IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., GALEBA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 230 OF 2021

ABUBAKARI I.H. KILONGO .... 1ST APPELLANT

ALEX ALEN MEMBA ....2ND APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es salaam)

(Luvanda, J.)

Dated the 16th day of April, 2021

in

Economic Case No. 1 of 2020

....

JUDGEMENT OF THE COURT

30th September & 21st November, 2022

WAMBALI, J.A.:

This appeal emanates from the decision of the High Court of Tanzania, Corruption and Economic Crimes Division at Dar es Salaam in Economic Case No. 1 of 2020, which was delivered on 16th April, 2021. In its decision, the High Court found the appellants, namely, Abubakari I.H. Kilongo and Alex Alen Memba (the first and second appellants respectively) guilty, convicted and sentenced each to thirty years imprisonment for the

offence of trafficking in narcotic drugs contrary to section 15(1) (a) of the Drugs Control Enforcement Act [Cap. 95 R.E. 2019] (the DCEA) and Paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200 R.E. 2019 now R.E. 2022].

The particulars in the information placed before the trial court alleged that on 15th November, 2018 at Mapinga area within Bagamoyo District in Coast Region, the appellants jointly and together trafficked in narcotic drugs, namely Cannabis Sativa, commonly known as bhang weighing 327.56 kilograms which were in the motor vehicle with registration No. T. 819 CYQ make Toyota Land Cruiser. The allegations were strongly denied by the appellants hence a full trial was conducted by the High Court (the trial court).

To support its case, the prosecution summoned seven witnesses and tendered nine exhibits which were admitted in evidence by the trial court. The appellants had no witnesses to summon as they defended themselves against the allegation.

At the height of the trial, the trial court believed the prosecution story and disbelieved that of the defence. Consequently, it found the appellants guilty, convicted and sentenced them as intimated above. The finding of

the trial court is the source of the present appeal which has attracted a total of sixteen grounds of appeal contained in the substantive and supplementary memoranda of appeal lodged jointly by the appellants. For the purpose of this judgment, for the reason to come to light herein, we neither deem it appropriate to revisit the background facts of the case as found by the trial court, nor find it important to reproduce the appellant's grounds of appeal.

At the hearing, Mr. Richard Rweyongeza who teamed up with Mr. Gideon Phares Opanda, both learned advocates, represented the appellants. On the adversary side, Ms. Cecilia Mkonongo learned Senior State Attorney assisted by Ms. Ester Martin and Mr. Kija Elias, learned Senior State Attorney and State Attorney, respectively represented the respondent Republic.

It is noteworthy that before we considered the grounds of appeal, having scrutinized the eight-pages' judgment of the trial court amid the appellants' complaints before the Court, we were confronted with the question whether the said judgment complied with the provisions of section 312(1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA) to

enable us determine the appeal. To this end, we requested counsel for the parties to respond to the query.

For his part, Mr. Rweyongeza out rightly submitted that it is apparent that the judgment of the trial court is not consistent with the requirement of the law. He argued that essentially, there is no summary of the substance of the evidence for both sides and how the relevant facts are linked to the issues or points for determination in relation to the applicable law. He added that some of the important issues for the determination of the case which were reserved by the trial judge for consideration at the later stage were not discussed in the judgment of the trial court. He argued further that basically there is no detailed evaluation of the evidence to justify the findings reached by the trial court. In his view, there is no judgment of the trial court which fulfils the requirement of section 312(1) of the CPA to enable the Court to consider and determine the appellants' complaints in the memoranda of appeal. To support his contention, he referred the Court to its decision in **Stanslaus Rugaba Kasusura and the Attorney General v. Fares Kabuye** [1982] T.L.R. 338.

In the circumstances, Mr. Rweyongeza submitted that as the judgment of the trial court contravenes the requirement of the law, it

cannot stand. He thus initially urged the Court to revise and nullify the judgment, quash convictions and set aside the sentences imposed on the appellants. With regard to the way forward, basically, Mr. Rweyongeza left it upon the Court to determine it in accordance with the law. However, he stated that considering the miscarriage of justice caused to the appellants by the trial court, he would have preferred to see that the order to be made by the Court should not further end into prejudicing them because the omission dented the entire proceedings of the case. On the other hand, Mr. Opanda who supplemented Mr. Rweyongeza's submission went further and argued that, as the trial was a nullity the entire proceedings of the trial court be nullified ending in the release of the appellants from custody. In his view, there is no evidence on record to warrant the convictions of the appellants.

On the adversary side, Ms. Mkononngo who addressed us on behalf of the Respondent Republic, readily supported the appellants' counsel submissions that the trial court failed to render judgment as required by the provisions of section 312 (1) of the CPA. She elaborated that generally, it is acknowledged that, the judgment of the trial court does not contain a brief account of the evidence of the parties tendered at the trial

in which the trial judge purportedly relied during the evaluation before he made findings of fact on the points for determination. She categorically submitted that even before the Court had required the counsel for the parties to respond to the propriety of the trial court's judgment, she had intended to rise up the same matter. In her view, apart from the absence of the summary of the evidence of the parties, the judgment does not reveal the critical analysis of the evidence of the prosecution and the defence in relation to the law with regard to the points for determination. She submitted further that the judgment has not addressed some important matters which were reserved by the trial judge in the course of the trial after he overruled the defence's objection regarding the admissibility of documentary exhibits. She thus argued that, the contents of the judgment of the trial court disabled the Court to determine the appellants' appeal. Basically, she maintained that the judgment of the trial court failed to meet the requirement stipulated under section 312(1) of the CPA which makes the appeal before the Court incompetent. To support her submission, she referred us to the decisions of the Court in **Elia John v. The Republic,** Criminal Appeal No. 267 of 2011 and **Kimangi Tlaa v. The Republic,** Criminal Appeal No. 22 of 2013 (both unreported). In the

event, Ms. Mkonongo supported Mr. Rweyongeza's submission that there is no judgment of the trial court which complies with the requirement of the law. She thus urged us to nullify it, quash convictions and set aside the sentences imposed on the appellants.

Nevertheless, the learned Senior State Attorney submitted that the option available to the Court is to remit the record in Economic Case No. 1 of 2020 to the trial judge to compose a fresh judgment in accordance with the law. She therefore categorically differed with the appellants' counsel prayer that the Court should nullify the entire proceedings of the trial court and order the immediate release of the appellants from custody on account that they will be prejudiced by any other order to the contrary. She argued that the failure of the trial judge to comply with the requirement of the law in rendering the judgment caused miscarriage of justice to both sides to the case, and thus an order to re-compose the judgment is an appropriate one as it is premised on the interest of justice. She strongly submitted that the rest of the proceedings of the trial court should remain intact because the crucial issue for consideration and determination by the Court at this stage, is on the trial court's failure to render the judgment in accordance with the law at the end of the trial.

From the foregoing, there is no dispute that the judgment of the trial court does not comply with the provisions of section 312(1) of the CPA which provides as follows:

> *"312 (1) Every judgment under the provisions of section 311 shall, except as otherwise provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and* ***shall contain the point or points for determination, the decision thereon and the reasons for the decision,*** *and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."* [Emphasis Added]

It is settled that one of the basic principles in the administration of justice is the requirement imposed on the court to determine one way or the other, the dispute of the parties brought before it. Determination of the dispute is reached by the court after a thorough evaluation and consideration of the parties' evidence tendered at the trial in relation to the

applicable law, and disclosing the reason for the decision and the conclusion thereon. Therefore, the primary purpose of a judgment is to set out qualitatively by reference to the evidence that is accepted or rejected; the primary facts which the judge or magistrate finds; to relate those findings to the factual issues in the case; and to show how any inference has been drawn (see http:// en.m.wikipedia. org., visited on 17th October, 2022).

It is equally settled that a judgment of the trial court must be based on a pure reflection of what is contained in the record of proceedings. Judgment, being the decision of the court regarding the rights and liabilities of the parties in the proceedings, must provide the court's explanation of why it has chosen to make a particular conclusion or order. We are, however, aware that every judge or magistrate may have his own style of composing a judgment. In this regard, in **Amir Mohamed v. The Republic** [1994] T.L.R. 138 it was held that:

> *"Every Magistrate or Judge has got his or her style of composing a judgment and what virtually matters is that essential ingredients should be there, and*

these include critical analysis of both the prosecution and defence cases."

[See also **Athanas Julius v. The Republic,** Criminal Appeal No. 498 of 2018 (unreported)].

Generally, there is no problem with regard to the style and the brevity of the court's judgment. However, the judgment of the court must contain relevant materials and be consistent with the evidence laid before it in relation to the law. In short, it should comply with the requirement stipulated by the law, in this case, section 312 (1) of the CPA.

It follows that a judgment of the trial court which does not conform to the requirement of the provisions of section 312 (1) of the CPA is not a judgment in law and will often run the risk of being quashed.

In **Lutter Symphorian Nelson v. The Hon. Attorney General and Ibrahim Said Msabaha** [2000] T. L. R. 419, the Court stated as follows at page 444:

"A judgment must convey some indication that the judge or magistrate had applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material

portion of the evidence laid before the court has been ignored."

The Court proceeded further and quoted with approval the decision in **Amirali Ismail v. Regina,** 1.T.L.R. 370, in which Abernethy, J., made some observations on the requirements of the judgment. He said:

> ***"A good judgment is clear, systematic and straight forward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particular to enable a Court of Appeal to know what facts are found and how."***
>
> [Emphasis Added]

In the case at hand, we have thoroughly reviewed the judgment of the trial court. With profound respect, we entirely agree with the counsel for the parties that the said judgment is fatally defective as it not only lacks a categorical brief facts of the case depicting the evidence of the witnesses

which the trial judge purported to evaluate and based on his findings, but it also lacks reference to the appreciable law. It also glaringly leaves some portion of contested matters which were reserved by the trial judge for decision, unresolved. This denies the Court the opportunity to know what facts are found and how, to enable it to determine the appellants' complaints against the respective findings, their being guilty and the ultimate convictions and sentences.

It is in this regard that faced with similar situation, in **Stanslaus Rugaba Kasusura and the Attorney General v. Phares Kabuye** (Supra), the Court observed that:

> *"In our view, the judgment is fatally defective; it leaves contested material issues of facts unresolved. It is not really a judgment because it decided nothing, in so far as material facts are concerned. It is not a judgment which can be upheld or upset. It can only be rejected; it is in fact a travesty of a judgment. We find ourselves in a dilemma".*

We are alive to the fact that one of the complaints of the appellants' in this appeal is that, the trial judge did not properly evaluate the evidence on record. We appreciate the position that in deserving cases, this being the first appeal, which is in the form of re – hearing, the Court can be in as good position as a trial court in evaluating the evidence of witnesses on record without the advantage of the trial judge's assessment and come to its own conclusion. But this is not one of those deserving cases. As intimated above, it is apparent that the contents of the judgment placed before us which not only lacks sufficient facts of the case, its critical analysis and the applicable law, but also falls short of the specific findings of the reserved issues which are crucial in determining the case judiciously. We cannot therefore assess the evidence of the witnesses from the typed record in which the trial judge has not made findings thereon as we did not have the opportunity of seeing and hearing the said witnesses. It is settled that the one who sees and hears the witness is in the best position to assess his or her credibility which is important in the determination of any case before the trial court.

Besides, in the case at hand, we are settled, with profound respect that, in his judgment, the trial judge, failed to determine the credibility of

the evidence on record based on the demeanor of the witnesses and in relation to other considerations. He also failed to resolve the reserved matters which he had promised to give further consideration and decision later when he admitted the disputed exhibits. However, he relied on some of those exhibits in reaching his conclusion on the case. The failure of the trial judge to set out the bases of accepting some piece of evidence and his finding thereon makes it impossible for us to intervene to make findings of facts. As a result, the appellants are also deprived of the opportunity to appeal against nothing.

Considering the judgment and the record of proceedings of the trial court and the points for determination raised during the trial, it is our respectful view that, this is not a case where we should rewrite the judgment of the trial court. Clearly, the judgment in this case falls short of what a judgment is supposed to contain as provided for by section 312 (1) of the CPA. It is apparent that the omission to render judgment occasioned miscarriage of justice to the parties.

It is plain that, though the judgment contains the purported findings of facts, the reasoning and conclusion thereon, there is glaringly no complete narration of the evidence that was tendered by both sides of the

case at the trial court and the analysis of the said evidence and the applicable law upon which the trial judge drew his conclusion on the points for determination of the case. It is also unfortunate that, though, after the case for the defence was closed parties were granted leave to lodge final written submissions, and the State Attorney who prosecuted the case complied with the said leave and raised pertinent issues of facts and law on the contested matters, the trial judge did not discuss them in his judgment. That is notwithstanding the fact that at the beginning of the judgment he had promised to make reference to the submission whenever the need arose.

More importantly, the judgment contain no decision at all on some of the issues which the trial judge reserved to a later stage when he overruled the defence objection on the admissibility of some documentary evidence. One of the matters which remain unreserved in the judgment concerns the authenticity of the statement of the crucial witness admitted under section 34B of the Evidence Act [Cap. 6 R. E. 2022]. The respective witness allegedly signed the seizure certificate (exhibit P2). At this juncture, we find it appropriate to make reference to the persuasive observation of the Supreme Court of Zambia on the contents of a judgment of the trial court

as reflected in **Kunda and Another v. The People** [1980] ZMSC 100, thus:

> " *We must however, stress for the benefit of the trial courts that every judgment must reveal a review of the evidence where applicable, a summary of the argument and submission, if made, the findings of fact, the reasoning of the court on the facts and authorities if any, to the facts. Finally, the judgment must show the conclusion. A judgment which only contains verbatim reproduction and recitals is no judgment. In addition, the court should not feel compelled or obliged and moved by any decided cases without giving reasons for accepting those authorities. In other words, a court must reveal its mind to the evidence before and not simply accept any decided case."*

Moreover, in **Mohamed Aretha v. Habasondar** [2007] Z.R. 100 the Supreme Court of Zambia held that:

"By failing to make specific finding of fact; the court had in effect failed to render a judgment. The trial judge in this case failed to make some specific findings of facts and law in her judgment. Consequently, we find in effect, failed to render a judgment. It is also our finding that there is a miscarriage of justice where a trial judge convicts an accused person without rendering a judgment".

We unreservedly subscribe to the observations of the Supreme Court of Zambia on that position of law. Equally, in the case at hand, the omission of the trial judge to comply with the provisions of section 312 (1) of the CPA, prejudiced the parties as there is no judgment as we know it under the law. Consequently, we are constrained to join hands with the counsel for the parties that the omission by the trial judge vitiates the judgment. In the circumstances, we are respectfully satisfied that the trial judge failed to make findings of the ultimate facts and the law in relation to the evidence on record upon which he purportedly drew his conclusion in the case.

The question that follows is the effect on the non- compliance with the law. There is no dispute as per the concurrent submissions of the counsel for the parties that the trial court's judgment cannot stand. The dispute is on the status of the entire proceedings, the fate of the appellants and the appropriate order of the Court in the circumstances of the case.

We have carefully considered the contending arguments of the counsel for the parties. Given the nature of the offence, the circumstances of the case and the evidence on record presented at the trial court, we are of the view that the interests of justice will be served if we nullify the judgment and direct the trial court to compose a fresh judgment in accordance with the law as correctly submitted by the respondent Republic's counsel. With respect, therefore, we do not agree with the appellants' counsel that the entire trial court's proceedings be nullified resulting in the release of the appellants.

In the result, we invoke the provisions of section 4(2) of the Appellate Jurisdiction Act [Cap. 141 R. E. 2019] to revise and nullify the judgment, quash convictions and sentences imposed on the appellants by the trial court. Ultimately, we return the record in respect of Economic Case No. 1 of 2020 to the trial court and direct that the trial judge

composes a proper judgment which reflects what transpired at the trial in accordance with the law.

Meanwhile, the appellants are to remain in custody pending composition and delivery of the fresh judgment by the trial court.

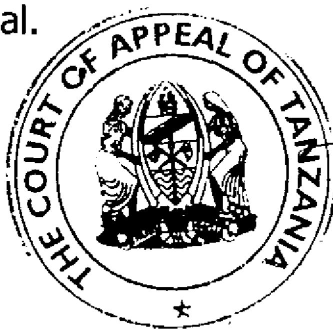
DATED at **DAR ES SALAAM** this 16th day of November, 2022.

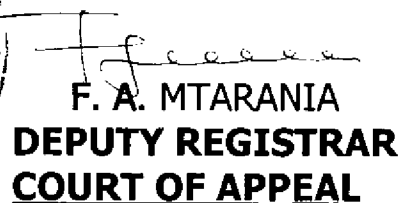
F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 21st day of November, 2022 in the presence of Appellant connected via Video facility from Ukonga Prison, Ms. Rehema Samwel, counsel for the appellants and in the presence of Mr. Jaribu Bahati, State Attorney for the Respondent is hereby certified as a true copy of the original.





F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL