IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 334 OF 2017

LIVINGSTONE BATHOLOMEO @ URASSA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwingwa, J.)

dated the 24th day of August, 2017
in
Criminal Sessions Case No. 37 of 2016

.....

JUDGMENT OF THE COURT

29th November & 3rd December, 2021

NDIKA, J.A.:

The appellant, Livingstone Batholomeo @ Urassa, was on 24th August, 2017 found guilty 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to section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 R.E. 2002, which is now repealed, following his trial by the High Court of Tanzania sitting at Moshi (Mwingwa, J.). He was duly convicted and, consequently, sentenced to life imprisonment. He now appeals against the conviction and sentence.

The prosecution produced a total of eleven witnesses as well as eleven documentary exhibits to prove the accusation that the appellant, on 19th May, 2013 at Usseri Kahe village within Rombo District in Kilimanjaro Region, was found trafficking 499.5 kilogrammes of *cannabis sativa*, commonly known as bhang, valued at Tanzania Shillings Forty-Nine Million Nine Hundred Fifty Thousand (TZS. 49,950,000.00). In his defence, the appellant gave a sworn testimony, which he supported with two documentary exhibits.

For the reason that will become apparent shortly, we find no pressing need to preface this judgment with the summary of the evidence on record. It suffices to state that after a full trial, the High Court (Mwingwa, J.) summed up the case to the three assessors he sat with, who then returned a unanimous verdict of not guilty in favour of the appellant. However, the learned trial Judge disagreed with the assessors as he found it proven on the evidence on record that the appellant was arrested at his homestead on the material day trafficking 499.5 kilogrammes of a substance that the authorized drug analysts from the Government Chemist Laboratory Agency confirmed to be *cannabis sativa*, a prohibited drug. The learned Judge reasoned in part, as shown at page 92 of the record of appeal, that:

"It is my considered [view] that the prosecution proved its case because ... the accused person himself led the police officers and PW4 to show them where the consignment of bhang was hidden. The question is how did he know that the said consignment was there ... if it [did not] belong to him and kept by him at his compound ...."

As hinted earlier, the trial court, having convicted the appellant of the charged offence, sentenced him to life imprisonment as the mandatory punishment.

The appeal was originally predicated on three memoranda of appeal lodged by or on behalf of the appellant, raising a total of seventeen grounds of complaint. However, at the hearing of the appeal, Mr. Majura Maige Magafu, learned advocate for the appellant who was also present, sought and obtained leave in terms of Rule 81 (1) of the Tanzania Court of Appeal Rules, 2009 to argue two new grounds, namely:

1. That the learned trial Judge erred for not selecting assessors and informing them of their duties.
2. That the learned trial Judge's summing up to the assessors he sat with was improper.

Mr. Magafu addressed us on both new grounds but in the course of his rejoinder, he abandoned the first ground and focused on the second grievance. Accordingly, we will deal with the latter ground only.

The essence of Mr. Magafu's contention on the new second ground was that the trial proceedings were a nullity due to the learned trial Judge's failure to properly sum up the case to the assessors. Referring us to pages 181 to 205 of the record of appeal containing the summing up notes, Mr. Magafu censured the learned trial Judge for providing nothing beyond a summary of the facts of the cases for the prosecution and the defence without any direction on several vital points which he considered or should have been considered in his judgment, shown at pages 208 to 234 of the record. He pointed out the said points as follows: first, no guidance was given on the contested legality of the appellant's arrest, the search conducted at his compound and the certificate of seizure. Secondly, nothing was said on the key ingredients of the charged offence. Thirdly, the centrality of the questioned chain of custody of the seized substance was not addressed. Fourthly, no direction was given on how contradictions and inconsistencies in the evidence on record could be resolved.

Citing the case of **Ronjino s/o Ramadhani @ Ronji & Two Others v. Republic**, Criminal Appeal No. 75 of 2019 (unreported), Mr. Magafu argued that the effect of the aforesaid non-directions was to render the trial before the High Court a nullity as the case would be deemed to have proceeded without the aid of assessors contrary to the requirement of section 265 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA). Accordingly, he urged us to nullify the trial proceedings and the judgment thereon.

Replying, Ms. Verediana Mlenza, learned Senior State Attorney appearing for the respondent, agreed so candidly and unreservedly with her learned friend's submission.

Having heard the learned submissions of the counsel on the issue at hand, we deem it necessary to reiterate the peremptory requirement under section 265 of the CPA that criminal trials before the High Court must be conducted with the aid of at least two assessors. Furthermore, a trial Judge sitting with assessors is required to sum up the case to them when the case on both sides is closed before inviting their opinion in terms of section 298 (1) of the CPA:

> *"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]

We have emboldened the above phrase *"the judge may sum up the evidence"* to stress the settled position that although the word "may" generally signifies discretion, it has been interpreted as imposing a mandatory duty on the trial Judge to sum up the evidence. Our decision in **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 (unreported) is illustrative of the position thus:

> *"We wish first to say in passing that though the word 'may' is used implying that it is not mandatory for the trial judge to sum up the case to the assessors* ***but as a matter of long established practice and to give effect to s. 265 of the Criminal Procedure Act*** *that all trials before the High Court shall be with the aid of assessors,* ***the trial judges sitting with assessors have invariably been summing up the cases to the assessors****."* [Emphasis added]

In summing up, the presiding Judge is required to explain all the vital points of law in relation to the relevant facts of the case – see, for example, **Said Mshangama @ Senga v. Republic**, Criminal Appeal No. 8 of 2014; **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015; and **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (all unreported). In the latter decision, the Court, having noted that the learned trial Judge omitted to address the assessors in a murder trial on the voluntariness of a confessional statement and the defence of *alibi*, held that:

> *"There is a long and unbroken chain of decisions of the Court which all underscore the duty imposed on trial High Court judges who sit with the aid of assessors, to sum up adequately to those assessors on* ***'all vital points of law.'*** *There is no exhaustive list of what are the vital points of law which the trial High Court should address to the assessors and take into account when considering their respective judgments."*

In **Andrea Ngura v. Republic**, Criminal Appeal No. 15 of 2013 (unreported), the Court stressed that the value of the opinions of assessors is dependent upon how informed they are:

> *"Trial by assessors is an important part in all the trials of capital offences in Tanzania. Although, in terms of section, 298(2) of the CPA their opinions are not binding on the trial judge,* ***the value of their opinions very much depends on how informed they could be****."* [Emphasis added]

Guided by the above position, we agree with both learned counsel that in the instant case the learned trial Judge's summing up was clearly inadequate. It is discernible from the summing up notes, from pages 181 to 205 of the record, that the learned trial Judge provided nothing beyond what he considered to be the précis of the facts of the case. Although the case turned mainly on the contested legality and propriety of the appellant's arrest, the search conducted at his compound, the certificate of seizure and the chain of custody of the substance allegedly seized from the appellant's farm adjoining his homestead, the learned trial Judge did not direct the assessors on the applicable legal position. Certainly, as shown at pages 232 to 234 of the record of appeal, the appellant's conviction was primarily based on the learned trial Judge's reasoning and finding that he was arrested and found at his homestead in possession of the prohibited substance. We also agree that the learned trial Judge failed to direct the assessors on the key ingredients of the charged offence as

well as how the apparent contradictions and inconsistencies in the evidence on record could be resolved. Besides the above omissions pointed out by the learned counsel, we noted that the learned trial Judge omitted to address the vital issue of burden and standard of proof in criminal trials.

In view of the non-directions as discussed above, we agree with both learned counsel that the appellant's trial was vitiated and that it cannot be said to be one conducted with the aid of assessors as envisioned under section 265 of the CPA. The trial was, consequently, vitiated. In the premises, we find merit in the second new ground of appeal.

In anticipation of the apparently inescapable nullification of the trial proceedings, both learned counsel addressed us on the path forward, a question on which they were sharply divided. While Mr. Magafu urged that the appellant be retried, his learned friend moved us to remit the case to the High Court for a new Judge to take over and re-sum up the case to the same assessors who sat with Mwingwa, J. While informing us that Mwingwa, J. retired from his judicial office, Ms. Mlenza referred us to our recent decision in **Salehe s/o Rajabu @ Salehe v. Republic**, Criminal Appeal No. 318 of 2017 (unreported) where we remitted the case to the

High Court for re-summing up subject to the provisions of section 299 of the CPA after we had found that the appellant's trial had been vitiated. Mr. Magafu, however, rejoined that section 299 of the CPA would be inapplicable and reiterated his prayer that the appellant be tried afresh.

We have considered the principles governing retrials as stated by the erstwhile Court of Appeal for East Africa in **Fatehali Manji v. Republic** [1966] EA 341 as well as this Court's decisions in **Selina Yambi & Others v. Republic**, Criminal Appeal No. 94 of 2013; **Seif Salum & Another v. Republic**, Criminal Appeal No. 119 of 2015; and **Athanas Julius v. Republic**, Criminal Appeal No. 498 of 2015 (all unreported). In view of the circumstances of the case as well as the gravity of the offence involved, we go along with Ms. Mlenza's submission. We think that it would be in the interests of justice that we trod the same path we took in **Salehe s/o Rajabu** (*supra*), cited to us by the learned Senior State Attorney.

In the premises, we allow the appeal and proceed to nullify the trial proceedings from the stage of summing up to assessors and the judgment of the trial court, quash the impugned conviction and set aside the corresponding sentence.

Consequently, we order that the case be remitted to the High Court for a retrial from the stage of summing up to assessors to be conducted expeditiously before a new Judge but with the same set of assessors subject to the provisions of section 299 of the CPA. In the event that the set of assessors who sat with the previous Judge cannot quorate in terms of section 265 of the CPA, the appellant should be tried *de novo*. In the meantime, the appellant shall be in remand prison.

DATED at **ARUSHA** this 2nd day of December, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of the Appellant in person and Ms. Akisa Mhando, learned Senior State Attorney for the Respondent/Republic, is hereby certified as true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL