

IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MJIASIRI, J.A., KAIJAGE, J.A. And MMILLA, J.A)

CRIMINAL APPEAL NO. 456 OF 2015

RAMADHANI ATHUMANI MOHAMED APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal for Conviction and sentence from the Judgment of the
High Court of Tanzania at Tanga)
(Khamis, J.)

dated 22nd day of May, 2015

in

Criminal Appeal No. 8 of 2014

JUDGMENT OF THE COURT

22nd & 29th June, 2016

MMILLA, J.A:

Ramadhani Athuman Mohamed (**the appellant**) was charged in the High Court of Tanzania at Tanga along with three other persons namely, Rashid Mohamed @ Flashman, Issa Abdulrahman Sudi and Ally Mohamed @ Abdalla (the bus conductor and turn boys respectively) with two offences; conspiracy to commit an offence contrary to section 384 of the Penal Code Cap. 16 of the Revised Edition, 2002 and section 22 (a) and 25 both of the Drugs and Prevention of Illicit Trafficking in Drugs Act Cap. 95

of the Revised Edition, 2002 and drug trafficking contrary to section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs of the said Cap. 95. The trial court found all of them not guilty and acquitted them in respect of the first count. However, while it acquitted the appellant's colleagues in respect of the second count too, it nevertheless convicted the appellant on that count and sentenced him to 20 a years imprisonment term. He was aggrieved and preferred the present appeal to this Court.

The background facts leading to the present matter were briefly that on 24.7.2011 at about 10.00 a.m., PW6 No. F. 222 Detective S/Sgt Salum Mohamed Shayo who was at Chumbageni Police Station received information that some drugs were being transported in a bus christened Tawaqal with Registration Nos. KBN 847F, pink in colour which was enroute to Mombasa from Dar es Salaam via Tanga. PW6 shared the information with PW1 Detective Sgt. Gustav who was with him in the office at the time the call was made. They discussed and decided to inform PW8 SSP Audas Majaliwa who was the in charge of the Anti-Drugs Unit in Tanga Region. The latter ordered PW6 and PW1 to track and arrest the said bus. He provided them with a police motor vehicle make Land Rover Defender with Registration Nos. PT. 0852 whose driver was PC George.

In compliance with the directives of PW8, PW6 and PW1 elected to proceed to a weighing bridge situated at Majani Mapana area, a place they found to have been ideal for the task that lay ahead of them. In an endeavour to brave alerts, they opted to leave the police motor vehicle at Chumbageni Police Station. Instead, they took a motorcycle with Registration Nos. T. 576 ABN and proceeded to the said place. However, they told George, the driver of their motor vehicle, to be at standby as they were going to call him upon the arrival of the said bus at the said weighing bridge.

At about 12.00 noon, PW6 and PW1 called their driver and instructed him to hide the motor vehicle at the Institute of Animal Research (NDUROBO). George complied. Around that time, the targeted bus arrived at the weighing bridge. After the normal process of weighing, PW6 and his colleagues introduced themselves to the bus conductor, after which they arrested it. They ordered the bus driver to drive it to Chumbageni Police Station, he obliged. While PW1 was on board of that bus which was being trailed by the police motor vehicle, PW6 drove the motorcycle.

On arrival at Chumbageni Police Station, PW8 and his team conducted the search in that bus. After a protracted search, they allegedly recovered drugs under the driver's seat. Consequently the driver, who is

the appellant and three other persons namely, Rashid Mohamed @ Flashman, Issa Abdulrahman Sudi and Ally Mohamed @ Abdalla (the bus conductor and turn boys respectively) were arrested and as aforesaid, jointly charged.

Before us Mr. Wilfred Akaro, learned advocate appeared for the appellant who was also present in Court. There were filed two sets of memoranda of appeal but Mr. Akaro abandoned the one which was filed by the appellant in person in favour of the set which was filed by him on behalf of the appellant. It raised two grounds; **one** that, the trial court wrongly believed the evidence of PW4 D/C Maiga, PW5 Juma Ally Juma and PW6 Salum Mohamed Shayo which was loaded with discrepancies compared to the statements they had previously recorded; and **two** that, the trial court improperly relied on the circumstantial evidence which did not irresistibly point to the guilt of the appellant. He signified to discuss them one after another.

Before he proceeded to discuss these grounds, the Court probed the counsel for the parties to address the Court on two fronts; **firstly** on whether or not the trial High Court convicted the appellant, and if in the negative, the attaching consequences; **secondly** on whether or not it was

proper for the trial court to allow the assessors to cross examine the witnesses instead of allowing them to put questions to them.

On his part, Mr. Akaro submitted in the first place that the trial High Court did not convict the appellant as required by law, which omission was fatal and rendered the sentence it imposed illegal.

On the other point, Mr. Akaro appreciated that the trial High Court allowed the assessors to cross – examine the witnesses. He submitted that it was wrong to have done so because under section 177 of the Law of Evidence Act Cap. 6 of the Revised Edition, 2002 (**the Evidence Act**) the assessors are only allowed to ask questions to the witnesses. He maintained that was a fatal irregularity and it amounted to unfair trial. As such, he urged the Court to declare those proceedings null and void, quash the proceedings, set aside the sentence and order a retrial before another judge sitting with a different set of assessors.

On the other hand, the respondent Republic enjoyed the services of Mr. Saraji Iboru, learned Senior State Attorney who was assisted by Ms Shose Naiman, learned State Attorney.

While Mr. Iboru too appreciated that the trial High Court did not enter conviction as required by law, therefore that it was a fit case in which

to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), quash the sentence and remit the record to the High Court to enable it pass the sentence according to law; he was on the other part not convinced that the assessors ever cross – examined the witnesses.

In justifying that the assessors did not cross - examine the witnesses, Mr. Iboru submitted that it was not easy to determine whether or not the assessors strayed into that error because the court record did not show the questions they put to the witnesses. He contended that such claims cannot be deduced from the answers alone. Even, he submitted, if at all they cross examined the witnesses, there is nothing in the record to suggest prejudice to either party in the case. If anything, he added, the error was curable under the provisions of section 388 of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 **(the CPA)**. He lamented that if a retrial will be ordered in the circumstances of this case, injustice will be occasioned on the part of the prosecution on account that the exhibits were disposed of at the end trial.

Mr. Iboru submitted similarly that the Court is required to avoid falling trap to technicalities. He relied on Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 **(the Constitution)**

as amended from time to time which cautions the courts not to be unduly tied by technicalities which may derail dispensation of substantial justice in the case.

In a brief rejoinder, Mr. Akaro insisted that the court record clearly shows that the assessors cross - examined the witnesses. He insisted that the error resulted into unfair trial which cannot be overlooked by the Court. He reiterated his prayer for the Court to declare the proceeding null and void.

There is no controversy, as appreciated by both counsel for the parties, that the trial High Court did not convict the appellant after finding him guilty on the second count. As everyone is supposed to be aware, conviction is one of the prerequisites of a judgment. This is in terms of section 235 (1) of the CPA which states:-

"(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code."

It is also important to point out, as this Court did in **Shabani Iddi Jololo and 3 Others v. Republic**, Criminal Appeal No. 200 of 2006 (unreported), that a conviction is one of the fundamentals of a judgment in terms of section 312 (2) of the Criminal Procedure Act. That section states:

*312 (2).- In the case of **conviction** the **judgment shall specify** the offence of which, and the section of the Penal Code or other law under which, **the accused person is convicted** and the punishment to which he is sentenced.*
[Emphasis added].

Failure by a trial court to enter conviction is an incurable irregularity which will render such judgment and the sentence a nullity.

In **Amani Fungabikasi v. Republic**, Criminal Appeal No. 270 of 2008 (unreported), the Court was minded to remit the record to the trial court for entering of a conviction after vacating the judgment and sentence of the trial court as well as the proceeding and judgment of the High Court. In the circumstances of this case however, we have declined to do so for the reasons which will unfold in the course of tackling the second point we raised on whether or not it was proper for the trial High Court to allow the assessors to cross - examine the witnesses, to which we now revert.

It is notorious that in terms of section 265 of the CPA, all criminal trials before the High Court must be with the aid of assessors, a fact which

makes them part of the court and are therefore supposed to be impartial. To the contrary, the law allows them to ask questions in terms of section 177 of the Evidence Act which provides that:-

"In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the court, which the court itself might put and which it considers proper."

It is requisite to point out here that under section 290 of the CPA, **cross examination is an exclusive right of the accused person or his advocate**. That section stipulates that:-

*"The witnesses called for the prosecution **shall be subject to cross-examination by the accused person or his advocate and to re-examination by the advocate for the prosecution.**"* [Emphasis provided].

See the cases of **Mathayo Mwalimu v. Republic**, Criminal Appeal No. 147 of 2008, CAT (unreported), and **Thomas Pius v. Republic (supra)** in which the Court held that the assessors are not allowed to cross – examine the witnesses, but their mandate is to put questions to the witnesses.

It is also essential to refer to the provisions of section 155 of the Evidence Act which illustrates what cross - examination entails. That section provides that:-

"When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-

*(a) **to test his veracity;***

(b) to discover who he is and what is his position in life; or

*(c) **to shake his credit, by injuring his character,***

although the answer to such questions might tend directly or indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture." [Emphasis provided].

In a sense, this section provides the rationale why the assessors are not allowed to cross examine because given that cross examination entails contradicting, including testing the veracity of a witness and/or shaking a witness's credibility. As such, they cannot indulge to do so because they are part of the court and are supposed to be impartial.

Since Mr. Iboru maintained that there is nothing in the trial court's record to show that the assessors cross – examined the witnesses in this case, we have found it essential to pin point the specific areas in the proceedings which tend to show that indeed, the assessors cross – examined the witnesses.

The starting point is the response of PW1 at page 29 first paragraph when he was cross examined by the first lady assessor, Ms Zahira Kakere. That witness stated as follows:-

*"DC Maiga called me, he told me that he discovered the narcotic drugs. He did not tell me the owner of the drugs. DC Maiga said that he found the drugs at the driver's area (eneo la dereva). I did not interrogate the driver. **The four accused are suspected of transporting the narcotic drugs. We connect the four accused to the three packets because no passenger came forward to say that he is the owner. The accused failed to name the owner.**"*

There is also the response by PW4 at pages 89 to 90 when he was cross examined by the first lady assessor, Ms Zahira Kakere. That witness was recorded to have said that:-

*"...The civilian witness was also witnessing the search as it was being conducted by the four policemen. **When the order was given by ASP Majaliwa that all passengers should occupy their seats, the driver also occupied their [sic: his] seat.** The conductor and two turn boys did not have seats in the bus. They stood in the bus near the passenger's door.*

*When I ordered the driver to open his door, the conductor and his turn boys were not nearby they were standing some distant place from where I was. When I got out of the bus with driver and civilian witness, the conductor and the turn boys remained in the bus. **I did not ask the driver the owner of the parcel that contained cakes and biscuits. The parcel was produced by the driver from the space below his seat...I am the one who got the drugs from the driver's seat.** The three packets were in respect of narcotic drugs. I was not sure if they were narcotic drugs...**After I found drugs from his seat, I asked the driver as to what the three packets were all about. He did not reply but he just put his hands on the head.** I did not show the three packets of narcotic drugs to the conductor and turn boys. My boss ASP Majaliwa showed them to them...**I cannot precisely say who the owner of***

the three narcotic drugs is. However, from the fear that the driver had on that day, I think it belongs to him. I have no doubt the three packets do not belong to the second, third and fourth accused."

Similarly, when he was cross examined by the second assessor Elizabeth Oscar, PW4 responded at page 91, last paragraph as follows:-

*"...I did not proceed with the search after I seized the three packets because my boss, ASP Majaiwa did not give me an order to continue with the search. **I believe that the three luggages were not sled to the driver's seat by passengers."***

Likewise, when he was cross examined by the third assessor Mbwana Rashid, PW4 responded at page 92 first paragraph as follows:-

*"I did not inquire where the conductor and turn boys used to seat on safari. There were other small luggages inside the bus. What we used to do is that each passenger sat on his seat and we inspected one seat after the other. **The driver opened the driver's door from outside of the bus. It is the driver himself who removed the packets of the cakes and biscuits from his seat. He did***

not respond when I asked if there was anything else on his seat. ..."

There is also the response by PW5 at page 117, last paragraph over to page 118. When he was cross examined by the first lady assessor, Ms Zahira Kakere, that witness said as follows:-

"Before the alleged packets of drugs were found a black plastic bag was found below the driver's seat and was opened in front of me. . .
The driver was asked as to what was in the packets but did not reply anything and instead put his hands on the head. . .
."

At page 140, second paragraph, when PW6 was cross examined by the first lady assessor Ms Zahira Kakere, he responded as follows:-

*"The confidant person did not tell me the owner of the narcotic drugs. I do not know the person who telephoned me. He only identified himself as a good citizen. He did not say he was calling from where. He did not know the type of drugs or where they were kept. **He did not tell me the quantity of drugs...the driver was asked about the owner of drugs but he kept quiet..."***

Similarly, when cross examined by the second lady assessor Ms Elizabeth Oscar, the response of PW8 was as follows:-

*"The second and third accused told me that they were not responsible for the drugs. . . . I decided to charge all of them because of a possibility of conspiracy between them. **The way the four packets were kept below the driver's seat, no outsider could do that because it requires time to pack them in that empty space below the seat.**"*

We are firm that the above extracts clearly show that the assessors exceeded their mandate in that they cross – examined the witnesses, thus they ceased to be impartial. Such a procedural irregularity is fatal, and rendered the proceedings, judgment and the resultant sentence a nullity. This means, this is not the kind of defect which can be cured under section 388 of the CPA as suggested by Mr. Iboru.

We may add here, as we said in the case of **Kulwa Makomelo & 2 Others v. Republic**, Criminal Appeal No. 15 of 2014, CAT (unreported), that it is a breach of the principles of natural justice provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania which stipulates the right to be heard by a fair and/or unbiased tribunal.

Mr. Iboru submitted also that the Court is required to avoid falling trap to technicalities. He referred us to Article 107A (2) (e) of the Constitution of the United Republic of Tanzania.

Article 107A (2) (e) of the Constitution of the United Republic of Tanzania provides that:-

"Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, mahakama zitafuata kanuni zifuatazo, yaani

(e) kutenda haki bila kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka."

Loosely translates it means:-

". . . in dealing with criminal or civil cases the courts shall administer substantive justice without undue regard to technicalities."

Applicability or otherwise of that Article has been discussed in a number of cases by this Court, including those of **Zuberi Musa v. Shinyanga Town Council**, Civil Application No. 100 of 2004 and **Ami (Tanzania) Limited v Ottu on behalf of P.L. Assenga and Others**, Civil Application No. 76 of 2002 (both unreported). In the former case of **Zuberi Musa v. Shinyanga Town Council** the Court said that:-

". . .Article 107A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive

interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice. It recognizes the importance of such rules in the orderly and predictable administration of justice. The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements. The word "unduly" here should only be taken to mean "more than is right or reasonable, excessively or wrongfully . . ."

See also the case of **Ami (Tanzania) Limited v Ottu on behalf of P.L. Assenga and Others** (supra) in which the Court observed that:-

*" . . . Article 107 A (2) (e) of the Constitution **does not in any way command that procedural rules should be done away with in order to advance substantial justice.** Each case will be considered on its own peculiar facts and circumstances...."* [Emphasis is provided].

Taking into account the above laid guidance, we rush to say that Article 107 A (2) (e) of the Constitution cannot apply in the circumstances of the present case on account that we can hardly gather any element of technicalities involved. This is because as we have found, cross –

examination by assessors is prohibited by law, that is section 177 of the evidence Act, and that where it may be established that they cross – examined the witnesses, the act constitutes a fatal irregularity, rendering the proceedings of the trial High Court, judgment and the sentence thereto, a nullity.

That said and done; we are constrained to invoke the powers obtaining under section 4 (2) of the AJA, for which we quash the proceedings of the trial High Court and set aside the sentence that was imposed. Consequently, we order a retrial before another judge sitting with a different set of assessors.

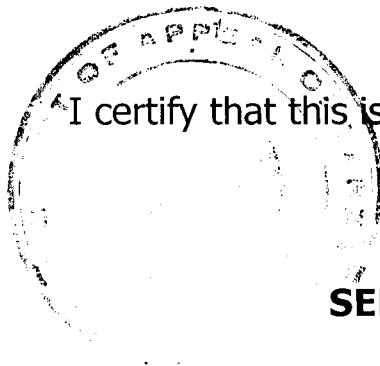
Order accordingly.

DATED at **TANGA** this 28th day of June, 2016.


S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL



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


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL