TANZANIA / JUDGMENT

rukia khamis mohamed vs republic 2023 tzca 17435 20 july 2023

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IN THE COURT OF APPEAL OF TANZANIA AT MOSHI fCORAM: KWARIKO. J. A - LEVIRA, J.A And MDEMU. 3.A.1 CRIMINAL APPEAL NO. 130 OF 2018 RUKIA KHAMIS M O H A M E D ..... APPELLANT VERSUS THE R EP U B LIC .....RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Moshi) f Sumari, 3.1 dated the 10th day of April, 2018 in Criminal Sessions Case No. 57 of 2016 JUDGMENT OF THE COURT 1(F & 20* July, 2023 LEVIRA. J.A, The appellant, Rukia Khamis Mohamed was 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 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). It was alleged by the prosecution that, on 21st December, 2013 at Kilimanjaro International Airport (KIA) area, within Hai District in Kilimanjaro Region, the appellant was found trafficking an amount of 1800 grams of Heroin, valued at TZS. 72,000,000.00. When the charge was read over to her, she denied it. The trial was then conducted. The prosecution paraded a total of 7 witnesses and tendered 11 exhibits to prove the charge against the appellant. The appellant fended for herself without calling witnesses and did not tender any exhibit. Both parties got an opportunity of presenting their final submissions after closure of the prosecution and defence case. Thereafter, the trial Judge summed up the evidence to the assessors who at the end unanimously opined that the appellant was guilty as charged. The trial Judge having evaluated the evidence and considered assessors' opinion, was satisfied that the offence of trafficking in narcotic drugs was proved beyond reasonable doubt against the appellant. Therefore, the appellant was convicted and sentenced to life imprisonment. Aggrieved by both conviction and sentence, the appellant lodged a memorandum of appeal on 22nd January, 2019, containing 9 grounds of appeal and supplementary memorandum of appeal containing 8 grounds of appeal lodged by her counsel on 5th July, 2023. At the hearing of the appeal, the appellant was represented by Messrs. Edmund R. Ngemela and Sylvester S. Kahunduka, learned 2 advocates, whereas the respondent had services of Mr. Juma Sarige, learned Senior State Attorney. Before commencement of the hearing in earnest, Mr. Ngemela prayed to abandon the grounds of appeal found in the memorandum of appeal. He however retained the supplementary memorandum of appeal and mainly, argued three out of eight grounds of appeal presented therein. For the reasons to come into light shortly,

we shall not reproduce the background of the case and all the grounds of appeal save for the first, fourth and eighth grounds which were argued by the parties. We shall renumber the fourth ground to read the second, and the eighth ground as the third. For ease of reference, these grounds read:

1. That, the learned trial Judge erred in taw and fact in holding that the charge was proved beyond reasonable doubt and to the required standard o f law against the appellant.

2. That, the learned trial Judge erred in law when conducted the case contrary to sections 265, 285 (1) and 298 (1) o f the Criminal Procedure Act, Cap. 20 o f the Laws o f Tanzania.

3. That, the learned trial Judge erred in law and in fact when failed to analyse properly evidence before it consequently arrived at a wrong verdict and sentence. In his submission in support of the appeal, Mr. Kahunduka started to argue the second ground of appeal. According to him, the learned trial Judge erred in law when she conducted the case contrary to sections 265, 285 (1) and 298 (1) of the Criminal Procedure Act [Cap. 20 RE. 2002 now R. E. 2022] (the CPA). He submitted further that, initially, section 265 of the CPA required the trial court to sit with assessors in trials. However, following amendment of the law, the said provision was repealed and replaced by section 30 of the Written Laws (Miscellaneous Amendment) Act No. 1 of 2022 which introduced section 285 (1) of the CPA. The section directs that when the court sits with assessors, it has to select them first. Therefore, he said, since this case is of 2018, then it was mandatory for the court to select and sit with assessors. He referred us to page 60 of the record of appeal and argued that, although on 25th July, 2017 it was the first day of the trial, assessors' names were included in the coram without proper selection contrary to the requirement of the law. In support of his argument that assessors must be selected, he cited the decision of the Court in Boniface Marcel Tariro @ Sijali v. Republic, Criminal Appeal No. 289 of 2017 in which the case of Hilda Innocent v. Republic, Criminal Appeal No. 191 of 2017 (both unreported) was cited. 4 The Court stated in the case of Hilda Innocent (supra) that, involvement of assessors as per section 285 (1) of the CPA, begins with their selection. Mr. Kahunduka went on to submit that, even if the Court will find that selection of assessors in the present case was proper, then it should consider that, section 298 (1) of the CPA which requires summing up to assessors to be conducted was not complied with. It was his argument that, there was no proper summing up to assessors in this case. He referred us to page 259 through 281 of the record of appeal and argued that, the record is clear that the trial Judge just summarized the evidence of both parties but did not explain to the assessors the vital points of law in the matter before her. He further referred us to page 289 of the record of appeal and identified some of the vital points of law which the trial Judge ought to have explained to the assessors; including, the issue of chain of custody of exhibits which was relied upon to ground the appellant's conviction. He submitted that, on that page, the trial Judge considered the chain of custody but did not explain it to the assessors as required by the law for them to understand what it entails and its relevance in proving the case. He argued that, had it been explained, assessors would have different opinion as far as guiltiness of the appellant is concerned. He 5 backed up his argument with

the decision of the Court in Jalilu Mgoba

v. Republic, Criminal Appeal No. 508 of 2020 (unreported). It was his conclusion that, the trial of the present case was a nullity. Therefore, he urged us to nullify the proceedings, quash conviction and set aside the appellant's sentence and order a retrial thereof. In addition, he said, under normal circumstances, if the Court finds improper to order a retrial, it should set the appellant free because there is no sufficient evidence on record to sustain conviction. As such, he said, the evidence adduced during trial was full of discrepancies, contradiction and inconsistences which when retrial is ordered, it will be like giving the prosecution an opportunity to fill in evidential gaps. Adding on the submission by his learned friend, Mr. Ngemela submitted on the first and third grounds of appeal together to the effect that, the evidence adduced by the prosecution during trial was weak and contradictory to the extent that it could not ground conviction. He referred us to page 62 of the record of appeal where police officer No. F. 1157 D/Sgt Hashim (PW1) told the trial court that, on 21st December, 2013 while in his office, he received exhibits from A/Insp. Shufaa from KIA Police Station which were seized from the appellant on the same date. The said exhibits included, a brown bag which contained an envelope 6 wrapped in yellow cello tape and in it contained some powder form suspected to be illicit drugs as indicated in the statement of A/Insp. Shufaa dated 21st December, 2013 which was admitted as exhibit P ll. He submitted further that, PW1 tendered handing over certificate of the items handed to him by A/Insp. Shufaa (KIA/IR/233/2013) admitted as exhibit P4 and the Exhibits Register, PF 16 showing movement of exhibits and the same was admitted as exhibit P5. It was his argument that, in exhibit P ll, A/Insp. Shufaa stated that, the weight of suspected illicit drugs which she handed over to PW1 was 1800 grams including the envelope in which the said drugs were kept. When PW1 tendered the exhibit seized from the appellant (exhibit P6 collectively), he did not mention the weight. The weight was stated by Thereza John Kahatono, Government Chemist (PW5) when testifying at page 86 of the record of appeal. PW5 is the one who weighed the envelope and the powder substance in it, which she said, it weighed 1694.60 grams. She further weighed the empty envelope wrapped in the yellow cello tape initially containing powder substance suspected to be drugs and its weight was 223.45 grams. From arithmetic calculation, PW5 said, the weight of yellow wrapped envelope with its contents inside minus 7 that of empty envelope, equals to 1471.15 grams which is the weight of the powder. Mr. Ngemela argued further that, the variance of weight of the heroin hydrochloride allegedly found in possession of the appellant shall not change even if the Court will order a retrial. He wondered, if at all, as per the evidence of WP.3052 D/Cpl. Janeth (PW4) and seizure certificate (exhibit P8) which she tendered, the weight of the seized powder was 1800 grams, then what happened to the said powder when F. 5878 D/Ssgt. Mtoo (PW6) handed it to PW5. He argued that, the weight was reduced and became 1694.60 grams when it was measured in his presence, and finally, found to be 1471.15 grams as per PWS's evidence. Besides, he submitted that, when the said heroin hydrochloride allegedly seized from the appellant was being seized, there was no involvement of an independent witness. According to him, Ahmed Mwachulula, KADCO KIA Security Officer (PW7) who signed seizure certificate

(exhibit P8) as a witness, was not an independent witness because he was the one who suspected the drugs and thus a complainant. In the circumstances, he argued that, exhibit P8 was not valid and it should not be considered as evidence proving that the alleged heroin hydrochloride was seized from the appellant. He insisted that, there was 8 a need for the prosecution to find an independent witness to witness the process, otherwise, the defect goes to the root of the case and ordering a retrial is not an ideal decision as it will give the prosecution an opportunity to fill in the identified gaps. That apart, Mr. Ngemela submitted that, the 1471.15 grams of heroin hydrochloride allegedly found in possession of the appellant which was the basis of the case, was not tendered in evidence as exhibit during trial. Failure to tender it, he argued, shows that the charge against the appellant was not proved beyond reasonable doubt. Mr. Kahunduka cemented that, the prosecution evidence was also contradictor/ and doubtful as far as to the place where search was conducted is concerned. While A/Insp. Shufaa explained in exhibit P l l that search was conducted at the Airport, PW4 said it was done at the police station. Another weakness of the prosecution evidence according to Mr. Kahunduka is in relation to seizure certificate. He argued that, the prosecution failed to explain the reason why seizure certificate was not filled and signed at the scene of crime (at the Airport), instead, it was filled and signed at the police station. He concluded that, all weaknesses of prosecution case identified go to the root of the case. Therefore, it cannot be said that the prosecution proved their case to the required standard. He insisted that, an order for a retrial cannot do justice to the case. Otherwise, doing so will amount to giving the prosecution an opportunity to fill in evidential gaps contrary to the requirements of the law. He thus argued us to allow the appeal, quash conviction, set aside the sentence and order immediate release of the appellant from prison. In response, Mr. Sarige partly supported the appeal, particularly, the second ground. He opposed the rest. It was his submission that, according to the record of appeal there was no proper selection of assessors and the trial Judge did not direct assessors on vital points of law. He expounded his submission by stating that, the record of appeal is silent on how the assessors were selected as it can be observed from page 61 of the record of appeal. The trial Judge ought to have told the parties that assessors who were before the court were the ones selected and thereafter, ask the appellant whether there was any objection. In support of his submission, he cited the case of Samwel Jackson Saabai @ Mng'awi and 2 Others v. Republic, Criminal Appeal No. 138 of 2020 (unreported). Submitting on the second limb of this ground, Mr. Sarige concurred with the submission by the counsel for the appellant that, assessors were not directed on vital points of law; including, the ingredients of the offence 10 with which the appellant was charged and chain of custody of exhibits. The effect of non-direction, he said, is to remit the case file to the trial court for re-summing up. However, it was his submission that, since the assessors were not well selected, we should order the case to go for a full retrial. As regards the first ground of appeal, he submitted that, the case against the appellant was proved beyond reasonable doubt as there was sufficient evidence adduced by the prosecution. However, he admitted that, there was a change of the weight of heroin hydrochloride allegedly found in possession of the appellant. He highlighted that, the record shows that at the first time the narcotic drugs were measured by customs personnel weighed

1.8 kilograms. This, he said, was because the said exhibit was in the envelope. Nevertheless, he submitted when considering the evidence of PW5 at page 86 of the record of appeal that, the same was measured and found to be 1694 grams, and finally after removing it from the envelope and deducting the weight of the envelop, it remained to be 1471.15 grams, as the actual weight. Despite that admission, he urged us to find that, the appellant was caught trafficking in narcotic drugs, to wit; 1471.15 grams of heroin hydrochloride as per li the evidence of PW5 and exhibit P9 which however, differed from the evidence of PW1, PW7, exhibits P4, P8 and P l l regarding the weight. As regards the argument that the alleged heroin hydrochloride was not tendered in evidence, Mr. Sarige opposed this argument. He submitted that, since exhibit P6 contained everything that was in the bag, obviously, the heroin hydrochloride seized from the appellant was also tendered. He went further submitting that, since the disposal order found at page 309 of the record of appeal indicates that exhibit P6 should be disposed and the inventory further indicates that heroin hydrochloride 1471.15 grams had to be disposed of, then we should consider that the said exhibit was tendered during trial. Regarding contradictions in handing over of seized exhibit, Mr. Sarige submitted that, the same was properly handed from PW4 to A/Insp. Shufaa in the presence of (PW7) who also witnessed seizure and signed seizure certificate as a witness. He argued that, even if there was no handling notes, the evidence of those who witnessed can also be considered; he relied on the decision of the Court in Saganda Saganda Kasanzu v. Republic, Criminal Appeal No. 53 of 2019 (unreported). Mr. Sarige insisted that, what was seized was the appellant's property as per the evidence of PW4 at page 80 of the record of appeal, where she said, 12 when the appellant was asked by PW7 whether the bag was hers, she replied affirmatively. On the claim that there was no independent witness, he responded that PW7 was an independent witness. In the alternative, he said, if the Court finds PW7 was not an independent witness, it should consider the circumstances of this case where the incident took place at the midnight around 2:30 am and thus it was impossible to get another person to witness search and seizure. He implored us to find the argument by the appellant's counsel that search was conducted outside the airport baseless, as the same was conducted at the Airport. After all, he said, it is not disputed that the appellant was found in possession of heroin hydrochloride. Finally, he urged us to find that the case was proved beyond reasonable doubt against the appellant. Upon being asked by the Court about what would be the way forward, Mr. Sarige submitted that, it is impossible to order for retrial under the circumstances of this case where the exhibits, including the drugs have already been destroyed. He thus prayed that, the appellant be set free because if the case goes for retrial, the prosecution will have no evidence to prove the case. However, upon further reflection, he changed his mind and submitted that, the disposal inventory and 13 witnesses who witnessed disposition can be used to prove that the drugs were seized from the appellant and destroyed. He thus abandoned his previous prayer and urged us to order for a retrial. Rejoining, Mr. Kahunduka submitted that at page 68 of the record of appeal PW1 listed all items which were in the bag whereas, the alleged drugs were none of them. He insisted that, the drugs which were the basis of the case were not tendered and admitted in evidence. As such, he said, there was no proof that the drugs were the property of the

appellant. As well, he was not aware of where the bag was kept. According to him, in the circumstances of this case where the weight of the alleged heroin hydrochloride kept on changing, and the said narcotic drugs was something which could easily change hands, documentation of handling of the same was a necessity. He attacked the argument by the counsel for the respondent that, failure to call independent witness was due to the fact that search was conducted at the midnight to be devoid of merits. Regarding the argument that the appellant admitted the bag to be hers, Mr. Ngemela submitted that, the issue was on narcotic drugs and not the bag. He stated that the appellant never admitted to have been found in possession of heroin hydrochloride. He also submitted with regard to the disposal of exhibit to the effect that, whenever proceedings 14 are nullified, even the inventory goes away with the nullified proceedings. Therefore, it will as well be impossible to rely on that document to prove existence of drugs. In addition, he said, while the inventory indicates that the drugs were 1471.15 grams of heroin hydrochloride, the charge and some prosecution witnesses together with other exhibits indicate that, it was 1800 grams making it difficult to prove. He insisted that, PW7 was not an independent witness but a complainant in this case. In conclusion, he urged us to allow the appeal and set the appellant free. Having heard the parties and considering the grounds of appeal together with the entire record of appeal, we think determination of this appeal is based on two main issues; to wit, whether the trial was conducted with the aid of assessors as per the then requirement of the law and if the answer will be in the negative, then what is the way forward. We note that, regarding assessors, the appellant has faulted the trial Judge on account of improper selection and summing up. We understand that the first and third grounds of appeal were argued with a view of supporting the way forward should the Court finds that there was no proper summing up to assessors. With that understanding, we shall concentrate on the issues we have raised. 15 It is common knowledge that, before amendment of the law by Written Laws (Miscellaneous Amendment) Act No. 1 of 2022 which came into operation on 22nd February, 2022, the law made it a mandatory requirement under section 265 of the CPA that, trials before the High Court must be conducted with the aid of assessors. The said provision stated: "AH trials before the High Court shall be with the aid o f assessors the number o f whom shall be two or more as the court thinks fit". [Emphasis added]. It can be deduced from the above provision that, although the law required the court to sit with assessors, selection of who should sit with, was left to the trial court (section 285 (1) of the CPA). As a matter of practice, after selection of assessors, it is upon the court to give the accused person an opportunity to object assessor(s), if he has a reason to do so. Thereafter, if not objected, the court invites assessors to take their position and explain to them their duties throughout the trial. [See: Fadhili Yusufu Hamid v. The Director of Public Prosecutions, Criminal Appeal No. 129 of 2016 and Abdul Ibrahim @ Masawe v. Republic Criminal Appeal No. 319 of 2017 (both unreported]. 16 In the present case, the counsel for the parties were at one that there was no proper selection of assessors. We have thoroughly gone through the record of appeal and observed that three assessors were selected; namely, Mursal Shirima, Sara Mchomvu and Saumu Richard. Before assuming their position, the trial Judge gave the appellant the right to comment on them, if she had any objection. The record is clear at page

60 that, she had no objection. Thereafter, the trial Judge explained to them, their roles and duties before commencing the trial. In the circumstances, we do not agree with the assertion by the counsel for the parties that assessors were not properly selected. As a result, we find no reason to fault the trial Judge on that procedural aspect. We now revert to consider the second limb of the first issue regarding summing up to assessors. Summing up to assessors is a legal requirement for a trial judge sitting with the aid of assessors. Section 298

(1) of the CPA provides: "When the case on both sides is dosed, the judge may sum up the evidence for the prosecution and the defence and shall then require each o f the assessors to state his opinion orally as to the case generally and as to any specific question o f fact addressed to him by the judge, and record the opinion. " In terms of the above provision, it is the duty of trial judge to sum up the evidence to assessors before inviting them to give opinion. We wish to note that, the above provision provides that "the judge may sum up the evidence"which normally is construed to be a discretion, but this phrase has been interpreted as imposing a mandatory duty on the trial judge in a number of our decisions as stated in Livingstone Batholomeo @ Urassa v. Republic, Criminal Appeal No. 334 of 2017 (unreported). The aim of summing up to assessors is to enable them understand the case thoroughly in relation to the relevant law so as to arrive at a correct opinion which will assist the judge to make a just decision. See: Washington Odindo v. Republic, (1954) 21 EACA 392). Therefore, trial judge is duty bound whenever summing up to assessors to explain clearly to them the ingredients of the offence and applicable law in relation to relevant salient facts of the case, among others. Assessors must be directed on vital points of law otherwise a trial will be deemed to be a trial without the aid of assessors. See: Said Mshangama @ Senga v. Republic, Criminal Appeal No. 8 of 2014; Rashid Othman Ramadhan and 3 Others v. DPP, Criminal Appeal No. 305 of 2017; and, Salehe Rajabu @ Salehe, Criminal Appeal No. 318 of 2017 (all unreported). 18 In the present case, the counsel for the parties concurred, save for the way forward, that the trial Judge did not direct assessors on vital points of law; to wit, the essential ingredients of the offence and chain of custody. We have revisited the record of appeal, as pointed to us by counsel for the parties. Indeed, it is apparent that, the appellant's conviction was based on the above legal principles; particularly, proof of the case beyond reasonable doubt based on unbroken chain of custody of exhibit P6. We may add here that, although the trial Judge relied on proof beyond reasonable doubt of the offence of trafficking in narcotic drugs, she never explained to the assessors the meaning of trafficking, essential elements of the offence, burden and standard of proof, contradiction and inconsistences in evidence and expert evidence which formed the base of the appellant's conviction. Apart from that, we noted in the summing up notes that, the trial Judge used terms as actus reus and means rea which were not elaborated. Failure to direct assessors on vital points of law had impact on their opinion as we observed from the record. For example, at page 282 of the record of appeal, the opinion of Mursal Shirima which was supported by other assessors was mostly based on expert opinion which its value was not explained before being given the opportunity to opine. 19 However, as intimated earlier, the record does not suggest that the

principle governing how the said exhibit was handled (chain of custody) from the day of seizure up to the time it was tendered to the court as exhibit was explained to the assessors for them to gauge whether it was properly handled before giving their opinion. Reading the record of appeal between the line, it is dear to us that assessors' opinion was not based on clear understanding of the above highlighted vital points of law although the trial Judge agreed with them. We observed further that in the summing up notes, the trial Judge concentrated much on summarising testimonies of the witnesses without directing the assessors on the vital points of law. The effect of inadequate summing up to assessors is to deprive them an opportunity to give informed opinion on the case to assist the trial Judge in arriving at a just decision. In Said Mshangama @ Senga (supra), when the Court was confronted with a similar scenario, it stated that: 'Where there is an inadequate summing up, non- direction on such vita/ points o f law to assessors, it is deemed to be a trial without the aid o f assessors and renders the trial nullity" We have already indicated that, there is no dispute between the parties, and we agree, that in the present case, there was inadequate summing up to assessors in that they were not directed on vital points of law. In the circumstances, we are of firm view that, failure of the trial Judge to direct assessors on vital points of law was a fatal omission which vitiated the trial. Therefore, it cannot be said with certainty that the trial was conducted with the aid of assessors in compliance with the law. As such, the proceedings from the stage of summing up to the judgment and all subsequent orders were a nullity. Hence, the first issue is answered in negative. Following the determination of the first issue and being guided by the principle in the decision of the defunct Court of Appeal of Eastern Africa in Fatehali Manji v. Republic [1966] E.A. 343, we now proceed to consider the way forward. We have considered rival submissions and propositions of the counsel for the parties as regards the way forward. Given the circumstances of the present case, we agree with Mr. Sarige that justice of the case demands a retrial. In that view, we shall not dwell on the complaints raised in the first and third grounds of appeal as the second ground is merited and it suffices to dispose of the appeal. As a result, we nullify the proceedings of the trial court from the stage of summing up to assessors and the judgment, quash the conviction and set aside the sentence imposed on the appellant. Consequently, we order the 21 case file to be remitted to the High Court for a retrial from a stage of summing up to assessors to be conducted before another judge and a similar set of assessors in terms of section 299 of the CPA. In the event that the set of assessors who sat with the previous Judge cannot be reached, the appellant should be tried de novo. Meanwhile, the appellant shall remain in custody. DATED at MOSHI this 19th day of July, 2023. M. A. KWARIKO JUSTICE OF APPEAL M. C. LEVIRA JUSTICE OF APPEAL G. J. MDEMU JUSTICE OF APPEAL The Judgment delivered this 20th day of July, 2023 in the presence of Mr. Slyvester Kahunduka, learned counsel for the appellant and Mr. Innocent Exavery Ng'assi, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original. 22

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