IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A)

CRIMINAL APPEAL NO. 319 OF 2017

ABDUL s/o IBRAHIM @ MASSAWE.. APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Mwingwa, J.)

dated the 3rd day of August, 2017 in

Criminal Session No. 51 of 2016

RULING OF THE COURT

07th & 11th February, 2022

SEHEL, J.A.:

Before us is an appeal by the appellant who was convicted by the High Court of Tanzania at Moshi District Registry of an 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 R.E. 2002. Initially, he was charged together with Sophia d/o Joseph Kimario who was discharged after the Director of the Public Prosecutions had entered a *nolle prosequi*, withdrawing charge against her. The prosecution alleged that on 4th

December 2014 at Njoro ya Pepsi area within the Municipality of Moshi in Kilimanjaro region, the appellant together with the former second accused person were found trafficking 19 Kilograms of prohibited drugs namely khat commonly known as *"Mirungi"*.

The appellant pleaded not gulity. In its endevour to prove the case against the appellant, the prosecution lined up a total of seven witnesses and tendered seven exhibits which are the seizure certificate (P1), a certified copy of the register (P2), Khat (P3), the Motorcycle with Registration No. T. 173 CZX (P4), a letter (P5), a Scientific Laboratory Analysis report (P6) and the Valuation Certificate (P7). On the defence side, the appellant fended for himself and called one witness Musa **Jumanne Kondo** (DW2). He did not tender any documentary evidence. At the end of the trial, the three assessors who sat with the learned trial Judge each returned own verdict. Having being satisfied that the prosecution proved their case against the appellant, the first assessor returned a verdict of guilty whereas the second and the third assessors found the prosecution case was not credible thus they returned a unanimous verdict of not guilty in favour of the appellant. The learned trial

Judge concurred with the first assessor that the prosecution proved its case beyond reasonable doubt against the appellant. As a result, the appellant was found gulity, convicted and sentenced to the mandatory term of life imprisonment. Aggrived, he has now appelead to this Court.

Briefly, the prosecution case was such that: on 4th December, 2014, an investigation officer working in the Anti Drugs Unit in the Regional Crime Office, Kilimanjaro (R.C.O), one F. 1157 Detective Sergent Hashimu Mafuru (PW1) while in his office, was tipped by an informer that in Njiro area there is a lady dealing with prohibited drugs (khat) and that she was about to receive a new consignment on that same day during the afternoon hours. Upon receipt of such information, he assembled his team and headed to the suspect's house. On arrival, they met the occupier of the house, that is, the former second accused person and they posed as customers. Unsuspectingly, she took them to the room where the police officers saw some green leaves suspected to be khat hidden in the old tyre. Immediatedly, they arrested her. Whilst there, the appellant arrived with his motorcyle, red in colour (EXh. P4) carrying a sulphate bag at the back of his motorcyle. Without noticing the police officers, he parked his

motorcyle and called the second accused person by her name "Dada Sophia". Right away, PW1 appeared and arrested him. PW1 called a ten cell leader of that area, one Hamisa Hussein Seiph Mwamba (PW7) to witness the search. The search was conducted in the house and the sulphate bag was opened. In the bag, they found green leaves kept in bundles suspected to be khat. The supsected khat was taken to the Chief Government Chemist (the CGC) in Arusha by the Dectective John Gilian (PW6). A Chemist working in the office of the CGC, Arusha one Erasto Lawrence (PW2) took the exhibit to Dar es Salam for analysis. Eliamini Elias (PW4) a Chemist from the office of the CGC, Dar es Salaam received the suspected drugs and conducted a scientifc analysis on the samples and found that the green leaves were illicit drugs known as khat (Exh. P3). To that effect, he prepared his report which was tendered as Exh. P6. Thereafter, Keneth James Kaseke (PW5) who was a Commissioner for Commission of Drugs upon being requested by the R.C.O Kilimanjaro vide a lettter with Ref. No. Moshi/IR/1019/2014 (Exh. P5) weighed and made an evaluation of the substances. In his evaluation report made a finding that the substances had a weight of 19 kilograms whose total value was TZS. 950,000.00 (Exh. P7).

In his defence, the appellant completely disassociated himself from the offence. Although he admitted to have been arrested in Njiro area he claimed to have been there to repair his motorcyle only to be arrested by the police officers who took him to the house of the second accused person where he saw Exh. P4 which had a sulphate bag on it. His evidence was supported by his witness, DW2 who told the trial court that on the fateful day, while at his garage thereby arrived the appellant with his motorcyle for repair.

As stated earlier, at the conclusion of the trial, the appellant was found guilty, convicted and sentenced hence the present appeal. He earlier on lodged a memorandum of appeal comprising of six grounds and at a later stage, he filed a suplementary memorandum of appeal containing one ground. For reasons that will become apparent shortly, we shall not reproduce the grounds of appeal. It suffices to state here that the grounds of appeal focused on the merit of the appeal whereas we *suo motu* raised a procedural irregularity regarding summing up.

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas Ms. Agatha Pima and Ms. Grace Kabu, both learned State Attorneys, appeared for the respondent Republic.

Before we proceeded to hear the arguments on the grounds of appeal, we invited parties to address us on how the assessors were involved and the way the summing up was conducted. The appellant being a layperson asked to let the learned State Attorney to make her submission first and he opted to make a reply, if need would arise.

On her part, Ms. Pima expressed the Republic's stance that they support the appeal on ground that the assessors were not sufficiently involved because there was an omission in the selection and involvement of the assessors. She argued that section 265 of the Criminal Procedure Act, Cap. 20 R.E. 2019 (henceforth the CPA) requires that all trials before the High Court to be with the aid of assessors of not less than two and that they are selected by the court in terms of selection 285 (1) of the same Act. After being selected, she added that the trial Judge ought to have explained to them their roles or duties in the trial which was not done. She referred us to pages 46 – 47 of the record of appeal where although the

names of three assessors were listed, the record is silent as to whether they were directed on their roles or duties. Such an omission, she argued, was not fatal because the assessors participated fully throughout the trial by asking questions to all prosecution and defence witnesses and in the end, each stated his opinion and hence they were aware of their role at the trial.

Nonetheless, the learned State Attorney argued that the appellant was prejudiced as he was not accorded a right to comment or object any assessor's involvement in the trial.

Another irregularity pointed by Ms. Pima was the failure by the learned trial Judge to sufficiently sum up the case to the assessors as required by section 298 (1) of the CPA. She referred us to pages 116 to 134 of the record of appeal where the summing up was done by the learned trial Judge. It was contended by Ms. Pima that, instead of making a summing up, the trial Judge made only a summary of the evidence of the witnesses as he did not address the assessors on vital points of law such as, the ingredients of the offence of trafficking in narcotic drugs and the chain of custody.

On account of the pointed anomalies, she submitted that there was no fair trial on part of the appellant nor could it be said that the trial was conducted with the aid of assessors as required by the provisions of section 265 of the CPA. She argued further that, under the circumstances and in the interest of justice, the anomalies vitiated the entire trial proceedings. She therefore urged the Court to invoke its revisional powers conferred on it by section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (henceforth the AJA) and declare the summing up proceedings a nullity, quash the conviction and set aside the sentence meted to the appellant and make an order of a retrial from the summing up stage. In support of her argument, she referred us to the decisions of the Court in **Salehe s/o Rajabu @ Salehe v. The Republic**, Criminal Appeal No. 318 of 2017, **Abdallah Juma @ Bupale v. The Republic**, Criminal Appeal No. 557 of 2017 and **Hilda Innocent v. The Republic**, Criminal Appeal No. 181 of 2017 (all unreported).

The appellant did not have anything useful to say apart from urging the Court to consider the time he spent in prison custody and beseeched us to set him free.

Having heard the submissions of the learned State Attorney, we wish to start with the issue of selection of assessors which precedes their involvement. Admittedly, as rightly submitted by Ms. Pima, it is mandatorily required under section 265 of the CPA that all criminal trials before the High Court and the subordinate courts with Extended Jurisdiction to be conducted with the aid of assessors whose number shall not be less than two and that, it is the court which selects the assessors -see section 285 (1) of the CPA. Of course, it is not the law but a rule of practice that the accused must be given a right to comment or object on the assessors. In the case of **Laurent Salu and 5 Others v. The Republic**, Criminal Appeal No. 176 of 1993 (unreported) the Court said:

> *"Admittedly, the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in the Country. The rationale of the rule is fairly apparent. The rule is designed to ensure that the accused has a fair hearing."*

In the case of **Hilda Innocent v. The Republic**, Criminal Appeal No. 181 of 2017 (unreported) the Court expressed the manner of giving an accused person an opportunity to object or comment on the assessors. It said:

> *"The trial judge ... must indicate in the record that the assessors were selected, followed by asking the accused person if he objects to the participation of any of the assessors before the commencement of a trial. This must usually be followed by the usual practice that the trial judge must inform and explain to the assessors their role and responsibility during the trial up to the end where they are required to give their opinions after summing up of the trial judge."*

The Court then went further to stress that: -

> *"...it is equally important although informing the assessors on their role and responsibility is a rule of practice and not a rule of law, as it is for a long time an established and accepted practice in order to ensure their meaningful participation, a trial judge must perform this task immediately after ascertaining that there is no any objection against any of the assessors by the accused*

before commencing the trial. It is also a sound practice that a trial judge has to show in the record that this task has been fully performed. For even logic dictates that whenever a person is called upon to assist in performing any task or to offer any service, he must be fully informed of what is expected of him in performing that task. Thus, failure to inform assessors on their role and responsibility in the trial diminishes their level of participation and renders their participation which is a requirement of the law meaningless."

It follows then that the proper procedure of selecting assessors starts with the court to select them, then the accused person is given a chance to object to any assessor and finally, the trial Judge inform and explain to the assessors on their role and responsibilities from the beginning up to the end of the trial where they have to ask questions to seek clarification from the witnesses and at the end to give their separate opinions.

As to the position of the law regarding non-compliance of such a procedure depends on the circumstances of each case. This was expressed in the case of **Tongeni Naata v. The Republic** [1991] TLR 54 where the Court stated:

"It is a sound practice which has been followed, and should be followed, to give an opportunity to an accused to object to any assessor, however, the result of such omission cannot be the same in each case."

It is in that respect, in the case of **Salehe s/o Rajabu @ Salehe** (supra) cited to us by Ms. Pima, the Court held that the omission by the trial Judge to explain to the assessors on their role and responsibility did not prejudice the appellant because the assessors participated throughout the trial by asking questions to witnesses of both the prosecution and defence and at the end gave their opinions.

In this appeal, in order to appreciate how the assessors were selected, we have found it appropriate to let the record of appeal speaks for itself as hereunder:

*"**Date:** 18/07/2017*

***Coram:** B.B. Mwingwa, J.*

***For Republic:** Mndeme*

***For Accused:** Sisya*

***Accused:** Present*

Assessors:

1. *Mary John*

2. Benedict Kimaro

3. Agnes Mkumbo

C.C: Mpondyo

Information is read over and, explained to the accused person in his/her own language and he/she is required to plead thereto:

Accused's Plea: "It is not true"

***Court: Entered** as a **PLEA** of Not Guilty.*

Sgd: B. B. Mwingwa

Judge

18/07/2017

***M/S Mndeme:** Today I have one witness, we pray to proceed with prosecution case."*

From the above, it is obvious that the trial of the appellant commenced without adhering to the statutory procedure of selecting assessors as the trial Judge merely listed the names of the assessors with no more. More so, he did not give the appellant an opportunity to comment whether he had any objection to the assessors before they participated in the trial and neither did he explain to the assessors on their role and responsibility in the trial from the beginning to the end. Given the

circumstances of the case, we are settled in our mind that such omission prejudiced the appellant. We shall explain why.

The main reason lies in the second part of the learned State Attorney's submission that the trial Judge did not properly sum up the case to the assessors. As alluded earlier, the law requires the trial judge to sum up the case to the assessors, direct them on vital points of law and require them to state their opinions on the case. Although, their opinion is not binding on the trial judge, where the trial judge differs with the assessors' opinion shall give reasons. Times without number, it has been held that, the value of opinion of the assessors depends on how much they have been informed. If vital points of law in relation to the relevant case is not addressed to them such as the ingredients of the offence, the trial Judge cannot be said to have been aided by the assessors as they will be disabled from giving him the aid required which has the effect of vitiating the entire proceedings - see for example, **Tulubuzya Bituro v. The Republic** [1982] TLR 264, **Said Mshangama @ Senga v. The Republic**, Criminal Appeal No. 8 of 2014, **Masolwa Samwel v. The Republic**, Criminal Appeal No. 206 of 2014, **Omari Khalfan v. The Republic**, Criminal Appeal No. 107 of 2015 and **Charles Karamji @ Masangwa & Another**

v. The Republic, Criminal Appeal No. 34 of 2016 and **Ahazi Kilowoko v. The Republic**, Criminal Appeal No. 254 of 2019 (all unreported).

In the case of **Masolwa Samwel** (supra) the appellant appealed to the Court against the conviction of murder. In that appeal, it was noted that there was an omission on part of the trial Judge to address the assessors on voluntariness of the confessional statement and the defence of *alibi* which were the vital points in that appeal, it was held:

> *"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 the case of **Ahazi Kilowoko** (supra) the Court said:

> *"...it is an established principle that where there is a failure by a trial court to direct assessors on vital points of law, the remedy is to nullify the proceedings, quash judgment and conviction, set*

aside sentence and order a trial de novo. However, there are particular situations where a fresh trial of a case may be impracticable. In such situation, the Court has found it appropriate to leave the proceedings up to the summing up stage intact, quash only the summing up proceedings and those following from that stage order the trial court to sum up the case afresh to the assessors."

In this appeal the appellant stood charged with the offence of trafficking narcotic drugs. However, as aptly submitted by Ms. Pima, the learned trial Judge did not address and explain to the assessors on the salient features of the case such as, the ingredients of the offence of trafficking in narcortic drugs and what was required to be proved in such an offence. Similarly, the learned trial Judge did not explain to them the meaning of the chain of custody in respect of the seized exhibit P3. The issue of chain of custody prominently featured in his judgment but it is nowhere to be seen in the summing up notes that had only the summary of the evidence of the witnesses. The irregularity vitiated the proceedings.

We are alive that there are instances where the proceedings are vitiated from the stage of summing up – see **Salehe s/o Rajabu @ Salehe** (supra), **Livingstone Batholomeo @ Urassa v. The Republic**, Criminal Appeal No. 334 of 2017 and **Shija Ng'hwaya Ng'hwagi v. The Republic**, Criminal Appeal No. 368 of 2019 (both unreported). However, according to the facts of the present appeal, we find that there are no special circumstances warranting this Court to apply the exceptional rule. In that respect, we find that the omission rendered the trial of the appellant not conducted with the aid of assessors as envisaged under sections 265 and 298 (1) of the CPA. Hence, the omission vitiated the entire trial court proceedings.

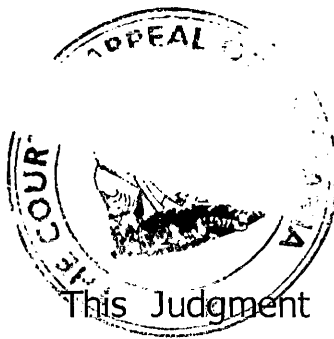
As to the way forward, we have considered the proposition made by the learned State Attorney that the Court should invoke its revisional powers conferred to it under section 4 (2) of the AJA to make an order of a retrial from the summing up proceedings. Given the nature of the circumstances of the case, in terms of section 4 (2) of the AJA we invoke our revisional powers and nullify the proceedings of the trial court, quash the conviction and set aside the sentence meted out against the appellant. We further make an order of an expedited retrial of the appellant. For

avoidance of doubt, we order that the appellant, **Abdul s/o Ibrahim @ Massawe** should remain in custody to await a retrial before another judge with a new set of assessors.

DATED at **ARUSHA** this 11th day of February, 2022.

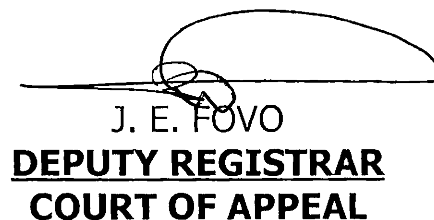
S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL



L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 11th day of February, 2022 in the presence of the Appellant in person and Ms. Upendo Shemkole, learned State Attorney and Ms. Msao and Ms. Naomi Mollel, both learned State Attorneys for the respondent Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL