

IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: KWARIKO, J. A., LEVIRA, J.A And MDEMU, J.A.)

CRIMINAL APPEAL NO. 8 OF 2019

JOHN CHIBUZO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Moshi)

(Sumari, J.)

dated the 9th day of May, 2017

in

Criminal Sessions Case No. 24 of 2015

.....

JUDGMENT OF THE COURT

5th & 20th July, 2023

MDEMU, J.A.:

On 9th May, 2017, John Chibuzo, the appellant herein, was convicted and sentenced to serve life sentence for trafficking in narcotic drugs, to wit; heroin hydrochloride. According to the information filed in the High Court of Tanzania at Moshi, the appellant was found trafficking in heroin hydrochloride weighing 3,406.84 grams valued at TZS. 204,410,400.00 at Kilimanjaro International Airport (KIA) on 23rd November, 2013. The charge was preferred under the provisions of section 16 (1) (b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 R.E. 2002 as

amended by section 31 of the Written Laws (Miscellaneous Amendments) Act, No. 6 of 2012 (now the Drugs Control and Enforcement Act, Cap. 95 R.E. 2019).

Facts of the case giving rise to the instant appeal as gathered in the record of appeal are that, Gloria Gadiel Mmary (PW6) KADCO Security Officer was on duty at KIA departure lounge screening passengers and luggage using x-ray machine. In the screening process, she noted one brown coloured bag (exhibit P2) to have contained undetected materials. She then informed one Novatus Simfukwe. The suspect (the appellant herein) Nigerian National travelling to Italy, suspected to be the owner of the bag, opened it and emptied all articles. The bag was then re-screened, yet some unknown items remained detected by the x-ray machine. Salome John Rukiko (PW3), also KADCO Security Officer and Shift Incharge was then informed on the incident and witnessed when 3052 D/Cpl. Janeth (PW8) tore the bag in presence of the appellant in which something like a small sponged pillow material with powder stuff got retrieved and seized together with other items. According to E. 1974 Cpl. Chediell (PW2), the appellant was arrested and referred to the Officer Commanding Station (OCS) at KIA together with all seized articles.

It is gathered further from the record that, on 24th November, 2013, ASP Leonidas Ngenda (PW5) took the appellant to the Office of Regional

Crimes Officer (RCO) at Moshi where he was placed under the custody of one F. 5878 D/SSgt. Mtoo (PW4) with the impounded articles documented in the certificate of seizure prepared by PW2. Later, on 2nd December, 2013, the seized articles were referred to the Chief Government Chemist where one Machibya Ziliwa (PW10) conducted forensic investigation in which, according to the report (exhibit P7), the powder was certified to be heroin hydrochloride valued at TZS. 204, 410, 200.00 (exhibit P6) as testified by Keneth James Kaseke (PW7).

As was to the plea of not guilty, the appellant maintained non-involvement in the impounded contraband. While conceding his arrest at KIA, he fronted in his defence disowning the seized bag. That notwithstanding and as alluded to above, the trial court (Sumari, J., now Retired) found the appellant guilty, convicted and sentenced him to life imprisonment on 10th March, 2017.

Considering himself innocent, the appellant on 22nd January, 2019 lodged a memorandum of appeal comprising of seven grounds of appeal. Thinking such grounds not exhaustive, a supplementary memorandum of appeal containing two grounds got filed by the appellant on 29th September, 2019 and another subsequent supplementary memorandum of appeal filed with leave of the Court on 4th July, 2023. The latter had two grounds of appeal. For apparent reasons to follow, the grounds of

appeal are not going to be reproduced save for the first ground in the supplementary memorandum of appeal filed on 4th July, 2023 which reads:

- 1. That, the learned trial judge grossly erred both in law and fact in wrongly assent with court assessors' opinions that the Appellant is guilty of the charged offence, therefore convicted and sentenced him despite her non directing the court assessors on the vital points of law in this case.*

When the appeal was called on for hearing on 5th July, 2023 the appellant appeared in person, unrepresented, whereas the respondent Republic had the service of Mr. Juma Sarige, learned Senior State Attorney assisted by Mr. Henry Chaula, learned State Attorney. Both parties to this appeal agreed to submit only on the above quoted ground of appeal. When invited by the Court to prosecute his appeal, the appellant opted to hear first from the respondent Republic and would thereafter submit his oral rejoinder submissions.

Responding in support of the foregoing reproduced ground of appeal, Mr. Chaula who argued the appeal for the respondent Republic submitted that, the provisions of section 298 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 now R.E. 2022 (the CPA) legally mandates the trial

judge in the role of summing up to assessors, in among other matters, to direct assessors on vital points of law depending on the nature of the offence involved in the trial. This role, in his view, should precede assessors' opinion.

In respect of the instant offence of trafficking in narcotic drugs, Mr. Chaula thought the summing up on vital points of law should comprise of like; what amounts to and ingredients of the offence of trafficking in narcotic drugs, the chain of custody as applicable in drug related cases. In this, the learned State Attorney referred to us the case of **Godfrey Mfuse v. Republic**, Criminal Appeal No.174 of 2020 (unreported), insisting on the role and obligation of the trial judge to guide and direct assessors on vital points of law in summing up before they are able to opine on involvement of the accused person in the offence charged.

Submitting on noncompliance of the above stated principles by the trial court, the learned State Attorney, while making reference to the summing up notes, told the Court that, the trial Judge abdicated that duty because the summing up notes are devoid of vital points of law addressed to assessors. In his view, that obligation was not performed thus assessors gave their opinion in ignorance of such important legal requirement.

As to what now should be the way forward following failure of the trial court to direct assessors on vital points of law during summing up, Mr. Chaula was of the view that, this Court should nullify proceedings from the summing up stage and the judgment and further make an order for retrial from summing up to assessors stage. He added further that, the learned trial Judge should thereafter compose a fresh judgment. On this one, Mr. Chaula referred to us the case of **Erick Gabriel Kinyaiya v. Republic**, Criminal Appeal No. 668 of 2020 (unreported) on the need for a partial retrial from the summing up to assessors' stage. He fronted two reasons for his proposition on partial retrial. **One** relates to what the trial court did at page 293 of the record of appeal by ordering disposition of the impounded contraband which order was executed and therefore, he thought, there would be no real evidence (heroin hydrochloride) to bank on in event a full retrial is prescribed. **Two**, key witnesses, some of whom were public servants, might have retired from public service thus creating some predicament in relocating them for trial purposes.

He concluded on that account to have the appeal allowed by nullifying proceedings of the trial court in the summing up stage and the subsequent judgment and orders followed thereafter and make an order for the trial court to conduct a fresh summing up to assessors and compose a fresh judgment forthwith.

In his brief rejoinder, the appellant resisted the proposed retrial by the respondent Republic thus urged us to set him free. He did not however submit to us on how the complained illegalities on non-direction of assessors on vital points of law during summing up impacted on the outcome of the case as to compel his being set free instead of attracting retrial fronted by the learned State Attorney.

On our part, having gone through the sole argued ground of appeal and the evidence on record and also having taken into account submissions of parties, we wish to state at the outset that, from what parties agreed and subsequently submitted and also which we were able to hear, our main focus will be on irregularities complained by the appellant regarding defects in summing up to assessors. The complaint is on abdication by the learned trial Judge to direct assessors on vital points of law during summing up on the offence of trafficking in narcotic drugs before she allowed them to air out their opinion.

As conceded by the learned State Attorney of which we also associate ourselves is this that, the trial judge abdicated her legal responsibility and role in her summing up to assessors for not directing them on vital points of law. We are saying so because our perusal from page 253 through 267 of the record of appeal could not comprehend compliance of such a legal requirement. What we have so far noted is a

summary of evidence summarized to assessors by the trial Judge. Let in this one the record speak of itself at page 253 of the record as hereunder:

Ladies and Gentleman assessors, having heard the evidence in this case, we are now coming to an end and my task now is to sum up the evidence and thereafter, I will require your opinion. In so doing I will remind you the evidence in its detail as much as I can.

From this end, the mission solely hinged on the summary of evidence and in fact the learned trial Judge summarized the intended evidence as she intimated. Later, basing on the summarized evidence, she dared to remind assessors present on one general legal principle that, the accused person may only be convicted on strength of the prosecution case and not on weakness of the accused's case. After this undertaking, assessors were duly invited to give their opinion. In our view, this was a partial and incomplete undertaking of the requirement of section 298(1) of the CPA regarding summing up. The summing up, in our respective view, should unreservedly comprise among other matters, a summary of evidence and vital points of law. The section is reproduced as hereunder:

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.

Looking as to whether section 298 (1) of the CPA requires summing up to assessors to be on both matters of facts (evidence) and law (vital points of law), this Court in **Godfrey Mfuse v. Republic** (supra) supplied to us by Mr. Chaula at page 8 had this to say:

It is common ground that under section 298(1) of the CPA, where the case is tried with assistance of assessors, the trial Judge or magistrate with extended jurisdiction, as the case may be, is obliged, before causing the assessors to opine on the guilty or otherwise of the accused, to make a sum up to them on the substances of the evidence of both sides and any vital point of law involved therein.

Back to the instant case, we are alive that the trial Judge gave a summary of evidence from both the prosecution and that of the accused person to assessors and went ahead to remind them, basing on the summarized evidence, the prosecution's duty to prove their case beyond reasonable doubt and further that conviction of the accused should base on the strength of the prosecution case and not on weakness of the accused's case. Nonetheless, we think, in our view and as alluded to above, the said assessors, under the circumstances were not properly,

comprehensively and adequately directed on vital points of law regarding the offence of trafficking in narcotic drugs.

As the record speaks, there is nowhere assessors were directed on vital points of law regarding the offence of trafficking in narcotic drugs such as meaning of narcotic drugs; what entails as to trafficking in narcotic drugs; ingredients of the offence of trafficking in narcotic drugs; principles embedded in the chain of custody as applied to trafficking in narcotic drugs and admissibility of expert opinion evidence. This, as said, was abdicated by the learned trial judge.

It is our observation that, since trial of the appellant in the instant appeal was with the aid of assessors, the trial Judge was legally duty bound and seized with obligation to sum up to assessors on both matters of evidence and vital points of law, see **Godfrey Mfuse v. Republic** (supra); **Said Iddi Mshangama @ Senga v. Republic**, Criminal Appeal No.8 of 2014; **Ndaro Sumuni Mabuse @ Amiri@Ronaldo & Two Others v. Republic**, Criminal Appeal No.547 of 2019 (all unreported). In the latter case on 8th of July, 2022 at page 10 through 11 of the judgment, the Court observed that:

When summing up, the learned trial Judge is duty bound to explain all the vital points of law relevant to the case. There is a long and an unbroken chain

*of authorities stressing the importance and duty imposed on trial High Court Judges who sit with the aid of assessors, to sum up adequately to those assessors. See, for example, **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015, **Said Mshangama @ Senga v. Republic**, Criminal Appeal No. 8 of 2014, **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2016 and **Lazaro Katende v. DPP**, Criminal Appeal No. 146 of 2018 (all unreported). In the case of **Omari Khalfan** (supra) the Court when faced with an akin situation reiterated the importance of summing up to assessors underscored in the defunct Court of Appeal for Eastern Africa in **Washington s/o Odindo v. R** [1954] 21 EACA 392 thus:*

"

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 assessors' opinion is correspondingly reduced".

The next question we are asked to resolve basing on what parties submitted is what is the remedy available in the circumstances of this

case where assessors gave their opinion without being dully guided on vital points of law? As alluded to above, the appellant could not agree with the respondent Republic regarding nullification of summing up proceedings and judgment and a retrial be ordered instead. On our part, we are in all fours with the learned State Attorney that noncompliance with the requirement in summing up to direct assessors on vital points of law is incurable and vitiates the trial. There are many decisions guiding on this aspect. For clarity to us perhaps it suffices to refer to the decision of the Court in the case of **Godfrey Mfuse v. Republic** (supra) at page 8, in which, we said:

Since it is a matter of logic that assessors cannot give meaningful opinions in the absence of proper summing-up, we have held from time to time that, failure to comply with the requirement is not a matter of technicalities. It is fatal irregularity which renders the trial deemed conducted without the aid of assessors and henceforth null and void.

Under the circumstances, we decline to associate ourselves with the appellant's view that he be set free basing on the foregoing irregularities committed by the trial court. For the respondent Republic, their advice to us was to partially nullify the proceedings in the summing up notes and subsequent proceedings followed thereafter with direction that the trial court should conduct fresh summing up, require assessors' opinion and

compose a fresh judgment thereof. The learned State Attorney, as said, persuaded us to take this course for two reasons. **One**, disposition of the impounded contraband (heroin hydrochloride) by order of the trial court and **two**, uncertainties on availability of key witnesses given the time the offence was committed. As said, this offence was allegedly committed in the year 2013, which is almost ten years now.

On our part, we are prepared, which we now do, to order that since the complained irregularities is on summing up notes to assessors and the resultant assessors' opinion, conviction and sentence, prudence dictates to leave the rest of the proceedings intact. This course was taken in among many other cases, the case of **Ndaro Sumuni Mabuse @ Amiri @ Ronaldo & Two Others v. Republic** (supra) at page 13 where the Court held that:

Finally, in our case, the only irregularity is in respect of the summing up notes to the assessors as there was no irregularity in their selection and participation unlike in other cases where a fresh trial was ordered. It is for the foregoing reasons, we think, in all fairness and justice ordering a fresh summing up to the assessors serves the interest of justice better.

On that understanding and for the foregoing reasons, we nullify proceedings of the trial court from the summing up stage onwards and

the judgment thereon, quash conviction and set aside the life sentence imposed on the appellant. We direct further the trial court to sum-up the case to the same set of assessors in compliance with the provisions of section 298 (1) of the CPA and thereafter compose a fresh judgment. In the event assessors who participated in the trial are at large for any reason whatsoever, then a full trial be conducted in terms of section 299 of the CPA. In the meantime, the appellant should remain in custody pending his retrial. It is so ordered.

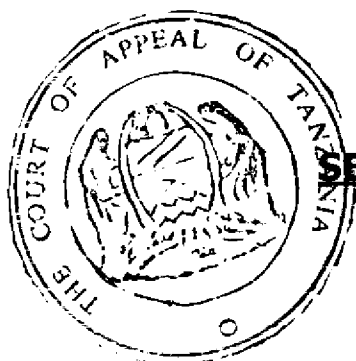
DATED at MOSHI this 17th day of July, 2 023


M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered on 20th day of July, 2023 in the presence of Appellant present in person and Mr. Innocent Exavery Ng'assi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL