IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 558 OF 2021

ISMAIL MUSTAPHA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Arusha)

(Mzuna, J.)

dated the 1st day of October, 2021

in

Criminal Sessions No. 17 of 2019

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JUDGMENT OF THE COURT

15th & 24th February, 2023

MAKUNGU, J.A.:

In the High Court of Tanzania sitting at Arusha, the appellant, Ismail Mustapha and Kassim Jamal who is not subject to this appeal, were charged with 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 R.E. 2019] as amended by section 31 of the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 6 of 2012 (hereinafter "the Act"). It was alleged that on 9th March, 2014 at Sekei area within Arumeru District in Arusha Region the appellant was found

trafficking 50 kilograms of narcotic drugs namely Khat, commonly known as Mirungi valued at TZS. 2,500,000.00.

The appellant denied the charge and as a result, the case proceeded to a full trial at which, the prosecution relied on the evidence of seven witnesses, whereas the appellant relied on his own evidence in defence. Having heard the evidence of the parties together with final submissions made by the counsel for both parties, the learned trial Judge (Hon. Mzuna, J.) found that the prosecution had proved their case against the appellant beyond reasonable doubt. He was consequently convicted and sentenced to life imprisonment. Aggrieved by the decision of the High Court, the appellant has preferred this appeal.

The background facts giving rise to the arraignment and eventually, the conviction and imprisonment of the appellant may be briefly stated as follows: On 9th May, 2014 Policemen were notified by an informer about a Coaster motor vehicle Reg. No. T 965 CBH suspected of carrying parcels of khat heading from Moshi to Arusha. PW1 No. E9435 D/Cpl. Kaleb, acting on such information, notified his bosses at the Anti-Drugs Unit. Thereafter, PW1 and Flora (PW7) together with other two Policemen Cpl. Fulgence (PW5) and Mathew,

after instruction, went to Phillips area while in the pickup police motor vehicle.

They saw a minibus with a board labelled TBL Staff. They made a follow up, up to Mount Meru Hotel where it stopped and then went to Sekei. In front of it there was a Saloon Car, which was Corolla motor vehicle Reg. No. T 780 AUS, owned by one Abuu. This car went in front of the Coaster leading it to a particular destination, which turned out to be Sekei ya Juu. They followed up to there. Their plan was to catch the Coaster minibus. So, they made sure that those who were inside could not disembark. By then there were two people only a driver and a conductor who introduced themselves as Ismail Mustapha (the appellant) and Kassim Jamal respectively.

The Policemen found a free agent one Joseph Laizer, from neighbourhood who witnessed the search. They noted that under the passenger's back seat there was a box in which there were 16 parcels stored in a specially made back seat. It had a special iron bar designed to carry narcotic drugs and the like. They had to tear off a board, a plastic made, so as to have access to what was inside.

PW1, who conducted the search, filled out a certificate of seizure. He duly signed it and then had it signed by the appellant and Joseph Laizer (an independent witness). The certificate of seizure was received, admitted and marked as Exhibit P1.

The appellant and the motor vehicle together with the 16 parcels of khat were taken to Police Station where PW1 handed the exhibits to the RCO's Office and the motor vehicle was kept at the Police Station.

The 16 parcels of khat which measured 50 kgs, according to PW6: Joyce Njisya, were worth TZS. 2,500,000.00 as the market value at that time, according to PW4: Kenneth James Kaseke, former Commissioner of Anti-Drugs Unit. They were labelled by PW6 Joyce Njisya and then taken to Dar es Salaam by PW7, Flora P. Matutu. The chemical analysis which was done by PW2: Elias Zacharia Mulima revealed that it had a substance called *cathilane* which cannot be found in other plants other than khat as per the report, Exhibit P4. Then they sent the report to the Arusha Zone Office. The said 16 parcels being perishable goods, were destroyed as per the inventory form Exhibit P5. The appellant was then charged in court.

As stated above, the appellant denied to have committed the offence on the date of the incident, that is 9th March, 2014. Apart from admitting that he was a driver of the Coaster minibus, he denied the allegation that the Coaster motor vehicle carried parcels of khat.

On the whole of the evidence, the trial court was satisfied that, the prosecution case was proved to the hilt. Thus, as earlier indicated the appellant was convicted and sentenced to life imprisonment. The appellant is seriously aggrieved by the conviction and sentence imposed by the trial court, hence the present appeal. He lodged a total of eleven (11) grounds of complaint. On account of what is to unfold in due course, we have opted not to reproduce the grounds of complaint.

At the hearing of the appeal, the appellant was represented by Mr. Hamis Mkindi, learned counsel while the respondent Republic was represented by Ms. Tarsila Asenga assisted by Mr. Felix Kwetukia, both learned Senior State Attorneys.

Having heard the parties' submissions on the grounds of appeal, we invited the counsel of the parties to address us on the propriety or otherwise of summing up to the assessors made by the trial Judge.

Addressing us on that point, Mr. Mkindi argued that the learned trial Judge did not, **first** sum up the evidence to the assessors as required by the law and **secondly**, did not direct them on vital points of law involved in the case, such as the doctrine of chain of custody and contradictions in the evidence of the prosecution's witnesses. He thus, urged us to nullify the proceedings of the trial Court, quash the judgment, set aside the appellant's convictions and release the appellant from prison.

Responding to the submissions made by the counsel for the appellant on that point, Mr. Kwetukia readily conceded that the learned trial judge did not properly sum up the case to the assessors as required by section 298 (2) of the CPA. He went on submitting that the trial judge did not address to the assessors on vital points of law such as the ingredients of the offence of trafficking in narcotics, the chain of custody and expart evidence. He contended that, looking at the summing up to the assessors notes found at pages 183 – 194 of the record of appeal, the trial judge just summarized the evidence of the witnesses without more. The learned Senior State Attorney submitted further that as the trial judge failed to explain to the assessors the vital elements of law involved in the case, the assessors could not have been in a position to

give an informed opinion. He said, failure to do so was a fatal irregularity which cannot be cured by the provisions of section 388 (1) of the CPA. He thus, urged us to nullify the proceedings of the trial court, quash the judgment, set aside the appellant's conviction and order retrial.

As correctly submitted by the learned counsel for either side, it is glaring from pages 183 to 194 of the record of appeal that, in summing up the case to the assessors the learned trial judge did not address them on several vital points, namely the essential ingredients of the offence of drug trafficking, the chain of custody of seized parcels of khat, expert opinion on drug analysis, the defence of *alibi* and the evidential value of the retracted or repudiated cautioned statement of the appellant. However, the learned trial judge relied on the said points of law in relation to the evidence adduced to convict the appellant without having initially addressed the assessors on them. A glimpse on the opinions of the assessors at pages 149 to 150 clearly shows that, their responses are apparently confused. That is why the learned trial judge interrupted them when they were giving their opinions to make clarifications at least on two occasions. In this regard, it cannot be safely said that the assessors were informed to make rational opinions

which renders the summing up not compatible with the dictates of section 298 (1) of the CPA.

Moreover, since it is settled law that, it is the proper summing up can enable the assessors to fully understand the facts of the case before them in relation to the relevant law, which is crucial for them to make rational and informed opinions to aid the judge in a criminal trial, in this matter, the omission to explain the law and drew their attention of assessors to the salient facts of the case, incapacitated the assessors from giving valuable opinions to the learned trial judge which correspondingly reduced the value of their opinion. This has been emphasized in a number of decisions including the case of **Washington s/o Odindo v. Republic** [1954] 21 EACA 392 whereby, the erstwhile East African Court of Appeal held:

> *"The opinion of 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 opinion of assessors is correspondingly reduced."***

[Emphasis added]

There is an unbroken chain of authorities to the effect that, the omission to sum up the evidence and or direct the assessors on vital points of law involved in the case renders the trial a nullity – see for instance, the case of **William Safari Kayala** (supra), **Charles Lyatii @ Sadala v. Republic**, Criminal Appeal No. 290 of 2011 and **Sanifu Haruna @ Magezi v. Republic**, Criminal Appeal No. 429 of 2018 (both unreported). As a result of the non-direction therefore, we find that the purported summing up and the proceedings that followed are a nullity.

On the way forward, it was Mr. Mkindi's submission that, although in the circumstances surrounding the present matter, ordinarily, the Court would order a retrial, he argued that in the instant case such course is not worthy because of the discrepant prosecution evidence which is sufficient to prove the charge of trafficking against the appellant. He thus urged the Court to allow the appeal and set the appellant at liberty.

On the other hand, the learned Senior State Attorney opposed the submission made by the appellant's counsel. He was of the view that there were no such discrepancies. He added that, in the wake of cogent prosecution account and since it is the summing up which was flawed, a

retrial is not proper remedy. On the way forward, the learned Senior State Attorney implored the Court not to acquit the appellant and instead, nullify the summing up to the assessors, quash and set aside the conviction and sentence imposed on the appellant and return the case file to the trial court for it to conduct a proper summing up and thereafter compose a fresh judgment.

We have considered Mr. Kwetukia's proposition as well as Mr. Mkindi's rival submission. Given the circumstances of the case, we agree with the learned Senior State Attorney that, since it is only the summing up to the assessors which was flawed, neither the acquittal nor retrial sound to be a proper recourse. We are fortified in that regard having considered a retrial not worthy because the trial was properly conducted and it was not vitiated by the irregular summing up to the assessors by the learned trial judge. Hence, in terms of section 4 (2) of the AJA, we invoke our revisional powers and nullify the proceedings from the stage of summing up to the assessors and the judgment of the trial court, quash the conviction and set aside the sentence imposed on the appellant.

Accordingly, we remit the case to the High Court for a resuming up to the assessors to be conducted expeditiously before the same trial judge and a similar set of assessors or at least two assessors unless otherwise the circumstances do not allow, then the provisions of section 299 of CPA should apply. Meanwhile, the appellant shall remain in remand custody. The 2nd accused who was acquitted should also be involved in this process.

It is so ordered.

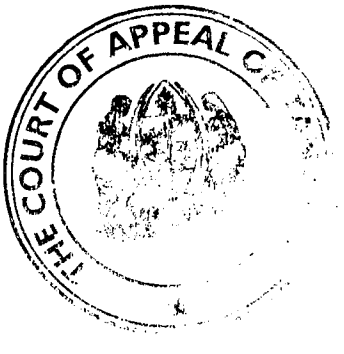
DATED at **Arusha** this 24th day of February, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2023 in the presence of Mr. Hamis Mkindi, learned counsel for the appellant also in presence of the appellant and Mr. Felix Kwetukia, learned Senior 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