IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And KIHWELO J.A.)

CRIMINAL APPEAL NO. 318 OF 2017

SALEHE S/O RAJABU @ SALEHE..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwingwa, J.)

dated the 25th day of July, 2017
in
Criminal Sessions No. 42 of 2016

.....

JUDGMENT OF THE COURT

13th September &1st October, 2021

MKUYE, J.A.:

The appellant, Salehe Rajabu @ Salehe was charged with an offence of trafficking in narcotic 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) (No 2) Act No. 6 of 2012. It was alleged in the particulars of offence that the appellant on 11th day of April, 2015 at Moshi Police area within the Muncipality of Moshi in Kilimanjaro Region, was found trafficking 89 kgs of narcotic drugs namely Khat commonly known as

"*Mirungi*" valued at Tshs. Four million four hundred fifty thousand only (4,450,000/=). Upon the conclusion of the trial, the appellant was found guilty, convicted and sentenced to the mandatory term of life imprisonment. Aggrieved, he has now appealed to this Court.

Before embarking on the merits of appeal, we find it appropriate to narrate, albeit briefly, the facts of this case. They go thus:

On the material date 11th May, 2015, the appellant was travelling from Makanya within Same District to Babati onboard a commuter bus christened Kirenga Luxury Coach. On reaching Moshi town, the bus was stopped by police officers acting on a tip that in the said bus there was a passenger transporting narcotics. The police officers entered inside the bus and inspected various luggage some of which were in the staff carrier.

The police picked four bags including the one believed to belong to the appellant. The owners of such bags, two women and two men the appellant inclusive, were ordered to alight from the bus. The contents of the bag belonging to the appellant were emptied where some green leaves suspected to be khat were found.

Thereafter, the appellant was arrested and recorded his cautioned statement in which he admitted to traffic narcotics. The suspected khat was taken to D/Sgt Hashimu Ally Mafulu (PW1), (Exhibit keeper), who kept it in the police store and monitored its movement when it was taken to the Zonal Chief Government Chemist in Arusha, Kaijunga Trifon Blass (PW3) for weighing; Keneth James Kaseke (PW2) for valuing; Christopher Augusto Onyayo (PW6) of the Chief Government Chemist for its analysis; and Elias Mulima (PW10) of the Chief Government Chemist at Dar es Salaam who examined it and revealed that it was cathinone and prepared the report thereof admitted in court as Exh P9.

In his defence, the appellant disassociated with the offence but as alluded to earlier on, upon the conclusion of trial he was convicted and sentenced accordingly.

Initially, the appellant on 4/5/2018 lodged a memorandum of appeal consisting ten grounds of appeal. Nevertheless, at the hearing he prayed and leave was granted to lodge a supplementary memorandum of appeal consisting of four grounds of appeal but for purposes of our determination of this matter, we shall reproduce ground No. 4 of the supplementary memorandum, as we think, it is capable of

disposing of the appeal without necessarily dealing with the remaining grounds. The said ground of appeal states:

> *"That the trial court grossly erred both in law and fact in failing to explain to the assessors the duty imposed on them in assisting the court, moreover the appellant was not involved during the selection of the assessors."*

At the hearing of this appeal, the appellant appeared in person and unrepresented while linked through a video conference facility from Arusha Central Prison; whereas the respondent Republic was represented by Ms. Verediana Peter Mlenza learned Senior State Attorney assisted by Ms. Lucy Kyusa and Ms. Sabitina Mcharo, both learned State Attorneys.

When the appellant was availed an opportunity to elaborate his grounds of appeal, he in the first place sought to adopt his substantive memorandum of appeal together with the supplementary memorandum of appeal imploring the Court to consider them; and asked to let the learned State Attorney respond first with a view to making his rejoinder later, if need would arise.

In response, Ms. Mlenza prefaced by declaring their stance that they were supporting the appeal. Responding on ground No. 4 of the supplementary memorandum of appeal, she readily admitted that the procedure for selection of assessors was flawed. She took us at the back of page 37 (as some pages of the record of appeal are not numbered) where three assessors were listed and she explained that the appellant was not asked to comment or object to the said assessors. Instead, she said, the trial judge after having listed them, allowed the information to be read over and proceeded with taking the witnesses' evidence.

Apart from that, the learned Senior State Attorney pointed out that the assessors were not appointed or selected in accordance with the law; and that the trial judge did not explain the roles or duties of the assessors before commencement of the hearing of the case. In this regard, she contended that, this contravened the requirements of the law under section 265 of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA) requiring the High Court to sit with assessors; section 283 of the CPA which requires the court to choose the assessors; and section 285 of the same Act providing for the selection of assessors. To support her argument, she referred us to the case of **Abdallah Juma @**

Bupale v. Republic, Criminal Appeal No. 557 of 2017 page 17 (unreported).

Ms. Mlenza, however, argued that these anomalies were not prejudicial to the appellant since the assessors participated in the whole trial where they asked questions to the witnesses and gave their opinions.

Ms. Mlenza went on submitting that the trial judge did not address the assessors on vital points of law such as the ingredients of the offence of trafficking in narcotics, the chain of custody and inconsistencies in evidence. She contended that, looking at the summing up to the assessors notes found at pages 86 to 100, the trial judge just summrarised the evidence of witnesses without more. While citing the case of **Abdallah Juma @ Bupale** (supra), the learned Senior State Attorney was of the view that as the trial judge failed to explain to the assessors the vital elements of law involved in the case, the assessors could not have been in a position to give an informed opinion. She said, failure to do so was a fatal irregularity which cannot be cured. She, thus, implored the Court to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) and nullify the proceedings from the

stage of summing up to the assessors and the judgment thereof, quash the conviction, set aside the sentence and order for a retrial from that stage.

In rejoinder, the appellant did not have much to say but insisted that the Court should set him free as the irregularity was caused by the court and not himself.

We have considered the grounds of appeal as well as the submissions from both sides and also, we have gone through the entire record of appeal. There is no gainsaying that the appellant has taken issue on the trial judge's failure to ask the appellant to comment on the identified assessors, and to explain to the assessors their roles in trial. In addition, there is an issue that the trial judge failed to address the assessors on vital points of law in the case during the summing up to them.

In dealing with the issues relating to the assessors, we wish to reiterate the essence of assessors in trials before the High Court.

Section 265 of the CPA provides that all trials before the High Court are mandatorily required to be with the aid of assessors the number of which is to be two or more as the court may think fit. In

terms of section 285(1) of the same Act, the assessors are to be selected by the court. On top of that, under section 298 (1) of the CPA the trial judge is required after the case on both sides has been closed to sum up the evidence for the prosecution and for the defence and then call upon each of the assessors to give his/her opinion orally as to the case generally and as to any specific question of fact which may be addressed to him by the judge and the trial judge shall record such opinion.

In this case, in order to demonstrate how the assessors featured in the trial, we find it apposite to reproduce a portion of the proceedings relating to the purported selection of the assessors as hereunder:

"Date: 5/7/2017

Coram: B.B. Mwingwa J,

For accused: Janeth Alphone

For Republic: Ms. Mndeme,

Mwinuka and Mahalu Vestine.

Accused: Present

ASSESSORS.

1. Agnes Mkumba

2. Mary John

3. Lomilu Laizer

Cc: Mpondyo"

Information of trafficking in narcotic drugs contrary to section 16 (1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs is read out and explained to the accused in his own language (Kiswahili) and he is required to plead thereto:

Accused's Plea: It is not true
Court: Entered plea of not guilty

Sgd: B.B. MWINGWA
JUDGE
5/7/2017

PROSECUTION CASE OPENS

PW1: Detective Sergeant Hashimu Ally Mafulu, Adult, Moslem, Tanzanian, Affirmed and stated":

Looking at the above quoted portion of the proceedings, it is clear that the assessors were not properly selected. The record of appeal does not show how the trial judge selected them to sit with him in the High Court. What is vivid is that the assessors were just listed in the coram of that date as evidenced even before the process of their selection had taken place – (see the back of page 37 of the record of appeal). It was expected that the trial judge would have shown a process of selecting or choosing them before listing them as assessors.

That was not the only anomaly in relation to the process of selection of assessors. After the purported chosen assessors were listed down, the trial judge did not give a chance to the appellant to comment or object to them before the commencement of the trial. In the case of **Monde Chibunde @ Ndishi v. Republic**, Criminal Appeal No. 328 of 2017 (unreported) when the Court was confronted with a similar scenario it stated that:

> *"The Court must select assessors and give an accused person an opportunity to object to any of them."*

But again, in the case of **Fadhili Yusufu Hamid v. The Director of Public Prosecutions,** Criminal Appeal No. 129 of 2016 (unreported) when the Court was faced with an analogous situation it stated among others that:

> *"The case of **Laurent Salu and Five Others v. R,** Criminal Appeal No. 176 of 1993 (unreported) is elaborative on all the steps which must be complied with in a trial with aid of assessors:*
>
> *1) The Court **must select assessors** and **give an accused person an opportunity to object to any of them.***
> *2) ..... N/A....."*

Besides that, the trial judge did not explain to the assessors their role. Though it is not a matter of law, this is now a settled practice which the trial judges have been invariably complying with. This was emphasized in the case of **Abdallah Juma @ Bupale** (supra) and other numerous authorities such as **Hilda Innocent v. Republic**, Criminal Appeal No. 181 of 2017(unreported) and **Fadhili Yusufu Hamid's** case (supra). For instance, in the latter case, on this aspect the Court stated as follows:

> *"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."*

Thus, applying to the above authorities, since the trial judge failed to select the assessors as per section 285 (1) of the CPA; he did not give a chance to the appellant to comment or object on the appointment of the assessors; and to explain to them their roles, that was an irregularity in the trial. However, we agree with the learned Senior State Attorney that though there was such irregularity, it was not prejudicial to the appellant since the assessors participated in the whole trial as they

heard the witnesses of both the prosecution and defence, asked them questions and gave their opinion.

Nevertheless, we also agree with both parties that the trial judge did not address the assessors on vital points of law in relation to the case as required by section 298 (1) of the CPA. In **Abdallah Juma @ Bupale's case** (supra) also while referring to the case of **Fadhili Yusufu Hamid's** (supra) emphasised this requirement when it was stated among others that:

> ***"The Court has to sum up to the assessors at the end of submission by both sides. The summing up to contain a summary of facts/the evidence adduced and also the explanation of the relevant law/for instance/what is malice aforethought.*** *The court has to point out to the assessors any possible defences and explain to them the law regarding those defences."* [Emphasis added]

The importance of explaining to the assessors the vital points of law was stated by the Court in the case of **Michael Kazanda @ Kaponda and 2 Others v. Republic,** Criminal Appeal No. 374 of 2017 (unreported), while citing the case of **Mbalushimana John Maria Vianney @ Mtokambali v. Republic,** Criminal Appeal No. 102 of 2006

(unreported) which made reference to the case of **Washington Odindo v. Republic**, (1954) 21 EACA 392 as follows:

> *"The opinion 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 assessors' opinion is correspondingly reduced."* See also **Kato Simon and Another v. Republic,** Criminal Appeal No. 180 of 2017 (unreported).

In this case, as was rightly submitted by Ms. Mlenza the trial judge failed to address the assessors on vital points of law involved in the case. He did not explain to them the ingredients of the offence of trafficking in narcotic drugs and what was required to be proved in such an offence. Apart from that, although he based the conviction on among others the doctrine of chain of custody, he did not explain what it entails by chain custody and its import it applied in the case at hand. Also, the issue of inconsistencies in the evidence and how they can be treated in evidence was not explained. Instead, from page 86 to page 100 of the record of appeal shows that the trial judge summarized the evidence for the prosecution and defence as well as the rival submissions from the

counsel from both sides and invited the assessors to give the court their opinions.

Since those salient elements of law were used and relied upon in mounting a conviction against the appellant, it was incumbent upon the trial judge to explain them to the assessors before they were called upon to give their opinions to enable them give an informed opinion.

Failure to explain such essential elements of law to the assessors we think, vitiated their participation as envisaged under sections 265 and 298 (1) of the CPA in giving the opinion to the court. As such, the proceedings from the stage of summing up to the judgment were a nullity.

As to the way forward, we have considered Ms. Mlenza's proposition as well as the appellant's rival submission. Given the circumstances of the case, we agree with the learned Senior State Attorney's proposition that a retrial is the best option. Hence, in terms of section 4 (2) of the AJA, we invoke our revisional powers and nullify the proceedings from the stage of summing up to assessors and the judgment of the trial court, quash the conviction and set aside the sentence meted out against the appellant.

We further order for a retrial from the stage of summing up to assessors to be conducted expeditiously before the same judge and a similar set of assessors unless otherwise the circumstances do not allow, then the provisions of section 299 of CPA should apply. Meanwhile, the appellant shall remain in custody to await the said retrial.

Order accordingly.

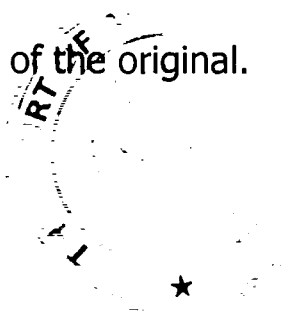
DATED at **ARUSHA** this 1st day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Judgment delivered on 1st day of October, 2021 in the presence of the appellant in person, and Ms. Tusaje Samuel, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL