

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 132 OF 2023

SAID ADAM HIJA VS THE REPUBLIC

COURT
TANZLIIDECIDED
1 January 2023

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IN THE COURT OF APPEAL OF TANZANIA AT SONGEA f CO RAM: MWARI3A, 3.A.. KEREFU. 3.A.
And MAKUNGU. J.A.^1 CRIMINAL APPEAL NO. 132 OF 2023 SAID ADAM
HIJA.....APPELLANT VERSUS THE
REPUBLICRESPONDENT (Appeal from the decision of
the High Court of Tanzania at Songea) (Mlvambina. 3/1 dated the 1st day of February, 2023 in
Economic Case No. 6 of 2022 JUDGMENT OF THE COURT 9th & 19th August, 2024 MWARIJA, 3.A.:
This appeal arises from the decision of the High Court of Tanzania, Corruption and Economic
Crimes Division at Songea in Economic Case No. 6 of 2022. The appellant, Said Adam Hija, was
charged with the offence of trafficking in narcotic drugs contrary to section 15 (1) (a) and

- (3) (1) of the Drug Control and Enforcement Act, Chapter 95 of the Revised Laws read together with paragraph 23 of the First Schedule to, and section 57 (1) of the Economic and Organized Crime Control Act, Chapter 200 of the Revised Laws (the EOCCA). The prosecution alleged that, on 21/5/2020 at.Mke.nda - Nakawale area within Songea District in Ruvuma Region, the appellant was found trafficking of narcotic drug known as heroin weighing 1.76 kilograms. When he was arraigned before the trial court, the appellant denied the charge and thus, with a view of proving its case, the prosecution relied on the testimony of five witnesses and a total of eight real and documentary exhibits. On his part, the appellant relied on his own evidence in defence. Having considered the evidence adduced by the prosecution witnesses and the defence, the learned trial Judge was satisfied that the case against the appellant had been proved to the required standard. The appellant was, consequently, convicted and sentenced to life imprisonment, Aggrieved by the decision of the High Court, he has preferred this appeal. According to the prosecution evidence, the appellant was arrested on 21/5/2020 at Mkenda border while entering Tanzania from Mozambique. He was arrested after the Immigration Officer, one Cpl Mussa Ramadhani Nassoro (PW3), who was on duty at Mkenda, Tanzania/Mozambique border suspected the pairs of rubber shoes contained in the appellant's bag and as a result, sought the assistance of a police officer, D/C Chande (PW2). PW3 suspected the pairs of rubber shoes, which were four in number, because the soles appeared to have been stitched afresh after being pulled apart, suggesting that certain things were inserted in between. When he removed the soles of the four pairs of the shoes and inspected them, PW2 found a total of 12 packets containing whitish substance suspected

to be illicit drug. The search was conducted in the presence of PW3 and other police officers, including Gpl Emmanuel Mrisho. Having seized the twelve packets and the appellant's bag, PW2 prepared a seizure certificate which was signed by among others, the appellant. Evidence was also adduced by SP Kulwa Kasile Misogalya (PW4) who was at the material time the OC/CID, Songea. Upon being informed of the incident, he went with other police officers, including A/Insp. Shedrack Meshack (PW5), to Mkenda and interviewed the appellant who had been detained at the Mkenda Nakawale Police Station. On the part of PW5, it was his evidence that, he was handed over the 12 packets containing the suspicious substance. He took and kept them in safe custody until on 18/6/2020 when he took them to Dar es Salaam to the Chief Government Chemist (the CGC) for analysis. The same was received and analysed by Theodori Ludanha (PW1), a chemist at the CGC's Laboratory, Dar es Salaam. In his testimony, PW1 averred that, his analysis of the samples of the substance from all the 12 packets revealed that, the content was narcotic drug known as heroin. In his evidence, the appellant raised the defence of alibi. He stated that, he was arrested on 21/5/2020 while he was at home at Wailes area in Temeke. He left for Songea on 24/5/2020 with his uncle, Hemed Mbao who was travelling to Songea in his motor vehicle. According to the appellant, his uncle had visited him and his family at Temeke and thus upon his return, accompanied and travelled with him to Songea. It was the appellant's further evidence that, on the date of his arrest, he had gone out from his uncle's residence at Maenge area in Songea and before his arrest, he had entered a certain shop to buy airtime for his mobile phone. In the process, there arose misunderstandings between him and the lady shopkeeper who sold airtime to him. He went on to state that, the misunderstanding developed into a quarrel, attracting a gathering of people, the result of which, some police officers appeared, arrested and took him to police station. At the police station, he was searched and his passport was taken. He attributed the cause of the charge against him to his passport which showed that he had travelled to many countries, the last one being Mozambique. As pointed out above, the trial court found that the prosecution evidence had proved the case to the hilt. The appellant's defence of alibi, which was raised at the defence stage of the case, was found to have not raised any reasonable doubt against the prosecution case. In his memorandum of appeal, the appellant raised three (3) grounds which were supplemented by other thirteen (13) grounds contained in his supplementary memorandum of appeal. Later, his advocate filed a second supplementary memorandum of appeal consisting of one ground. For reasons which will be apparent in this judgment, we do not find it necessary to reproduce or state the substance of all the grounds of appeal raised by the appellant. We shall only deal with the ground of appeal raised by his advocate in the second supplementary memorandum of appeal. In that ground, the learned counsel challenges the decision of the trial court contending as follows: "That, the trial court erred in law and fact to try the matter contrary to section 26 (1) of the Economic and Organized Crime Control Act, Cap. 200 RE. 2019". When the appeal was called on for hearing, the appellant was represented by Mr. Dickson Ndunguru, learned counsel while the respondent Republic was represented by Mr. Baraka Mgaya, learned Senior State Attorney. At the outset, Mr. Mgaya conceded to the ground of appeal raised by the learned counsel for the appellant. He agreed

that, the trial was conducted without the consent of the Director of Public Prosecutions (the DPP) as required by section 26 (!) of the EOCCA. He submitted that, lack of the OP'Pfs consent rendered the proceedings a nullity thus deserving to be quashed and the sentence imposed on the appellant set aside. On the way forward, the learned Senior State Attorney urged us to order a retrial on account that, the evidence adduced by the prosecution witnesses is sufficient, not Having any gaps to be filled in to secure the appellant's conviction at the second trial. On his part, Mr. Ndunguru supported the stance taken by the learned Senior State Attorney on the effect of the trial, which was conducted in contravention of section 26 (1) of the EOCCA. He however, opposed the prayer for a retrial order. According to the learned counsel, the order will enable the prosecution to fill up the gaps in its evidence which, he insisted, was insufficient to warrant the appellant's conviction. In rejoinder, Mr. Mgaya reiterated his stance that, there are no gaps in the prosecution evidence which will be filled up at the second trial. When he was asked whether lack of the DPP's consent affected also the committal proceedings because, it was not issued at the institution stage of the case, the proceedings cannot recommence from the trial stage, Mr. Mgaya contended that, under section 26 (1) of the EOCCA, consent may be given after institution of a case, only that, it should be before commencement of trial. From the record, it is an undisputed fact that, no consent was issued by the DPP for the trial of the appellant in this case. Section 26 (!) of the EOCCA provides as follows: "26 - (1) subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions" It is therefore, obvious, as submitted by the appellant's counsel and agreed by the learned Senior State Attorney that, the proceedings which were conducted by the trial court without such consent, are a nullity. The issue for our determination however, is whether or not, the Irregularity affected the whole proceedings from the stage of institution of the case. From the wording of section 26 (1) of the EOCCA, we are certain that, the consent mandatory only before the trial commences and not before institution of a charge or information, as is the case with the consent issued under section 94 (1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA). Consent issued under that section of the CPA relates to the trial of persons who are not citizens of the United Republic charged with offences committed within the Tanzania's territorial waters. - See for instance, the case of Hsu Chin Tai and Another v. Republic (Criminal Appeal No. 250 of 2012)

- [2014] TZCA 2151. Interpreting that provision of the CPA, the Court held that, from the wording thereof, the consent must be filed at the time of instituting a charge because it prohibits institution of proceeding without the consent of the DPP. Under section 26 (1) of the EOCCA however, the requirement of consent is with respect to the trial of offences. It is for this reason that, in the case of DPP v. Semeni Gwema Mswima (Criminal Appeal No. 601 of 2022) [2024] TZCA 29, the Court observed that: "In terms of section 26 (1) of the EOCCA, every trial, in respect of an economic offence may only be commenced before the corruption and Economic Division or a subordinate court upon which jurisdiction has been conferred under section 12 (3) of the EOCCA, once the Director of Public

Prosecutions has issued his consent to the prosecution" [Emphasis added]. That being the position therefore, in the case at hand, the transgression affected the proceedings from the trial stage. Consequently, we nullify the proceedings from the trial stage, quash the judgment and set aside the sentence. Next for our consideration, is on the way forward. The conditions upon which a retrial may or may not be ordered were stated in the case of Fatehali Manji v. Republic [1966] E.A. 341. In that case, it was observed that: '7/7 general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency or for purposes of enabling the prosecution of fill up gaps in its evidence at the first trial. Even where the conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that, a trial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made when the interests of justice require". In the case at hand, the trial was defective for want of consent of the DPP. Having perused the record, we are unable to agree with the learned counsel for the appellant that an order of retrial will provide an opportunity to the prosecution to fill up gaps in its evidence. Furthermore, the offence with which the appellant was charged is a 10 serious one. It will therefore, serve the interests of justice to order a retrial. For these reasons, we order that, the record be remitted to the trial court for the case to be heard afresh from the stage where the first trial commenced. Meanwhile, the appellant shall remain in custody pending his retrial which, we direct, should be expedited. DATED at SONGEA this 17th day of August, 2024. A. G. MWARIJA JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL

0. 0. MAKUNGU JUSTICE OF APPEAL The Judgment delivered this 19th day of August, 2024 in the presence of the Mr. Dickson Pius Ndunguru, learned counsel for the appellant and Mr. James Rhobi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. SENIOR DEPUTY REGISTRAR COURT OF APPEAL

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