IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 189 OF 2020

REMINA OMARY ABDUL .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Appeal from the judgment of the high court of Tanzania, Corruption and Economic Crimes Division)

(Luvanda, J.)

dated 17th day of April, 2020

in

Economic Case No. 04 of 2018

....

JUDGMENT OF THE COURT

11th February & 15th March, 2022

LILA, JA:-

The appellant, **REMINA OMARY ABDUL** and two other persons, namely Maemba Jonathan and Said Makonde Kitalo were arraigned before the High Court of Tanzania (Corruption and Economic Crimes Division) facing a charge of trafficking in narcotic drugs contrary to section 15(1)(b) of the Drugs Control and Enforcement Act, No. 5 of 2015 9the DCEA) read together with paragraph 23 to the First Schedule of the Economic and Organized Crime Control Act, Cap. 200 R.E 2002. (EOCA) The charge, which is also a subject of appeal before this Court in the additional ground of appeal, was couched thus:-

"STATEMENT OF OFFENCE

TRAFFICKING IN NARCOTIC DRUGS*; contrary to section 15(1) (b) of the Drugs Control and Enforcement Act, No. 5 read together with paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act [Cap 200 R. E. 2002] as amended by Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.*

PARTICULARS OF OFFENCE

REMINA OMARI ABDUL, MAEMBA JONATHAN MAEMBA and SAID MKONDE KITALO*, on 29th day of august, 2017 at Kinondoni Ufipa area within Kinondoni District in Dar es Salaam region,* ***did Traffic in Narcotic Drugs*** *namely heroin Hydrochloride weighing 201.38 grams." (Emphasis added)*

Neither the appellant nor the other two persons admitted the accusation. Trial ensued and at its conclusion, only the appellant was convicted and sentenced to serve life imprisonment. The other persons were acquitted hence not parties to this appeal.

Obviously, the appellant was aggrieved by both conviction and sentence hence the instant appeal.

We do not intend, at this stage, to narrate, in details, the facts of the case which precipitated the institution of the present appeal. Instead, we shall give a general highlight on the material facts leading to the present appeal and where necessary and for ease of reference, we shall reproduce the crucial parts of the evidence at a later stage of this judgment. Suffice it to say that the prosecution case was built along eight (8) witnesses who tendered various documentary and physical exhibits as shall become apparent soon. Their version of the evidence was simple and straight forward. It goes this way. An undisclosed informer relayed information to SSP Salimin that there were suspects involved in narcotic drugs business at Kinondoni. Acting on that information, on 29/8/2017 SSP Salmin, who did not testify in court, at around 20.30 hrs, called Inspector Daniel Mtewele (PW2), D/SSGT Titolaus, SGT Juma Suleman Ally (PW8), WP Christina Paul Kitiba (PW6), DC William and DC Lazaro and told them that Remina Abdul (the appellant) and Maemba Jonathan Maemba were suspected of dealing with drug business. The six policemen who worked with the Drug Control and Enforcement Agency Authority (DCEA Office) formed a search team which went to the appellant's residence at Ufipa Street Kinondoni area to conduct search. The three suspects were found outside the house where there was a bar but there were no customers.

After introducing themselves, a ten cell leader one Martin Lwambo was traced at his home so as to participate in the search as an independent witness that was to be conducted in the appellant's residence. PW2, the ten cell leader PW6 and PW8 entered in the appellant's house. Search started at the appellant's bedroom where 31 sugar-like cubes were found in the box which was in the clothes cupboard. Search proceeded to the sitting room where two transparent packets which contained flour-like substance were retrieved behind a television cabinet. The two packets were tied up together. A certificate of seizure was filled and PW2, PW6, Martin Lwambo, the appellant and one Maemba Jonathan Maemba signed on it. The certificate of seizure was tendered and admitted as exhibit P4. Martin Lwambo's statement was recorded thereat. The three suspects were arrested and taken to DCEA offices located along Malik street, Upanga area where the statement of the appellant was recorded by PW6. PW2 stored the retrieved substances in the cabinet in his office and on 30/7/2017 at around 9.30hrs, he handed it to the store keeper one SP Neema (PW3).

When PW2 was cross-examined by Mr. Nehemia Nkoko, learned advocate, who represented all accused persons, regarding which parts of the house were searched, he stated that:-

> *"I do not remember the number of rooms in Remina's house. The only rooms we entered were the sitting room and the bed room and it was on information from our informer. The house also has a bar.* ***We did not search the other rooms, we only searched the rooms where our information had relayed ..."*** (emphasis added)

PW3, on 30/8/2017, packed the retrieved substances in envelopes "A" and "B" in the presence of three suspects namely; Remina Omari Abdul (the appellant), Maemba Jonathan Maemba and Said Mkonde. John Jacob Muhone (PW5), an independent witness, also witnessed the packaging. Envelope "A" contained the two packets found at the sitting room while envelope "B" contained 31 sugar-like cubes found in the bedroom and all of them signed on it. On 4/9/2017, PW3 handed them to D/CPL Lazaro Raphael Mhegele (PW4) who took them with Form DCEA 001 (exhibit P1) to the Government Chemist Laboratory Agency (GCLA) where it was received by Elias Mulima (PW1), a Government Chemist who signed on exhibit P1 and also labeled the envelopes containing the substances with laboratory No. 2410/2017. Upon subjecting them to laboratory test, it was revealed by PW1 that envelope "A" which had two packets weighing 201.31 grams contained heroin hydrochloride while envelope "B" which had 31 sugar-like cubes

did not contain narcotic drugs. Envelopes "A" and "B" with the respective contents were tendered and admitted as exhibits P3(a) and P3(b), respectively after an objection to its admissibility by the defence counsel on the competence of PW1 to tender them was overruled by the learned trial judge. PW1 reduced the findings in Form No. DCEA 009 (a report) dated 8/9/2017 (exhibit P2). PW4 then returned the substances to PW3 for safe custody on the same day. During the trial, efforts to secure the whereabouts of Martin Lwambo, to testify by A/Insp. Beatus Venas Tuyanywe (PW7) proved futile and the court summons with the endorsement by Ufipa street hamlet office that Mr. Martin Luambo's whereabouts was unknown were admitted as exhibit P5.

According to the record, PW2 and PW6 gave similar evidence on how search was conducted at the appellant's house. That, PW2, the ten cell leader, PW6 and PW8 and the three suspects entered in the appellant's house and participated in the search in the appellant's bedroom where 31 cubes of sugar were retrieved from a box located in the clothes' cupboard. Further searches at the sitting room behind the television cabinet, 2 packets containing flour-like substances were retrieved. While that is the case, in his evidence PW8 at page 209 of the record, in respect of who participated in the search. Part of his testimony was that:-

> *"...The police officers searched themselves in their bodies to show things which were in their possession into the pocket. After that search, I entered inside where I took a role of security for that search.* ***When the team entered inside to conduct search, I remained outside at the sitting room*** *to prevent other people to enter..."* (Emphasis added).

PW8 went further to state that after the search he recorded Martin Luambo's statement which was admitted as exhibit P6.

The foregoing prosecution version was strongly controverted by the three accused persons whose defence amounted to a complete denial of the accusation. To be specific, the appellant (DW1) claimed that she was a business woman engaged in shop keeping, catering and saloon businesses. She claimed that she was arrested by armed policemen who wore civilian clothes at night while she was at her house when she turned out to see what had befallen of her brother who she heard him crying. That, after introducing herself as being Remina, she was arrested, seriously beaten and taken into the police car wherein she found her son Maemba (DW2), her brother Said Mkonde(DW3) and another person she did not know and were thereafter taken to Central Police Station where they spent a night. That, the following day, they

were taken to Diamond Jubilee area near a military base at Upanga where again she was tortured by battery wire being inserted into her ears and later beaten and forced to tell them that her son was a drug dealer. She further claimed that upon admitting that her son was a drug dealer, her photograph was taken and was later returned to Central Police Station before being taken to court on 12/10/2017. She denied her house being searched, seeing Martin Lwambo that day, knowledge of exhibit P2 and also signing on exhibit P4.

On his part, Maemba Jonathan Maemba (DW2) claimed that he was arrested by police when he intervened so as to rescue his mother (DW1) who was being beaten by unknown persons. He denied the accusation of using narcotic drugs and that he thought he was arrested for assisting his mother. Said Makonde Kitalo (DW3), in his defence, claimed that he was a dealer in selling used clothes and was arrested by police when he made a comment whether those who were arresting people were police officers or unknown persons. That he was taken to Central Police Station before he was, later arraigned in court together with DW1 and DW2.

At the conclusion of the trial, the appellant's co-accused persons were acquitted. The appellant was convicted and in so doing it stated thus:-

> *"Finally, whether the act committed by the first accused person amounted to trafficking in narcotic drugs. According to penal provision to wit section 15(1)(b) of the Drugs Control and Enforcement Act, No. 5 of 2015, provide that it is an offence to traffic in narcotic drug or psychotropic substance. Section 2 of Act No. 5 of 2015 (supra) define trafficking to mean (and include) storing by any person of narcotic drugs.*
>
> *Now, so far the two packets containing flour of heroin, exhibit P3(a) were kept by the first accused at her premises (sitting room). Therefore the first accused is taken to have been storing heroin, which amount to trafficking in narcotic drug within the purview of the definition of trafficking depicted above....*
>
> *The first accused is convicted for trafficking in narcotic drugs contrary to section 15(1)(b) of the Drugs Control and Enforcement Act, No. 5 of 2015 read together with Paragraph 23 of the First Schedule to the Economic and Organised Crime Control Act (Cap. 200 R. E. 2002) as*

amended by Written Laws (Miscellaneous amendment) Act No. 3 of 2016."

Aggrieved, the appellant presented a six (6) point memorandum of appeal. Before the commencement of hearing of the appeal, Mr. Nkoko, learned advocate, who together with Mr. Mpaya Kamara, also learned advocate, represented the appellant, rose up and sought leave of the Court to abandon grounds 4 and 6 of appeal which leave was granted and the same were accordingly marked abandoned. Accordingly, these four grounds remained:-

> " (1) *That the trial judge misdirected himself by receiving exhibit P3 (a) and P3 (b) which were not listed during committal proceedings and preliminary hearing as contemplated under section 246(2) of the Criminal Procedure Act, Cap 20 R.E 2002.*
>
> (2) *That the trial judge misdirected in convicting and sentencing the appellant based on the testimonies of PW2 and PW6 without assessing the demeanor of PW1. It also failed to analyze properly the evidence adduced by the prosecution before concluding that the prosecution case was proved beyond reasonable doubt.*
>
> (3) *That having regard to the circumstances of the case and contradictions in the evidence adduced by the prosecution on the arrest of the appellant, search and*

seizure, the trial judge was biased and misdirected in finding that the appellant was found in possession of exhibit P3 (a) and P3 (b) and signed exhibit P2 while PW8 was at the sitting room alone while others were inside the appellant room something which raised doubt that exhibit P3 (a) was planted.

(4) *That the High Court misdirected in failing to properly analyze the evidence given by the appellant and the respondent and shifted the burden of proof to the appellant."*

Mr. Nkoko did not stop there. He further sought leave of the Court, in terms of Rule 81(1) of the Tanzania Court of Appeal Rules, 2009 to be permitted to argue a ground of appeal not specified in the memorandum of appeal. As the prayer was not resisted by the prosecution, we granted him leave to present and argue that new ground. It states that:-

> *"That the trial judge erred in law and fact by convicting and sentencing the appellant on the defective information as it did not disclose the specific type of trafficking something which prejudiced the appellant."*

In amplifying the grounds of appeal, Mr. Nkoko opted to start arguing the additional ground of appeal. It was his submission that the

information at page 3 of the record of appeal is wanting for failure to disclose to the appellant the specific type of trafficking she was being charged with. Elaborating, he argued that the definition of trafficking under section 2 of the DCEA encompasses a number of types of trafficking including importation, exportation, buying, sale, giving, supplying, storing, possession, production, manufacturing, conveyance, delivery or distribution by any person of narcotic drug or psychotropic substance hence a need to specify the relevant one in the particulars of the offence to which the appellant was called upon to answer in the charge. According to him, the defect was not cured by the evidence on record as the prosecution witnesses also made references to various types of trafficking. He took us through the record pointing out such references. He started with PW2 who, at page 66 line 19 to 20 and page 67 line 10 to 11, said SSP Salmini told them "*that there were suspects involved in narcotic drugs* ***business*** *in Kinondoni area...*". As for PW6, he argued that page 92 line 9, shows that the suspects "*were involved in narcotic drugs,* ***use and dealing****...*" and in line 12 to 14 he talked of "*...**dealing with narcotic drugs**...*" Accordingly, Mr. Nkoko lamented that the evidence, too, was not specific as to the nature and type of trafficking charged hence rendering the charge fatally defective. To substantiate his assertion that the appellant and her co-accused persons

were prejudiced, Mr. Nkoko, submitted that there is clear evidence that the accused persons did not understand the type of trafficking hence were not certain how their defence should be aligned. As a result of that ambiguity, he argued, the accused persons gave inconsistent defences in respect of the type of trafficking. He then pointed out examples of the inconsistences and uncertainties apparent in the defence evidence which clearly reflected the confusion created by both the charge and the evidence. Beginning with the appellant (DW1), the learned counsel referred us to page 216 line 13 where she talked about ***drug dealer,'***; page 217 line 18 where DW1 said "...*What I am saying I am not* ***vending narcotic drugs***..."and page 220 line 9 to 11 where she said "... My child Maemba is not **using narcotic drugs**..."

In respect of DW2, Mr. Nkoko referred us to page 222 line 21 to 23 where he said "... *may be I was arrested for assisting my mother. No witness testified to involve me in narcotic drugs. I never* ***used narcotic drugs...***"

Mr. Nkoko's attack did not end there. He went further to point out that even DW3 was not an exception to the confusion created by the charge and prosecution case. He referred us to page 224 lines 20 to 23 of the record where, in his defence, DW3 stated that "...*I never*

transported narcotic drugs*. There is no exhibit or witnesses who said that I am* ***involving in narcotic drugs****..."*

In view of the above nature of defence evidence led by the appellant and her co-accused persons, Mr. Nkoko submitted that each one defended himself/herself on what he/she understood of the charge. He concluded that the charge was not informative enough to the appellant and other accused persons to enable them marshal a focused defence. They were thereby prejudiced, he contended. Consequently, he pressed, the appellant was unfairly tried. In the circumstances, he argued, that the appellant's ultimate conviction of **storing** was not proper. He urged the Court to nullify the trial and let the appellant free. On this stance, the learned counsel sought fortification from our decision in the case of **Hamisi Mohamed Mtou v Republic**, Criminal Appeal No. 228 of 2019 (unreported).

Mr. Nkoko, then, argued with force the remaining grounds of appeal. He started with ground 1 of appeal where the complaint is centered on admissibility of exhibits P3(a) and P3(b) which he argued that they were not mentioned and listed during committal proceedings as being among the physical exhibits intended to be tendered during trial by the prosecution. He faulted the learned trial judge for holding

that it was an afterthought to raise the issue in the final submissions. It being a legal issue, he stressed, the learned judge was obligated to determine it. In the circumstances, he argued that they were wrongly introduced into evidence. He urged the Court to expunge them from the record of appeal with the consequences that, in their absence, the charge cannot stand.

Mr. Nkoko's final attack was on the propriety of the arrest, search and seizure of exhibits P3(a) and P3(b) which complaints are comprised in grounds 2, 3 and 5 of appeal which he opted to argue together. He submitted that page 66 of the record clearly shows that the search team which comprised of PW2, PW6 and PW8 had time to prepare themselves before going to the appellant's house to conduct search and then arrest her. He argued that PW2 got information from one SSP Salmin at 20.30hrs who in turn had received such information from the informer. It being not an emergence search, he wondered why there was no search order issued and tendered in court as required under section 38 of the Criminal Procedure Act Cap. 20 R. E. 2019 (the CPA). Besides, he argued, the search was wrongly conducted at night and without the court's permission. Relying on the case of **Shaban Said Kindamba v Republic**, Criminal Appeal No. 390 of 2019 and the **Director of Public Prosecutions v Doreen John Mlemba**, Criminal Appeal No. 359 0f

2019 (both unreported), he lamented that that was quiet in violation of section 40 of the CPA. Following that violation, he urged the Court to expunge such evidence. He relied on the holding by this Court in the case of **Joseph Charles Bundala v Republic,** Criminal Appeal No. 15 of 2020 (unreported) to augment his assertion.

Participation of the appellant in the search was also taken in issue by Mr. Nkoko. He submitted that exhibit P6 did not indicate that the appellant was involved in the search exercise in her residence which fact is supported by PW2 and PW6 who, at pages 67 to 68 and page 90, respectively, simply stated that the appellant signed the seizure certificate. Such prosecution evidence, he argued, has a lot of bearing on the appellant's defence evidence that search was conducted in her absence and she did not sign the search certificate. He further submitted that it was for that reason it was not surprising that the learned trial judge doubted the validity of the search in his judgment at pages 364 to 365 but failed to make a finding in favour of the appellant. The infraction pointed out prompted Mr. Nkoko to urge the Court to hold that the search was illegal.

Another complaint linked to the above is that there were serious contradictions and discrepancies in the prosecution evidence regarding

whether PW6 signed the certificate of seizure. Mr. Nkoko pointed out that while PW6 herself, at page 93, denied signing on it, PW2, at page 68, claimed that she signed. The discrepancy, Mr. Nkoko, argued, was serious and went to the root of the case which was not resolved by the trial judge.

The last grievance linked with search and seizure is that exhibit P3(a) could have been placed and owned by someone else than the appellant. Mr. Nkoko's contention was that, exhibit P3(a) was, according to evidence, found behind the television cabinet which was an open space accessible to many people who stayed therein hence the possibility that it was placed and was owned by another person other than the appellant could not be discounted. Further elaborating, he argued that in the circumstances of this case and the manner the search, arrest and seizure was effected, chances of exhibit P3(a) being planted or owned by another person cannot be eliminated. He referred us to a foreign decision in Appeal No. XC40/11/HCJAC 57, **Mrs. Mary Hutten Martin or Lees versus Her Majesty's Advocate**, (Lord EASSIE, LORD DRUMMOND YOUNG., and LORD WHEALEY); APPEAL COURT, HIGH COURT OF JUSTICIARY.

In reply, Ms. Matikila did not quite contest the complaint that the charge did not disclose the specific nature or type of trafficking the appellant was accused of in the charge but she was not ready to accept that the charge was thereby rendered fatally defective. She appreciated the fact that section 2 of the DCEA outlines various acts which constitute the offence of trafficking and the charge did not specify, in the particulars of the offence, which one was a subject of the charge leveled against the appellant. Nonetheless, she was quick to argue that the charge is clear enough and even if there were some deficiencies, the evidence led by the prosecution salvaged the anomaly. She insisted that the evidence on record is clear that the appellant had kept exhibit P3(a) behind the television cabinet hence the learned trial judge was right to convict the appellant with "storing". The anomaly is, she pressed, easily curable under section 388 of the CPA.

Responding specifically on the contention by Mr. Nkoko that the prosecution witnesses were not consistent on the type of trafficking thereby prejudicing the appellant, Ms. Matikila stoutly opposed that contention. She submitted that witnesses differed in their explanation of the information they got from SSP Salimin and PW2 but not in the substance of the evidence they gave. She argued that all those who formed the search team were consistent that exhibit P3(a) was found

behind the television where it was kept hence the appellant was not prejudiced and the line of defence she took clearly indicated that she knew the accusation she was facing. She accordingly urged the Court to find that ground unmerited and dismiss it.

In response to ground 1 of appeal, Ms. Matikila submitted that the Economic and Organised Control (The Corruption and Economic Crimes Division) (Procedure) Rules GN No. 267 of 2016 (henceforth the CECD Rules) provides for the procedure governing search and seizure in matters involving drugs and Rules 2 and 8 deals with committal proceedings in which naming or mentioning the exhibits, whether physical or documentary is not a requirement hence failure to list exhibit P3(a) during committal proceedings could not bar production and admission of it during the trial. She distinguished the procedure of conducting committal proceedings under section 246 of the CPA and that under the CECD Rules arguing that the former requires all exhibits to be listed and not the latter. In the alternative, she argued that in the event the Court is to find otherwise, then it should consider the contents of the letter at page 1 of the record forwarding the information to the trial court which stated that "*physical exhibits will be tendered during trial of the case*" and the seizure certificate (exhibit P6) listed during committal proceedings to have had sufficiently indicated the intention to

produce exhibit P3(a). In addition, Ms. Matikila submitted that even the facts for preliminary hearing mentioned exhibit P3(a). She accordingly beseeched the Court to hold that the appellant was not prejudiced since the infraction is curable under section 388 of the CPA.

In her response to Mr. Nkoko's contentions in grounds 2, 3 and 5, apart from conceding that the DCEA permits invocation of the provisions of the CPA where there is a *lacuna* in the DCEA, the learned Senior State Attorney was emphatic that search and arrest in drugs cases is effected in accordance with the DCEA and under that Act, section 48 does not require an officer from DCEA to have a search warrant before effecting search. Since those who formed the search team were from DCEA, she submitted, then there was no need to have search warrant which is applicable to police officers who conduct search in accordance with the provisions of the CPA.

Effecting search at night did not pose any issue to Ms. Matikila who argued that it was not clear when the informer informed SSP Salimin the incidence but the latter revealed the information at about 20.30 pm. Search was conducted at that night during which time the search team had no time to obtain a search warrant or permission from the magistrate because the courts do not work at night. She, all the

same, urged the Court to treat the contention as an afterthought following the appellant's failure to cross-examine the witnesses on the issue of search warrant. The case of **Deus Josiah Kilala @ Deo v Republic,** Criminal Appeal No. 191 of 2018 (unreported) was relied on to augment that assertion. Otherwise, she was of the view that the cases cited by the appellant's counsel are distinguishable.

Last to be addressed by Ms. Matikila is the allegation that the trial court failed to appreciate contradictory evidence regarding PW6 signing the certificate of seizure (exhibit P4). She readily agreed with Mr. Nkoko that, indeed, PW6 did not sign exhibit P4 and that the fact that PW2 said PW6 signed is not a serious contradiction which did not change the factual setting of the case.

Finally, the learned Senior State Attorney prayed that the appeal should be dismissed.

Rejoining, Mr. Nkoko stressed that the cases cited by the appellant are relevant to the case at hand. For instance, he argued, the case of **Shabani Said Kindamba v Republic** (supra) dealt with the applicability of the CPA in drugs cases when section 32 of DCEA was discussed by the Court. In respect of the appellant participating in the search, he urged the Court to look at page 92 where those who entered

the appellant's house were listed and will realize that she (the appellant) is not listed hence supporting her contention, during defence, that her house was not searched and if searched then it was so done in her absence. Otherwise, he reiterated his earlier submission and urged the Court to allow the appeal, quash the conviction and set the appellant free.

We have duly considered the rival contentions by the counsel of the parties. We shall first consider the merit or otherwise of the additional ground of appeal. As already pointed out above, Mr. Nkoko's attack on that ground of appeal was directed at the information which he claimed was fatally defective for want of a specific type of trafficking. He impressed on us that the omission was fatal and occasioned injustice to the appellant. On her part, Ms. Matikila was candid enough to concede to the omission but she argued that it was inconsequential in view of the manner the charging provision is couched.

Admittedly, the complaint raised by Mr. Nkoko in respect of the charge is a bit intractable. In the first place, we are alive to the mandatory requirement under section 132 of the CPA that every charge shall contain not only a statement of the specific offence with which the accused is charged but also such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

This requirement hinges on the fact that in a criminal trial a charge is the foundation of any trial against an accused person. (See **Mussa Mwaikunda v R** [2006] T. L. R. 387). Accordingly, the particulars, in order to give the accused a fair trial, the particulars should be informative enough so as enable him to align a proper defence. They must allege the essential facts (ingredients) of the offence required by law.

We are, in the instant appeal, invited to determine whether or not the charge under discussion, as quoted above, lacks the basic attributes of a charge which would have reasonably informed the appellant the nature of the case she was to answer.

In approaching this issue we are mindful that the information laid at the appellant's door was predicated under section 15(1)(b) of the DCEA read together with paragraph 23 of the First Schedule to the EOCA as amended by Act No. 3 of 2016. The said section 15(1)(b) reads as follows:-

"15.-(1) any person who-

(a) ....(not applicable)

(b) Traffics, diverts or illegally deals in any way with precursor chemicals, substances with drug related effects and substances used in the process of manufacturing of drugs; ..

(c)..............(not applicable)

commits an offence and upon conviction shall be sentenced to life imprisonment.

While the above provision creates an offence of trafficking in drugs, the provisions of sections 2 and 15(2) of DCEA, in almost similar wordings, provide for the definition or instances under which the crime of trafficking is committed as follows:-

> *"trafficking" means the importation, exportation, buying, sale giving, supplying, storing, possession, production, manufacturing, conveyance, delivery or distribution, by any person of narcotic drug or psychotropic substance any substance represented or held out by that person to be a narcotic drug or psychotropic substance or making of any offer ..."*

From these provisions and a reading of sections 15 and 15A of DCEA as a whole, it will be immediately realized that trafficking in drugs as an offence encompasses various manners of handling of narcotic drugs or psychotropic substances. It is crystal clear that the manner of

handling drugs as stated under sections 2 and 15(2) of DCEA does not create species of crimes. Instead, it is the type or nature of substance involved which creates a certain type or category of an offence. Sections 15(3)(i)(ii)(iii) and 15A(2)(a)(b)(c) of the DCEA are clear on this. The categories of offences created are trafficking in-

(i) Narcotic drugs, psychotropic substances weighing more than two hundred grams;

(ii) Precursor chemicals or substance with drug related effect weighing more than 100 litres in liquid form or 100 kilograms in solid form, or

(iii) Cannabis and or khat weighing more than fifty kilogram.

As these categories of offences are founded on certain and specific factual circumstances (ingredients) without which the offence cannot be committed, such ingredients must be included in the particulars of the offence. The categorization is done by the statute hence the need to spell out the essential ingredients or type of trafficking in the charge becomes imperative.

We have examined the charge in the light of the above position in the instant case, and we are inclined to accept the reasoning by Ms. Matikila that all types of trafficking defined under section 2 of DCEA constituted one offence of trafficking in drugs hence there was no need

to specify the type in the particulars of the offence. We also note with satisfaction that the particulars of the offence, in very clear terms, made it clear that the category of the offence was trafficking in narcotic drugs and went further to name the type of drugs as being heroin hydrochloride quite in line with section 15(1)(a) of DCEA although it inadvertently cited as subsection (b). That section provides:-

"15.-(1) Any person who-

(a) Trafficks in narcotic drug or psychotropic substance..."

We think, therefore, that the issue of the charge failing to specify the type or nature of trafficking does not completely arise.

We have given ourselves ample time to examine the decision of this Court in **Hamisi Mohamed v Republic** (supra) relied on by Mr. Nkoko. Nevertheless, we are of the firm view that facts in that case are distinguishable with the present ones. In that case the drugs were seized in a bag belonging to Hamisi Mohamed who was at the Julius Nyerere International Airport (JNIA). Such circumstances, in our view, posed an issue whether he was trafficking them from or importing into the United Republic of Tanzania. Conversely, in the present case the drugs were allegedly seized from a cabinet behind a television in the sitting room. It is obvious to us that that case was decided according to

those peculiar facts. We think, in view of the facts and arguments placed before us, we cannot avoid taking the course we have taken.

Much as we agree with Ms. Matikila that it is true that PW2, PW6 and PW8 recapped what they were told by SSP Salimin by giving different expressions as to what the appellant and the other two persons were suspected of, yet they were consistent in their testimony that exhibit P3(a) the subject of the information was found in the cabinet behind the television. The record is clear on that and we are of a decided view that the appellant and her co-accused were made aware of that. The fact that the appellant and her co-accused took different courses of defence particularly on what they were being accused of, by itself, cannot be a justification that the charge and/or the evidence was not clear to them. It was a matter of one's understanding. A charge may be proper and clear, yet that is no guarantee that the accused person will defend himself on that line. More often accused persons, for their own reasons, have decided to lead any defence they consider favourable to them. That is their prerogative. All the same, the manner of handling drugs referred to by the appellant and her co-accused persons still amounted to trafficking in narcotic drugs as defined under section 2 and 15(2) of DCEA. It goes without saying that, whether the finding of exhibit P3(a) under the circumstances explained by witnesses amounted

to "**storing**" as the learned judge concluded or possession is inconsequential for a reason that any of such acts or types of handling drugs constitute an offence termed trafficking in narcotic drugs as defined under sections 2 and 15(2) of DCEA. That said, we hold that there was no need to mention the specific type of trafficking in the charge. We, accordingly, find no merits in this complaint and hereby dismiss it.

We now turn to consider ground 1 of appeal that the trial judge misdirected himself by receiving exhibit P3 (a) and P3 (b) which were not listed during committal proceedings and preliminary hearing as contemplated under section 246(2) of the CPA.

Central in this complaint is that the learned trial judge wrongly acted and relied on exhibits P3(a) and P3(b) to convict the appellant because they were not mentioned and listed during committal as potential exhibits to be tendered during trial. We think mentioning here exhibit P3(b) is an incongruity because it was not found to contain drugs. Hence could and did not ground the appellant's conviction. We shall therefore have focus on exhibit P3(a) only.

It was common ground that the two exhibits were not specifically mentioned and their substance read during committal proceedings. But,

according to Mr. Nkoko, in terms of section 246 of the CPA which governs the conduct of committal proceedings, such exhibits could not be tendered in court. That proposition was strongly disputed by Ms. Matikila who argued that conduct of committal proceedings in cases of this nature is governed by Rules 2 and 8 of the CECD Rules which became operational on 9/9/2016 which has no such requirement. Even if that was the requirement, the letter transmitting to the trial court the information for committal and the mention of them during preliminary hearing remedied the anomaly. Two issues stem out clearly calling for our determination here. **One**; whether the provisions of section 146 of the CPA applies in this case, and **two**; whether the two exhibits could be tendered during trial and acted on to convict the appellant.

We have perused the respective provisions and we agree with both counsel that they provide for the same procedure of conducting the committal proceedings. They imperatively require the inquiry court (district or resident Magistrates' 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 whom the Director of Public Prosecutions intends to call at the trial. Neither of them specifically provides that the physical exhibits be

mentioned or listed during such exercise. Does it mean that it is not a requirement as proposed by Ms. Matikila ?

We will consider, first, the issue whether section 246(2) of the CPA applies in this case. For clarity we hereunder quote Rule 8(2) thus:-

> *"(2) Upon appearance of the accused person before it, the district or a resident magistrate' 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."*

This 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). It is thus plain that Rule 8(2) of the CECD Rules is almost a replica of section 246 (2) of the CPA. It is self-sufficient hence no need to resort to

the CPA in conducting committal proceedings. However, the two provisions being identical, there can be no doubt that they serve the same purpose of ensuring that the accused is made aware of the case he is going to face in court during trial hence prepare his defence. Such was the pronouncement by the High Court of Tanzania (Corruption and Economic crimes Division) in the case of **Republic v Raymond Adolf Louis & 6 Others**, Economic Case No. 1 of 2017 (unreported) where it categorically stated that:-

> *"(i) When one carefully reads rule 8(2) of the Economic and Organized Crime Control (The Corruption and Economic Crimes Division) (Procedure) Rules, 2016 GN 267 of 2016, the purpose of reading the evidence to the accused in committal proceedings is to avail the accused with the substance of the prosecution evidence against them and in effect enable them to device a defence against the accusations."*

We fully subscribe to the pronouncement. Since the Rule is a replica of section 246 of the CPA, we have no doubt that the principles propounded by the Court when interpreting section 246 of the CPA to ensure that the above stated purpose is achieved squarely apply in committal proceedings conducted under Rule 8 of the Rules. One such

principle is that no witness whose statement or a document the contents of which is not made known to the accused during committal will be allowed to testify or be received in evidence during trial. The principle accords well with the rule against surprise.

The aforesaid purpose would definitely not be achieved if part of the evidence is not disclosed. In the case of **The Director of Public Prosecutions v Sharif Mohamed @ Athuman and 6 Others,** Criminal Appeal No. 74 of 2016 (unreported), the Court made it clear that there are various types of evidence when it stated that:-

> *"It is also relevant to point out that, there are four types of evidence, that is to say, real, demonstrative, documentary and testimonial. The general rules of admissibility of relevance, materiality, and competence, apply to all those types of evidence. In the present appeal two types of evidence come to the fore, namely, real and documentary.*
>
> *Real evidence is a thing whose characteristics are relevant and material. It is a thing that is directly involved in some event in the case..."*

In the present case, admissibility of exhibit P3(a) is being questioned by the appellant on the ground that it was not listed during

committal proceedings. It is a substance in the form of flour, a real thing hence a real evidence. Its admissibility in court is, therefore, subject to compliance with Rule 8 of the CECD Rules that is; 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.

Given the above exposition of the law, was exhibit P3(a) properly admitted as exhibit? This is the issue we now revert to resolve. It seems clear that the learned counsel are at one that exhibit P3(a) was neither explained to the appellant nor listed as among the exhibits to be tendered by the prosecution. Ms. Matikila, however, contended that the letter transmitting the information to the court and the statement by witnesses indicated existence of exhibit P3(a) hence sufficiently informed the appellant about it. We are not ready to go along with her

contention. Alluding to a document or exhibit and reading and listing it are quite distinct processes. In **The DPP v Sharif and 6 Others** (supra), this Court faced an identical situation. In that case Inspector Samwel Humphrey Maimu alluded in his witness statement read during committal proceedings about a register of exhibits which was however not listed as one of intended exhibits to be tendered and in the substance of his testimony identified it. But his attempt to have it received as an exhibit was objected to on the ground that it would contravene the provisions of section 246(1) of the CPA. Nonetheless, the trial judge overruled the objection. On appeal, it was contended that section 246 refers to both statement and documents hence it was not enough to read the statement of the witness alone without the documents that goes along with it. That, it requires both the witness statement and document must be read during committal. The Court stated that:-

> *"Our understanding of the provisions of s. 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."

Section 246 of the CPA and Rule 8 of the CECD Rules emphasize on the requirement of listing down all the intended witnesses whose statements were read out to the accused, documents and other physical exhibits for them to be receivable during trial.

In the present case, therefore, although exhibit P3(a) was mentioned in the letter transmitting the information to the trial court and also may have been mentioned in the witnesses' statements, that would not have made it admissible. Ms. Matikila's contention misses legal basis and is therefore dismissed. We accordingly hold that it was improperly received as an exhibit. We expunge it from the record of appeal.

Having expunged exhibit P3(a), the subject matter of the charge, from the record, definitely, no other evidence would be able to ground the appellant's conviction.

We would have ended there, but we find ourselves compelled to consider grounds 2, 3 and 5 of appeal and seize the opportunity to address the propriety of search conducted at the appellant's house. While the prosecution insisted that a proper search was conducted in the appellant's sitting room and exhibit P3(a) was seized from the cabinet behind the television, the appellant vigorously disputed her house being searched and, if done, then it was done in her absence. However, we wish to, at first, put things right regarding the contention by Ms. Matikila on the applicability of the provisions of the CPA in searches conducted by Officers of DCEA in matters related to drugs. Ms. Matikila forcefully argued that section 48 of the DECA does not impose as a requirement that an officer conducting search should have a search warrant when conducting search. Mr. Nkoko, on the other hand, had a different view. Similar issues arose and, we think, were exhaustively considered and resolved by the Court in the recently decided case of **Shabani Said Kindamba v Republic**, (supra) cited to us by Mr. Nkoko where the Court categorically stated that the provisions of the DCEA relating to search and seizure were not intended to replace the CPA but rather subject them to the CPA. In that case, after a thorough examination of sections 32(7) and 48(2) of DCEA and section 38 (1) and

(3) of the CPA which deals with search, the Court pronounced itself thus:-

> *"In our conclusion on the two related issues, there is no justification for the learned Senior State Attorney arguing that the search and seizure was under the DCEA and therefore a search warrant was not a requirement. This is because sub-sections (4) and (5) of section 32 of the DCEA cited by above, require that arrests and seizure be conducted in accordance with the law in force, specifically in this case, the CPA."*

We think, with this stance, the seemingly doubt exhibited by Ms. Matikila stands cleared. Given that stance of the law, possession of search warrants where search is not an emergence one, observance of time of conducting search and need for permission from magistrate when search is conducted beyond prescribed time as stipulated by the two legislations and the Police General Orders (PGO) 226 are matters which cannot be dispensed with. These provisions are there for lending credence to not only the manner search and seizure is conducted but also to the property seized.

Our reading of the record quite obviously contradicts the learned Principal State Attorney's argument that search conducted in the

appellant's house was an emergence one. As was rightly argued by Mr. Nkoko, PW2, PW6 and PW8 in very clear terms stated that they were summoned by one SSP Salimin at around 20:30hrs in his office at DCEA and were told about the mission of conducting search at the appellant's residence. That they then prepared themselves by taking the firearms, search order and papers for recording witness statements. Nothing came out from them as to what prevented them from obtaining a search warrant. Besides, they arrived at Kinondoni at around 20:45 and search was conducted at 21:00hrs. That was night time. Search conducted, under the circumstances, cannot be said to be an emergence one. The search team had enough time to ensure they comply with the laws regarding search and seizure by possessing the search order and search warrant. The more so, search was conducted at night time without the court's permission. As those documents were not produced in court during the trial, we have no hesitation to agree with Mr. Nkoko that there was non-compliance with the provisions of section 38 and 40 of the CPA rendering the search illegal.

The manner exhibit P3(a) was retrieved is not free from doubts, either. The record bears out clearly that the search was not done by a specific officer. It appears, it was a random search as each of those who formed the search team (PW2, PW6 and PW8) was not forthcoming as

to who was specifically assigned the duty to search. Not surprisingly, they all stated that they found the two packets tied up together at the cabinet behind the television which presupposes that all those who formed the search team conducted the search. We unreservedly expressed our concern on such kind of search that it is not free from the possibility of a search object being planted in the case of **Shabani Said Kindamba v Republic** (supra). Our worries are further enhanced by the fact that when search was being conducted in the appellant's bedroom, PW8 remained at the sitting room where exhibit P3(a) was later retrieved. We need not overemphasize that the way certificates of seizure are crafted suggests that search is conducted by one person and others present will simply witness it. This explains why they sign it as witnesses. Besides, the record further bears out that no further search continued thereafter which fact casts more doubts on why it stopped there without satisfying themselves that no more drugs could be found therein. One may be made to believe that the search team new well before where the drugs were something which, again, invites suspicion on the whole exercise. In all, the whole exercise of the search and seizure casts doubt which, in our criminal jurisprudence, is resolved in favour of the appellant.

In view of what we have stated herein above, we are of the considered view that there was no sufficient evidence to ground the appellant's conviction. Consequently, the appeal is hereby allowed, conviction is quashed and the sentence is set aside. The appellant shall be released from prison forthwith if not held therein for another justifiable cause.

DATED at **DAR ES SALAAM** this 7th day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 15th day of March, 2022 in the presence of Mr. Nehemia Nkoko, learned counsel for the Appellant and Mr. Waziri Magumbo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL