IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., GALEBA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 530 OF 2019

MAULID MFAUME FARAHANI .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(Luvanda J.)

dated the 31st day of October, 2019

in

Criminal Sessions Case No. 145 of 2015

.....

JUDGMENT OF THE COURT

21st September & 18th November 2022

GALEBA, J.A.:

Maulid Mfaume Farahani, the appellant in this appeal, was charged before the High Court of Tanzania at Dar es Salaam in Criminal Sessions Case No. 145 of 2015 for the 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contrary to section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act [Cap. 95 R.E. 2002], now repealed and replaced by the Drug Control and Enforcement Act [Cap 95 R.E. 2019]. According to the particulars of offence in the information, the appellant was arrested while trafficking 83 pellets of Heroine Hydrochloride weighing 1,094.56

grams, valued at TZS. 65,673,600.00 (the narcotic drugs), to a destination outside the United Republic of Tanzania.

According to the prosecution, in the afternoon of 15th December 2013, on suspicion that he could be carrying narcotic drugs within his bowels, the appellant, who was one of the passengers in the international departure lounge at the Julius Nyerere International Airport Dar es Salaam, was intercepted and subsequently apprehended. At the time of his arrest, the appellant was in the active process of clearing with the airport and other government authorities, ready for take-off to Hong Kong *via* Addis Ababa aboard Ethiopian Airline, flight ET 804 departing from Dar es Salaam at 1645 hours, local time. The prosecution alleged further that eventually, at uneven intervals of time, while under close observation, between the said 15th December 2013 and 16th December 2013, the appellant emitted 83 pellets of a substance, which the prosecution suspected to be the narcotic drugs.

He was arraigned as above, and to prove the charge, the prosecution called a total of ten (10) witnesses and tendered seven (7) exhibits. On his part, the appellant called no other witness other than himself, where he denied the charge and concluded that the prosecution did not manage to prove the case against him beyond reasonable doubt.

Nonetheless, consequent to his trial, which was assisted by assessors, on 31st October 2019, the trial High Court found the appellant guilty, convicted him for trafficking in narcotic drugs and sentenced him to imprisonment for life. This appeal is challenging both conviction and the sentence.

In that pursuit, the appellant lodged two sets of memoranda of appeal. The first one with 10 grounds of appeal was lodged on 1st April 2022 and the supplementary memorandum with 4 grounds, followed on 16th September, 2022. However, at the hearing of the appeal the appellant abandoned the 8th ground of appeal in the original memorandum of appeal, and the 3rd in the supplementary memorandum. Therefore, in total there remained 12 grounds of appeal on record after dropping the two grounds mentioned above. Thus, for reasons that will become clearer as we proceed, we will neither reproduce nor tackle all the 12 grounds in this judgment. Thus, we propose to start our deliberation by considering the 2nd ground of appeal in the original memorandum of appeal, which is to the following effect:

> *"2. That the trial Judge erred in law and fact for failure to sufficiently and adequately direct Assessors on both the facts and vital points of law in the case (during summing up) which rendered the trial a nullity."*

At the hearing of this appeal, the appellant appeared in person without legal representation, whereas the respondent Republic had the services of Ms. Cecilia Mkonongo, Ms. Elizabeth Mkunde both learned Senior State Attorneys assisted by Ms. Tully Helela, learned State Attorney.

According to the appellant in the above ground of appeal, the trial being assisted by assessors as required by sections 265 and 298 of the Criminal Procedure Act [Cap 20 R.E. 2002, now R.E. 2022] (the CPA), the trial Judge ought to adequately direct assessors on issues of credibility of witnesses, ingredients of the offence charged and the meaning of the concept, chain of custody. These, according to the appellant, were vital points of law upon which the trial court was duty bound to adequately address assessors, but which it did not. He submitted that the trial court's omission in that regard vitiated the entire trial, and rendered its outcome a nullity. To bolster his point, the appellant relied on **Washington Odongo v. R** (1954) 21 EACA 392 and **Kato Simon and Another v. R,** Criminal Appeal No. 180 of 2017 (unreported). Based on that ground, the appellant prayed that the proceedings and the judgment be nullified, his conviction quashed and the sentence imposed upon him be set aside. He further implored us to

order his immediate release from prison so that he can go home and join his family.

In reply, Ms. Mkonongo had no objection, to the ground of appeal. She very concisely submitted that, it is true that going through the summing up notes in the record of appeal, it is clear that the trial Judge did not address assessors on what the principle of chain of custody meant and also the summing up is quiet on the ingredients of the offence for which the appellant was convicted. In the circumstances, she prayed that the proceedings of the trial court from summing up onwards be nullified, the judgment quashed, the conviction and sentence imposed upon the appellant be set aside.

As for the way forward, without referring us to any authority, Ms. Mkonongo moved the Court to order that the original record be remitted to the trial court for that court to sum up to assessors and compose a fresh judgment after receiving opinion of assessors according to law.

We have carefully considered the arguments of parties and we first wish to indicate that there is no specific definition of a vital point of law upon which a trial Judge has to address assessors. According to **Kato Simon and Another** (supra), each case must be decided based on its own merits. So vital points of law for purposes of addressing lay

assessors in criminal trials depend on a particular case and its unique facts. The test, we think is this; what is, in the best judgment of the trial Judge, does a lay participant in a criminal trial needs to know concerning the law applicable before he can be required to give an informed opinion as to the guilty or innocence of the accused. Such, in our view, is a vital point of law, necessary for a trial Judge to address assessors aiding him in a criminal matter.

The position of the law is that, where assessors are involved in a trial, inadequate summing up, non-direction or misdirection on vital points of law to them, amounts to conducting a trial without their aid, contrary to sections 265 and 298 (1) of the CPA, at the time of the trial. Where those provisions of the CPA are offended, the trial is rendered a nullity as observed in **Said Mshangama Asenga v. R,** Criminal Appeal No. 8 of 2014, **Halfan Ismail @ Mtepela v. R,** Criminal Appeal No. 38 of 2019 and **Weda Mashilimu and Six Others v. R,** Criminal Appeal No. 375 of 2017 (all unreported). For instance, in the latter case the issue of circumstantial evidence was not adequately addressed to assessors and this Court stated that:

> *"In view of the omission to address the assessors on the salient points of law as discerned in this case, it is clear as argued by the learned counsel for both sides, that the learned trial Judge did*

not comply with sections 265 and 298 (1) of the CPA. Non-compliance with the stated provisions in effect, meant that the trial was conducted without the assistance of the assessors. Consequently, what is on the table is that the trial, final judgment and sentence were vitiated and the trial rendered a nullity."

We will then examine whether summing up to assessors, in this case, was offensive of the law on 29th October, 2019 when it was conducted. Before enactment of the Written Laws (Miscellaneous Amendments) Act, 2022, Act No. 1 of 2022, the law on participation and summing up to assessors respectively, in the context of the complaint in this ground of appeal, was contained in sections 265 and 298 (1) of the CPA. Those sections at the time, provided as follows:

"265. All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit.

298.-(1) Where 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."

Thus, at that time participation of assessors in criminal trials in the High Court was a mandatory requirement. In accordance with section 298 (1) of the CPA, which has not been affected by Act No. 2 of 2022, upon closure of both the prosecution and the defence evidence, assessors who participated in a trial must be invited to give their opinion after the presiding Judge has summed up the evidence tendered and addressed vital points of law in the case to the assessors.

In this case, assessors participated in the trial in compliance with section 265 of the CPA, as it stood at the time. What is at issue and complained of in the 2nd ground of appeal, is non-compliance with section 298 (1) of the CPA. That complaint, which in essence is the subject of this judgment, is that summing up to assessors on vital points for determination of the case were not specifically addressed to them, prior to giving their opinion. To agree or disagree with the parties on their unanimous position, we will, from this point onwards, closely examine the record.

In this case, the summing up notes are included in the record of appeal at pages 99 to 104. The learned trial Judge properly stated to the assessors that the appellant was charged with the offence of trafficking in narcotic drugs, but his summing up did not refer to the ingredients of the offence charged. The same is the position with the doctrine of chain

of custody. Although the learned trial Judge described the participation of prosecution witnesses in handling the alleged narcotic drugs and various documentary exhibits, he did not address the lay members of the court, specifically on the significance of persistently maintaining the sequence and clear succession of handling and keeping of such exhibits unbroken from recovery (of the alleged drugs) and authoring (of documentary exhibits) to the point of tendering them in court.

Thus, we are in agreement with both the appellant and Ms. Mkonongo, that the assessors were not adequately addressed on vital points of law, before they were to give their opinion. In law, failure to address assessors on such points amounts to noncompliance with the provisions of sections 265 and 298 (1) of the CPA, in which case conducting a trial in such circumstances was tantamount to having conducted it without aid of assessors. A trial without aid of assessors at the time, was a nullity as observed in the cases referred to above including that of **Said Mshangama Asenga** (supra).

Next, we need to address our mind on how much of the High Court proceedings we have to nullify, and obviously, make orders as to the way forward. On that aspect the appellant prayed that we nullify the entire proceedings of the trial court and order his immediate release from prison. As for Ms. Mkonongo, she prayed that the proceedings be

nullified from summing up onwards such that the proceedings recorded before summing up should not be affected by the order, and the original record be remitted to the trial court for summing up and composition of a fresh judgment after receiving opinion of assessors.

Our thorough review and analysis of available authorities on the dilemma facings us in this case, has revealed that depending on the circumstances of each case and the extent of the miscarriage of justice, the Court nullified the entire proceedings from the point the assessors were selected up to sentencing of the appellant. Particularly the Court took this position in **Chacha Ghati Mwita and Another v. R,** Criminal Appeal No. 354 of 2015, **Masolwa Samwel v. R,** Criminal Appeal No. 206 of 2014 and **Shadida Issa @ Rasta and Another v. R,** Criminal Appeal No. 125 of 2019 (all unreported).

On the other hand, the Court had taken the position that the error or irregularity taints only the proceedings from summing up onwards, in which case only the summing up notes, the judgment and conviction are nullified and the resulting sentence set aside. With this reasoning, the Court quashes the summing up notes, the judgment, conviction and sets aside the sentence but leaves valid all the evidence and any proceedings recorded before summing up. This Court has taken that stance in **Shija Ng'hwaya Ng'hwagi v. R**, Criminal Appeal No. 368 of 2019 and

Michael Maige v. R, Criminal Appeal No. 153 of 2017 (both unreported). We think this is the position that Ms. Mkonongo had in mind.

However, in the case at hand, considering the circumstances, the nature of the offence charged, the extent of the miscarriage of justice and a need to have a fair trial of the appellant, the interests of justice dictate that we adopt the position that all proceedings in which assessors had a hand be nullified. In view of that, we are in agreement with both the appellant and Ms. Mkonongo that the second ground of appeal has merit and we allow it. Thus, we find no point in venturing into discussing the other 11 grounds of appeal because in any event, if we were to do that, the outcome thereof would legally be inconsequential.

Consequently, we nullify all the proceedings from selection of assessors through to judgment. The conviction of the appellant is quashed and the life sentence imposed upon him is set aside. Consequently, we order that the appellant, Maulid Mfaume Farahani be tried afresh before another Judge of the High Court according to law. We further direct that, in the retrial we have just ordered, regard be had to section 265 (1) of the CPA as introduced by section 30 of the Written Laws (Miscellaneous Amendments) Act, 2022, Act No. 1 of 2022 with

regard to involvement of assessors. For avoidance of doubt and clarity, all proceedings in this matter from the beginning of the case up to the end of Preliminary Hearing are the only valid proceedings which have not been affected by the above order.

Accordingly, this appeal succeeds to the above extent. In the meantime, pending his retrial, the appellant shall remain in custody as a remandee.

DATED at **DAR ES SALAAM** this 16th day of November, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 18th day of November, 2022 in the presence of the Appellant in person connected via video facility from Ukonga prison and Mr. Tumaini Maimu Mafuru, State Attorney for the Respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL