IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 366 OF 2019

HAJI SALIM MINTANGA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Amour, J.)

dated the 19th day of August, 2019

in

Criminal Session Case No. 73 of 2016

JUDGMENT OF THE COURT

2nd July, 2021 & 11th March, 2022

MWARIJA, J.A.:

In the High Court of Tanzania at Dar es Salaam, the appellant Haji Salim Mintanga was charged with the offence of illicit traffic 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] (the Act). The appellant denied the charge. However, after a full trial at which the prosecution relied on the evidence of seven witnesses while the appellant was the only witness

for the defence, the trial court found that the case against the appellant had been proved beyond reasonable doubt.

It found, as alleged in the charge, that on 26/6/2013 at Julius Nyerere International Airport, within Ilala District in Dar es salaam Region, the appellant was found trafficking in narcotic drugs namely, Heroine Hydrochloride valued at TZS, 88,888.500.00. Having been found guilty, the appellant was convicted and sentenced to life imprisonment. He was aggrieved by the decision of the High Court hence this appeal.

The background facts leading to the appellant's arraignment and later on his conviction, may be briefly stated as follows: On 26/6/2013, the appellant was at Julius Nyerere International Airport, Dar es Salaam (the JNIA) having planned to travel to Athens, Greece. While in the check-in process, he was arrested by one Clement Kazinja (PW6), a Security Officer of the Tanzania Airports Authority who was at that time, at the screening point together with one Shabani Hassan who operated the screening machine. According to PW6, he was informed by the said Shabani that he noticed from the screening machine, an image suggesting that one of the appellant's luggage, a lap top bag, had a suspicious item.

It was PW6's evidence that, when he opened and inspected the lap top bag, he found that there had been imposed, beneath the bag's inside liner, certain material. He thus took the appellant and the bag to the JNIA police post so that the bag could be thoroughly searched. At the police post, A/Insp. Makole Bulugu Makole (PW4) tore up the inside liner of the lap top bag and found that there were two packets which had been placed beneath that liner. It was his further evidence that, the packets contained powdery substance. He seized the same and prepared a seizure certificate listing the two packets as well as the appellant's lap top, the bag, passport, air ticket and the boarding pass. Thereafter, in the company of SP Salmin and Shaban Hassan, PW6 took the appellant and the seized substance, which was packed in an envelope and sealed with a glue, to the Headquarters of the Anti – Drugs Unit (ADU).

At the ADU, the substance was handed over to ASP Neema Andrew Mwakagenda (PW2), who was one of the officers of the Drugs Control and Enforcement Authority (DCEA). She was the officer responsible for exhibits keeping. In her evidence, PW2 stated that, on the materials date at 9:00 a.m., she received from PW4 a khaki envelope containing two packets of

powdery substance suspected to be narcotic drugs. She said further that, she was also handed over the appellant's passport, Turkish airline ticket, a lap top computer; make Toshiba, a lap top bag, a search order and a certificate of seizure. Having received the said items and documents in the presence of SCAP Godfrey Nzowa, Zainabu Duwa Maulana (PW3) and SP Salmin Shelimo, D/C Francis, PW4 and the appellant, she wrapped, sealed and labelled the two packets and stored them in the exhibits room. She added that the appellant signed on the sealed envelopes and so was PW3, who was at the material time, the ADU area's ten cell leader.

At about 11:00 a.m, PW2 went on to state, she took the two packets of the suspected substance (exhibit P2) to the Chief Government Chemist (the CGC) for examination. According to her evidence, she was accompanied by among other persons, PW4. Having been received, the substance was marked with laboratory No. 488/2013 and later examined by the late Isaka of the CGC's laboratory and the same, which weighed 1975.30 grams, was confirmed to be heroine hydrochloride. Although the late Isaka did not testify in court, his statement was tendered under s. 34B of the Evidence Act [Cap. 6 R. E. 2002, now R. E. 2019] by A/Insp. Wamba

Msafiri Makulubu (PW7), the police officer who recorded it. That examination report was approved by Sabaniho Laurent Mtega (PW5), who was at the material time a Government Chemist Grade 1 and the Director of Products Quality Services Department in the CGC's office. According to his evidence, he was by then, the Ag. Chief Government Chemist and therefore, counter signed the draft report prepared by the late E. L. J. Isaka. PW5 tendered the examination report which was admitted in evidence as exhibit P11. The laptop bag which was found in possession of the appellant was also admitted in evidence as exhibit P3. The other documents and items; the appellant's passport No. AB2 258716 issued on 14/1/2008, Turkish electronic air ticket, boarding passes, TK 0604 and TK 1849, a search order and certificate of seizure issued under s.38 (3) of the Criminal Procedure Act [Cap. 20 R. E. 2002] and a lap top; make Toshiba were admitted as exhibits P4-P10 respectively.

On her part; PW3 testified that she was at the material time a business woman and the ten-cell leader of police ufundi, the area where the ADU offices are located. On the material date, she was called to the ADU office and requested to witness the sealing of the substance which

was suspected to be narcotic drugs. She said that, she witnessed the sealing, which was done by PW2, of two packets which contained powdery substance. That, she said, was done in the presence of the appellant and other police officers including PW4. It was her evidence further that, after the sealing and labelling of the packets, she signed the envelope and so was PW2 and the appellant who did so through his thumb impression. The witness identified her signature on the envelope (exhibit P2).

After his arrest, the appellant was interrogated by PW7. In his evidence, PW7 stated that he recorded the appellant's cautioned statement on 26/6/2013 at 11:45 a.m. and that, in his statement, the appellant admitted that he committed the offence charged. The cautioned statement was admitted in evidence as exhibit P13 after trial within a trial.

As stated above, the appellant denied the charge. Testifying as DW1, he averred that he was arrested on 26/6/2013 at the JNIA between 1:20 and 1:25 a.m. at the departure lounge while he was checking-in ready to start his journey to Greece. According to his evidence, he had a hand bag and in front of him were two persons who appeared to be of European nationality. One of the two had passed the x-ray machine but the other

one was still in front of him. DW1 went on to state that, he had at that time, placed his items; a camera, wrist watch, mobile phone and other documents including his passport, air ticket and a boarding pass in a container and his small hand bag (cabin luggage) on the conveyer belt for screening purposes. As he was about to pass through the screening machine, he remembered that he did not place his wallet in the container and thus stepped back and placed it in the container but because it contained money, he took it out so that it could be easier for him to declared the amount as per the applicable regulations.

He went on to state that, while his small hand bag was about to be screened, he heard the officer who was responsible with the screening, one Shaban Hassan asking the white man whether a certain bag which was on the conveyer belt was his property. The white man denied that the bag belonged to him and thus walked away.

It was DW1's further evidence that, before he passed through the screening point and before all his items could be screened, the said Shaban Hassan asked him the same question whether the suspected bag belonged to him. When he refused, that person called PW6 who, after having been

told about the denial of ownership of bag by both the white man and DW1, took it and conducted inspection on it. Later on, he went back and after a short conversation with Shaban, PW6 told him (DW1) that the bag belonged to him. He denied ownership adding that the bag in question was taken by PW6 and the same was not returned to PW4. It was his defence that the lap top, make; Toshiba and its bag were implanted on him. He stated further that he was forced by PW7 and Godfrey Nzowa to sign a document alleged to be his cautioned statement.

In convicting the appellant, the trial court acted on the evidence of the appellant's cautioned statement. He found that he had confessed to have committed the offence. It also acted on the evidence of PW6, PW2, PW3 and PW4 which was supported by that of PW6 as well as exhibits P2-P10. It was the trial court's finding further that the substance which was seized at the JNIA was the same one sent to the CGC and which, according to the evidence of PW5, was upon examination, found to be heroine Hydrochloride. The learned trial Judge was of the view that the principle of the chain of custody as stated in the case of **Paulo Maduka & 4 others**

v. Republic, Criminal Appeal No. 110 of 2007 (unreported) was properly observed.

In his memorandum of appeal filed on 14/1/2020, the appellant has raised a total of 18 grounds of appeal. Later on 25/6/2021, he lodged a supplementary memorandum of appeal consisting of 2 grounds.

At the hearing of the appeal, the appellant was represented by Mr. Josephat Mabula, learned counsel while the respondent Republic was represented by Ms. Sabrina Joshi assisted by Mr. Candid Nasua, learned State Attorneys. Before the commencement of hearing, Mr. Mabula informed the Court that he was abandoning grounds 1 and 17 of the appellant's grounds of appeal. He said further that, he had decided to consolidate the 1st ground of the appellant's supplementary memorandum of appeal with grounds 4, 10, 11 and 18 of the memorandum of appeal. He also sought and obtained leave to raise an additional ground of appeal. In the circumstances, the appeal was predicated on the following 13 grounds of appeal including grounds 4, 10, 11 and 18 which were consolidated with ground 1 of the supplementary memorandum of appeal, that:

1. *The learned trial judge erred in law and in fact in convicting the appellant without considering that the chain of custody of exhibit P2 was not proved and that the evidence' to that effect was contradictory."*

The other grounds in the memorandum of appeal and ground 2 of the supplementary memorandum of appeal are as hereunder:

"2 That the learned trial Judge erred in law and fact by convicting the appellant basing on a defective charge which the particulars of offence did not specify category of trafficking that the appellant was charged with.

3. *That, the Hon. Judge erred in law and fact in convicting the appellant relying on EXH/P3 (Black laptop) and EXH/P2 (Heroine Hydrochloride) without any cogent evidence to show or prove who placed the said exhibit on the conveyor belt of the screening machine at the airport.*

4. *That, the learned trial judge erred in law and fact by convicting the appellant basing on EXH/P2 and EXH/P3 without considering that search and seizure of the said exhibits were made in absence*

of an independent witness and results of the search and seizure were not submitted to a magistrate as per mandatory requirement of law.

5. *That, the Hon. trial Judge erred in law and fact in admitting EXH/P13 (Repudiated confession statement) and acted upon it to convict the appellant without considering:*

- *That it was not voluntarily made and was recorded out of the Basic period available for interviewing a person who is in restraint;*

- *That the time at which the appellant was cautioned was not disclosed contrary to the mandatory provisions of section 57 (2) (d) of the Criminal Procedure Act, (Cap. 20 R. E. 2002).*

6. *That, the learned trial Judge erred in law and in fact by relying on EXH/P12 (statement of ERNEST LUJUO ISAKA) and acted upon it to convict the appellant while the said statement had no evidential value as it was not signed by the maker of the same, hence failed to meet the condition set under section 34B of the Evidence Act, (Cap. 6 R. E. 2002).*

7. *That, the learned trial Judge grossly erred in law and fact by failing to properly evaluate and appreciate the defence evidence in its totality hence he arrived at wrong conclusion.*

8. *That, the learned Judge erred in law and fact by wrongly convicting the appellant without taking into account that ZAINABU MWALANA (PW3), the ten-cell leader, was a witness with interest to serve.*

9. *That, the learned trial Judge erred in law and fact by giving cursory value at the failure of the Government chemist to test the purity of the alleged EXH/P2.*

In ground 13 (which is the 2nd ground of the supplementary memorandum of appeal), it is contended that:

> *"The learned trial Judge erred in law and fact by failing, when summing up the evidence, to inform and properly direct the assessors on vital points of law involved in the case, the omission which is a serious error resulting into a miscarriage of Justice thus constituting a mistrial for breach of sections 265 and 298 (1) of the Criminal Procedure Act [Cap. 20 R. E. 2019]."*

In the 14th ground, which is an additional ground, the appellant contends that:

> *"The learned trial Jude erred in law and fact in failing to find that the case against the appellant was not proved beyond reasonable doubt because the prosecution did not call material witnesses to testify."*

The learned counsel for the appellant made his submission in support of all the above stated grounds of appeal. In her reply submission, Ms. Joshi conceded to the 2nd ground of the supplementary memorandum of appeal, that the learned trial Judge did not direct the assessors on vital points of law involved in the case. We thus find it apposite to start with that ground of appeal.

In his submission, Mr. Mabula argued that, although in his summing up notes, the learned trial Judge summed up the evidence to the assessors, he did not direct them on the points of law which were crucial for determination of the case. According to the learned counsel, the learned Judge did not, **first**, address the assessors on the ingredients of the offence charged and **secondly**, on crucial issues such as the chain of

custody of the exhibits, the evidence on which the appellant's conviction was founded. The learned counsel argued that the effect of the omission is to render the trial a nullity because it amounted to having been conducted without the aid of assessors. To bolster his argument, he cited the case of **Bakari Selemani Binyo v. Republic**, Criminal Appeal No. 12 of 2019 (unreported).

On her part, although she conceded that the learned trial Judge did not direct the assessors on the vital points of law, Ms. Joshi argued that the omission did not vitiate the trial. According to the learned State Attorney, the assessors were aware of the vital points of law involved in the case, the ingredients of the offence and the principle of the chain of custody.

Having considered the argument made by the appellant's counsel and the learned State Attorney on this ground of appeal, we are with respect, unable to agree that the omission is not a fatal irregularity. There is unbroken chain of authorities to the effect that, failure to direct the assessors on vital points of law involved in the case, renders the trial a nullity. In a trial which is conducted with the aid of assessors, the trial

court is required, under s. 98(1) of the CPA, to sum up the case to assessors. That provision states as follows:

> *"278 (1). 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."*

Although the section is not couched in mandatory terms as regard the requirement of summing up the case to assessor, the Court has held that from the practice, the requirement is mandatory. In the case of **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015 (unreported), it was stated that:

> *"... the phrase the judge may sum up does not mean that the trial Judge can skip the summing up to assessors. This phrase has been expounded by the Court to imply a mandatory duty placed on the shoulders of the trial Judge to sum up."*

The summing up must be adequately made, including directing the assessors on vital points of law involved in the case. In the case of

Masolwa Samwel v. Republic, Criminal Appeal No. 206 of 2014 (unreported), the Court underscored that duty in the following words:

> *"There is long and unbroken chain of decisions of this 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*** *...."*
> [Emphasis added].

On the effect of a failure by the trial Judge to sum up the case adequately to the assessors, there is unbroken chain of authorities to the effect that, such an omission renders the trial a nullity. See for instance, the cases of **Tulibuzya Bituro v. Republic**, [1982] TLR 265, **Charles Lyatii @ Sadara v. Republic**, Criminal Appeal No. 290 of 2011, **Samitu Haruna @ Magezi v. Republic**, Criminal Appeal No. 429 of 2018, **Imani Katebi v. Republic**, Criminal Appeal No. 508 of 2017, **Philemon Zakaria Laizer v. Republic**, Criminal Appeal No. 8 of 2014 and **Said Mshangama @ Singa v. Republic**, Criminal Appeal No. 8 of 2014 (all unreported).

In the case of **Omari Katesi** (supra) in which, like in the case at hand, the learned trial Judge did not direct the assessors on vital points of law, the Court observed as follows:

> *"We have shown that the trial Judge erred by her failure to direct the assessors on vital points of law. There is a plethora of the Court's decisions which state that failure of the trial Judge to direct the assessors on vital points of law is fatal and thus vitiates the whole proceedings."*

On the basis of the foregoing reasons, we find that the omission by the learned trial judge to direct the assessors on vital points of law rendered the trial a nullity because it amounted to having been conducted without the aid of assessors. We consequently nullify the proceedings, quash the judgment and conviction and set aside the sentence.

That said and done, the remaining issue is on the way forward. The guiding principle in answering the issue is stated in the case of **Fatehali Manji v. R**, [1966] E. A. 341 in which the erstwhile East African Court of Appeal observed as follows:

"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in the evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."

We have considered the submissions made by the appellant's counsel on the rest of the grounds of appeal and the reply thereto made by the learned State Attorney. In essence, the submissions centered on the evaluation of the tendered evidence. Guided by the principle stated on the **Fatehali Manji Case** (supra), we do not find that an order of retrial will enable the prosecution to fill up gaps in its evidence. It is rather our considered view that, given the serious nature of the case, the interests of justice require that a retrial be ordered.

In the event, we order that a trial of the appellant be commenced afresh before another Judge and a new set of assessors. Meanwhile the appellant should remain in custody pending his retrial.

DATED at **DAR ES SALAAM** this 7th day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 11th day of March, 2022 in the presence of the Appellant through video conference at Ukonga Prison, Ms. Nura Manja, learned State Attorney for the respondent/Republic and in the absence of Mr. Josephat Mabula, counsel for the appellant is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL