**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: LILA, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)**

**CRIMINAL APPEAL NO. 545 OF 2021**

**MUSSA RAMADHANI MAGAE ..... APPELLANT**

**VERSUS**

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

**(Appeal against the Judgment of the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es Salaam)**

**(Banzi, J.)**

**dated the 29th day of October, 2021**

**in**

**Economic Case No. 12 of 2019**

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## JUDGMENT OF THE COURT

15th March & 11th April, 2023

**KOROSSO, J.A.:**

The appellant was charged in the High Court of Tanzania, Corruption and Economic Crimes Division, at Dar es Salaam on three counts. In the first count, the charge was that of trafficking in narcotic drugs contrary to section 15 (1) (b) of the Drugs Control and Enforcement Act, No. 5 of 2015 (the DCEA) read together with paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act [Cap 200 R.E. 2002, now R.E. 2022] (the EOCCA). In the second count, the charge was possession of a small quantity of narcotic drugs contrary to section 17 (1)

(b) of the DCEA, and in the third count, possession of utensils intended for preparation of narcotic drugs contrary to section 16 of the DCEA read together with paragraph 23 of the First Schedule of the EOCCA.

In the first count the particulars are that on 14/9/2017 at Mlandizi area within Kibaha District within Coast Region, the appellant trafficked narcotic drugs namely heroin hydrochloride weighing 200.34 grams. Allegations found in the second count, are that on the same date, and in the same area as in the first count the appellant was found in possession of narcotic drugs namely *cannabis sativa* commonly known as *bhangi* weighing 2.88 grams. In the third count, it was alleged that the appellant on the same date and in the area as stated in the first and second counts the appellant was found in possession of three pieces of tiles intended to be used in the preparation of narcotic drugs. The appellant denied the charge against him in all three counts.

In the trial which ensued thereafter, the prosecution produced seven witnesses and twenty-one exhibits to prove their case. The defence on the other hand paraded the appellant as its lone witness. At the end of the trial, the trial Judge convicted the appellant on the first and second counts and acquitted him on the third count convinced that the prosecution had proved the case against the appellant in the first and

second counts and failed to prove their case in the third count. The appellant was then sentenced to serve thirty (30) years imprisonment in the first count and ordered to pay a fine of Tshs. 500,000/= or three years imprisonment if in default, in the second count.

For reasons to be disclosed in a short while, we find no need to give the background of the case. Suffice it to say aggrieved by the decision of the trial court, three memoranda of appeal containing thirteen grounds were filed for the appellant on 4/4/2022, 6/9/2022 and 28/3/2022. Moreover, as can be discerned from the record of appeal, on 29/9/2022 when the appeal was called for hearing in Court, the appellant abandoned the memorandum of appeal filed on 28/3/2022 by Mr. Wilson K. Magoti, learned advocate who at the time represented him. This was after the appellant had also rejected to be represented by Mr. Magoti. Accordingly, the Court discharged Mr. Magoti from representing the appellant.

Our scrutiny of the eight remaining grounds of appeal found in the two memoranda of appeal filed by the appellant himself reveals that they advance the following grievances: **One**, faults the trial court for convicting the appellant relying on the physical evidence in exhibits P.12-P18 whose substance was neither listed nor read at the committal proceedings in contravention of section 246 (2) of the Criminal Procedure Act [Cap 20

R.E. 2002, now 2022]. **Two**, faults the trial court for convicting the appellant on a defective charge whose particulars did not reveal the essentials of the offence charged to show where the narcotic drugs were seized from. **Three**, faulted the trial court for not considering the procedural irregularities in the search conducted at the appellant's premises in contravention of the CPA and the Police General Orders (PGOs). **Four**, flawed the trial court's failure to consider variance in the testimonies of the prosecution witnesses on the place of seizure and the contents of the seized exhibits and the contents of the DCEA Form 002 (exhibit P2) and the seizure certificate (exhibit P21). **Five**, faulted the trial court's reliance on the contradictory evidence of PW1, PW4, PW5 and PW7. **Six,** queried the trial court's failure to consider the absence of proper labeling, sealing and recording of the seized exhibits at the *locus in quo* and the fact that the chain of custody of the seized exhibits was not intact; and **seven**, failure of the prosecution to prove the case against the appellant beyond reasonable doubt.

On the day the appeal came for hearing before us on 15/3/2023, the appellant appeared in person and informed the Court of his intention to proceed without representation. On the part of the respondent Republic, Ms. Janetherezia Kitaly, learned Senior State Attorney entered

appearance assisted by Ms. Gloria Mwenda, learned Senior State Attorney, Ms. Mossie Kaima and Mr. Bryson Ngidos learned State Attorneys.

When given the floor to amplify his grounds of appeal, the appellant commenced by adopting the grounds in his two memoranda of appeal and the appellant's points of arguments filed on 6/9/2022. He then prayed for the Court to accord the Senior State Attorney the opportunity to respond to his appeal first and he retained the option to rejoin later if he will be so inclined.

We find it prudent to start consideration of the arguments from the contending sides with respect to grievance number one and thereafter proceed to delve into the other grounds of appeal. For the appellant, we will rely on his arguments as found in his filed written points of argument. In essence, in this ground of appeal, the appellant faults the trial court for non-compliance with section 246 (2) of the CPA when it took into account exhibits P12- P18, exhibits he argued, which were neither listed nor mentioned at the committal proceedings. He argued further that with such an infraction it was improper for the prosecution to bring forth such evidence at the trial and for the trial court to admit and consider such evidence.

The appellant had no issue with the statements of the prosecution witnesses who testified at the trial and the three pieces of documentary evidence that is, the Government Analyst report, the certificate of seizure and the sample submission form which were read in court on 18/12/2019 during the conduct of the committal proceedings. He queried the fact that on the date of committal, there was no mention or a provided list of the physical exhibits including exhibits P12-P18. The appellant argued that this error contravened the position of the case law that requires physical evidence to also be part of the committal proceedings. He referred us to the case of **Remina Omary Abdul v. Republic**, Criminal Appeal No. 189 of 2020 (unreported) to reinforce his contention. The appellant further submitted that had the said anomaly been carefully considered, it should have led the trial court to find that the exhibits were improperly admitted and thus led it to refrain from bestowing any weight on exhibits P12-P18. The appellant urged the Court to expunge exhibits P12 to P18 from the Court records. The appellant further argued that when the said exhibits are expunged, there will no longer be any other cogent evidence left for the prosecution to prove the charge against him. He thus prayed for the appeal to be allowed and for him to be set at liberty.

On the other side, Ms. Kitaly, who steered the respondent Republic's submissions, commenced by asserting that the appeal is resisted and that she supported the conviction and sentence imposed on the appellant. Expounding the reasons for her stance, the learned Senior State Attorney began by conceding to the appellant's complaint that exhibits P12-P18 were not particularly mentioned during the committal proceedings. She argued that this was, however, not fatal since the substance of the evidence of the said exhibits were entrenched in the statements of the prosecution witnesses; Faustine John Wanjala (PW1) John Jacob Muhone (PW2), Christina Paulo Katiba (PW4) and Sophia Hussein Hamza (PW7) and a certified Government Chemist Report (exhibit P1), Form No. DCEA 001 (exhibit P2) and the certificate of seizure (exhibit P21) which were read to the appellant during committal proceedings. Ms. Kitaly argued that section 246 (2) of the CPA and Rule 8 (2) of the Economic and Organized Crime Control (The Corruption and Economic Crimes Division) (Procedure) Rules, 2016, GN No. 267 of 2016 (the CECD Rules), were complied with and cited the case of **Ester Jofrey Lyimo v. Republic**, Criminal Appeal No. 123 of 2020 (unreported) to augment her contention.

The learned Senior State Attorney urged us to consider that, the failure by the prosecution to particularly mention the relevant exhibits at

the committal proceedings in light of her submissions on the same, was neither fatal nor prejudicial to the rights of the appellant. It was her contention that the circumstances of the present appeal differed from those in the case of **Remina Omary Abdul** (supra) and thus distinguishable. She concluded her submission by imploring the Court to find that exhibits P12-P18 were properly admitted by the trial court and to find grievance number one to lack merit.

There was no rejoinder from the appellant with respect to this grievance apart from reiterating his earlier prayers urging the Court to consider his grounds of appeal and the written points of arguments.

Having carefully reflected and considered grievance number one, the appellant's and learned Senior State Attorney's submissions together with the cited authorities, certainly, the rival sides are in agreement that at committal proceedings, after the charge (information) facing the accused is explained, the prosecution is required to list and read out the documents and statements containing the substance of evidence they expect to present to prove their case. The rival parties were also in tandem that exhibits P12-18, which are physical exhibits were not explicitly listed or mentioned at the committal proceedings conducted on 18/12/2019.

The contentious issue for our determination, therefore, is whether the physical evidence intended to be tendered as evidence by the prosecution at the trial must undergo the same process. When this issue was raised by the appellant's counsel during the preliminary hearing proceedings on page 30 of the record of appeal, the High Court Judge who presided over at that stage, stated:

> *"The purpose of filing information letter and committal proceedings is intended to ensure that accused person becomes conversant with the charge (s) against him, the intended witnesses, documentary, and physical exhibits which the prosecution intends to reiy on to prove their case against the accused in relation to the charges against him. Committal proceedings serve the purpose that the accused person is not taken by surprise to any facts in respect of the case against him... it enables the accused person to prepare and present his defence and for the issues in dispute to be clearly defined."*

The trial Judge went on to overrule the objection for reason that all the relevant witnesses' statements and documents were read and availed to the appellant and thus there was no element of surprise to occasion injustice or prejudice against him. The trial Judge also found that the

Republic is allowed to list physical exhibits during trial citing Rule 15(2) of CECD Rules.

We understand that the appellant's complaint is that the trial court contravened section 246 (2) of the CPA and Rule 8 (2) of the CECD Rules when considering admissibility and the weight to be accorded to exhibits P12-P18. He argued that the essence of section 246(1) of the CPA also embraces physical exhibits. While Ms. Kitaly on her part, argued that it is not a requirement of the law and that in any case the substance of the physical evidence was provided to the appellant through the statements of the intended prosecution witnesses particularly PW2, PW4, and PW7 and exhibits P1, P2 and P21 which were read during committal proceedings.

We find it important to point out that even though the complaint cites section 246 (2) of the CPA to have been contravened by the trial court and the prosecution, in the instant appeal, since the charges leveled at the appellant were economic offences under the EOCCA, the proper provision was Rule 8 (2) of CECD. However, we take note that the provisions of Rule 8 (2) of the CECD Rules are similar in content to section 246 (2) of CPA, a fact which was also observed by the Court in **Remina Omary Abdul case** (supra). In that case, the Court considered the

applicability of section 246 (2) of the CPA in the appeal before it since the charge was an economic offence and held that:

> *"The Rule, like section 246 (2) of the CPA imposes an obligation on the court holding the preliminary inquiry to make sure that it reads the information and the contents of the statements of potential prosecution witnesses or the documents containing the substance of their evidence. The exercise therefore involves listing of intended prosecution witnesses whose statements have been read out and those of the defence (if any)."*

Furthermore, the Court also made a finding that Rule 8 (2) of the CECD Rules "*is almost a replica of section 246 (2) of the CPA*" and is self-sufficient there is no need to resort to section 246 (2) of the CPA. On our part, we still stand with the said observation, finding it relevant to the instant appeal.

Confronting the issue before us, we find it pertinent at this juncture to reproduce section 246 (2) of CPA and Rule 8 (2) of CECD Rules for ease of reference. Rule 8 (2) of the CECD Rules:

> "Rule *8 (2)- Upon appearance of the accused person before it, the district or a resident Magistrates' court shall read and explain or cause to be read and explained to the accused person or*

*if need be, interpreted in the language understood by him, the Information brought against him as weil as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to caii at the trial."*

Section 246 (2) of CPA which state thus:

*"S. 246 (2)- Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the Information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial."*

The essence of section 246 (2) of the CPA and Rule 8 (2) of the CECD Rules is that the committing court shall cause the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions (DPP) intends to call at the trial to be read and understood by the accused person. The Court has had occasions to address the issue of failure to list exhibits at the committal proceedings. In the case of **DPP v. Sharifu and 6 Others**, Criminal Appeal No. 74 of 2016 (unreported) the Court held:

> *"Our understanding of this provision is that it is not enough for a witness to merely ailude to a document in his witness statement, but that the contents of that document must also be made known to the accused person(s). If this is not compiied with the witness cannot later produce that document as an exhibit in court. The issue is not the authenticity of the document but on noncompliance with the law. We, therefore, agree that unless it is tendered as additional evidence in terms of section 289 (1) of the CPA, it was not receivable at that stage."*

(See also, **Mashaka Juma @Ntatula vs Republic**, Criminal Appeal No. 140 of 2022 and **DPP v. Sheriff Mohamed @ Athuman and 6 Others**, Criminal Appeal No. 74 of 2016 (both unreported)).

What is clear from the above-cited cases is that the Court addressed the failure of the prosecution to list documents and witnesses intended to be paraded at the trial by the prosecution side during committal proceedings. In the instant appeal, the issue for consideration is whether the position stated therein also applies in situations of failure of the prosecution to list physical evidence as the situation in the instant appeal. The learned Senior State Attorney's argument was that it is not a requirement of the law for such evidence to be listed during the committal

proceedings. She argued that even if it was to be taken that the legal requirement also includes physical exhibits, in the instant appeal, consideration should be on the fact that the statements of some of the prosecution witnesses, PW1, PW4, PW5 and PW7 together with exhibits P1, P2 and P21 which alluded to the substance of exhibits P12-P18. According to her, taking into account the fact that the purpose of section 246 (2) of the CPA is to ensure the appellant is made aware of the substance of the intended exhibits for the prosecution, then, without doubt, the appellant through the listing of the said statements of the prosecution witnesses and the stated exhibits at the committal proceedings, means, the substance of exhibits P12-18 made known to the appellant and therefore, the law was complied with.

The Court had an occasion previously to consider the issue before us. In the case of **Remina Omary Abdul** (supra) where on appeal the appellant challenged the fact that exhibit P3 (a) and P3 (b), the alleged narcotic drugs, were not mentioned or listed during committal proceedings as being among the physical exhibits intended to be tendered by the prosecution side during the trial in compliance with section 246(2) of the CPA. In the determination of the issue, the Court considered whether the provisions of section 246 (2) of CPA and Rule 8 (2) of the

CECD Rules applied in that case and whether the two exhibits could be tendered during the trial and acted upon to convict the appellant. The Court made a finding that whilst the referred provisions provide for the inquiry court to read and explain to the accused the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses intended to be called by the DPP at the trial, none of the provisions specifically provides that the physical exhibits be mentioned or listed during committal proceedings. Then the Court proceeded to consider whether in such circumstances it was not a requirement observing thus:

> "... *the substance in the form of flour, a real thing... it should have been made known by the appellant during the committal proceedings. To ensure that it was made clear, it ought to have been explained and listed as being among the intended prosecution exhibits. It is for this reason that, during committal proceedings, it is now established practice that courts not only read and list potential prosecution witnesses, but also read/explain the contents of documents and then list down documentary and physical exhibits the prosecution would rely on during trial. We do not therefore share the view that Rule 8 does not require physical exhibits to be listed down during*

*committal and we endorse the view by Mr. Nkoko that it is a mandatory requirement."*

The position above was restated in the case of **Michael Maige v. Republic**, Criminal Appeal No. 222 of 2020 (unreported), where the Court confronted a similar challenge of failure to list at the committal proceedings, the gold metal detector machine, a real/physical exhibit intended to be produced by the prosecution side at the trial. In that case, the Court dealt with the import of section 246 (2) of the CPA and held that failure of the prosecution to list it as among the intended prosecution exhibits during committal proceedings or to pursue the remedy provided by section 289 (1) of the CPA providing room for prosecution side to seek leave to call additional evidence was in contravention of mandatory requirements of section 246 (2) of CPA rendering the exhibit to have been improperly admitted and thus liable to be expunged.

Indeed, what the Court faced in **Remina Omary Abdul's case** (supra) and in the case of **Michael Maige** (supra) is similar to what is before us as expounded hereinbefore. Alive to the fact that whilst the learned Senior State Attorney conceded to the fact that exhibits P12-P18 were not listed or mentioned in the committal proceedings, she implored us to distinguish this case from the Court's holdings in **Remina Omary**

**Abdul** (supra) and **Michael Maige** (supra). She maintained that the circumstances in the cited cases differ from the present case and that the appellant was not in any way prejudiced since the substance of P12-18 was availed to him through other evidence listed and mentioned at the committal proceedings. She cited the case of **Ester Jofrey Lyimo** (supra) to reinforce her arguments.

Having gone through the case of **Ester Jofrey Lyimo** (supra) we are of the view that it is distinguishable. In that case, the Court addressed the complaint related to evidence of a witness for the prosecution which was not listed or read out at the committal proceedings. The Court dismissed the complaint stating that the substance of her evidence was read out at committal proceedings through the cautioned statement recorded by the said witness. Upon going through the cited decision we are of the view that had the Court been fully appraised of the established principle of law and the remedies available to a party who failed to list a witness or exhibit at the committal proceedings it would have reached a different conclusion as we shall soon explain herein.

Important to note here is that the need to comply with Rule 8 (2) of CECD Rules and section 246 (2) of CPA cannot be overstated and is further amplified by the fact that the law under section 289 (1) of the CPA

provides for the prosecution room upon reasonable notice to call for additional witnesses or evidence where it was not listed or its substance or statement was not read during committal proceedings. This provision further cements the necessity of compliance with section 246 (2) and Rule 8 (2) of CECD Rules. Clearly, circumventing the said provisions will in essence lead to making section 289 (1) of CPA redundant and defeat the purpose of enacting them and the requirement therein. We thus reject the invitation by the learned Senior State Attorney which we are of the firm view will only negate the requirement engrained in section 246 (2) of CPA and Rule 8 (2) of the CECD Rules.

Indeed, in the instant case, a scrutiny of the record of appeal shows that the trial court erred in admitting and considering exhibits P12A, P12A1, P12B, P12B1, P12C, P12D, P12E, P13A, P13B, P14A, P14B, P15A, P15B, P16, P16A, P16A1, P16A2, P16B1, P16B2, P16C1, P16C2, P16D1, P16E1, P16E2, P17, P17A1, P17A2, P17B1, P17B2, P17C1, P17C2, P17D1, P17D2, P17E1, P17E2, P17F1, P17F1, P181A, P181B, P182A, P182B, P183A, P184A, P184B, P155A, P185B, P186 (exhibits P12-18) containing powder substance and dried leaves alleged to be narcotic drugs. Exhibits whose substance was neither presented nor listed during committal proceedings as evidence to be tendered in court by the prosecution side.

We find admitting the mentioned exhibits into evidence to be fatal having contravened Rule 8 (2) of CECD Rules. The exhibits are henceforth expunged from the record.

Having expunged exhibits P12-P18, the alleged narcotic drugs, the question that remains is whether there is another evidence to sustain the case for the prosecution for the conviction of the appellant. Indeed, the charges leveled against the appellant included trafficking in narcotic drugs, that is, heroin hydrochloride 200.04 grams and cannabis sativa (*bhangi)* 2.88 grams. Undoubtedly, the alleged narcotic drugs are what grounded the prosecution case against the appellant. Having expunged the exhibits which founded the charge it means the charge of trafficking in narcotic drugs cannot be said to have been proved beyond reasonable doubt against the appellant by any other available evidence. In those circumstances, as correctly submitted by the appellant, there is no cogent evidence to prove the charges against him.

We thus find grievance number one to have merit and suffices to dispose of the appeal. We find no need to proceed to consider and determine the remaining grounds of appeal. We are of the firm view that for the foregoing, the prosecution failed to prove the charge against the appellant found in the first and second counts beyond reasonable doubt.

In the end, we allow the appeal, quash convictions in both counts against the appellant and set aside the sentences imposed. The appellant is to be released from prison immediately unless he is held for other lawful purposes.

**DATED** at **DAR ES SALAAM** this 6th day of April, 2023.

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

W. B. KOROSSO
**JUSTICE OF APPEAL**

O. O. MAKUNGU
**JUSTICE OF APPEAL**

The Judgment delivered this 11th day of April, 2023 in the presence of Appellant in person via Video Link from Ukonga Prison and Ms. Salome Matunga, learned State Attorney, for the Respondent/Republic is hereby certified as a true copy of the original.


R.W. CHAUNGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**