IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

CRIMINAL APPEAL NO. 95 OF 2013

(CORAM: MBAROUK, J.A., LUANDA,J.A. And JUMA, J.A.)

OTHMAN ISSA MDABE ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from the judgment of the High Court of Zanzibar at Vuga)

(Mkusa, J.)

dated 30th day of August, 2012
in
Criminal Case No. 12 of 2012

JUDGMENT OF THE COURT

5th & 13th December, 2013

MBAROUK, J.A.:

The appellant, Othman Issa Mdabe was charged before the High Court of Zanzibar with the offence of unlawful Trafficking of Narcotic Drugs contrary to section 15 (1) (b) (i) of Act No. 9 of 2009 of the Laws of Zanzibar. The trial High Court convicted him of being in possession of 277 packets of dry leaves known as "Bhangi". The appellant was then sentenced to serve fifteen (15) years in the educational centre and pay a fine of twenty million Shillings

(20,000,000/=). In default of the payment of fine, additional five years sentence is to be imposed to the appellant. Aggrieved, the appellant has preferred this appeal.

In this appeal, the appellant lodged his memorandum of appeal containing eight grounds of appeal. However, we shall not discuss them for the reasons which we shall explain herein after.

Briefly stated, the facts leading to this appeal are as follows, that on 20th June, 2011 at or about 5:15 p.m at Zanzibar port, Malindi in the urban District within the urban West Region of Unguja the appellant while arriving from Tanzania mainland was unlawfully found in possession of eleven (11) pillows of different colours containing a total of two hundred and seventy seven (277) packets of Narcotic Drugs known as Bhang weighing 13.87 kg. He was arrested and eventually charged and convicted as stated earlier.

At the hearing of the appeal, the appellant appeared in person unrepresented, whereas the respondent Director of Public Prosecutions

was represented by Mr. Suleiman Masoud Makame, learned Senior State Attorney assisted by Mr. Abdulla Issa Mgongo and Mr. Ali Rajab Ali, learned State Attorneys. The appellant being a lay person opted not to elaborate his grounds of appeal, instead, he allowed the learned State Attorney to submit first and opted to react later on.

From the outset, the learned State Attorney, Mr. Abdulla Issa Mgongo and later the learned Senior State Attorney Suleiman Masoud opposed the appeal. In the cause of hearing the appeal, the learned Senior State Attorney informed the Court that, while going through the record of appeal he noted a pertinent point that the trial High Court failed to comply with the requirements of section 278 (1) of Zanzibar Criminal Procedure Act No. 7 of 2004. He submitted that there has been no summing up to assessors conducted by the trial High Court Judge in this case. In addition to that, he pointed out that at page 52 of the record of appeal it has been shown that a coram was incomplete when the purported oral summing up was conducted by the trial Judge. Neither the prosecution side nor the accused was present at that time. He then urged us to find out that, it was not

proper for the trial Judge to record the summing up to assessors orally and in the absence of the appellant and the prosecution. Having raised those anomalies, the learned Senior State Attorney urged us to find that the trial Judge erred procedurally. He prayed to the Court to quash the proceedings and set aside the sentence as the same were a nullity and order the case to start afresh.

On his part, the appellant in his re-joinder simply claimed that, as far as the mistake of failure to sum up to assessors was not occasioned by him, he prayed not to remit the case back to the High Court for re-trial, instead the Court should proceed with the hearing of the appeal on merit.

The trial in the High Court was held with the aid of assessors. At the end of the trial, the court is required to sum up the evidence to assessors as provided under section 278 (1) of the Criminal Procedure Act which reads as follows:-

> *"When the case on both sides is closed, the Judge may sum up the evidence for the prosecution and the defence, and shall then require each of the*

assessors to state his opinion orally, and shall record such opinion."

Though the word **may** has been used in section 278 (1) of the Zanzibar Criminal Procedure Act, this Court in the **John Mlay v. Republic,** Criminal Appeal No. 216 of 2007 (unreported), has emphasized the need to sum up the evidence to assessors. In the said case of **John Mlay** (supra), this Court stated as follows:-

"...What is the purpose of summing up to assessors? The answer is also clear. The purpose of summing up to assessors is to enable the assessors to arrive at a correct opinion."

Section 298 (1) originally section 283 (1) of the Tanzania Criminal Procedure Act is *in pari materia* with section 278 (1) of the Zanzibar Criminal Procedure Act. The principle regarding summing up is the same in both jurisdictions.

Furthermore, in the case of **Abdallah Bazaniye and others V. Republic,** (1990) TLR 42, this Court observed that:-

"...We think that the assessors' full involvement as explained above is an essential part of the process,

that its omission is fatal, and renders the trial a nullity. We wish to add another thought to this exposition: For our purpose in the Court of Appeal, the informed and full views we have to rely on what we might call the Segesela principle, that is in the event of the trial judge disagreeing with the unanimous views of his assessors we shall want to determine whether he was entitled to do so. In order to enable us to make that determination meaningfully we must know the judge's reasons for so disagreeing, and to appreciate those reasons we would have to gauge them against the full and informed views of the assessors which they can only express satisfactorily if the trial was with their aid as explained. This need for a judge to give his reasons for disagreeing with the unanimous views of his assessors was enunciated in ***Charles Segesela V R.,*** *E.A.C.A. Criminal Appeal No. 13 of*

1973, from a case tried in Tanzania, and we wish to express our approval of it."

The erstwhile East African Court of Appeal in the case of **Andrea s/o Kulanga and Others v. R** [1958] EA 684 observed as follows:-

"It is true that under s.283, sub-s. (1) of the Tanganyika Criminal Procedure Code a trial Judge is not under a statutory obligation to sum up to assessors. On this point we prefer the decision of this court in ***Washington s/o Odingo v.R*** *(1) (1954), 21 E.A.C.A. 392. following as it does the express words of s. 283, to the dictum in* ***Miligwa s/o Mwinje and Another v.R.*** *(2) [1953], 20 E.A.C.A. 255, 256, that s. 283 (1) "requires the judge to sum up the evidence to the assessors". Nevertheless we wish to endorse the view expressed by this court in* ***Washington s/o Odingo v.R.*** *(1) that "it is a very sound practice ... to do so except in the very simplest cases".* ***The opinions of assessors can be of great value and assistance to a trial judge, but only if they fully understand the facts of the case before them in relation to the relevant law. If***

> ***the law is not explained and attention not drawn to the salient facts of the case, the value of the assessors' opinion is correspondingly reduced.*** *The instant case was essentially one where the assessors should have had the benefit of a carefully summing-up if any weight was to be attached to their opinions. The failure of the learned trial judge to sum up largely negative the value of the assessors." [Emphasis added].*

All those authorities have emphasized the importance of summing up of the case where the trial High Court sits with assessors.

Having established the importance of summing up to assessors, this Court in the case of **Laurent Salu and Five others V.R,** Criminal Appeal No. 176 of 1993 (unreported) listed the requirements in a case where the trial is conducted by way of assessors which are as follows:-

1) The court must select assessors and give an accused person an opportunity to object to any one of them.

2) The court has to number the assessors, that is, to indicate who is number one, number two and number three, as the case may be.

3) The court must carefully explain to the assessors the role they have to play in the trial and what the judge expects from them at the conclusion of the evidence of both sides.

4) The court to avail the assessors with adequate opportunity to put questions to the witnesses and to record clearly the answers given to each one. If an assessor does not question any witness that, too, has to be clearly indicated as: "Assessor 2: Nil or No question".

5) The court has to sum up to the assessors at the end of the submissions by both sides. The summing up to contain a summary of facts, the evidence adduced, and also explanation of the relevant law, for instance, what is malice aforethought. The court to point out to the assessors any possible defences and explain to them the law regarding those defences.

6) The court to require the individual opinion of each assessor and record the same.

See also the decision of this Court in the case of **Bashiru Rashid Omar V. S.M.Z,** Criminal Appeal No. 83 of 2009 (unreported).

Having satisfied ourselves the importance of summing up the evidence to assessors, the record in the instant case does not show the Judge to have summed up the evidence to assessors. The trial Judge seems to have conducted it orally without recording it. The record shows as follows:-

> ***"Court:*** *while in Court at about 12:30 p.m.* ***the Coram is the same but the accused and the prosecution while are absent. This Court has sum up the case to the assessors in accordance with section 278 (1) of Criminal Procedure Act No. 7 of 2004".***

The question we have asked ourselves in this case is whether it was enough for a trial Judge merely to state that section 278 (1) of the Criminal Procedure Act was complied with, without clearly having put it in writing in the record of proceedings the requirement of

conducting summing up to assessors. The trial Judge ought to have shown in the record the following:-

1. The summary of facts of the case.
2. The evidence adduced.
3. Explanation of the relevant law e.g. the ingredients of the offence, malice aforethought etc.
4. Any possible defences and the law regarding those defence.

We are increasingly of the view that failure by the trial Judge to sum up to assessors in writing is fatal. It is not enough to state it orally that section 278 (1) of the Criminal Procedure Act to have been complied with. Such a defect renders the decision of the High Court a nullity. Without summing up, the trial cannot be said to have been conducted with the aid of assessors.

Having established that the decision of the High Court is a nullity, we are constrained to invoke the powers conferred upon us under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 R. E. 2002 by quashing the proceedings, and setting aside the sentence

against the appellant which we do. Since the trial was defective, we order the case to be tried *de novo* before another Judge with a set of new assessors. It is so ordered.

DATED at **ZANZIBAR** this 13th day of December, 2013

M.S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL