IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 72 'B' OF 2016

JOSEPHINE D/O MUMBI WAITHERA ..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Sumari, J.)

Dated 27th day of January, 2016
In
Criminal Session No. 28 of 2013

JUDGMENT OF THE COURT

9th & 13th March, 2018

MUSSA, J. A.:

In the High Court of Tanzania, at Moshi registry, the appellant was arraigned as hereunder:

" ***STATEMENT OF OFFENCE***

TRAFFICKING IN NARCOTIC DRUGS: *Contrary to section 16(1)(b)(i) of the Drugs and Prevention of Illicit. Traffic in Drugs Act [Cap. 95 R. E. 2002]*

PARTICULARS OF OFFENCE:

JOSEPHINE D/O MUMBI WAITHERA *on the 4th day of June, 2012 at Kilimanjaro International Airport Area within Hai District in Kilimanjaro Region, was found trafficking an amount of 3249.82 grams of* ***Heroin Hydrochloride*** *or* ***Diacetylmorphine Hydroclorlde*** *valued at Tshs. One Hundred Forty Six Million Two Hundred Forty one Thousand and Nine Hundred Only (Tshs 146, 241,900/=).*

signed at Moshi this 4th day of October, 2013

IGUNAS J. MWINUKA

STATE ATTORNEY."

From the statement of offence and the date of the information, it is beyond question that the indictment was predicated under Section 16(1) (b) (i) of the now repealed Drugs and Prevention of Illicit Traffic in Drugs Act, Chapter 95 of the Revised Laws (Chapter 95), which was comprised in the Revised edition of 2002. It is, perhaps, pertinent to reproduce in full

the provisions of Section 16(1) as it then read at the time of the appellant's arraignment:-

> *"16(1) – Any person who -*
>
> *(a) has in possession or does any act or omits to do any act or thing in respect of narcotic drugs or any preparation containing any manufactured drugs commits an offence and upon conviction is liable to a fine of ten million shilling or three times the market value of the narcotic drugs or any preparation containing such manufactured drug or whichever is greater or to an imprisonment for life or to both the fine and imprisonment;*
>
> *(b) traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drugs or psychotropic substance commits an offence and upon conviction is liable.*
>
> *(i) In respect of any narcotic drug or psychotropic substance to a fine of ten million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and in addition to*

imprisonment for life but shall not in every case be less than twenty years;

(ii) In respect of any other substances, other than a narcotic drug or psychotropic substances which he represents or holds to be narcotic drugs or psychotropic substances to a fine of not less than one million shillings and in addition to imprisonment for life but shall not in every case be less than twenty years"

From the foregoing provision, it is noteworthy that, at all the material times, a person convicted under Section 16(1)(i) (b) was liable to pay the prescribed fine and, in addition, to a maximum term of life imprisonment or such other term which, in every case, shall not be less than twenty years.

In a new legislative development, more precisely, on the 6th April, 2012 the National Assembly Promulgated a Written Laws (Miscellaneous Amendments) (No. 2) Act No. 6 of 2012 which, *inter alia*, deleted

paragraphs "(a)" and "(b)" of Section 16(1) and substituted for them the following:-

> *" (a) found in possession or does any act or omits to do any act or thing in respect of narcotic drugs or any preparation containing any manufactured drugs commits an offence and upon conviction shall be sentenced to life imprisonment; and*
> *(b) trafficking in any narcotic or psychotropic substance commits an offence and, upon conviction, shall be sentence to life imprisonment."*

The foregoing amendment, so to speak, enhanced the punishment for trafficking narcotic or psychotropic substances to a minimum sentence of life imprisonment. We should, however, be quick to add that the newly prescribed punishment could not have been effected against the appellant. We say so because she allegedly committed the arraigned offence on the 4th June, 2012, whereas the amendments came into force on the 15th June, 2012.

In a further legislative development, Chapter 95 was itself repealed and replaced by the Drug Control and Enforcement Act, No. 5 of 2015

which came into force on the 11th May, 2015. Thus, undoubtedly, this legislation is, just as well, inapplicable to the situation at hand. With this detail, so much for the particulars of the indictment and its legislative background. We would, next, reflect on what transpired in the trial court.

The appellant is recorded to have refuted the information, whereupon the prosecution featured nine witnesses as well as several physical and documentary exhibits. The appellant gave sworn evidence in reply and did not call any witness. At the close of the case on both sides, the presiding Judge (Sumari, J.) summed up the case to the three assessors who sat with her and required them to state their opinions. As it were, the first and second assessors returned a verdict of not guilty, whereas the third assessor returned a guilty verdict.

On her part, the learned presiding Judge was satisfied that the case for the prosecution was proved to the hilt and, in consequence, the appellant was convicted and handed down a sentence of life imprisonment. For some obscure cause, the learned Judge did not account for her dissent on the opinion of the two assessors who had returned a not guilty verdict.

We shall revert to this disquieting aspect of the trial at a later stage of our judgment. In the meantime it is apt to express that the appellant is presently aggrieved by the whole decision upon a lengthy memorandum of appeal which is comprised of ten(10) points of grievance, namely:-

1. *THAT, the Trial Court erred in law and in fact by proceeding to charge convict and sentence the appellant on a law which had been repealed and was no longer in force.*

2. *THAT, the Trial Judge grossly erred in law and in fact by admitting the prosecution case which had a lot of contradictions and inconsistencies to the facts that admitted by both prosecution and noted by the asesors, yet proceeded to convict and sentence the appellant on such evidence.*

3. *THAT, the Trial Judge erred in law and in fact by finding that the appellant as the owner of the chattel in which it was found with drugs when no evidence was adduced in fact to show that the appellant was the owner of the bag allegedly carrying the drugs or any bag in issue at all.*

4. *THAT, the Trial Judge erred in law and in fact by the while admitting that there was a problem in identifying the colour of the bag in issue, yet found the witnesses as being colour blind and yet proceeded to convict and sentence the appellant thereof.*

5. *THAT, the Trial Judge erred in law and in fact by over-ruling the defese objection on admission of the statement of the appellant while in police custody when in fact and in law it was inadmissible.*

6. *THAT, the Trial Judge erred in law and in fact by not considering at all the appellant deposition at trial and calling it lies contrary to the law.*

7. *THAT, the Trial Judge grossly misdirected herself by failing to consider the chain of custody of the drugs from the time of their being impounded, paraded before the press and eventually being taken for confirmatory test, which did violate sage custody of exhibits an act which was prejudicial to the appellant.*

8. *THAT, the Trial Judge erred in law and in fact by shifting the burden of proof generally to the appellant, and not resolving any doubts raised by the defense in favour of the appellant as required by law.*

9. *THAT, the Trial Judge erred in law and in fact by imposing the maximum sentence on the appellant as it was too severe contrary to principles of sentencing.*

10. *THAT, for all intents and purposes, the offence of trafficking drugs against the accused was not proved at all by the*

prosecution, hence the appellant was wrongfully convicted thereof.

To appreciate the gist of the issues of contention in this appeal, it is necessary to unveil, albeit briefly, the background giving rise to the appellant's apprehension, arraignment and her eventual conviction.

From a total of nine (9) witnesses, the case for the prosecution was to the effect that on the 4th June, 2012 around 3.00 p.m or so, the appellant was at the Kilimanjaro International Airport (KIA). As it turned out, she was enroute to Vienna, Austria via Adis Ababa, Ethiopia and Paris, France and was booked on Ethiopian Airlines flight No. ET 815. The appellant was travelling with a Kenyan passport and, incidentally, in her testimonial account, she confirmed that she is a Kenyan citizen.

The prosecution evidence was further to the effect that, as the appellant's silver coloured suit case was being checked, a security officer, namely, Christina Mbakilwa (Pw4), who was operating the screener, noticed an image which she could not recognize. Upon confirmation

through the luggage tag that the suit case belonged to the appellant, Pw4 sought the assistance of an Ethiopian airline staff at the check in counter who called the appellant through a loudspeaker and directed her to report at the screening machine desk. After she was shown the suspected luggage, the appellant confirmed that it was her belonging. Pw4 then asked her to open the bag, which she did. She was further asked to remove all her belongings from it which she, again, obliged. When the supposedly empty bag was re-screened, the strange image was still apparent. Thereafter, WP 2102 Detective staff sergeant Ndeshi (Pw2), who had joined PW4, physically inspected the inside of the suit case and noticed that there was something like another bag glued to the suit case. The police officer ripped off the attachment to separate it from the suit case and that was when they discovered that the attachment which was wrapped in a nylon paper had an off white flourish substance which Pw2 suspected to be comprised of narcotic drugs. The police officer immediately seized the flourish substance and reported her findings to her superior, namely, ASP Leonidas (Pw3). The latter apprehended the appellant and took her along with the flourish substance to KIA police station where he subjected the substance to a preliminary test following

which he was satisfied that the same comprised narcotic drugs. In the course of her testimony, Pw2 produced the silver coloured suit case (exhibit P5).

On the 8th June, 2012 the substance was conveyed to the Chief Government Chemist in Dar es Salaam where it was handed over to a chemist, namely, Machibya Peter (Pw1) for examination. Upon examining the flourish substance, Pw1 confirmed that the same comprised heroine drugs in the name of heroine hydrochloride or diacelylemorphin. This detail concludes, in a nutshell, the version unveiled by the prosecution witnesses during the trial.

In her sworn reply, the appellant did not quite deny that, on the fateful day, she was at KIA enroute to Vienna Austria and that she was booked on an Ethiopian airline flight. At the information desk, she presented her passport to a male attendant who told her that her Visa was about to expire. Thereafter, the attendant left with her passport to enquire from his supervisors as to whether the appellant should be allowed to travel.

In the meantime, the appellant remained at information desk. A little later, she was confronted with two men who asked her to follow them to their office. As she followed them, she left her suit case at the information desk. At that office, there were seven more persons aside from the two who called her. One of those present was Pw2. In addition, there was a grayish suit case which was opened. The same had clothes and many pairs of shoes. Pw2 asked her if the suit case and its contents were hers. She told her that the suit case was not hers and that she left hers at the information desk. Thereafter she was incarcerated at KIA police station and on the 11th June, 2012 she was formally arraigned at the Resident Magistrate's Court, Moshi for trafficking narcotic drugs.

The appellant insistently refuted ownership of the grayish suit case which the prosecution produced as exhibit P5. Her account was that she left her suit case, which was light green in colour, at the information desk and never recovered it. Thus, in a nutshell, the appellant's defence was that the case against her was sheer fabrication.

As we have already hinted upon, on the whole of the evidence, the trial court was satisfied that the case for the prosecution was proved beyond all reasonable doubt. We have again intimated that the appellant was convicted and sentenced to life imprisonment, hence this appeal.

At the hearing before us, the appellant was represented by Mr. John Materu, learned Advocate, whereas the respondent Republic had the services of Ms. Tarsila Gervas, learned State Attorney. From the very outset, we are obliged to express our profound appreciation in the manner learned counsel on either side lucidly addressed the issues of contention in this appeal. Nonetheless, for reasons that will shortly become apparent, we need not address each and every point raised by both counsel, particularly in relation to the sufficiency of the evidence. As we shall soon demonstrate, this appeal partly turns on the complaint raised by the appellant on ground No. 1, which was refurbished by Mr. Materu at the hearing, as well as some other procedural shortcomings and material misdirections and non-directions of the trial court which were prompted by our intervention

As regards the first ground of appeal, it is noteworthy that in the course of arguing the appeal, as we have hinted upon, Mr. materu refurbished the complaint to mean that the trial court erred by proceeding with the hearing of the case on a wrong assumption that the appellant was arraigned under section 16(1)(b)(i) of Chapter 95, as amended by Act No. 6 of 2012. Addressing us on this complaint, the learned counsel for the appellant particularly criticized the learned Judge for misdirecting the assessors on the nature of the information and the sentence that was to be meted out in the event of a conviction.

If we may express at once, there is force in the complaint much as in, for instance, her summing up to assessors, the trial Judge clearly expressed that wrong assumption in the following words at page 243 of the record:-

> *"The accused Josephine Mumbi Waithera is charged with unlawful Trafficking of Drugs contrary to section 16(1) (b) (i) of the Drugs and prevention of Illicit Traffic in Drugs Act, Cap. 95 [R.E. 2002]* ***as***

amended by section 31 of the Written Laws (Miscellaneous Amendment Act) No. 6/2012"

[Emphasis is supplied].

The learned Judge replicated this wrong impression of the nature of the sentence to be meted out at page 256 of the record by further directing them thus:-

> *".....according to our laws, the sentence for one convicted with unlawful Trafficking of Drugs contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95[R. E. 2002]* ***as amended by section 31 of the written laws (Miscellaneous Amendments) Act, No. 6/2012 is the life imprisonment and no optional sentence."*** [Emphasis supplied].

The learned State Attorney submitted that the misdirections to the assessors by the trial Judge on the nature of the charge and sentence were curable in as much as the information to which the appellant was arraigned did not refer to the amendment Act and, as such, the appellant was not prejudiced.

With respect, to us, the misdirections on the nature of the information facing the appellant as well as the culpable sentence were serious, the more so as the referred Act No. 6 of 2012 was inapplicable to the case at hand. In the case of **Tulubuzya Bituro Vs The Republic** [TLR] 264, the Court observed thus:-

> *"In a trial in the High Court, where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of the assessors. The position would be the same where there is a non-direction to the assessors on a vital point ."*

The trial court's reference to the inapplicable Act No. 6 of 2012 in the summing up was, undoubtedly, a misdirection both on the nature of the information and the culpable sentence which are vital points of law.

Speaking of the non-directions we also noted and raised another shortcoming to the effect that the learned judge did not, at all, direct the assessors on the ingredients of the offence to which the appellant was arraigned. Both Mr. Materu and Ms. Gervas were of the view that such was a serious non-direction which vitiated the trial. Whereas the learned

State Attorney urged us to order a new trial, Mr. Materu opposed the suggestion for the reason that, to him, the evidence in support of the information fell short. To say the least and, as we have already intimated, we need not venture into the merits of the evidence but, generally speaking, on the whole of the material laid before the trial court, it seems to us that the case was evenly contested.

We shall, at a later stage, determine the consequences of these misdirection's and non-directions. In the meantime, we propose to consider and determine the other shortcomings which were prompted by our intervention. In that regard, we propose to begin with the failure by the trial Judge to assign reasons for her dissent with the two assessors who had returned a verdict of not guilty in favour of the appellant.

Addressing us on this shortcoming, Mr. Materu urged us to find that the failure by the trial Judge to assign reasons for her dissent was fatal to the extent of vitiating the entire proceedings. He referred us to the old case of **Baland Sigh Vs Reginam** (1954) 21 EACA at page 209 where the Court of Appeal for Eastern Africa held:

"It is most desirable that a judge should record his reasons where he disagrees, with the assessors, particularly, if the assessors have given reasonable grounds for their opinions."

On her part, Ms. Gervas was of the view that assigning such reasons was a desirability and not an imperative requirement the more so as assessors' opinions were not binding on the Judge.

Dealing with the learned rival contentions, we need do no more than reiterate the observation of the Court in the case of **Abdallah Bazimiya and Others Vs** The Republic [1990] TLR 42:-

" For our purpose in the Court of Appeal, the informed and full views of the assessors become further necessary when we have to rely on what we might call the Segesela Principe, 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."*

More recently, in the unreported Criminal Appeal No. 504 of 2016 – **Richard Lucas Muhanza @ Leonard and Three Others Vs The Republic,** the Court held:

"Non-involvement of assessors and failure to consider opinion of assessors without assigning reasons are serious irregularities which, for whatever reason, distorted the proceedings to the detriment of any party to the proceedings. The trial cannot be said to have been conducted with the aid of assessors. It becomes a nullity."

We are fully alive to the principle that each case has to be decided upon its own particular facts and circumstances. But, in a trial such as the present, where the first and second assessors gave detailed opinions in support of their verdict, it was necessary for the Judge to assign reasons

for her dissent so as to enable us to determine whether or not she was entitled to do so.

The last shortcoming pertains to the procedure adopted by the trial court in the examination of the witnesses and questions by assessors. As it were, upon the witness testifying in chief, the adversary counsel was called in to cross-examine followed by the assessors questions. The counsel calling the witness was then allowed to re-examine the witness. Mr. Materu submitted that such procedure was flawed much as it placed the calling party to fill in whatever gaps were created by the assessors' questions, whereas the adversary party was not, as such, advantaged. The learned State Attorney's short answer to the complaint was that the procedure did not in any way prejudice the appellant and that, in any event, such procedure is permissible.

Again, with respect, we do not think that the procedure adopted by the Court for examination of witnesses and assessors questions is permissible. In the unreported Criminal Appeal No. 147 of 2008 – **Mathayo Mwalimu and Another Vs The Republic,** the Court advised:-

"As at what stage in the trial can assessors ask questions, we think that this depends on the trial judge. In our respectful opinion, however, we think that assessors can safely ask questions after the re-examination of a witness."

The procedure adopted by the trial court pertaining to the order of examination of witnesses and the assessors questions was, indeed, unprecedented and we cannot say with certainty that appellant was not, in the result, prejudiced.

On the whole, we are of the settled view that the misdirection and non- directions to the assessors which we have singled out; the failure by the trial judge to assign reasons for her dissent with the opinion of the two assessors and; the procedure adopted by the trial Judge with respect to the examination of witnesses and the assessors' questions; had the cumulative effect of vitiating the entire proceedings. We, therefore, proceed to invoke the provisions of section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws, and nullify the entire proceedings. On account of the fact that the case involved a serious offence which, as we have said, was evenly contested, we are constrained

to order a new trial before another Judge of competent jurisdiction and a new set of assessors. Just in case the new trial ends with a conviction, at the sentencing, the trial court should take into account the period of sentence served by the appellant. In the meantime, the appellant should remain in custody while she awaits the new trial. Order accordingly.

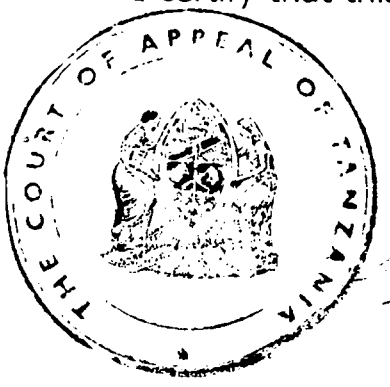
DATED at **DAR ES SALAAM** this 12th day of March, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
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