of the Exhibit is concerned. Although this is not a mandatory requirement found in the **Evidence Act Cap 6 R.E. 2019** nor is there a decided authority on the same but it is a matter of procedure.

On the fourth ground, the learned state attorney admitted

that, it is true that the respondent failed to prove the case beyond reasonable doubt, despite the absence of the appellant. There was no proper chain of custody, the charge sheet itself is defective since it is not certain whether it was "possession" or "trafficking" and the alteration were not signed by the one who made the same.

In view of the first and fourth grounds, the learned state attorney finally submitted that, they support the appeal and pray the conviction and sentence be set aside and the appellant be set free.

In his rejoinder, Mr. Kitaly insisted that, an independent witness such as a bus driver and a conductor could easily be tracked to appear to testify but the prosecution side failed to do so.

After painstakingly going through the proceedings, judgment, grounds of appeal and the respective submissions that support the 1st and 4th grounds appeal, I concur that the offence against the appellant was not proved at the required standard in criminal jurisprudence. Starting with the chain of custody, in the case of **Paul**

Maduka V R, (supra), the Court of Appeal of Tanzania defined the chain of custody as: -

> *"1) .... By a chain of custody, we have in mind the chronological documentation and/or proper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic.*
>
> *2) The chain of custody requires that from the moment the evidence is collected, its every transfer from one person to another must be documented and that it be provable that nobody else could have accessed it...."*

In the appeal at hand, during the trial, the prosecution did not establish how the alleged 34 bundles of "Mirungi" drugs were handled from when PW1 & PW2 seized them, taken to Police, received by a Police officer in charge of exhibits, whether or not the same were recorded in the exhibit register. Further it was not established how the same were taken to the government chemist for analysis and returned, as well as who collected the said "Mirungi" drugs on the day they were brought to court and from the court back to where they were

kept until when they were finally disposed when the case was finally determined. This chain has been broken, actually the record is completely silent on what happened to the exhibits after they were seized. The same was neither established through documentation nor parading of witnesses. Lack of documentation creates a probability that someone else could have accessed the exhibit.

Another fatal irregularity is on the defective charge. It is not clear as to whether the appellant was charged with "trafficking" or "possession" of the alleged drugs. It is common knowledge that the charge sheet is the back bone of the case, it is therefore necessary and important for it to disclose with sufficiency and clarity the essential elements of the offence. This is necessary because it informs the accused on the charges levelled against him/her and at the same time to give him/her the opportunity to prepare his or her defence. Therefore, any move for non-disclosure of the particulars of the offence denies the accused person his or her fundamental right to have his or her defence case well prepared and heard, before determination. The case of **Isdory Patric v. R [2006] TLR 387** clearly states that, the particulars of the charge shall disclose the essential elements

or ingredients of the offence i.e. the prosecution side has to prove that, the accused committed ("*actus reus*") the offence with the necessary "*mens rea*".

From the above analysis and cited authorities it is evident that, the trial court erred in convicting the appellant on a defective charge and such omission goes to the root of the case and was curable only if the charge sheet was amended before conviction.

There are a lot of other doubts but the two discussed suffice to dispose of the appeal at hand. In the case of **Abdallah & 3 Others V Republic Criminal Appeal No. 28 of 2010 CAT at Dar Es Salaam**, it was held *inter alia* that: -

> "...*Where there is any doubt, the settled law is to the effect that in such a situation an accused person is entitled as a matter of right to the benefit of doubt or doubts*"

In the upshot, I am of the considered opinion that, the case against the appellant was not proved at the required standard to warrant the appellant's conviction and sentence. This appeal is therefore meritorious and I allow it by quashing the conviction and setting aside the sentence. The

appellant is to be released from custody with immediate effect unless held for other lawful reasons.

It is so ordered.

B. R. MUTUNGI
JUDGE
11/12/2020

Judgment read this day of 11/12/2020 in presence of the Appellant, Mr. Wilhad Kitaly the Appellant's Advocate and Mr. Kibwanah (S.S.A) for the Respondent.

B. R. MUTUNGI
JUDGE
11/12/2020

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
11/12/2020