

TANZANIA / JUDGMENT

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~ . -IN THE COURT Q.F APPEAL OF TANZANIA . · AT DAR ES SALAAM (CORAM: MBAROUK, J.A., MJASIRI.J°.A.; And KAIJAGE, J.A.) CONSOLIDATED CRIMINAL APPEALS NOS ..·261& 264 OF 2013 _EX.F 7153D/C _DICKSON MUGANYIZI ."".....";_.,,,. APPELLANT/RESPONDENT .. VERSUS THE REPUBLIC (DPP) .. ~-..... ;, ,.... ~ 'RESPONDENT/ APPELLANT · .. (Appeal from the decision of the High Court of Tanzania at Dar es Salaam) · (Utamwa, J.) Dated the 16th day · of April, 2013 In Criminal Appeal No. 55 of 2010

JUDGMENT

- .. OF THE COURT ' . 15th April& 8th November, 2016 ' In the Resident Magistrate's Court at Kisutu, Dar es Salaam Region, .. i the appellant ExF. 7153 D/C Dickson Muganyizi and two others · (D/C Waryuba Nyahura and Steven, Gerald Sipuka) who are not parties in this .ill)_Qe_gJ vy~r~.~har,ged with_ five.:(Sf9ounts. Ir, the fjr_\$. _t.count 9JI the ~s:cusgd__ . _ persons were charged with the offence of conspiracy to commit a felony of · store breaking contrary to section 384 of the Penal Code, [Cap 16, R.E. 1 2002], the· P~nal Code. It wasthe prosecution· case that on an unknown: date, time and place within_ Dar. es Salaam did unlawfully conspire to break· -_ into the Anti-Drug Unit store and to steal a total of 8441. ST grams of. : heroin, cocaine, and cannabis sativa worth· Tanzania Shs; bne Hundred· Seventy Six Million Four Hundred Twenty Four Thousand Nine Hundred and . seventy (176, 424, 970/=). In the second count the appellant- and Waryuba were charged with breaking into a· store and .committing a felony of stealing contrary to section 296 of the Penal Code: It was alleged by the prosecution that between May 29, 2005 and June 6, 2006 at midnight did unlawfully break into a store and stole therein a total of 844 l.87 grams of cocaine, heroin· and cannabis sativa valued at Shs. 176,424,Q70/= In the third count the appellant, D/C Waryuba Nyahura and others i were jointly charged of unlawful sale of Narcotic Drugs and Psychotropic Substances contrary to section 12(d) of the Drugs and Prevention of I_llicit- . · - Drugs Act No. 9 of 1995 as amended by Act No. 9 of 1997 [Cap 95 R.E. 2002] [Cap 95]. It was the prosecution· case that the: appellant and D/C Waryuba d_id unlawfully sell cocaine and heroin amounting to a total of -8431.37 grams valued at Shs. 176, 423,920 to Steven Sipuka. Count No. 4 2 did not involve the appellant,- this involved Sipuka -alone who ·was charged . _with unlawful purchase of Narc:otic_ and Psych_otropic substance contrary to _ · section 12 (d) of Cap 95> In--.t6unt No~ 5 the appellant was charged of_: being in unlawful .possession . of Narcotic Drugs and Psychotropic. substances contrary to section 12

(d) of the Drugs and Prevention of Illicit Drugs Act No. 9 of 1995 as amended by Act No. 9 of 1997. It was the prosecution case that on the 13th day of June 2006 at about 14:30 hours at the Kilwa Road Police Barrack, the appellant's residence was searched by Assistant Inspector Kombo and he was found in unlawful possession of 10.5 grams of cannabis sativa valued at Shs. 1050/= . . The appellant and the two others all pleaded not guilty and totally denied the charges. The trial court held that the prosecution failed to prove all the four counts (1st, 2nd, 4th and 5th counts) against the appellant and Waryuba. The appellant and Waryuba were acquitted on the first, second, third and fifth count. After Sipuka was acquitted on the 4th count, the 5th count was referred to as the 4th count, by the trial magistrate. The trial court found that the prosecution evidence was insufficient to ground a conviction on the said counts. However, the appellant and Waryuba were convicted on the alternative charge of being in possession of property suspected of having been stolen and/or unlawfully obtained contrary to section 312 (1) (b) of the Penal Code. They were each sentenced to three (3) years imprisonment. The Court also ordered various properties including the houses purchased by the accused be confiscated by the government. The properties were to be sold and the proceeds of which were to be paid to the Treasury. The bhang found with the appellant was to be destroyed. Being aggrieved by the decision of the trial court the appellant filed an appeal to the High Court. His appeal was successful. However, the first appellate court (High Court) did not make any order against the confiscation of the appellant's property, on the ground that the appellant only appealed against conviction and sentence and not against the confiscation order. The appellant filed a one-point memorandum of appeal which stated that:-

1. Having found the alternative conviction was erroneously entered hence quashed the conviction and set aside the sentence. The Honourable Judge erred in law and fact by 4 refusing to order the return to the appellant of his confiscated properties which was the outcome of his conviction and sentence. The Republic also appealed against the decision of the High Court. The following ground of appeal was presented.
1. The Honourable Judge erred in fact and law when he declined the appellant's prayer to assess the evidence on record and make findings thereof by convicting and sentencing the respondent on the 4th count for possession of narcotic drugs; The two appeals (Criminal Appeal No. 261 of 2013 and Criminal Appeal NO. 264 of 2013) were consolidated. At the hearing of the appeal, the appellant appeared in person and defended for himself. He was previously represented by Mr. Wilson Ogunde, learned advocate, who could not be in Court during the hearing. The respondent Republic had the services of Mr. Edwin Kakolaki, learned Principal State Attorney who was assisted by Mr. Nassoro Katuga, learned Senior State Attorney and Mr. Ramadhani Kalinga, learned State Attorney. Mr. Muganyizi being without legal counsel opted to let the Senior State Attorney address the Court first. Mr. Katuga sought leave of the Court to raise a point of law under Rule 4 (2) (a) of the Tanzania Court of Appeal Rules, 2009 (the Court Rules) leave of which was granted. Mr. Katuga made reference to Section 362 (1) and (2) of the Criminal

Procedure Act. He submitted that an appeal in the High Court shall be by way of petition. According to him, the appellant presented three grounds of appeal in the High Court, at page 164 of the record. However, the appellant did not appeal against the confiscation and/or forfeiture order. The appeal filed in the High Court was against conviction and sentence only. Even though the confiscation arose from the conviction of the appellant, no complaint was presented to the High Court in respect of the said order. The court deals with what was presented before it. The forfeiture order was made under Section 351 of the CPA. It is not enough for the appellant to appeal against the conviction and sentence alone. It does not cover the forfeiture order. He made reference to section 35T of the Criminal Procedure Act, TCA: 2016-2017 (the CPA) which empowers the court to order confiscation and/or forfeiture. Mr. Muganyizi on his part submitted that the appeal had merit. The basis of the appeal is the conviction and sentence. The confiscation order is linked to the sentence. Once the conviction is quashed and the sentence set aside the order of forfeiture cannot stand on its own. He complained that his properties are still confiscated by the government. He should therefore be allowed to apply to the court for the release of the properties. He urged the Court to allow his appeal. On the appeal filed by the Republic, the major complaint was the failure by the High Court Judge to assess the evidence on record and to convict and sentence the respondent on the 5th count for possession of 10.5 grams of cannabis sativa. Mr. Kakolaki conceded that there was a need for the Republic to file a cross appeal against the decision of the trial magistrate. This issue was only raised in the respondent's written submissions.

submissions.

4[.

- Mr. Kakolaki made reference to page 191 of the record. According to Exhibit P10, which shows that when a search was conducted in the appellant's premises 21 pellets were found. No finding was made on the fifth count by the trial magistrate. He submitted that they were challenging the decision of the first appellate Court for refusing to re-assess such evidence. He asked the Court to step into the shoes of the High Court. He relied on the case of George Maili Kemboge versus Republic, Criminal Appeal No. 85 of 2012 CAT (unreported). Mr. Muganyizi on his part relied on the findings of the first appellate court at page 209 of the record that as long as the Republic did not formerly appeal in the High Court on that issue, it cannot do it through the backdoor; We on our part after carefully going through the record and submissions by both the appellant and the learned Principal and Senior State Attorneys, would like to state that we are of the considered view that the main issues for consideration and determination arising from the consolidated appeal can be stated as follows:-

- (1) Whether or not the appellant is entitled to his confiscated/forfeited properties once his conviction was quashed and the sentence set aside.

- (2) Whether or not the request by the prosecution to review the trial court's record is admissible given the fact that no cross appeal was filed against the decision of the trial court in relation to the fifth count 8 . . . In relation to issue No. 1, we are of the firm view that a confiscation / . . . , ~ and/or forfeiture order is made after conviction in order to deprive the defendant of the financial benefit he or she has obtained from crime. Section 15 of the Proceeds of Crime Act, 2002 [Cap 256 R.E. 2002] (Cap of Crime Act, . . [Cap
- 256) provides as follows:- "15 (1) Subject to subsection (2) where a court makes a forfeiture order against property, the property shall vest in the United Republic . .
- (2) Where a forfeiture order is made against property subject to the registration in the Registry of Title . . any rights in the property shall lie with the United Republic until the registration is effected. . . ~
- (3) The Treasury Registrar shall be registered as owner . . . of any property subject to a forfeiture order and the Minister shall do or authorize to be done, anything necessary or convenient to obtain the registration of the Treasury Registrar as owner, including the execution to be executed by a person transferring an interest in property that nature Section 17 of Cap 256, provides as follows:- . . . , 9 i . "17 (1) (1) A forfeiture order against property shall be discharged on the quashing of the conviction on which the forfeiture is based.
- (2) Where a forfeiture order against property is discharged in terms of subsection (1) on appeal against making the order the Attorney General shall:-
- (a) as soon as practicable after the discharge of the order give written notice of the discharge of the order to any person who he has reason to believe had an interest in the property . . . immediately before making the order or
- (b) if required by the court publish in the Gazette a notice of discharge of the order in such manner and within such time as the court consider appropriate. ' I
- (3) A notice referred to in subsection (2) shall specify in accordance with subsection (4) the manner in which any person who claims an interest in the property shall apply for the transfer of the interest to such a person. [Emphasis provided]. '10 In Aidan Mwalutenga v. Republic, Criminal Appeal No. 207 of 2006, CAT (unreported) the appellant was charged with murder contrary to . . . ; . section 196 of the Penal Code and sentenced to death. Upon conviction his shot gun was forfeited. On appeal his conviction was quashed and the death sentence set aside. The forfeiture order was also quashed and set aside. The Court stated thus:- "The trial court upon conviction of the appellant also forfeited his shotgun with serial No. 13442L which was admitted in Court as Exhibit PJ. Since the appeal has been allowed, the forfeiture order is equally quashed and set aside; The shotgun should be restored to the appellant. In R v Menocal (1980) AC 598 the English case on forfeiture of proceeds of drug related crimes, the Court of Appeal held that:- 'I' . "the power of forfeiture contained

in section 27 of the Misuse of Drugs Act 1971 was not in the nature of a sentence and was therefore not subject to the restriction contained in section 1(2) of the Courts Act 1971/ that a sentence imposed, or other (Order made by the Crown Court when dealing with an offender, if it was to be varied or rescinded within 28 days of passing the original sentence. // 1 "On appeal the House of Lords pronounced that a "forfeiture including an order made under section 27 of the Misuse of Drugs Act 1971/ being in the nature of a penalty, was a sentence for the purpose of section 11 {2} of Courts Act 1971. [Emphasis provided]." Therefore, if a Court makes a confiscation and / or forfeiture order as part of the sentence or orders imposed on a person convicted and the conviction is subsequently quashed, the quashing of the conviction -- ... discharges the instrument of forfeiture order. The confiscation and/or -- forfeiture order is linked to the conviction and sentence. In the instant case; the High Court having quashed the conviction against the appellant; the forfeiture order was thereby discharged. This is a common practice in all the commonwealth countries and the legal position is similar to that in Tanzania under the Crime-Proceedings Act, (supra), : On the sole ground . . . of appeal filed by the Republic complaining that . . . the court failed to reassess the evidence and to make a finding on the 5th count for possession of narcotic drugs, the position is as follows. Upon a careful perusal of the record, we find that the issue raised in the Republic's 12th ground of appeal was never raised. as a ground of appeal in the first appellate court. Following the conviction of the appellant on the alternative ground, in relation to count . . . 3 and acquittal of the appellant and the other accused persons the prosecution did not file a cross appeal to the High Court. Mr. Kakolaki, learned Principal State Attorney for the Republic, only raised the issue in his written submissions. The issue cannot therefore be raised at this stage. The first appellate court therefore rightly refused to consider the said issue. The law is settled. The procedure for appeals by the Director of

- . . . , Public Prosecutions (DPP) . . . provided , . . . under sections 377, 381 of the CPA. We hereby reproduce the relevant provisions for ease of reference. Section 377 provides as follows: "In the following section of this Part unless the context otherwise requires: "Director of Public Prosecutions" includes an officer subordinate to him acting in accordance with his general or special instructions; "respondent" means the person who was the accused in the proceedings to which the appeal under section 378 relates and who may be affected by any order of the High Court on such appeal. 13 I 378 (1) Where the Director of Public Prosecutions is dissatisfied with an acquittal, finding sentence, or order made by a subordinate court, other
- than, a subordinate court exercising its extended powers by virtue of an order made under section 173 of this Act, may appeal to the High Court

- (2) An appeal from the High Court under this section may be in a matter of fact as well as in a matter of law. 379 {1} Subject to subsection (2) no appeal under section 378 shall be entertained unless the Director of Public Prosecutions— (a) has given notice of his intention to appeal to the subordinate court within thirty days of the acquittal' . finding; 'sentence' . . . or order against which he . . . wishes . . . to appeal and ' (b) has lodged his petition of appeal within forty - five days the time requisite for obtaining a copy of the proceedings in the case shall be excluded.
- (2) The High Court may for good cause/ admit an appeal notwithstanding that the period of limitation prescribed in this section have elapsed. 380 (1) Every appeal under section 378 shall be made in the form of a petition in writing presented by the Director . . . of . . . Public Prosecution and shall, . . . unless the High Court otherwise direct be accompanied by a copy of the proceedings judgment or order appealed against.
- (2) The petition shall (contain particulars of the matters of law or fact in regard to which the subordinate court appealed . . . from . . . is alleged . . . to have erred. . . 381 (1) Where a petition of appeal is lodged with the High Court in accordance with the provisions . . . of section . . . 380 the High Court shall cause notice to be given to the respondent or to his advocate and every such notice shall state the time and place at which the appeal will be heard and shall be accompanied by a copy of the petition of appeal and a copy of the proceedings judgment or order appealed against.
- (2) Where notice of time and place and hearing cannot be served on the respondent because he cannot be found through the address obtained by the court under section 228 and 275 the notice shall be brought to his attention through public notice in a newspaper [see the case; £...:a (Jud at the end of the ' . . . service the court shall . . . proceed ' . . . with . . . the . . . appeal ; . . . ' in . . . the absence of the respondent. :15 The procedure outlined herein above was not followed. It is evident from the record that this was not done. . . ' In Samuel Sawe v Republic, Criminal Appeal No. 135 of 2004 CAT (unreported), the Court stated thus:- ' . . . a second appellate court, we cannot . . . adjudicate . . . on a matter which was . . . not raised . . . as a ground of appeal in the first appellate court. The record of appeal [pages 21 to 23, shows that this round of appeal by the appellant was not among the appellants, ten grounds of appeal which he filed in the High Court . . . In the case of Abdi Athuman v Republic (2004), TLR 151 the issue on whether or not the Court of Appeal may decide on a matter not raised and decided by the High Court was . . . considered. ' . . . It was held by the . . . Court that the Court of Appeal had no such jurisdiction. The Court then ' I . . . struck out the ground of appeal. This is the legal position taken by the . . . Court and we therefore subscribe to the view expressed in Samuel Sawe v Republic (supra). ' 16 In line with the principles of a fair trial, the procedural requirements have been clearly outlined in order to ensure a full awareness to the respondent as to what is at stake. This is done in order to ensure the respondent gets a fair hearing. . . . given a right to be heard by a non- . . . biased

tribunal and not to be taken by surprise in the course of hearing the appeal. We are in agreement with the first appellate Judge that it was not proper for the Republic to lodge a complaint that no finding was made on the 5th count when the issue was not raised by way of an appeal or a cross-appeal. It is also evident from the record that the first appellate Judge pointed out by the first appellate Judge that the trial magistrate U'poh the acquittal of Sipuka on the basis of no case to answer, on the fourth count, re-organized and re-numbered the counts in respect of the charges, and the 5th count was then considered as the 4th count. It can therefore be safely concluded that the

- The 5th count, re-numbered 4th count was duly considered by the trial magistrate and the respondent was therefore acquitted on the said count. See *Luuma Manjario v Republic*, Criminal Appeal No. 2.11. of 2009 CAT (unreported). Consequently, we hereby strike out the ground of appeal filed by the Republic in Criminal Appeal No. 261 of 2013, we further find that the foregoing reasons allow Criminal Appeal No. 261 of 2013. Order accordingly. DATED at DAR. ES SALAAM this 2nd day November, 2016. M. S. MBAROUK JUSTICE OF APPEAL. C. M' J'A's ... IRI"
- JUSTICE OF APPEAL ~ ~ ~ ~ ~ 18

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