IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., FIKIRINI, J.A, And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 523 OF 2020

SAID SHABANI MALIKITA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mashaka, J.)

dated the 18th day of September, 2020

in

Economic Case No. 12 of 2018

.....

JUDGMENT OF THE COURT

21st March & 5th June, 2023

FIKIRINI, J.A.:

This is an appeal from the decision of the High Court, in Economic Case No. 12 of 2018, whereby the appellant, Said Shabani Malikita was arraigned for the offences of trafficking and/or unlawful possession of narcotic drugs contrary to sections 15 (1) (b) or 15 (1) (a) of the Drug Control and Enforcement Act, No. 5 of 2015 read together with paragraph

23 of the First Schedule to, and section 57 (1) and 60 (2) of the Economic and Organised Crime Control Act, Cap. 200 R.E. 2002 as amended by Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.

Particulars of the offence are that the appellant on the 29th August, 2017 at Kinondoni Ufipa area within Kinondoni District in Dar es Salaam, the appellant either trafficked or was found in unlawful possession of narcotic drugs namely Heroin Hydrochloride weighing 238.24 grams. The appellant refuted the charges. However, after a full trial, he was found guilty and convicted of the second count in the alternative offence of unlawful possession of narcotic drugs and sentenced to serve thirty (30) years imprisonment.

The appellant is protesting his innocence.

To understand what transpired culminating in the present appeal, an account in a nutshell, as discerned from the eight prosecution and three defence witnesses fielded, is necessary. The evidence revealed that on 29th August, 2017, a special operation by the Drug Control and Enforcement Authority (the DCEA) was carried out on drug dealers and users in the Kinondoni area. On the material day, at around 9.00 pm along Ufipa Street,

the appellant was arrested by PW4, who was in the company of other DCEA officers. Upon search, he was found with a nylon bag containing powdered substance suspected to be narcotic drugs in one of his trouser pockets. A nylon bag was seized. Later a seizure certificate was prepared and signed by the arresting officer, the appellant and an independent witness cum area leader (mjumbe). Other items seized were three (3) handsets, two (2) Nokia make and one (1) Huawei make, a handkerchief and money in a note and coins amounting to TZS. 6.200/=.

The seized nylon bag was on 30th August, 2017 handed to PW2, a DCEA officer and the exhibit keeper. She labelled and made an entry in the exhibit register as file no. DCEA/IR/08/2017. On the same day, PW2 prepared and packed the impounded substance in an envelope in the presence of the appellant, PW3 (an independent witness), PW6, who investigated the case and recorded PW3's statement and other DCEA officers. The envelope was sealed and kept in the exhibit room for safe custody. The envelope was on 4th September, 2017 handed to PW5 to take to the Government Chemist Laboratory Agency (GCLA) for tests.

At the GCLA office, a sample was taken and examined and found to be Heroin Hydrochloride weighing 238.24, by a Government analyst. The remaining sample was sealed and returned to PW5, who returned it to PW2 for safe custody. The Sample Submission Form DCEA 001 was admitted as exhibit P1, whereas a Chemist Report dated 8th September, 2017 confirming the Government analyst finding was admitted as exhibit P2. The nylon bag containing Heroin Hydrochloride was admitted as exhibit P3. Other exhibits admitted during the trial were the seizure certificate as exhibit P4 and the statement of an independent witness during the arrest of the appellant Martin Luambo, who could not appear in court and testify, was admitted as exhibit P5.

In his defence, the appellant denied the charges and testified to having been assaulted by PW4 and other DCEA officers. And a packet suspected to contain narcotic drugs was placed in his pocket by PW4. Although he raised alarm, calling for help from DW2 and DW3 but to no avail. After the futile search, the appellant and others who were arrested were taken to the Police station instead of the DCEA office.

The trial judge was convinced that there was ample evidence that the appellant was found in unlawful possession of narcotic drugs and proceeded to convict and sentenced him to thirty (30) years imprisonment. Offended by the decision, the appellant lodged the present appeal under several Memoranda of Appeal. In his first Memorandum of Appeal lodged on 14th January, 2021 through Mr. Abraham Hamza Senguji, his then advocate, the appellant advanced nine (9) grounds of appeal. This was followed by a Supplementary Memorandum of Appeal containing twenty one (21) grounds of appeal lodged on 2nd February, 2021. Again, on 7th March, 2023 the appellant lodged, yet, another Supplementary Memorandum of Appeal having one (1) ground of appeal and written submission in support of his appeal plus a list of authorities.

When this appeal came on for hearing on 21st March, 2023, Mr. Nehemia Nkoko learned advocate appeared for the appellant and Mr. Edgar Luoga learned Principal State Attorney assisted by Mr. Saraji Iboru and Ms. Mwasiti Athumani Ally both learned Senior State Attorneys, appeared for the respondent Republic. Mr. Nkoko opted to abandon the rest of the grounds of appeal and consolidated some from the main Memorandum of

Appeal and two Supplementary Memoranda of Appeal and came up with four (4) grounds of appeal styled as follows:

1. That the trial court erred in law and fact by admitting exhibit P3 which was not listed during the committal proceedings as contemplated under section 246 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2002 [now R.E. 2022] (the CPA) and Rule 8 of the Economic and Organized Crimes Control (the Corruption and Economic Crimes Division) (Procedure), Rules GN. No. 267 of 2016 (the CECD Rules).
2. That the trial court erred in law and fact for convicting the appellant based on a fatally defective charge sheet and without due regard to the fact that the appellant has already been acquitted on the first count of trafficking in narcotic drugs.
3. That the trial court erred in law and fact in convicting and sentencing the appellant while the search of the appellant and seizure of exhibit P3 did not comply with the law. Taking into account that the chain of custody of exhibit P3 was broken.
4. That the trial court erred in law and fact for failing to properly analyze the evidence and failed to consider the appellant's defence.

Getting the ball rolling, Mr. Nkoko submitting on the first ground of appeal, contended that section 246 (2) of the CPA, which is akin to rule 8 (2) of the CECD Rules, requires that the substance of information should be read out and explained to the accused person and all the exhibits must be listed. Referring us to page 13 of the record of appeal, he argued that, nowhere exhibit P3 was mentioned or its substance read out or explained as required in law. Fortifying his submission, Mr. Nkoko cited the case of **Remina Omary Abdul v. R,** Criminal Appeal No. 189 of 2020 (unreported) in which the Court considered the omission fatal.

Submitting further on the point, Mr. Nkoko argued that exhibit P3, aside from not being listed, was not stated as one of the exhibits to be tendered during the trial. Even during the preliminary hearing, the exhibit was not listed or explained. Failure to list the exhibit and/or explain it to the accused had prejudiced the appellant. In addition, he contended that nowhere has it been indicated that section 289 of the Criminal Procedure Act, Cap. 20 R. E. 2022 (the CPA) was applied. According to him, the omission was fatal, such that section 388 of the CPA cannot cure it. He again referred to the case of **Remina Omary Abdul** (supra), where the Court faced with an akin situation it expunged the exhibit from the record.

He thus invited us to expunge exhibit P3 from the record as well. And without exhibit P3, there is no credible case, he underscored. With that submission, the counsel prayed for the appeal to be allowed, the conviction quashed, the sentence set aside and the appellant acquitted.

Mr. Luoga, outright admitted the omission of not listing exhibit P3 during the committal proceedings. He was, however, of the contention that from the inception of the charge, the appellant was found in unlawful possession of narcotic drugs. Since the appellant had counsel's representation and there was no objection to the tendering of exhibit P3, the appellant cannot say he was not aware of the existence of exhibit P3. Even though not listed but all along he knew his case. And PW1, during his testimony, identified exhibit P3 as the one he handled before and recognized it for the second time during the trial. Therefore, what was before the court and all evidence was in proving the case of unlawful possession of narcotic drugs with which the appellant was being charged.

He further argued that section 246 (2) of the CPA did not require listing physical evidence. Since that was not a legal requirement, he urged us not to consider the omission fatal.

Mr. Iboru chipped in, submitting that the requirement under section 246 (2) of the CPA, was listing of witness statements and documents only. The listing of physical exhibits was not among the listed. The requirement came after the amendment of section 289, which resulted in having section 289 (4) of the CPA. He thus urged us not to consider the appellant's submission as that was not the legal requirement at the time. Besides the non-requirement of listing physical exhibits under section 246 (2) of the CPA at the time, Mr. Iboru wanted us also to consider how the appellant was prejudiced, as from the word go, he knew the charge he was facing was that of either unlawful possession or trafficking in narcotic drugs.

Deliberating on the decision in the **Remina Omary Abdul** case (supra), Mr. Iboru acknowledged the position. He, nonetheless, urged us to depart from the decision, as that was not a legal requirement by then. He concluded by stating that the cases affected by the condition to list and explain physical exhibits should only be those filed after the amendment.

What stands for us to resolve after careful consideration of the rival submissions by the counsel, is whether the omission to list the physical exhibit was fatal or not. From the submissions, it shows that counsel for

the parties agree that the nylon packet suspected to contain narcotic drugs was not listed during the committal proceedings or mentioned during the preliminary hearing. Their point of departure is while Mr. Nkoko considers the omission fatal for failure to comply with section 246 (2) of the CPA, which is a replica of rule 8 (2) of the CEDC Rules, Mr. Luoga and Mr. Iboru are of a different view. They contended that listing physical exhibits was not a legal requirement then and that the appellant had not shown how he was prejudiced with the omission. The basis of the argument is that all the evidence availed was to prove the case of being found in unlawful possession of narcotic drugs. Thus, there was no need to list the nylon packet during the committal proceedings.

In determining this ground, we find it necessary to start by reproducing both section 246 (2) of the CPA and rule 8 (2) of the CEDC Rules:-

> *"Section 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."

Whereas rule 8 (2) of the CEDC Rules provides as follows:-

"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 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."

Aside from being identical, the two provisions are purposive to ensure that the accused was aware of the case against him or her. And this includes knowing the witnesses, the contents of their statements and the documents to be relied on, as well as physical exhibits, if any.

The rationale behind this is not farfetched. It enhances the equality of arms principle, where a fair balance is observed between the opportunities afforded to the parties involved in litigation. As a result,

no surprises on either side are experienced. This will certainly not be achieved if part of the evidence is not disclosed timely to the other party. This Court had an opportunity of dealing with the issue in the case of **Remina Omary Abdul** (supra) in which the case of **The Director of Public Prosecutions v. Sharif Mohamed @ Athuman & 6 Others,** Criminal Appeal No. 74 of 2016 (unreported), was quoted. Explaining various types of evidence of which the other party should be made aware, and the Court stated thus:-

> *"It is also relevant to point out that, there are four types of evidence, that is to say, real, demonstrative, documentary and testimonial...**Real evidence Is a thing whose characteristics are reievant and material. It is a thing that is directly involved in some event in the case..."***
> [Emphasis added].

Going by the principle of equality of arms and the position we held in **The DPP v. Sharif Mohamed & 6 Others** (supra), it is imperative that any evidence involved must be listed and information availed to the accused person during the committal proceedings. It is therefore important to note that compliance with either rule 8 (2) of CECD Rules or section 246

(2) of CPA is a must and not a choice. Or in the alternative resort to section 289 (1) and now specifically section 289 (4) of the CPA is made.

Hence while we agree with the learned Principal and Senior State Attorneys, at the time, there was no legal requirement stipulated under section 246 (2) of the CPA and rule 8 (2) of the CEDC Rules, that physical exhibits must be listed, but we firmly find there was another available option to handle the omission. As pointed out earlier in this judgment section 289 (1) of the CPA, could have been resorted to, but which was sadly not. Mr. Luoga's submission that all along, the appellant had known the charges he was facing, while not disputed, we disagree that it warranted not to comply with the requirement under section 246 (2) of the CPA or 8 (2) of the CEDC Rules.

We also think the argument that PW1 identified exhibit P3 or that it was not objected to during tendering was not sufficient to cure the problem. This is because what PW3 said or did in court or the fact the tendering of exhibit P3 was not objected to, did not invalidate the legal requirement that the accused person know all the information, including exhibits about his case, even though the appellant had legal

representation. It is our firm view that, since both parties are in agreement that compliance with the dictates of section 246 (2) of the CPA or rule 8 (2) of the CEDC Rules is required, non-disclosure of part of the evidence must thus not be taken lightly. Therefore, instead of the respondent demanding the appellant to point out how he was prejudiced, they ought to have done their job. Of course, this depends on the facts of each case. In the appeal before us, despite the appellant not substantiating the prejudices; he must have been prejudiced by not being aware that a physical exhibit would be used against him. We thus reject the invitation by the learned Principal and Senior State Attorneys that the omission was not fatal.

Hand in hand with the above is that we have failed to support Mr. Iboru's urge that we depart from the **Remina Omary Abdul** case (supra). Besides stating that that was not a legal requirement then, he has not assigned any other reason why he was imploring us to do so.

Guided by our decisions both in **Remina Omary Abdul** and **The DPP v. Sharif & 6 Others** (supra), we stress that compliance with the dictates of either section 246 (2) of the CPA for other cases or rule 8 (2) of the CEDC Rules in case of the dealing in narcotics drugs cases, is

mandatory. In **The DPP v. Sharif & 6 Others** (supra), we underscored that:-

> *"Our understanding of the provisions of section 246 (2) of the CPA is that, it is not enough for a witness to merely allude 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 complied with, the witness cannot later produce that document as an exhibit in court. The issue is not on the authenticity of the document but on non-compliance with the law. We, therefore, agree that unless it is tendered as additional evidence in terms of s. 289 (1) of the CPA, it was not receivable at that stage."*** [Emphasis mine].

Although the context in the decision is a document or documents, we want to believe it extends to the listing of physical exhibits, where the accused will be informed of the expected to be evidence against him or her. Again, the application of section 289 (1) was underscored.

Notwithstanding that exhibit P3 had already been admitted in evidence and used in grounding the appellant's conviction in the appeal

before us, we nevertheless think the same was wrongly admitted. Without listing the physical exhibit or applying under section 289 (1) of the CPA to call for additional evidence, exhibit P3 erroneously got its way into evidence under rule 8 (2) of the CEDC Rules. And such action, we say, was prejudicial to the appellant. The exhibit is thus expunged from the record. Having expunged exhibit P3, we ask ourselves if the remaining evidence on record is sufficient to hold up the conviction.

The charges levelled against the appellant include unlawful possession of narcotic drugs, 238.24 grams of heroin hydrochloride. The prosecution case was firmly based on exhibit P3, meaning after expunging the exhibit, the charge of being in unlawful possession of narcotic drugs cannot be said to have been proved beyond reasonable doubt against the appellant as there is no compelling evidence to prove the prosecution case to the hilt.

This has answered the first ground of appeal in favour of the appellant. We find this ground has sufficiently disposed of the entire appeal; hence, there is no need to consider the remaining grounds of appeal.

We allow the appeal, quash the conviction against the appellant and set aside the sentence which was imposed on him. The appellant is to be released from prison immediately unless he is held for other lawful purposes.

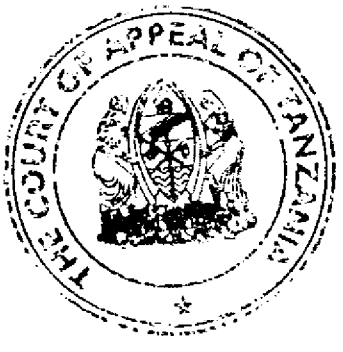
DATED at **DAR ES SALAAM** this 2nd day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 5th day of June, 2023 in the presence of Appellant in person through Video Link from Ukonga Prison and Ms. Hannelore Manyanga, learned Principal State Attorney and Mr. Meshack Lyabonga, 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