IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

CORAM: MWAMBEGELE, J.A. MWAMPASHI, J.A. AND MASOUD, J.A.)

CRIMINAL APPEAL NO. 84 OF 2019

GRACE TETA GBATU.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Fikirini, J.)

dated the 07th day of March, 2019

in

Criminal Session Case No. 47 of 2016

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JUDGMENT OF THE COURT

16th & 23rd August, 2023

MWAMPASHI, J.A.:

The appellant herein, Grace Teta Gbatu, a Liberian by nationality, was arraigned before the High Court of Tanzania at Moshi (the trial court) facing the offence of trafficking in narcotic drugs contrary to section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act [Cap. 95 R.E. 2002] as amended by Act No 6 of 2012 (the Drugs Act). It was alleged that on 01.12.2013 at Kilimanjaro International Airport (KIA) within the District of Hai in Kilimanjaro Region, the appellant was unlawfully found trafficking 10.064 grams of heroin hydrochloride valued at Tshs. 603,840,000/=. She denied the charges but after a full trial he was found guilty, convicted and

sentenced to life imprisonment. Aggrieved, she has preferred the instant appeal.

Briefly, in as far as the instant appeal is concerned, the material and relevant facts leading to the arrest, arraignment and conviction of the appellant are as follows; It all started during the early hours of 01.12.2013 at about 03:00 hours when the appellant showed up at KIA, enroute to Freetown via Nairobi Kenya. The appellant had two bags which when placed through the airport security screening machine, were found to contain some suspicious substances whose images could not be identified. The two bags, which had the appellant's name tag, were thus intercepted by the airport security officers on duty namely; Frank Lister Chindundwa (PW4) and Emmanuel Joel (PW5). When asked about the bags, the appellant confirmed to be the owner. The appellant was also asked to unlock one of the bags which when opened was found to contain clothes and other personal effects. The empty bag, which according to PW4 and PW5, was still unusually heavy even after being emptied, was placed through the screening machine and again the unidentified images were detected. Thereafter, the linings of the bag were cut open and four (4) sponge pillow like bags containing suspicious powder substance were retrieved. At this point, the incident had to be reported to the airport security officer in charge, one Ahmed Mwachalula, who came with a number of officers including Ass/ Inspector Shufaa and F. 1219 D/Cpl.

Fredrick (PW8). Upon their arrival, the other bag was also unlocked by the appellant and when its linings were cut open by Ass/Inspector Shufaa, four (4) other sponge pillow like bags containing suspicious powder substance were retrieved.

From the airport, the appellant and the seized 8 sponge pillow like bags were taken to KIA Police Station before the OCS one ASP Leonidas Ng'ende (PW3) who later handed them and other exhibits found in the appellant's possession to F. 1157 D/Stg. Hashim (PW2) for safe custody at the Regional Police Headquarters - Kilimanjaro. Before being handed over to PW2, the sponge pillow like bags which contained powder substance suspected to be illicit drugs, were sealed in four (4) khaki envelopes and labelled. On 11.12.2013, PW2 handed over the sealed 4 envelopes to PW8 who took them to the Chief Government Chemist at Dar es Salaam for chemical analysis. The powder substance in 8 sponge pillow like bags sealed in the four envelopes were tested and chemically analysed by Machibya Ziliwa Peter (PW1) who confirmed that the suspicious powder substance in question was heroin hydrochloride weighing 10.064 grams. The same was tendered in evidence by him as exhibit P2.

In her defence, the appellant who maintained her disassociation from being found trafficking the illicit drugs in question, told the trial court that she had come to Tanzania on 22.11.2013 to visit her boyfriend, one

Jack Benson. On the material night she was at the airport ready to fly back home and it was when she was heading to the immigration desk, when a certain airport security officer approached her and demanded to inspect her two travelling bags. She left the bags with the said officer and proceeded to the immigration desk. While there, she was approached by another security officer who told her that her two bags had some problems. She was then taken to a certain room where she found her two bags open and torn. The appellant did also see four sponge pillows like bags on the table. Thereafter she was taken to KIA Police Station and then to Moshi where she was remanded till 10.12.2013 when she was arraigned before the Resident Magistrates' court.

After a full trial and having considered the evidence on record, the trial court agreed with the unanimous decision of the assessors that the prosecution had managed to prove the case against the appellant to the hilt. The appellant was thus found guilty of trafficking in 10.064 grams of heroin hydrochloride, convicted and sentenced to life imprisonment.

Aggrieved, the appellant has preferred this appeal premised upon a total of 19 grounds of complaint contained in two memoranda of appeal. The initial memorandum of appeal was filed on 09.08.2019 and is comprised of 14 grounds while the supplementary memorandum which was filed on 24.08.2022 contains 5 grounds. We should also point out that

although the parties addressed us on all 19 grounds of complaint, we however, for reasons that will become apparent in the course of this judgment, neither intend to reproduce all of them nor canvass the relevant parties' arguments. For purposes of this judgment the focus and concentration will be on ground 7 which reads:

> *"That the learned trial Judge grossly erred in both law and fact in relying on exhibit P2 (four brown/khaki envelopes containing pillow/sponges with contents therein) while the same flouted the mandatory provisions of section 246 (2) of the Criminal Procedure Act, Cap 20 R.E. 2002".*

When invited to amplify her grounds of appeal, the appellant, who appeared in person, unrepresented, adopted her grounds of appeal and let the learned State Attorneys representing the respondent Republic to respond to the grounds. She however, reserved her right to rejoin should the need to do so arise.

The respondent Republic was represented by Ms. Cecilia Mkonongo, learned Principal State Attorney, assisted by Mr. Henry Chaula, learned State Attorney. At the outset, Ms. Mkonongo readily conceded that exhibit P2, that is, 10.064 grams of heroin hydrochloride, was not listed or mentioned, neither during the committal proceedings nor at the preliminary hearing. Notwithstanding her concession to the omission in question, Ms.

Mkonongo still expressed her stance of opposing the appeal. She argued that, under the circumstances of this case, the failure to list or mention exhibit P2 during the committal proceedings, did not contravene section 246 (2) of the Criminal Procedure Act [Cap. 20 R.E. 2002; now R.E. 2022] (the CPA), as complained by the appellant. She explained that by 15.08.2016 when the committal proceedings of the case at hand were conducted, it was not a requirement under section 246 (2) of the CPA, for physical exhibits intended to be relied upon by the prosecution at the trial, to be listed or mentioned. Ms. Mkonongo emphatically contended that by then, it was only documentary exhibits which were required to be listed.

It was further argued by Ms. Mkonongo that the requirement or principle for physical exhibits to be listed or mentioned during committal proceedings, was established by the Court in **Remina Omary Abdul v. Republic,** Criminal Appeal No. 189 of 2020 (unreported) whose decision was delivered on 15.03.2022. That being the case, it was contended and insisted by her that since the committal proceedings and the trial of the instant case were conducted before the Court decision in **Remina Omary Abdul** (supra) then, section 246 (2) of the CPA was fully complied with because by then, it was not a requirement under that provision for physical exhibits to be listed or mentioned during committal proceedings.

Ms. Mkonongo went on arguing that though she has no problem at all with the decision of the Court in **Remina Omary Abdul** (supra) and many other decisions that followed, her humble prayer is for the principle in **Remina Omary Abdul** (supra) which is procedural in nature, not to be applied retrospectively on the cases whose committal proceedings were conducted before **Remina Omary Abdul** (supra).

It was finally submitted by Ms. Mkonongo that, should the Court find that by exhibit P2 not being listed or mentioned during the committal proceedings, section 246 (2) of the CPA was contravened, the Court should also find that the appellant was not prejudiced. She explained that since the object of the exercise under section 246 (2) of the CPA is to let the accused person know beforehand the substance, kind and nature of the prosecution evidence upon which the case against him is built, then under the circumstances of this case where the contents of the certificate of seizure (exhibit P13) were read out then the appellant was sufficiently informed that the narcotic drugs in question (exhibit P2) would be tendered in evidence and the purpose of section 246 (2) of the CPA was thus served.

For the above reasons, Ms. Mkonongo insisted that, under the circumstances of this case, the ground is baseless and should be dismissed.

In her brief but focused rejoinder, the appellant insisted that the omission not to list or mention exhibit P2 neither during the committal

proceedings nor at the preliminary hearing, was fatal. She argued that since the prosecution did not indicate or show any intention that exhibit P2 would be tendered in evidence and relied upon at the trial, she was prejudiced because she was made to understand that the said exhibit would not be tendered in evidence. The appellant insisted that it is settled that failure to list or mention physical exhibits the prosecution intend to tender and rely upon at the trial during committal proceedings or at the preliminary hearing, is fatal. She thus urged us to find that the trial court erred first, in admitting exhibit P2 in evidence and then in grounding the conviction upon it. Placing reliance on our decisions in **Remina Omary Abdul** (supra) and **Kristina Biskasevskaja v. Republic**, Criminal Appeal No. 65 of 2018 (unreported), the appellant insisted and prayed for her appeal to be allowed.

Having heard the arguments for and against the appellant's complaint on ground 7 of the appeal, we find it not disputed that exhibit P2 was not listed or mentioned neither during the committal proceedings nor at the preliminary hearing as one of the exhibits the prosecution intended to tender and rely upon, at the trial. It is also common ground that, it is settled that all physical exhibits the prosecution intends to tender and rely upon, at the trial, are required to be listed or mentioned during committal proceedings and further that failure to do so is fatal and contravenes section 246 (2) of the CPA. The only issue for our determination comes

from Ms. Mkonongo's argument that when the committal proceedings were being conducted on 15.08.2016, it was not a requirement under section 246 (2) of the CPA for physical exhibits intended to be tendered in evidence and relied upon at the trial by the prosecution, to be listed or mentioned during committal proceedings. The issue calling for our determination in this matter, is therefore whether, taking into consideration the circumstances of this particular case, the admissibility of exhibit P2 was subject to compliance with the demands of section 246 (2) of the CPA.

We find it pertinent to begin by reproducing what is provided under section 246 (2) of the CPA, thus:

> *"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".*

Admittedly, as also acknowledged by Ms. Mkonongo, the scope of application of section 246 (2) of the CPA regarding physical exhibits was one of the issues that was discussed by the Court in **Remina Omary Abdul** (supra). In that case the trial court had received in evidence exhibit P3(a) (heroin) which was not listed or mentioned neither during committal

proceedings nor at the preliminary hearing as contemplated under section 246 (2) of the CPA. The Court observed, among other things, that, though it is not specifically provided under the provision in question that physical exhibits should be listed or mentioned during committal proceedings, that does not mean that it is not a requirement to do so. It was thus concluded by the Court that:

> *"Section 246 (2) 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".*

We should also re-state and emphasize, at this stage, that, the purpose of the exercise under section 246 (2) of the CPA is to avail the accused person with the substance and nature of the evidence the prosecution intends to lead against him at the trial. The exercise is aimed at enabling him to know the case facing him beforehand so that he can ably prepare his defence. Section 246 (2) of the CPA is therefore all about the rule against surprise. In the case of **Michael Maige v. Republic**, Criminal Appeal No. 222 of 2020 (unreported) a gold metal detector (exhibit P3) which was not listed during committal proceedings was received in

evidence by the trial court. When the matter reached this Court on appeal, the Court stated that:

> *"... it is apparent that Exhibit P3 was not listed during the committal proceedings and also not listed in the preliminary hearing as one of the intended exhibits to be relied upon by the prosecution. This exhibit P3 should have been made known to the appellant during the committal proceedings and also ought to have been explained and listed to be among the intended prosecution exhibits. Furthermore, the prosecution did not pray to tender exhibit P3 as additional evidence pursuant to section 289 (1) of the CPA. See;* ***The Director of Public Prosecutions v. Sharif Mohamed @ Athuman and Six Others,*** *(supra). The essence of introducing during committal proceedings and preliminary hearing is to help the appellant to prepare his/her defence and he/she should not be taken by surprise. In those circumstances, the prosecution contravened the mandatory requirement of section 246 (2) of the CPA and exhibit P3 is liable to be expunged".*

It is therefore clear, as it was also agreed by Ms. Mkonongo that, the position regarding the scope of application of section 246 (2) of the CPA and the consequences of the failure to comply with it, is settled. During committal proceedings the committal court is mandatorily required not only

to read and explain to the accused person the information brought against him as well as statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial but it is also required to list or mention physical exhibits the prosecution intends to tender in evidence and rely upon at the trial. It is also settled that the omission to list or mention physical exhibits which the prosecution intends to rely upon, at the trial during committal proceedings is fatal. See- **Mussa Ramadhani Magae v. Republic,** Criminal Appeal No. 545 of 2021, **Said Shabani Malikita v. Republic**, Criminal Appeal No. 189 of 2020 (both unreported) and **Kristina Biskasevskaja** (supra).

As we have alluded to earlier, Ms. Mkonongo had no qualms about the above settled position of the law. She however argued with force that, though in our case exhibit P2 was not listed or mentioned neither during committal proceedings nor at the preliminary hearing, section 246 (2) of the CPA was not contravened because by then that was not a requirement. She contended that while the committal proceedings in the case at hand were conducted on 15.08.2016, the requirement or principle in question was established in **Remina Omary Abdul** (supra) on 15.03.2022 well after the committal proceedings of the case at hand had been conducted. With respect, we do not agree with Ms. Mkonongo that before the decision in **Remina Omary Abdul** (supra) it was not a requirement under section 246 (2) of the CPA for physical exhibits to be listed or mentioned during

committal proceedings. The principle or requirement was not established on 15.03.2022 as contended by Ms. Mkonongo but it was in existence since when section 246 (2) of the CPA was enacted. It is our considered view that what the Court did in **Remina Omary Abdul** (supra) was not to amend or add anything to the already existing provision. All what the Court did was to apply the purposive approach in interpreting section 246 (2) of the CPA and emphasize on the requirement of listing or mentioning physical exhibits during committal proceedings. Taking into consideration the purpose of section 246 (2) of the CPA, that is, to let the accused person know beforehand the substance, kind and nature of the evidence the prosecution intends to lead against him at the trial, the Court interpreted the provision in question and insisted that under that provision, it is not only documentary exhibits which are required to be listed or mentioned during committal proceedings but also physical exhibits. It is for that reason that we find Ms. Mkonongo's argument meritless.

In her further attempts to impress us that the omission to list or mention exhibit P2 during committal proceedings was, under the circumstances of this case, not fatal and did not prejudice the appellant, Ms Mkonongo contended that the appellant was made aware of exhibit P2 through the certificate of seizure (exhibit P13) of which its contents were read out and explained to the appellant and which was listed during the committal proceedings in question. The contention should not detain us at

all because this is not the first time such an argument is raised before the Court. Such an argument was raised in **Remina Omary Abdul** and **Kristina Biskasevskaja** (supra). In the latter case where, as it is for the instant case, exhibit P2 was neither listed nor mentioned during committal proceedings, it was argued on appeal that the appellant was made aware that exhibit P2 would be tendered and relied upon in the trial through the certificate of seizure (exhibit P5). The Court disagreed with the argument and observed that:

> *"What we can say about this assertion is that, it is not backed by any law. The two exhibits are distinct from each other and therefore each ought to have been mentioned during the committal proceedings. After all, exhibit P2 was tendered ahead of exhibit P5, hence, it cannot be said that the appellant was made aware of exhibit P2 through it".*

The facts pertaining to the certificates of seizure and the two relevant exhibits in question are similar in the two cases, that is, **Kristina Biskasevskaja** (supra) above cited and the case at hand. That being the position, we are not ready to agree with the argument by Ms. Mkonongo that by making the appellant aware of the certificate of seizure (exhibit P13) and by listing it during committal proceedings, the omission to list and mention exhibit P2 did not contravene section 246 (2) of the CPA.

That said and based on the settled position of the law and the cited authorities, we have no grain of doubt in our mind that the issue we earlier posed has to be answered in affirmative. The requirements of section 246 (2) of the CPA ought to have been complied with in admitting exhibit P2 in evidence. Exhibit P2 which was not listed or mentioned as an exhibit neither during the committal proceedings nor at the preliminary hearing and which was not tendered in evidence as additional evidence under section 289 (1) and (4) of the CPA, was thus wrongly admitted in evidence and the trial court did therefore err in acting on it in convicting the appellant. Exhibit P2 is liable for expunction from the record, which we hereby accordingly do. Ground 7 of appeal is thus answered in the affirmative.

Having answered ground 7 of appeal in the affirmative and also after expunging exhibit P2 on which the case against the appellant hinged, from the record, we find no sufficient remaining evidence on which the appellant's conviction can be based. The mandatory provision of section 246 (2) of the CPA was not complied with and the case against the appellant was therefore not proved beyond reasonable doubt as required by the law. The finding on ground 7 of appeal suffices to dispose of the appeal and it is for this reason that we found, as earlier alluded to, no reason of discussing arguments on the remaining grounds of appeal.

Consequently, and for the above given reasons, we allow the appeal, quash the conviction and set aside the life imprisonment imposed against the appellant. The appellant be released from prison forthwith unless she is so held on any other lawful cause.

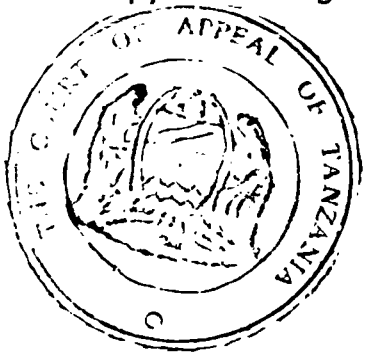
DATED at **MOSHI** this 22nd day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of August, 2023 in the presence of the appellant in person and Ms. Agatha Pima, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL