IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A., And KITUSI J.A.)

CRIMINAL APPEAL NO. 211 OF 2017

1. DIAKA BRAMA KABA
2. NDJANE ABUBAKARI } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dar es Salaam)

(Korosso, J.)

Dated the 22nd day of March, 2017

in

Criminal Sessions Case No. 14 of 2015

.....

JUDGMENT OF THE COURT

16th November & 28th December, 2020

MKUYE, J.A.:

Before the High Court of Tanzania (Dar es Salaam Registry) DIAKA BRAMA KABA and NDAJE ABUBAKAR (1st and 2nd appellants herein) together with SYLVIA KAAYA NAMIREMBE, FRANK KISUULE and ROBINSON DUMBA TEISE the former 3rd, 4th and 5th accused persons who were discharged in the course of trial, were charged with two counts, to wit, conspiracy to commit an offence contrary to section 22 (a) of the Drugs and Prevention of Illicit Trafficking in Drugs Act, Cap 95

RE 2002; and trafficking in narcotic drugs contrary to section 16 (1) (b) (i) of the same Act.

In the 1st count, it was alleged that DIAKA BRAMA KABA, NDAJE ABUBAKAR, SYLVIA KAAYA NAMIREMBE, FRANK KISUULE and ROBINSON DUMBA TEISE on unknown dates and places in 2010 all the five accused persons did conspire to traffic narcotic drugs namely, cocaine hydrochloride into the United Republic of Tanzania.

In the 2nd count, it was alleged that DIAKA BRAMA KABA, NDAJE ABUBAKAR, SYLVIA KAAYA NAMIREMBE, FRANK KISUULE and ROBINSON DUMBA TEISE on 23rd day of June 2010 at Mwalimu Julius Nyerere International Airport area within Ilala District in Dar es Salam Region did traffic into the United Republic of Tanzania 30,875.75 grams of narcotic drugs namely, cocaine hydrochloride valued at Tshs. 1,235,030,000/= (one billion, two hundred thirty five million and thirty thousand shillings).

Following the committal proceedings in terms of section 246(1) of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA) all accused persons stood for trial at the High Court. The Prosecution indicated to call 13 witnesses to testify in court and to produce 22 exhibits.

Six prosecution witnesses had testified in the trial court and when PW7 was giving his testimony, the prosecution side entered a *nolle prosequi* under section 91(1) of the CPA in favour of the 3rd, 4th and 5th accused whereupon they were discharged. Thereafter, the case proceeded against the two appellants herein.

Upon a full trial, the trial court was satisfied that the prosecution proved the two counts beyond reasonable doubt and proceeded to convict them on the 2nd count only and sentenced each to imprisonment for a term of twenty two (22) years and in addition to pay a fine of Tshs. 3,705,090,000/= being three times the value of the narcotic drugs.

Aggrieved by both conviction and sentences meted out against them, they have appealed to this Court.

The appellants had lodged both substantive and supplementary memoranda of appeal but on 10th July, 2020 when the appeal was placed before the Court for hearing which, incidentally, did not take off, the counsel for the appellants prayed and were granted leave to file a supplementary memorandum of appeal in lieu of the two sets they had filed earlier on.

In compliance with the Court's order, the appellants filed the supplementary memorandum comprising seven grounds of appeal as hereunder: -

1. *That the learned Honourable trial Judge erred in law and fact in convicting and sentencing the Appellants in the proceedings tainted with material irregularities which goes (sic) to the root of the case, namely that: -*

    a) *The trial Judge erroneously admitted and gave weight to exhibits P.7A and P.7B which did not form part of committal proceedings or which were not read during committal.*

    b) *The trial Judge erroneously admitted and gave weight to exhibits P.7A and P.7B which neither makes reference to any descriptions of the alleged narcotic drugs* ***(Exhibit P1)*** *nor mentioning the appellants in connection with valued narcotic drugs mentioned therein.*

    c) *The trial Judge erroneously gave weight in convicting and sentencing the appellants on the evidence of search order/certificate* ***(Exhibit P13)*** *which was not read over by PW5 to the appellants during trial.*

    d) *The trial Judge erroneously convicted and sentenced the appellants on the charges of trafficking in*

*narcotic drugs **(Exhibit P1),** while the appellants were illegally searched without search order.*

2. *That the Honourable trial Judge erred in law and fact by failure to rule out that the appellants were not present at ADU Kilwa road to witness sealing of Exhibit P1 for onward laboratory test to the Government Chemist, thus occasioning injustice to the appellants.*
3. *That the Honourable trial Judge erred in law and fact by failure to make a finding that the appellants were diplomats and further the court ought to have drew (sic) negative inference against the Respondent to open the appellants' bags in a violation of Vienna Convention on Diplomat status.*
4. *That the Honourable trial Judge erred in law and fact by failure to rule out that there are serious contradictions in the evidences of PW5 and PW9.*
5. *That the Honourable trial Judge erred in law and fact in convicting and sentencing the appellants while the evidence of the prosecution shows that the chain of custody in handling exhibit P1 was broken.*

6. *That the Honourable trial Judge erred in law and fact in convicting the appellants while the information is fatally defective suffering from duplicity.*
7. *That the Honourable trial Judge erred in law and fact in convicting and sentencing the appellants while the prosecution failed to prove the case beyond reasonable doubt.*

In addition, at the hearing of the appeal, the learned counsel for the appellants prayed and we granted them leave to add a new ground of appeal to the effect that:

> *"That the Honourable trial Judge erred in law and fact in convicting and sentencing the appellants while the charge was fatally defective for failure to amend it and read over to the two appellants after the former three accused persons were discharged on a nolle prosequi under section 91(1) of the CPA".*

When the appeal was called on for hearing, the appellants were represented by Messrs Wilson Ogunde, Juma Nassoro and Jeremiah Mtobesya learned counsel; whereas the respondent Republic was represented by Mr. Tumaini Kweka, learned Principal State Attorney, Ms. Veronica Matikila, learned Senior State Attorney and Ms. Batilda Mushi,

learned State Attorney. It should be noted that the Court was also assisted by Mr. Joseph Gasper Kitakwa who appeared as an interpreter from English to French languages and vice versa as the 2nd appellant was not conversant with English language.

All the grounds of appeal were argued for and against. However, we have deemed appropriate to deal with the issue concerning defectiveness of the charge on two limbs; one, for being duplex which is raised in ground No.6; and two, for failure to amend it after a *nolle prosequi* had been entered in favour of the former 3rd, 4th, 5th accused persons as in our view, it may have the effect of disposing of the whole matter without necessarily dealing with other grounds of appeal.

With regard to ground No. 6 on the duplicity of the charge sheet, it was Mr. Nassoro's argument that the appellants were charged jointly in one charge sheet though there was no indication that they committed the offence in the same transaction. He said, the two appellants did not know each other having arrived from different origins each with his own bag. In his view, this contravened the provisions of section 134(1) of the CPA and urged the Court to find this ground of appeal meritorious and allow it.

As regards the additional ground of appeal, Mr. Nassoro submitted that the information filed in the trial court had five accused persons, the 1st and 2nd appellants herein being the 1st and 2nd accused together with the 3rd, 4th and 5th accused persons and the trial commenced against all of them. He said, six witnesses testified against all of them and when PW7 was testifying, the prosecution exercising their power under section 91(1) of the CPA entered a *nolle prosequi* in favour of the 3rd, 4th and 5th accused persons and the trial judge granted the prayer and discharged them as shown at page 163 of the record of appeal. However, he said, the trial proceeded without amending, altering or substituting the charge. Neither was any charge read over for the remaining accused to enter a fresh plea.

It was his contention that, as the information contained five accused persons and the particulars of the charged offences involved all the five accused persons, it was prudent for the court to invoke section 276 (2) of the CPA and order an amendment, alteration or substitution of the charge and thereupon require the remaining accused to enter a fresh plea. While relying on the case of **Ramadhani Hussein Rashid @ Babu Rama and Another v. Republic,** Criminal Appeal No. 220 of 2018 (unreported), the learned counsel urged us to find that for this

omission the proceedings are a nullity and quash the conviction, set aside the sentence and allow the appeal.

In reply, Mr. Kweka, from the outset declared his stance of supporting both the conviction and sentence.

With regard to the additional ground of appeal, in the first place he conceded that in the middle of trial the prosecution entered *nolle prosequi* in favour of the 3rd, 4th and 5th accused persons and that after their discharge no amendment of the charge was made. He pointed out that, in terms of section 276 of the CPA the charge or information is amended or substituted where there is a formal defect or variance between the charge and the evidence; and that upon an order of amendment, the amended charge will be endorsed and be read over to the accused person so as to know the nature of an amendment. (See **DPP v. Danford Roman @ Kanani,** Criminal Appeal No.5 of 2018 page 18). Nevertheless, he submitted further that the provisions of section 91(1) of the CPA under which the *nolle prosequi* was entered in favour of the former three accused do not require amending or substituting the charge after termination of the charge, or reading it to the remaining accused. He pointed out that in such a situation the issue which would arise is whether the appellants were prejudiced when the

matter proceeded after the discharge of the former 3rd, 4th and 5th accused persons. He was of the view that the discharge of the three accused did not occasion any injustice to the appellants as the statement of offence and the particulars of the offence were not changed. He added that should there be any prejudice to the appellants, it is curable under section 388 of the CPA. As regards the case of **Ramadhani Hussein Rashid @ Babu Rama and Another** (supra), he submitted that it is of no help since it only discussed section 234(2) (a) of the CPA which is in parimeteria with section 267(2) of the CPA without discussing section 91(1) of the CPA.

With regard to ground no.6 challenging the charge for being duplex, Mr. Kweka contended that duplicity in the charge cannot be found in evidence but in the particulars of offence. He said, looking at the charge sheet there were no distinct offences in one count. He cited to us the case of **Livinus Uzo Chime Ajana v. Republic,** Criminal Appeal No.13 of 2018 (unreported) page 22. He added that, joinder or misjoinder of parties does not make the charge duplex. He concluded that the charge complied with sections 132 and 135 of the CPA and hence, this ground lacks merit.

As to the way forward, he was not at one with Mr. Nassoro's proposition for quashing the conviction and setting aside the appellants' sentences and instead he urged us to order a retrial.

In rejoinder, Mr. Nassoro quite briefly argued that there were no material facts warranting this Court to depart from the case of **Ramadhani Rashid @ Babu Rama** (supra). The quarrel is that the charge proceeded against the appellants without amending the particulars of the offence. He urged the Court to find the defect incurable and set free the appellants.

We wish to begin with the 6th ground of appeal on the complaint that the information was fatally defective for being duplex. At the very outset we wish to point out that a charge or information is said to be duplex if, two distinct offences are placed together in the same count or when an actual offence is charged along with an attempt to commit the same offence.

In the case of **Livinus Uzo Chime Ajana** (supra), the Court underscored that the charge may be said to suffer duplicity if allegation of commission of two distinct offences have been lumped together. (See also **Director of Public Prosecutions v. Morgan Maliki and Another,** Criminal Appeal No. 133 of 2013 (unreported).

Mr. Nassoro's challenge is that charging the appellants jointly while there was no indication that their offences originated from the same transaction and without proof that they knew each other contravened the provisions of section 134 (1) of the CPA. Mr. Kweka is of the view that duplicity of the charge is found in the particulars of offence and not in the evidence. Section 134 (1) of the CPA states:

> *"134 (1) the following persons may be joined in one charge or information-*
>
> *(a) persons accused of the same offence committed in the course of the same transaction;*
>
> *(b) persons accused of an offence and persons accused of abating or an attempt to commit such an offence;*
>
> *(c) .....*
>
> *(d) .....*
>
> *(e) .....*
>
> *(f) ....."*

Our reading of this provision is that, the persons who can be charged jointly are those whose offence is committed in the same transaction or those who abate in commission of such offence. And, in our view, this would be clearly shown in the particulars of the offence as

was rightly submitted by Mr. Kweka and not in evidence. In other words, it is at the time of preferring the charge or information that the circumstances of the case would have shown whether or otherwise the accused persons committed the offence together. In this regard, it is our view that, Mr. Nassoro's contention that the appellants did not know each other, being a fact which was revealed during the appellants' defence cannot be the basis for claiming that the charge was duplex. We, therefore agree that as submitted by Mr. Kweka, matters that required evidence could not be ascertained during charging. We thus, find this ground of appeal without merit and we dismiss it.

As regards the additional ground of appeal, the appellants' complaint is that they were convicted on a defective charge following the discharge of the three former co-accused without amending, altering or substituting it contrary to section 276 (2) of the CPA. The said provision states as follows:

> *" 276 (2) Where before a trial upon information or at any stage of the trial it appears to the court that the information is defective, the court shall make an order for the amendment of the information as it thinks necessary to meet the circumstances of the case unless, having regard*

to the merits of the case, the required amendment cannot be made without injustice; and all such amendments shall be made upon such terms as the court shall deem just."

Mr. Nassoro argued that after the discharge of the three former accused persons under section 91 (1) of the CPA, the prosecution ought to pray for the amendment, alternation or substitution of the charge and read over the amended charge to the remaining accused persons (appellants). On his part, Mr. Kweka is of the view that, that is not a requirement under section 91(1) of the CPA adding that even the appellants were not prejudiced. He went further to state that our decision in **Ramadhani Hussein Rashid @ Babu Rama** (supra) was a misdirection which ought to be departed from by this Court as section 91(1) of the CPA was not discussed. However, on this we hasten to say that the Court in that case did not misdirect itself as Mr. Kweka seems to suggest because section 91(1) of CPA was not at issue and, hence, the Court could not have made any determination on it. Even the learned Principal State Attorney's prayer that we depart from that decision is not tenable as he has not advanced any convincing arguments to warrant this Court do so (See **Abdallah Shrwa v. Sheikh Mohamed Haj Ahmed** [1977] HCD no 43 and **Geita Gold Mining Limited v.**

Commissioner General Tanzania Revenue Authority, Civil Appeal No 132 0f 2017 (unreported). For example, in the latter case it was stated that departing from an earlier decision should be more solemn and justified. We think this is not the case in the matter at hand.

On the other hand, we agree with both counsel that the Director of Public Prosecutions (the DPP) is, in terms of section 91(1) of the CPA, empowered to withdraw the charge against any accused person at any stage before the judgment. As was rightly contended by Mr. Kweka, the said provision does not require amendment, alteration or substitution of the charge where the other accused(s) is/are discharged.

It is, however, a settled law that where a charge which comprises more than one accused person is withdrawn against one or others it is the duty of the DPP to amend or substitute the charge so as to show those accused against whom the charge would proceed to trial. Even if the DPP is not proactive in doing so, the trial court is also allowed to make an order of amendment or substitution of the charge where it appears to it that the charge is defective either in form or substance.

In **Ramadhani Hussein Rashid @ Babu Rama** (supra), to which we subscribe, the Court was confronted with an akin situation

where the case against three accused persons (3rd, 4th and 5th accused) was withdrawn under section 91 (1) of the CPA and the case proceeded with the remaining two accused (1st and 2nd accused) without amending the charge. The Court after considering such scenario observed that:

> *"...we are settled in that in the circumstances of this case, after the charge which comprised five accused was withdrawn against the third, fourth and fifth accused, the* ***DPP was duty bound to amend or substitute the charge to reflect that the said charge proceeded with the two-remaining accused.*** *(the appellants)".*

[Emphasis added]

The Court in the same case went further to state that:

> *"....even if the DPP could not have prayed to amend or substitute the charge sheet, in terms of section 234 (1) of the CPA [which is in parimateria to section 276(2) of the CPA] the trial court is permitted to make an order of amendment or substitution of a charge where it appears to it that the said charge is defective either in substance or form (see* ***Elias Deodidas v. Republic*** *Criminal Appeal No. 259 of 2012 (unreported). ... if that order could have been*

made, the particulars could in the amended or substituted charge should have shown that only those remaining accused, in this case, the appellants are alleged to have been jointly involved in the commission of the offence of armed robbery. Unfortunately, this was not done in the present case. As a result, the trial court proceeded with the same charge sheet which comprised five accused, including those who were discharged by the court up to the conclusion of the trial. In the result, the position in the particulars of the offence remained that five accused were alleged to have jointly committed the alleged offence of armed robbery".

The above cited case is in all fours with the case at hand. We are settled in our mind that after the discharge of the three former accused persons by a nolle prosequi, the DPP ought to have amended or substituted the charge to reflect the two-remaining accused against whom the charge proceeded. Alternatively, the trial court could have made an order for the amendment or substitution of the charge if it occurred to it that the said charge was defective either in substance or form. It is also noteworthy that had the charge/ information been amended or substituted, it was required for such amended charge to be

read over to the remaining accused persons for them to enter their fresh plea. Where such procedure is not conducted, it would render the trial a nullity since the anomaly cannot be cured under section 388 of the CPA.

In the matter at hand, the record of appeal bears out that on 18th May, 2015 when the appellants together with the three former accused were arraigned before the trial court, the charge which was read over and explained to them comprised five accused persons as we have already mentioned and each pleaded not guilty to the charge as shown at pages 27 to 28 of the record of appeal.

The facts of the case appearing at pages 21-24 which were read over to the accused persons as shown at pages at pages 30-31 during preliminary hearing show that they involved five accused persons. Even the memorandum of undisputed facts at page 31 was signed by among others the five accused persons. Then, the trial commenced on 28th October, 2015 and continued on different dates whereupon six witnesses testified for the prosecution. On 14th December, 2015 while PW7 was still testifying in the court as shown at pages 162-163 of the record of appeal, the prosecution withdrew the charge against the 3rd, 4th and 5th accused persons under section 91(1) of CPA, however, the court

proceeded with the trial against the appellants herein to its conclusion without having amended or substituted the charge.

Incidentally, the trial court at pages 363-264 of the record of appeal when composing its judgment seems to have noticed the anomaly and amended the particulars of the offences from those involving five accused persons to those involving two accused persons which, we think, was not proper as there was neither an order of the court to that effect nor endorsement and the same was not read over to the remaining accused persons as required by sections 276 and 228 of the CPA.

Also at pages 364 -365 of the record of appeal, the trial court explained on how the case started with five accused persons and later the termination of the charges against three accused persons and further that at the time of withdrawal of the case several witnesses had already testified and various exhibits had been tendered with regard to the charges which the accused faced and proceeded with the hearing of the case.

Much as it may well be said that the appellants were given an opportunity to defend themselves, there is no doubt that their defence

based on a defective charge. On top of that they defended themselves on a charge and evidence which related to five accused persons.

In view of what we have endeavoured to explain above, it is clear that both the prosecution and the trial court failed to ensure that the charge was amended or substituted following the discharge of the three accused persons by a *nolle prosequi.* This was a fatal irregularity which occasioned miscarriage of justice as it caused the appellants not to be accorded a fair trial which in effect cannot be cured by section 388 of the CPA. If we may add, the appellants cannot be said to have been accorded a fair trial where they did not plead to a charge to which they were convicted.

Consequently, having found that the trial was marred by irregularity, we, in the exercise of our powers bestowed on us under section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002, nullify the proceedings and judgment of the trial court, quash the conviction and set aside the sentences imposed upon the appellants.

In addition, having considered the nature and the circumstances of the offence, we are of the view that this is a fit case for an order of retrial. Hence, we hereby order for a retrial of the case before another judge with a new set of assessors and further that should the appellants

be convicted, the period already served by them in custody be considered in the course of imposing a sentence. Meanwhile, the appellants shall remain in custody pending a retrial which has to be expedited.

It is so ordered.

DATED at **DAR ES SALAAM** this 23rd day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 28th day of December, 2020 in the presence of both Appellants linked via video conference at Ukonga Prison and Mr. Eliya Kalonge, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL