IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., KEREFU, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 320 OF 2017

GIBSON JOHN MCHOMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Fikirini, J.)

dated the 15th day of August, 2017
in
Criminal Sessions Case No. 44 of 2016

JUDGMENT OF THE COURT

26th Nov. & 3rd Dec., 2021

MWARIJA, J.A.:

In the High Court of Tanzania sitting at Moshi, the appellant, Gibson John Mchomba was charged with the offence of trafficking in narcotic drugs contrary to s. 16 (1) (b) of the Drugs and Prevention of Illicit Traffick in Drugs Act [Cap. 95 R.E. 2002, now R.E. 2019] as amended by s. 31 of the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 6 of 2012 (hereinafter "the Act"). It was alleged that on 21/12/2014 at Mijohoroni area within the Municipality of Moshi in Kilimanjaro Region, the appellant

was found trafficking 123 kilograms of narcotic drugs namely Khat, commonly known as *Mirungi*, valued at TZS 6,150,000.00.

The appellant denied the charge and as a result, the case proceeded to a full trial at which, whereas the prosecution relied on the evidence of nine witnesses, the appellant relied on his own evidence in defence. Having heard the evidence of the prosecution witnesses, the appellant's defence and final submissions made by the counsel for both parties, the learned trial Judge (Fikirini, J., as she then was) found that the prosecution had proved the case against the appellant beyond reasonable doubt. He was consequently convicted and sentenced to thirty years 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 21/12/2014, Emmanuel Joseph Lyany (PW9), a member of the Hai District Community Police *(Polisi Jamii),* received information from one of the drugs addict at Kiusa market that a certain motorcycle rider would traffic to Himo from Holili, a parcel of khat. In the company of his other three members of the community police, he went to the OCD, Moshi to disclose that information whereupon the OCD directed them to report

the matter to the OC/CID. The OC/CID ordered three policemen to assist in making a follow up. They had a police motor vehicle, make Land Rover Defender.

Later on that date PW9 and his three colleagues apprehended the appellant at Shah Tours area. Coincidentally, another police motor vehicle used by the Anti-robbery department, which was on patrol duty, arrived at the scene and assisted in the arrest of the appellant. The police officers who were using motor vehicle registration No. DFP 3818, were No. E. 385 D/Sgt. Sultan (PW7), WP Cpl. Fatuma, Constables Zakaria Emmanuel and Dominic.

Together with the presence of the appellant at the scene, they also found a motorcycle make Toyo, red in colour. The same was not affixed with its registration number plate but its chasis No. KE7KEFPKO 18525. On the motorcycle was a sulphate bag which upon inspection, it was found to contain fresh leaves suspected to be khat. Because they had a weighing scale, one of the instruments which they moved with in the course of their patrol duty, they weighed the parcel and found to be 123 kilograms.

The appellant and the motorcycle together with the sulphate bag and its contents were taken to Moshi Police Station. The sample of the

suspected narcotic drugs was later taken to the Chief Government Chemist and upon examination, the same was confirmed to be khat. The appellant was eventually charged as pointed out above.

In his evidence, PW9 testified that, after the OC/CID had provided him and his colleague assistance in terms of a police motor vehicle and three policemen, they went to Himo junction to intercept and arrest the person who would be riding a motorcycle having the description given to them by their informer. PW9 and his colleagues were each having a motorcycle. They positioned themselves in such a way that they could not be immediately noticed by the suspected person.

The witness went on to state that, after a short period of time, he saw a motorcycle which had a sulphate bag on its carrier. They suspected to be the one carrying narcotic drugs but could not however, manage to stop it because it was being rode at a very high speed. He went on to state that, after the suspected motorcycle had passed, they started to pull over it using their motorcycles. He said further that, the police motor vehicle also followed suit. As they were following it, the rider diverted into a non-tarmacked road and because it was a bumpy road, PW9 and his colleagues who were using motorcycles, overtook the police motor vehicle and at Mjohoroni area, while about 200 metres from the suspected

motorcycle, the same fell down. They surrounded the rider and before they could question him, another motor vehicle, make, Land Rover Defender different from the one used by the police officers who were assigned to assist them, arrived and parked at the scene. Three persons disembarked and introduced themselves to be police officers.

The prosecution evidence as tendered by PW7, was further to the effect that, on the material date, he was the in-charge of the patrol and together with him were the police officers named above. They had, by virtue of the nature of their duty, been equipped with guns, tear gas bombs, instruments of breaking doors, weighing scale, search warrant forms, papers for recording statements and seizure warrant forms. He went on to testify that, in the afternoon of that date while on patrol along Moshi- Himo road, they saw a motorcycle being rode at an unusually high speed. It had a parcel and behind it were three other motorcycles which followed it at a high speed. It was his evidence further that, the motorcycle which was being followed did not have its registration number affixed on it but what was placed at the number plate position was that of its chasis. PW7 who was the driver of the police motor vehicle, went on to state that, he decided to follow those motorcycles and after tracking them, at Shah Tours area, the rider decided to divert into a rough road.

A short distance thereafter, his motorcycle fell down and the riders of the three other motorcycles who were pursuing it surrounded him.

Having arrived at the scene where the appellant, who according to PW9 was the rider of the suspected motorcycle had been apprehended, PW7 introduced himself and his team and similarly, PW9 and his colleagues did the same. Upon being informed by PW9 that the appellant was suspected of having carried narcotic drugs and that such information had already been relayed to the OC/CID, PW7 opened the sulphate bag and upon inspecting it, found that it contained fresh leaves suspected to be khat. Thereafter, he reported the incident to the RCO, Kilimanjaro. The witness went on to testify that, he prepared a search warrant and seizure certificate which were signed by himself, the appellant and PW9. He thereafter arrested the appellant and took him to Moshi police station together with the motorcycle which was later tendered in Court as exhibit P7. The bag was taken to RCO's Office.

The evidence of PW7 was supported by No. G. 3870 D/C Zakaria (PW8) who was on duty together with the former on the material date, both being police officers who were working in Anti-robbery department. In his evidence, PW8 confirmed that he witnessed the search of the bag

which the appellant was alleged to have carried on the impounded motorcycle.

As to what transpired after the bag had been taken to the RCO by PW7, the same was testified to by NO. F 1157 D/Sgt Hashimu (PW1), the exhibits keeper at the RCO's Office. It was his evidence that on 21/12/2014, on the directions of the RCO, he was handed over the bag which contained what was suspected to be khat to keep it as an exhibit. Since a police case filed, Moshi/IR/11426/2014, had already been opened, he used that police case file to register the exhibit in the exhibits register and accorded it No. 38/14. He also recorded the name of the appellant as the suspect. He went on to state that, on 30/12/2014, he was ordered by the RCO to hand over the exhibit to No. G.4324 D/C John (PW3) to take it to the office of the Chief Government Chemists (CGC), Northern Zone at Arusha.

He added that, PW3 signed the handing over form and took the bag which had been labelled as exhibit "A". He said further that, the same was returned on the same day after it had been acted upon by the office of the CGC. They inserted on it a tag having reference No. NZ/114/2014. It was PW1's evidence further that, later on 12/7/2017, he handed the bag

to No. H 6040 D/C Simba. The same was tendered by PW1 and admitted in evidence together with the register as exhibits P2 and P1 respectively.

Erasto Laurence (PW2) was at a material time an officer working in the CGC office at Arusha. He testified that he received exhibit P2 from PW3. He weighed the bag which had been labelled "A" and found it to be 123 kilograms. Having taken the requisite samples, and given the contents laboratory No. NZ/144/2014, signed and sealed the bag and return it to PW3 who signed the handing over form (Exhibit P3). It was PW2 further evidence that, he thereafter took the sample to the office of the CGC, Dar es Salaam where the same was received and registered and accorded No. 1013/2014. He went on to state that, after the sample had been received at Dar es Salaam, he return to Arusha and reported to his superior, the Acting Manager of the Zonal CGC Office and handed over the new laboratory number issued by the CGC at Dar es Salaam.

At the CGC laboratory in Dar es Salaam, the sample was examined by Elias Mulima (PW5). It was his evidence that after having carried out laboratory test, he found out that the sample, which he received on 31/12/2014 for examination, was khat. He posted the result in the relevant register as examination report No. 1013/2014. Later on

21/1/2015, he prepared his report which was tendered in court and admitted in evidence as exhibit P4.

On her part, Joyce Laban Njisya (PW4) the Acting Manager of the CGC's Northern Zone, Arusha testified that on 30/12/2014 she received the report of the examination carried out by the CGC at Dar es Salaam on the sample; laboratory sample No. NZ/144/2014 taken there by PW2. According to her evidence, the sample was confirmed to be khat. The witness informed the RCO who arranged for its collection from her office.

Having received the report, the RCO arranged for valuation of the impounded drugs. The valuation was conducted by Keneth James Kaseke (PW6) who was at the material time the Commissioner of Anti Drug Control and Prevention. It was his evidence that, upon being requested by the RCO, Kilimanjaro, he valued the 123 kilograms of khat and found that it was worth TZS 6,150,000.00. He said that the valuation was arrived at upon consideration of the value of narcotic drugs' data base at the time showing that the market price of a kilogram of khat was TZS 50,000.00. He tendered the valuation report which was admitted in evidence as exhibit P5.

As stated above, the appellant was the only witness for the defence (DW1). According to his evidence, on the date of the incident, that is

21/12/2014 while at Shah Tours area recharging airtime to his mobile phone while walking, a motorcycle approached from the opposite direction and the rider almost knocked him. The rider stopped the motorcycle few steps ahead and asked DW1 as to why was he acting so recklessly on the road. He told the rider that he was not reckless but that he was merely recharging airtime to his phone. In the course of their encounter, he went on to state, another motorcycle arrived and its rider asked them what was the matter. While the first rider was explaining what had happened, a motor vehicle, make Land Rover Defender with DFP registration number arrived and three persons disembarked from it. He then heard the person who was riding the motorcycle which had almost knocked him telling those people that *"huyu ndiye yule kijana"* meaning that he (DW1) was the suspected person.

It was his further evidence that, he was immediately arrested by those three persons whom he came to learn later that they were police officers. After his arrest, he was taken to Moshi Police Station where he was locked up for 18 days without recording any statement and later transferred to Majengo Police Station where he was required to sign certain documents. On 8/1/2015 he was charged in court. It was his

defence that he was mistakenly arrested because he was not the person who was riding the motorcycle which carried the narcotic drugs.

Having considered the prosecution and the defence evidence, the learned trial Judge was satisfied that the case had been proved beyond reasonable doubt against the appellant. She found, **first** that the witnesses, PW7, PW8 and PW9 were credible and therefore, proved the allegation that the appellant was arrested with the sulphate bag, **secondly** that the handling of the contents found in that bag was done by observing the principle of the chain of custody as testified by PW1, PW2, PW3 and PW5. **Thirdly,** that the contents were examined and found to be narcotic drugs.

In his memorandum of appeal, the appellant raised 12 grounds of appeal as follows:

> *"1. That the learned trial Judge erred in law and in fact for holding that the case against the Appellant was proved beyond reasonable doubts as required in law.*
>
> *2. That the learned trial Judge erred in law an in fact in holding that the prosecution side had been able to fulfil the requirement under sections 110 and 111 of the Evidence Act, that the one who alleges must prove.*

3. *That the learned trial Judge erred in law and in fact in holding that the defence case rebutted all the prosecution case but no significant doubt was raised to warrant dent on the prosecution case.*
4. *That the learned trial Judge having made a finding that, like any other case this case might as well not have escaped from being blemished with contradiction and discrepancies, misdirected herself in holding that the said contradiction and discrepancies occurred due to the fact that the prosecution witnesses were coming from different places and that their version of the stories would be different.*
5. *That the trial Judge erred in law and in fact in holding that the Appellant assigns his arrest to mistaken identity but did not disassociate himself from Exhibit P6 and P7.*
6. *That the trial Judge erred in law and in fact in holding that mistaken identify defence (sic) PW7, PW8 and PW9 had already testified therefore could not counter the statement.*
7. *That the trial Judge erred in law and in fact in failing to make a proper summing up of the case to the assessors.*
8. *That the trial Judge erred in law and in fact in allowing the assessors to give their opinion instead of making submission.*

9. *That the trial Judge erred in law and in fact for ignoring the Appellant's defence.*
10. *That the learned trial Judge misdirected herself in holding that the discrepancy did not outweigh the strong and cogent evidence . . . that (DW1) was found in possession, control and trafficking of the sulphate bag containing fresh leaves of substance believed to be khat.*
11. *That the learned trial Judge misdirected herself in holding that the prosecution witnesses were trustful and credible.*
12. *That the learned trial Judge erred in law and in fact in convicting the Appellant and sentenced him to life imprisonment."*

At the hearing of the appeal, the appellant was represented by Mr. Majura Magafu, learned counsel while the respondent Republic was represented by Ms. Verdiana Mlenza assisted by Mr. Kassim Nassir, both learned Senior State Attorneys.

Given the effect which the 7th ground of appeal will have on the appeal, in the event the same is allowed, the counsel for appellant began his submissions by addressing us on that ground. In his submission, Mr. Magafu argued that the learned trial Judge did not; **first** sum up the evidence to the assessors as required by s. 298 (1) of the Criminal

Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] and **secondly,** did not direct them on vital points of law involved in the case. According to the learned counsel, save for the point of law on the burden of proof, the vital points of law involved in the case, such as the doctrine of chain of custody, identification as well as legal issues, pertaining to inconsistencies and contradictions in the evidence of the prosecution witnesses. Relying on the decision of the Court in the case of **Rojino Ramadhani @ Ronji v. Republic,** Criminal Appeal No. 75 of 2019 (unreported), Mr. Magafu submitted that the omission vitiated the trial because in effect, amounted to a trial without the aid of assessors. He thus urged us to nullify the proceedings of the trial court, quash the judgment and set aside the appellant's conviction.

Responding to the submissions made by the counsel for the appellant on that ground of appeal, Mr. Nassir readily conceded that the learned trial Judge did not properly sum up the case to the assessors as required by s. 298 (2) of the CPA. He agreed also that, from the authority of the case of **Rojino Ramadhani @ Ronji** (supra) cited by the counsel for the appellant, the omission rendered the trial a nullity.

Having gone through the summing up notes contained on pages 110 to 112 of the record of appeal, we agree with both counsel for the

parties that the summing up is deficient. With respect, the learned Judge did not sum up the evidence to the assessors. Section 298 (1) of the CPA provides that in a trial conducted with the aid of assessors, after the case for both sides has been closed, the trial Judge is required to sum up the evidence to the assessors. The provision states as follows:

> *"298 – (1) When 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."*

It is trite position as held in the case of **G. 2573 Pacificus Cleophas Simon v. Republic,** Criminal Appeal No. 484 of 2016 (unreported), that although the word may is used in the above quoted provision, given the established practice, the requirement is mandatory: see also the cases of **Jeremiah Paskal Gabriel v. The Director of Public Prosecutions,** Criminal Appeal No. 185 of 2012 (unreported) and **Khamisi Nassoro Shomari v. SMZ** [1996] T.L.R. 12.

In the case at hand, apart from reminding the assessors that there was on record, the evidence of nine witnesses who testified for the

prosecution and the appellant as the only witness for the defence, the learned trial Judge did not sum up their evidence to the assessors. She instead, proceeded with analysis of the same and called upon the assessors to give their opinion. In the case of **William Safari Kayda v. Republic,** Criminal Appeal No. 37 of 2017 (unreported), the Court had this to say on the requirement of summing up the entire evidence to the assessors.

> *". . . the assessors will properly exercise their statutory role and make informed opinions and effectively aid the trial Judge in a criminal trial only if the trial Judge has fully involved them which entails as well, the summing up to them. Thus, in the case at hand, it was incumbent on the learned trial Judge to* ***sum up the entire evidence of both the prosecution . . . and the defence."***
>
> *[Emphasis added]*

See also the cases of **Daniel Ramadhani Mkilindi @ Abdallah @ Dulla,** Criminal Appeal No. 16 of 2019 and **Boniface Marcel Tariro @ Sijali v. Republic,** Criminal Appeal No. 289 of 2017 (both unreported). Apart from the omission to sum up the entire evidence of both the prosecution and the defence as argued by Mr. Magafu, the assessors were not also directed on vital points of law such as on the principle of chain of

custody. They were also not directed on the ingredients of the offence charged.

There is 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 cases of **Safari Kayda** (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 omission therefore, we find that the proceedings of the trial court are a nullity.

That said, the next issue for our consideration is on the way forward. On his part, Mr. Nassir prayed for a retrial order from the summing up stage. On the other hand, Mr. Magafu submitted that, remission of the case for retrial will not be an appropriate move because there is no sufficient evidence to sustain the appellant's conviction. To substantiate his argument, the learned counsel relied on grounds 2, 3, 5, 6, 9 and 10 of appeal. Starting with grounds 10 and 5, Mr. Magafu submitted that there are contradictions and inconsistencies between the evidence of PW1, PW2 and PW3 as regards the seizure of exhibit P2 at the scene of incident. It was the learned counsel's further argument that, given the

fact that all the witnesses who signed the seizure certificate were all police officers (including PW9, in his capacity as a member of the community police) that document was wrongly admitted in evidence because the same was not witnessed by an independent witness. To bolster his argument, the learned counsel cited a High Court decision in the case of **R v. Mussa Hatibu Sembe,** Economic Case No. 4 of 2019 (unreported).

Mr. Magafu argued further that on the 6th ground that, the learned trial Judge erred in failing to consider the defence of the appellant, that his arrest was based on mistaken identity. He faulted the learned trial Judge's finding that the appellant should not have awaited to raise that defence until the time of giving his evidence. The appellant's counsel relied further on grounds 2, 3 and 9 of appeal which challenged the trial court's decision to the effect that the case was proved beyond reasonable doubt. In his submission, the learned counsel argued in essence that, the learned Judge had, **first** shifted the burden of proof to the appellant when she stated in her judgment that he did not adduce cogent evidence to tilt the prosecution case, **secondly,** that the appellant's defence did not raise significant doubt and **thirdly,** for having weighed the appellant's evidence by applying ss.110 – 112 of the Evidence Act [Cap. 6 R.E. 2002, now R.E.2019] which are not applicable in criminal cases.

In reply, Mr. Nassir countered the submission made by the appellant's counsel. He opposed the arguments that the evidence of PW1, PW2 and PW3 is contradictory as regards the seizure of exhibit P2 from the appellant and the contention that such evidence is tainted with inconsistencies. He also disputed the contention that the seizure certificate is invalid for want of signature of an independent witness. In that respect, the learned Senior State Attorney submitted that the cited decision of the High Court in the case of **Mussa Hatibu Sembe** (supra) is distinguishable on account that, it did not decide that a seizure certificate must be witnessed by an independent witness but rather, defined who an independent witness is.

With regard to the argument made in respect of ground 9 of the appeal, that the appellant's defence was not considered, Mr. Nassir referred us to pages 138 and 139 of the record of appeal and urged us to find that the argument by the appellant's counsel is untenable because the trial court performed that duty. It was the learned Senior State Attorney's reply further that, the contention in ground 6 of the appeal, that the appellant's arrest was based on a mistaken identity, is without merit because the fact that the person who was arrested with exhibit P2 was the appellant, has been proved by PW7, PW8 and PW9 whose

evidence was not challenged by way of a cross-examination. It was Mr. Nassir's further submission that, the learned trial Judge did not shift the burden of proof to the appellant, instead, she relied on the evidence of the prosecution witnesses which she found to have proved the case against the appellant beyond reasonable doubt.

On those arguments made in reply to the appellant's submission on the issue whether or not a retrial should be ordered, the learned Senior State Attorney reiterated his prayer that a retrial be ordered and such a retrial be commenced from the stage of summing up to the assessors.

We have duly considered the submissions by the learned counsel for the parties on the issue whether or not to order a retrial. The guiding principle to that effect was stated in the famous case of **Fatehali Manji v Republic,** [1966] EA 341. In that case, the erstwhile Court of Appeal for East Africa stated as follows:

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which*

the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."

Mr. Magafu's stance is that a retrial should not be ordered because there is insufficient prosecution evidence to sustain the appellant's conviction. With respect, we find that his submission was focused on analysing the tendered evidence. Having found that the proceedings were a nullity, it is our considered view that it would be in appropriate for the Court to answer the issues arising from the grounds of appeal argued by the learned counsel. This is because, that would amount to determining the appeal whose proceedings have been found to be a nullity. Otherwise, after having considered the tendered evidence, we do not find that an order of retrial would enable the prosecution to fill up gaps in its evidence. We are thus of the settled mind that, the interests of justice requires us to order a retrial.

It was Mr. Nassir's prayer that the retrial should be ordered to start from the stage of summing up the case to the assessors. We are aware that in certain circumstances, a retrial may be ordered to commence from that stage instead of a trial *de novo.* However, as stated in the case of

Ahazi Kilowoko v. Republic, Criminal Appeal No. 254 of 2019 (unreported) such an order may only be made where a peculiar situation exists. We cited as an example the cases of **Mashaka Ahumani @ Makamba v. Republic,** Criminal Appeal No. 107 of 2020 and **The Director of Public Prosecutions v. Ismail Shebe Islem & 2 Others;** Criminal Appeal No. 266 of 2016 (both unreported).

In the first case, the Court considered *inter alia* the fact that if a fresh trial was to be ordered, the appellant would stand trial for the third time because an order of retrial had previously been made in the same case. In the second case, in ordering that a retrial should commence from the stage of summing up, the Court considered the fact that a retrial would be difficult because the exhibits which were tendered in the first trial had been disposed of.

In the case at hand, if an order of retrial is made, it will be the first time for the appellant to be tried afresh. The condition does not thus apply in this case. As for the exhibits, although there is an order of disposal of the same, made under ss.353 (1) and 351 of the CPA, the execution of the order is subject to the provisions of s.353 (5) and 351 (4) of the CPA respectively. The provisions require that, except where the property is livestock or items which are subject to speedy and natural

decay, the execution of the disposal order should await expiry of the period of appeal or where an appeal has been filed, until the appeal has been disposed of. The second condition does not therefore also apply in the present case.

In the event and for the foregoing reasons, we hereby quash the proceedings of the High Court, quash the appellant's conviction and set aside the sentence. We consequently order a retrial.

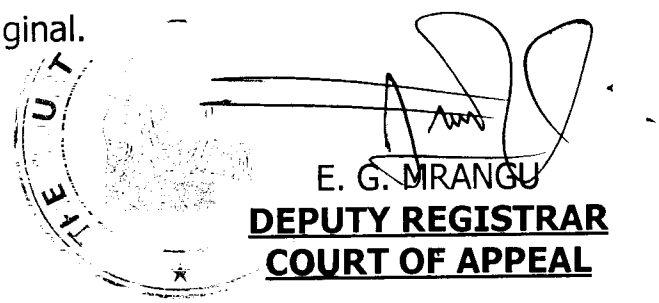
DATED at **ARUSHA this** 3rd day of December, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of the Appellant in person and Ms. Akisa Mhando learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL