IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 56 OF 2016

MWITEKA GODFREY MWANDEMELE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Arufani, J.)

dated the 11th day of December, 2015
in
Criminal Sessions Case No. 19 of 2015

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JUDGMENT OF THE COURT

25th October, 2017 & 5th February, 2017

NDIKA, J.A.:

Before the High Court of Tanzania sitting at Dar es Salaam, Mwiteka Godfrey Mwandemele, the appellant herein, was charged with the offence of trafficking in narcotic drugs contrary to section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 RE 2002. The prosecution alleged that on 11th May, 2011 at the Julius Nyerere

International Airport within Ilala District in Dar es Salaam, the appellant trafficked in a narcotic drug, namely, cocaine hydrochloride, weighing 1,112 grams, valued at Tanzania Shillings Fifty-Five Million Six Hundred Thousand only (TZS. 55,600,000.00).

At the trial, the prosecution featured twelve witnesses as well as five documentary exhibits including the appellant's cautioned statement (Exhibit P.4). The appellant defended himself by his testimony on oath without calling any witness.

The prosecution case at the trial was briefly as follows: It was adduced that, the appellant arrived at the Julius Nyerere International Airport, Dar es Salaam from Doha, Qatar on 11th May, 2011 at 15.00 hours aboard a Qatar Airways flight number QR544. He had left Sao Paulo, Brazil on board a Qatar Airways flight heading for Doha, Qatar where connected to the flight for Dar es Salaam. PW2 Assistant Inspector Salma Idd Chaurembo, an Immigration Officer, told the trial court that she was manning an immigration counter at the arrivals lounge at the Julius Nyerere International Airport, Dar es Salaam on 11th May, 2011 in the afternoon when the appellant, having arrived on board Flight QR544, approached and presented to her his Tanzanian Emergency Travel

Document (ETD) number AB0523021. As he was trembling and sweating, she asked him what the problem was whereupon he asked her to help get him out of the airport as he admitted to have ingested certain drugs. After scanning, stamping and signing the ETD, which had been issued for a single journey from Tanzania to Brazil, PW2 alerted her supervisor and officials of the Anti-Drugs Unit (ADU) at the airport.

PW3 D.7262 Detective Station Sergeant Mashaka and PW4 F.6059 Detective Station Sergeant Athuman were two police officers from ADU that took up the matter and arrested the appellant straightaway. According to them, they took the appellant to their nearby office for inspection. They found him with four pellets of a narcotic drug hidden in the shorts that he wore under his trousers. Thereafter, he was put under the observation of the police at the same airport terminal from that day (i.e., 11th May, 2011) to 14th May, 2011. At different times during surveillance, he excreted in a toilet at the terminal a total of sixty pellets of drug. Each time of defecation was witnesses by police officers and independent witnesses whose particulars were filled in an observation form that was, there and then, signed by the appellant and the witnesses to attest as to the correctness of its details. In this regard, four observation forms were tendered and

admitted collectively as Exhibits P.3. The said independent witnesses, who actually confirmed in their respective testimonies to have taken turns to eyewitness the defecation, were PW5 Nyahoro Kitumba, PW6 Amir Ally Abasi, PW7 Ladislaus Lunyaga and PW8 Shabani Babile. In the end of it all, a total of sixty-four pellets of drug were seized from the appellant.

PW9 Superintendent of Police Neema Andrew Mwakajenga, a police investigator at ADU, was the custodian of exhibits that included all seized drugs suspected to be narcotic drugs. She acknowledged to have received from PW3 and PW4 between 11th and 14th May, 2011 a total of sixty-four pellets, suspected of being narcotic drugs. Having recorded the substances in the appropriate register, she packed them in a khaki envelope, which she labelled and sealed. She told the court that the packing was witnessed by the appellant as well as PW3, PW4, PW10 Zainabu Dua Maulana and Assistant Commissioner of Police Godfrey Nzowa. It should be noted that PW10 was a Ten Cell Leader of Kurasini Police Station who testified that she was called by Mr. Nzowa to witness the packing as an independent witness. The said envelope was subsequently handed over to the Chief Government Chemist along with a letter requesting for a chemical analysis of the drug pellets.

PW1 Bertha Fredrick Mamuya, a Chemical Analyst at the Office of the Chief Government Chemist, gave elaborate details on how she analysed the substances after she opened the sealed envelope in the presence of a number of police officers, led by PW9, as well as other staffers from the Chief Government Chemist's Laboratory. According to her testimony and chemical analysis report that she tendered at the trial (Exhibit P.1), she established that the said drug, weighing 1,112 grams, was cocaine hydrochloride and that it constituted a Part I poison. As regards the value of the said drug pellets, PW12 Mr. Christopher Joseph Shekiondo, the Commissioner for the National Coordination of Drug Control Commission at the material time, tendered in evidence the certificate of value (Exhibit P.5) dated 1st August, 2011 issued in terms of section 27 (1) (b) of Cap. 95 (supra) that the said drug haul was worth Tanzania Shillings Fifty-Five Million Six Hundred Thousand only (TZS. 55,600,000.00).

PW11 Inspector Petro Maskamo, an investigator with ADU at the material time, recounted that the appellant was brought to him on 12th May, 2011 for interrogation on the allegation that he trafficked in narcotic drugs. He recalled to have recorded the appellant's cautioned statement (Exhibit P.4) in which admitted to have carried the drug pellets in his

stomach. Although the appellant repudiated the statement when it was tendered for admission, the trial court admitted it in evidence after conducting a trial-within-trial and concluding that the said statement was actually made and properly recorded.

The appellant then gave his defence in which he denied to have ever trafficked in narcotic drugs. More particularly, he refuted to have travelled from Brazil via Doha to Dar es Salaam or being the holder of the Emergency Travel Document mentioned by PW2. He said the truth of the matter was that while he was on his errands on 11th May, 2011 at 14.30 hours at Tabata, Dar es Salaam, a certain police officer arrested him and subsequently took him to the airport to assist the police to identify and nab suspected drug sharks despite his protestation that he was oblivious of any such criminals. He was then locked up in a cell at the airport terminal. On the following day, PW11 came to his cell and asked him to sign a certain hand written document along with other typed papers promising that he would release him on bail if he signed the papers. He admitted to have signed the papers but, to his surprise, PW11 reneged on his promise and returned him to his cell.

Following the close of the defence case, the trial court received final submissions of the parties and then summed up the case to the three lady assessors who sat with the learned Judge in the trial. Although the assessors were unanimous, in their non-binding opinion, that the prosecution case fell short of proof beyond peradventure, the learned trial Judge found the offence charged proven to the hilt. He reasoned as follows: at first, the learned trial Judge found, based upon the unchallenged evidence of PW1 and the chemical analysis report (Exhibit P.1), that the sixty-four pellets allegedly seized from the appellant were cocaine hydrochloride, which constituted a narcotic drug as defined under section 2 of Cap. 95 (supra) and listed in the First Schedule to that Act. Secondly, the learned Judge accepted the evidence adduced by PW2, PW3, PW4, PW5, PW6, PW7, PW8 and PW9 as believable and reliable that the appellant arrived at the airport from abroad aboard a Qatar Airways flight and that sixty-four pellets of the drug – sixty of which he excreted from his bowels – were seized from him. That fact was supported by the observation forms (Exhibits P.3). The learned trial Judge found further support from the appellant's cautioned statement as constituting a confessional statement that the appellant was found carrying the pellets of

the drugs on or in his body. Before relying on the statement, the learned Judge took cognizance of the directions in the decisions in **Mukami Wankyo v R** [1990] TLR 46 and **Tuwamoi v Uganda** [1967] EA 84. He concluded that despite the appellant's repudiation of the statement, it constituted nothing but the truth.

Having convicted the appellant of the offence as charged, the trial court sentenced him to twenty years imprisonment and fined him to pay to the Government Tanzania Shillings 166,800,000.00, which constituted three times the value of the drug he was found trafficking. As a consequential directive, the court ordered, in terms of section 351 (1) (a) and (b) of the Criminal Procedure Act, Cap. 20 RE 2002, the sixty-four pellets of drug be forfeited to the Government and then destroyed under the supervision of designated officials from the National Environment Management Council (NEMC), the Police Force and the Court.

Aggrieved, the appellant has now come to this Court with four grounds of complaint. In the main, he faults the learned trial Judge for convicting him on evidence that was not beyond the threshold of reasonable doubt. He also contends that the chain of custody of the pellets of drug was not established according to the applicable provisions of the

Police General Orders (PGO); that he was wrongly convicted on weak corroborating evidence of PW5, PW6, PW7 and PW8 as well as Exhibit P.3; and finally, that the learned trial Judge erred in relying upon the repudiated cautioned statement (Exhibit P.4).

At the hearing before us, the appellant appeared in person, unrepresented. Mr. Timon Vitalis, the learned Principal State Attorney, represented the respondent Republic.

Before the parties submitted in earnest on the grounds of appeal, we asked them to address us on the apparent omission of the learned trial Judge's summing up notes as can be seen at page 133 of the record of appeal.

In his submissions, Mr. Vitalis acknowledged that the summing up notes were missing from the record of appeal but noted that the learned trial Judge indicated on the record that he had actually summed up the case to the assessors. Although he was of the view that the said omission to capture on the record the contents of the summing up constituted a procedural infraction, he submitted that it had a limited effect to the proceedings and that it did not prejudice the appellants in whose favour

the assessors gave their respective findings. As he was insistent that the infraction did not affect the earlier proceedings of the court, he urged us to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 to nullify all the proceedings of the trial court from the summing up stage and, as a result, quash and set aside the appellant's conviction and sentence. He further prayed that the trial record be remitted to the trial court for a retrial that commencing with a fresh summing up.

The appellant, being an unrepresented lay person, had, quite understandably, no comment on the matter as it was purely a legal issue.

We find it opportune and imperative to state at this juncture that it is the requirement under section 265 of the Criminal Procedure Act, Cap. 20 RE 2002 that all criminal trials before the High Court be conducted with the aid of assessors whose number must be not less than two as the court may determine. After the case on both sides is closed, the provisions of section 298 (1) of Cap. 20 (supra) come into play, stating 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 *as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion."* [Emphasis added]

Although the above provisions use the word "may" connoting that a presiding Judge's summing up to assessors is discretionary, it is settled jurisprudence that it must be done and an abundance of authorities exists on how it should be done: see, for instance, **John Mlay v Republic**, Criminal Appeal No. 216 of 2007 (unreported). In a recent decision in **Makubi Kweli & Another v Republic**, Criminal Appeal No. 149 of 2015 (unreported), the Court restated that summing up notes must be captured on the trial record so as to provide proof of compliance with the requirement of summing up. We find it instructive to reproduce the relevant passage from that decision thus:

"We are of the view that there has to be the written summing notes by the trial judge. We are further of the view that the record in the summing up notes will show the guidance and direction of the trial judge which he gave to the assessors in arriving at a just decision when they give their opinions. Misdirection or non-direction of a trial judge will be seen in his

summing up notes to assessors, hence ***failure to record the summing up notes in a trial is a fatal anomaly which renders the entire proceedings a nullity.***" [Emphasis added]

In the instant case, we have thoroughly read the record of appeal and scrutinized the original trial court record. We reproduce from the record of appeal what was noted down to have transpired on 23rd November, 2015 when the matter came up for summing up:

"***Court:*** *Summing up of the evidence and the submissions made to this court is done to assessors in Swahili the language which they understand.*

Hon. I. Arufani

JUDGE

23/11/2015

Court: *After summing up the case to assessors the court asked if they are ready to give me their opinion as to whether they have been satisfied the case against the accused has been proved to the standard required by law or they need time to deliberate before giving me their opinion and each of them replied as follows:*

1st Assessor: Salama Mohamed

I am ready to give my opinion now.

2nd Assessor: Paulina Kulita

I am also ready to give my opinion now.

3rd Assessor: Leokadia James

I am also ready to give my opinion now."

The above chronicle is followed up immediately with a record of individual opinions of the three assessors. What is manifestly missing from the record of appeal, therefore, is the record of the contents of the summing up. Moreover, our perusal of the original trial court record confirmed that no summing up notes existed. In the circumstances, we are constrained to find that the learned trial Judge made no more than oral summing up to the assessors. As held by the Court of Appeal of Kenya in **Duncan Muchui v Republic** [2013] eKLR:

> *"In the absence of the written record of the contents of summing up, we cannot say whether the assessors had the benefit of a careful summing up; we cannot evaluate what principles of the law were explained to them; we cannot evaluate if the law relating to the offence with which the appellants had been charged was explained to them and how the evidence given at the trial could be applied to that offence.* ***In view of the foregoing, we are inclined to***

emphasize that failure of the learned judge to record the contents of the summing up to the assessors makes the proceedings fatally defective. *Summing up cannot be done orally only; the record must reflect the legal principles and questions of fact that the trial court is tasking the assessors to consider."* [Emphasis added]

We firmly subscribe to the above position, which, in essence, echoes the stance we took in **Makubi Kweli & Another** (supra). We took the same position in our earlier decision in **Othman Issa Mdabe v Director of Public Prosecutions**, Criminal Appeal No. 95 of 2013 (unreported) as we held 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 [of Zanzibar] 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."

See also **Samusoni Mukono & Another v Uganda** [1965] 1 EA 491 and **Upar v Uganda** [1971] EA 98 where the erstwhile East African Court of Appeal, deciding appeals from the High Court of Uganda, held that the notes of the summing up to the assessors must be made by the trial Judge in all criminal trials.

Applying the above position to the instant case, we are of the settled mind that the learned trial Judge's failure to capture his summing up notes on the trial record is fatal. As observed in **Makubi Kweli & Another** (supra), while we are mindful that most decisions of this Court on the issue of summing up to assessors have involved anomalies of misdirections or non-directions in summing up that were held to have fatally vitiated the trials, we think that cases, like the present one, where the trial Judge completely failed to capture the contents of the summing up on the trial record are unquestionably much worse.

In considering whether an order for retrial in this matter is justified or not, we made reference to the celebrated decision in **Fatehali Manji v Republic** [1996] 1 EA 343, in which the erstwhile East African Court of Appeal enunciated, at page 344, the principles for determining such an issue:

"in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

We recall that Mr. Vitalis was insistent that the summing up infraction in this case did not affect the earlier proceedings of the court, which, then, he urged us to spare and only nullify the trial court's proceedings that followed after the impugned summing up. As already indicated, he urged us to order a retrial from the summing up stage. We would venture to guess that Mr. Vitalis' position might have been grounded on fears that a complete retrial could face a likelihood of unavailability of witnesses or

exhibits that were tendered. Be that as it may, we wish to remark that while there have been occasions where the Court only nullified a part of the proceedings vitiated by certain infractions (see e.g., **Makumbi Ramadhani Makumbi & 4 Others v Republic**, Criminal Appeal No. 199 of 2010 and **Elisamia Onesmo v Republic**, Criminal Appeal No. 160 of 2005, both unreported), we have not found any authority supporting severability of proceedings fatally impaired by the omission of summing up notes or improper summing up arising from a misdirection or non-direction by the trial Judge. In the decisions that we cited earlier, the entire proceedings were rendered vitiated and consequently nullified.

In the circumstances, we think a complete retrial is, in the interests of justice, unavoidable on, at least, two grounds: first, as we have indicated, the appellant's original trial was rendered defective in its entirety, not just a part of it. Secondly, it has not been argued that the evidence on the trial record against the appellant is manifestly insufficient and that a retrial will provide an opportunity for filling up the gaps in the prosecution case. Nor is there likelihood that the appellant will be prejudiced or suffer injustice when retried.

In the upshot, we invoke our revisional jurisdiction under section 4 (2) of Cap. 141 (supra) by which we nullify the entire proceedings of the High Court. As a result, we quash and set aside the appellant's conviction as well as sentence imposed on him. We also quash and set aside the consequential order regarding the forfeiture and disposal of the seized drug. Finally, we order that the appellant be retried, as expeditiously as possible, before another judge with a new set of assessors. Meanwhile, the appellant shall remain in custody.

DATED at **DAR ES SALAAM** this 31st day of January 2018

M.S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

(E.F. FUSSI)
DEPUTY REGISTRAR
COURT OF APPEAL