IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 360 OF 2019

EKENE PAUL NDEJIOBI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Dar es Salaam]

(Khamis J.)

dated the 15th day of August, 2019
in

Criminal Sessions Case No. 28 of 2016

JUDGMENT OF THE COURT

25th August & 18th October, 2021

MKUYE, J.A.:

The appellant, Ekene Paul Ndejiobi was charged and convicted 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, R.E 2002; now R.E. 2019 and was sentenced to a fine of Tshs. 148,751,100/= and in addition, to imprisonment for twenty-five years. Aggrieved, he has now appealed to this Court.

Briefly, the facts giving rise to the present appeal are that: on the material day of 18/3/2012, the appellant while at Julius Nyerere International Airport (JNIA) enroute to Nigeria via Nairobi was arrested while in possession of 68 pellets containing narcotic substance to wit

heroine hydrochloride. It was the prosecution case that on the material day, the appellant passed through the screening machine which sounded an alarm indicating that there was something unusual. Then the appellant was required to go through the machine twice and still the alarm sounded.

The security officer Hassan Abdallah Sumai, (PW8) then informed the appellant that he presents himself for a further physical body search and while they were enroute to the room designed for such purposes, the appellant without notice took to his heels whereupon PW8 and his colleague pursued him and managed to arrest him at the airport parking lot. The appellant was brought back and when a body search was conducted, it was revealed that in his groin area there were some 17 pieces of substance whose contents were later discovered to be narcotic drugs.

Thereafter, the appellant was handed over to the police where according to No. PF 183442 Insp. Majinji Peter Pimbili (PW10) on 19/3/2012 he defecated 19 pellets. Later, he indicated that he was unwell and was rushed to Amana Hospital whereupon he was later transferred to Muhimbili National Hospital.

On arrival at the Muhimbili Hospital, it appears that the appellant was unable to speak but spoke through sign language expressing that

something was wrong with his stomach and anal area and he wished to take a loo. A container was made available to him and he defecated a total number of 32 pellets making a total number of 68 pellets when added with 17 pellets recovered at his arrest and 19 pellets defecated on 19/3/2012. Upon showing signs of recovery from his stomach uneasiness, the appellant was discharged and then recorded a cautioned statement. Thereafter, the 68 pellets were taken to the Chief Government Chemist (CGC) for test analysis and the result revealed that the same contained narcotic substance, to wit, heroine hydrochloride.

In his defence, the appellant disassociated himself with the offence.

After both the prosecution and defence had closed their cases, the trial judge summed up the case to the assessors whereby Assessor I returned a verdict of guilty and Assessor II gave an incomplete verdict. Subsequently, upon being satisfied that the prosecution proved the case beyond reasonable doubt, the trial court convicted the appellant and sentenced him as alluded to earlier on.

Dissatisfied with that decision, the appellant has appealed to this Court against both conviction and sentence on a total of twenty-four grounds of appeal some of which with sub items but for reason to become apparent in due course, we do not intend to reproduce all of

them except that we will reproduce grounds Nos. 1, 2, 3 and 5, as we think, they are capable of disposing of the entire appeal without necessarily discussing the remaining grounds of appeal.

The said grounds are as follows:

1) *"The learned trial judge erred in law and fact by convicting the appellant in a case where he failed to explain the duties and responsibilities to the assessors after their selection and hence contributing to their insignificant participation in the trial contrary to procedure (sic) law.*

2) *That the learned trial judge erred in law and fact by convicting the appellant in a case where vital points of law such as the chain of custody, ingredients/elements of trafficking were not explained to the assessors during the summing up contrary to the procedure (sic) law.*

3) *The learned trial judge erred in law and fact by convicting the appellant in a case where the court assessors opinion after the summing up did not reflect the questions posed to them by the trial judge and neither did the 2nd assessor's opinion indicate the guilty or innocence of the appellant contrary to the procedure (sic) law.*

5) *That the learned trial judge erred in law and fact by convicting the appellant by relying on a charge sheet*

whose particulars of offence was in variance with the evidence on record, hence rendering the same fatally incurable."

At the hearing of the appeal, the appellant was represented by Mr. Samson Shundi Mrutu learned counsel; whereas the respondent Republic was represented by Ms. Batilda Mushi and Ms. Tully Helela, both learned State Attorneys.

When called upon to expound the grounds of appeal, Mr. Mrutu in the first place sought to adopt the memorandum of appeal together with the written submission which was drawn and filed by the appellant earlier on and expounded on some few areas on it. For the smooth sequence of our determination, we propose to begin with ground No. 5, then No. 1 and lastly grounds Nos. 2 and 3 which will be dealt with co-jointly.

In relation to the 5th ground of appeal, the appellant's complaint is that the charge sheet is defective as the particulars of the offence are at variance with the evidence on record. In his written submission, the appellant has contended that whereas the charge sheet shows that on the alleged date he was arrested at the Julius Nyerere International Airport (JNIA) with narcotic drugs weighing 1101 grams, D/Ssgt. Andrew Msonge (PW6) testified that he was found with 17 pellets while at the

Airport and PW10 testified that 19 pellets were found through defecation at JNIA; and 32 other pellets were defecated at Muhimbili National Hospital. It was his argument that the particulars of offence do not reflect the dates when the other pellets were defecated on 19/3/2012 and 20/3/2012 and the places they were defecated. In the circumstances, the appellant argued that the trial court ought to have ordered for the amendment of the charge or the prosecution to have sought leave to amend it in terms of section 276 (1) and (2) of the Criminal Procedure Act, Cap. 20 R.E. 2002; now R.E. 2019 (the CPA). He cited the case of **Thabiti Bakari v. Republic,** Criminal Appeal No. 73 of 2019 (unreported) to support his argument.

Unfortunately, the learned State Attorney did not submit on this ground perhaps because her concentration was on issues related to the assessors.

In addressing this issue, we in the first-place, wish to point out that it is true that section 276 (1) and (2) of the CPA empowers the court to order an amendment of the information where it appears that the same is defective provided that the required amendment cannot be made without injustice upon such terms and conditions as the court may deem just. This position was expounded in the case of **Thabit Bakari** (supra) where the Court stated as follows:

> *"It is expected that when the prosecution becomes or is made aware of the variance between the charge and evidence, it was required to seek leave to amend the charge...It is well settied that in such a situation, failure to amend the charge sheet is fatal and prejudicial to the appellant. This is because such anomaly leads to serious consequences to the prosecution case".*

(See also **Issa Mwanjiku @ White v. Republic,** Criminal Appeal No. 456 of 2017 (unreported)).

However, we find that the circumstances of that case are distinguishable to the case at hand. We say so because in **Thabit Bakari's** case (supra), the variance was between the charge sheet particularly in the particulars of the offence relating to what was stolen and the evidence presented by the prosecution. While the particulars of offence showed that what was stolen was a tricycle bajaj, the evidence of PW1 and PW3 showed that it was a motorcycle that was stolen.

In this case the charge sheet (information) which is found at page 74 of the record of appeal reads 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***

Ekene Paul Ndejiobi, on 18th of March, 2012 at Mwl. Julius Nyerere International Airport Area within Ilala District in Dar es Salaam Region was found trafficking in narcotic drugs namely heroine hydrochloride weigh (sic) 101.86 grams valued at (Tshs. 49, 583,700) forty nine million five hundred and eighty three thousand and seven hundred Tanzania Shillings".

As it may be gleaned from the excerpt above, the information shows that the appellant was found with narcotic drug known as cocaine hydrochloride. They weighed 101.86 grammes and were valued at Tshs. 49, 583,700/=. We agree that the said information does not show the number of pellets and that it seems to show that the whole consignment was found in whole-some at JNIA. It does not reflect the dates when and places where the pellets were retrieved particularly those which were defecated on 19/3/2012 and 20/3/2012. However, much as the argument may seem so, in our view, it does not hold water. This is so because there is evidence from PW8 that the appellant was arrested while at JNIA after being suspected of possession of narcotic drugs. After inspection, he was found with 17 pellets. PW10 testified that on 19/3/2012 the appellant while under observation defecated 19 pellets. He also testified, as shown at pages 234 to 235 of the record of appeal,

that after experiencing stomach complications the appellant was taken to Amana Hospital and later to Muhimbili Hospital where he defecated 32 pellets on 20/3/2012 while under the observation of PW5. As it is, the defecation of 19 pellets on 19/3/2012 and 32 pellets on 20/3/2012 was under the same sequence of events from his arrest on 18/03/2012. In other words, the process of retrieving all the pellets ended at Muhimbili on 20/03/2012 counting from the date and place when the appellant was first found with the 17 pellets on 18/03/2012. Practically, the charge could not have been stretched to show the whole process as that would have been covered by evidence.

Besides that, the flow of the witnesses' evidence indicates that there is a chain and connection of events as from when the appellant was arrested at JNIA to when he was taken to Amana Hospital and later to Muhimbili Hospital where he finalized the process of defecation of pellets. It is our view that the change of location where the pellets were recovered does not create any variance rather the evidence on record supplements the sequence of events in retrieving the total number of pellets.

Nevertheless, we agree that the number of pellets was not indicated in the charge sheet. However, despite the fact that it was not indicated, the weight of 1101. 86 grammes as indicated in the charge

sheet is linked with the 68 pellets as was testified by PW1, PW2 and PW9. In any case, we asked ourselves whether or not the appellant was prejudiced. We think, the answer to this question is in the negative. This is so because of the evidence which was led by the prosecution clarified all those issues.

In the case of **Twalaha Ally Hassan v. Republic** Criminal Appeal No. 127 of 2019 (unreported), the Court was faced with a situation where the charge mentioned the victim as a fifteen years old girl while the evidence disclosed that she was eighteen years at the time of commission of offence. The Court after considering all the surrounding circumstances was of the view that the appellant was not prejudiced and it observed as follows:

> *"By the same token, we do not find any ostensible prejudice against the appellant by the two variances and the evidence. Although the charge stated the victim's age as being fifteen, which would not have entailed proof of the victims' consent to sexual intercourse, it was clearly particular that the sexual act was done without the victim's consent. This matched with the victim's evidence that she did not consent to the sexual act...".*

Applying the above cited authority, it is our considered view that the appellant was not prejudiced as the prosecution witnesses' evidence clarified what was in the charge. Even if we assume, for the sake of argument that there was a defect in the charge, it was curable under section 388 of the CPA and, hence, we find this ground unmerited and we dismiss it.

In relation to the complaints in grounds Nos. 1, 2 and 3, the appellant argued in the written submission that the trial judge did not explain to the assessors their duties and responsibilities after their selection and hence, their participation in the trial was rendered insignificant. Moreover, he contended that there was inadequate summing up to the assessors on vital points of laws particularly on the chain of custody and the ingredients or elements of the offence of trafficking in narcotic drugs. In addition, the appellant complained that the opinion of the assessors did not reflect or answer the issues posed to them by the trial judge for their opinion; and lastly, he argued that the 2nd assessor did not indicate whether the appellant was guilty or innocent.

On her part, Ms. Mushi conceded to all matters raised by the appellant on assessors. She took us to page 92-93 of the record of appeal and submitted that after the assessors were selected and

introduced to the appellant and their appointment having not objected to by both sides, the prosecution proceeded to call their first witness without the trial judge explaining to the assessors their roles and responsibilities. She argued that failure by the trial judge to explain to the assessors their roles rendered them not to discharge their duties properly.

Ms. Mushi went on submitting that the trial judge did not explain the vital points of law to the assessors. In relation to the ingredients of the offence, she said, though he reproduced section 169(1)(a)(b) and (2) of the Drugs and Prevention of Illicit Drugs Trafficking Act, he did not explain the elements of the offence to the assessors. She further argued that the elements of the chain of custody and the repudiated cautioned statement were also not explained to the assessors. She, therefore, was of the view that failure by the trial judge to explain such vital elements of law rendered the proceedings a nullity and while relying on the case of **Abdallah Juma @ Bupale v. Republic**, Criminal Appeal No. 531 of 2021 (unreported) decided by this Court at Shinyanga on 10/08/2021, she urged us to nullify the proceedings and judgment, quash the conviction and set aside the sentence.

As to the way forward, the learned State Attorney implored upon the Court to order a retrial since there is a watertight evidence from eye

witnesses and expert evidence proving the commission of the offence on 18/03/2012.

In rejoinder, Mr. Mrutu welcomed the concession by the learned State Attorney on those grounds of appeal. However, he had a different view on the way forward. It was his submission that a retrial was not the best option since the prosecution evidence was marred by inconsistencies and contradictions on how the appellant was arrested, how the pellets were recovered and handled (chain of custody) and that those contradictions went to the root of the matter warranting to be resolved in favour of the appellant. In this regard, he urged the Court not to order a retrial and instead allow the appeal and quash the conviction and order the appellant's immediate release from custody.

We have carefully considered the grounds of appeal, the submissions from either side together with the record of appeal in relation to the issue of assessors. Regarding the issue that the trial judge did not explain to the assessors their role we agree with both sides. Although, this is not a matter of law, we are aware that it is now a settled practice which the trial judges have to comply with. This stance was reiterated in the case of **Abdallah Juma @ Bupale** (supra) and **Fadhili Yusufu Hamid v. The Director of Public Prosecutions,**

Criminal Appeal No. 129 of 2016 (unreported). For instance, in the latter case, 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 the above authorities, since the trial judge failed to explain to the assessors their roles, that was an irregularity in the trial. However, we think that though there was such an irregularity, it did not prejudice the appellant since the assessors participated in the whole trial because they heard the witnesses of both the prosecution and defence, asked them questions and gave their opinion. Apart from that, we equally agree with the learned State Attorney that after Assessor II (Amina Kibinda) gave her opinion, she did not indicate whether the appellant was guilty or innocent. This again was an irregularity in the trial as her verdict was not complete. However, for the reason that will be apparent soon, we leave this matter at that.

Next is the complaint in relation to the inadequate summing up to assessors by the trial judge as shown from pages 281 to 309 of the record of appeal. In the first place it is without question that the trial judge convicted the appellant on the offence of trafficking in narcotic

drugs which was predicated under section 16(1)(b)(i) of the Drugs and Prevention of Illicit Trafficking in Drugs Act. In the summing up to assessors at page 282 of the record of appeal he religiously reproduced the provisions of section 16(1) (b) and (2), as was rightly submitted by the learned State Attorney. However, without elaborating the ingredients of the offence which the appellant was facing, he proceeded to tell them that the prosecution was bound to prove its case beyond reasonable doubt and not for the appellant to prove his innocence and went on summarizing the evidence of the prosecution witnesses. We asked ourselves, what in particular were the assessors told which the prosecution was required to prove? The answer to the posed question is that it is not clear. In our considered view, we think the trial judge ought to have explained the ingredients of the offence of trafficking in drugs so as to enable the assessors understand properly the type of offence and relate to the evidence which was supposed to be adduced to prove it - (See **Weda Mashilimu @ Baba Siha and 5 Others v. Republic**, Criminal Appeal No. 375 of 2017 (unreported).

Secondly, the trial judge relied on the principle of chain of custody of the alleged drugs (heroin) in convicting the appellant in that it was not broken. This is vividly seen at pages 342 to 349 of the record of appeal. This factor is very crucial in proving the offence of this nature.

However, in the summing up to assessors the trial judge as gleaned from page 308 of the record of appeal just asked the assessors to consider the aspect of the exhibit, the pellets containing narcotic drugs (Exh. P2) whether the chain of custody was tampered with, without explaining to them what entails the chain of custody and how it can be said to have been tampered with.

Thirdly, the trial judge relied on the appellant's cautioned statement in convicting the appellant. At page 341 of the record of appeal he quoted a portion of the repudiated cautioned statement (Exh. P8) relating to how the pellets were retrieved and stated that it corroborated other witnesses' testimonies. However, there is nothing on record to show that the said statement was explained to the assessors; and what is to be considered in it and the weight to be accorded more so when taking into account that it was repudiated.

In the case of **Mande Chibunde @ Mdishi v. Republic,** Criminal Appeal No. 328 of 2017 (unreported) the issue of directing the assessors on vital points of law as per section 298 (1) of the CPA was emphasized. In the said case, while citing the case of **Washington s/o Odondo v. Republic** [1954] 21 EACA 392 the Court stated as follows:

> *"The opinion of the assessors can be of great value and assistance to the 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 assessor's opinion is correspondingly reduced'.

Also, in the case of **Kato Simon and Another v. Republic,** Criminal Appeal No. 180 of 2017 (unreported) where the assessors were not properly informed on the vital points of law to enable them give their opinion the Court found that the trial cannot be said to have been aided by assessors and hence the trial judgment and sentence were nullified.

In this case, we are satisfied that the assessors were not directed to the vital elements of law which were crucial in the determination of the case. Thus, they could not have been in a position to assist the court as per section 265 of the CPA. Since there was such omission, it is obvious that failure to do so vitiated the entire proceedings. Hence, it rendered the trial, judgment and sentence a nullity the effect of which would be nullification of the entire proceedings.

As to the way forward, we have considered the arguments from either side. We are mindful of the well settled position of the law that a retrial should not be used to fill up gaps. This stance was taken in the case of **Fatehali Manji v. Republic**, [1966] EA 341 where the East African Court of Appeal expounded on when a retrial should be ordered

and the factors which are to be taken into consideration prior to ordering a retrial. The case has been followed by this Court on a numerous case, one of them being **Selina Yambi and others v. Republic**, Criminal Appeal No. 2013 (unreported) where this Court stated as follows:

> *"We are alive on the principles governing retrial. Generally, a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps. The bottom line is that, an order should only be made where the interests of justice require".*

In the instant case, having found that the trial and the resulting judgment, conviction and sentence a nullity, the remedy that would have ordinarily followed, was a trial *de novo* particularly so, if the evidence available is capable to sustain the conviction. However, we think that may not be the right cause to take in this case. We are guided by the case of **The Director of Public Prosecutions v. Ismail Shebe Islem and 2 Others,** Criminal Appeal No. 266 of 2016 (unreported) where the Court cited the case of **Makumbi Ramadhani Makumbi and 4 Others v. Republic,** Criminal Appeal No. 199 of 2010 (unreported) in which when the Court was faced with a similar scenario, did not nullify the entire proceedings and it stated as follows:

> *"First of all, there is the issue of the possibility of non-availability of witnesses, whose evidence was properly received in case we quash the entire trial court's proceedings.* ***Secondly, we have considered the issue of the exhibits which have already been disposed of. How will they be traced?*** *Thirdly, and of great significance in the orderly administration of justice, in ordering a re-trial the court must guard the prospect of giving the prosecution a chance to fill in gaps in its evidence at the trial (see* ***Fatehali Manji v. R*** *[1966) EA334)."* [Emphasis added]

Similarly, in the case at hand, we note that the trial court had on 23/8/2019 ordered Exh. P2, a parcel containing 68 pellets of heroine Hydrochloride weighing 1101 grams valued at Tshs. 49, 583, 700/= to be disposed of as per section 353 (2) of the CPA. This means that the said exhibit may not be retrieved for a retrial should the same be ordered. Given the circumstance, we think, in the interest of justice, taking a different cause will suffice.

Consequently, we partially nullify the proceedings from summing up conducted on 1/7/2019 and judgment of the trial court, quash the conviction, set aside the sentence and all orders subsequent thereof imposed against the appellant. We further order for an expedited retrial

from the stage of summing up to assessors before the same trial judge with a similar set of assessors. Meanwhile, the appellant shall remain in custody to await a retrial.

For avoidance of doubt, we direct that all the proceedings of the trial court prior to 1/7/2019 are to remain intact.

It is so ordered.

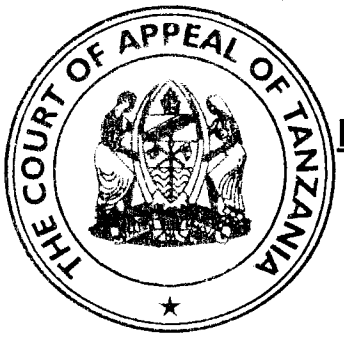
DATED at **DAR ES SALAAM** this 13th day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Judgment delivered this 18th day of October, 2021 in the presence of the appellant in person linked via-Video facility from Ukonga Prison, also represented by Mr. Simon Mrutu and Mr. Jonathan Mudeme both learned counsel for the appellant and Ms. Elizabeth Mkunde, learned State Attorney for the Respondent/republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL