IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, C.J., MROSO, J.A. And KAJI, J.A.)

CRIMINAL APPEAL NO. 75 OF 2006

1. JOSEPH CHUWA
2. HASHIM MOTTO.....APPELLANTS
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Rutakangwa, J.)

dated the 17th day of May, 2000
in
HC. Misc. Criminal Application No. 12 of 1998

RULING OF THE COURT
24 October & 30 November, 2007

MROSO, J.A.:

The two appellants intend to appeal against a revisional order of the High Court, Rutakangwa, J as he then was. Mr. Makange, learned advocate, has appeared **ex gratia** for them in these proceedings. But the Respondent Republic which is represented by Mr. Alexander Mzikila, learned State Attorney, has raised a preliminary objection on a point of law against the appeal.

According to Mr. Mzikila, the appeal is not properly before the Court because it contravenes Section 5 (2) (d) of the Appellate Jurisdiction Act, 1979, henceforth the Act, as amended by Act No. 25 of 2002. It is his argument that since the decision of the High Court on the revision matter before it was not final, there could not be an appeal against that decision.

He cited the case of **Seif Shariff Hamad** vs **SMZ**, [1992] TLR 43 in support of his argument. He asked the Court to strike out the appeal.

Mr. Makange, learned advocate, pointed out that the decision being appealed against was handed down on 17th May, 2000. The notice of appeal was lodged on 31st May, 2000. But Section 5 (2) (d) of the Act was amended by Act No. 25 of 2002. Since Section 5 (2) (d) referred to was not retrospective in effect it could not affect the validity of that appeal. The **Seif Shariff Hamad** case which was cited was irrelevant to the present appeal. Mr. Makange also asked the Court to accept his contention that the appeal squarely fell under Section 6 (7) (a) of the Act because the subject appeal is on a pure point of law. The point of law being referred to here appears to be that the learned Judge had erred in not following the dictum in the case of **Pangamaleza** vs **Kiwaraka and Another** [1987] TLR 140 where this Court held that where a magistrate's integrity is questioned by litigants or accused persons, the safest thing to do is for the magistrate to retire from the case. So, the appellant was entitled to come to this Court on appeal. He prayed that the preliminary objection be overruled.

Mr. Mzikila did not accept defeat and continued to argue that even if it were accepted that Section 5 (2) (d) of the Act did not apply, the decision in the **Seif Shariff** case barred this appeal from being brought to this Court.

After hearing both counsel for the parties we were in no doubt that the preliminary objection was raised needlessly. Prior to 14th December, 2002 when the amendment to Section 5 (2) of the Act brought in paragraph (d) to subsection (2) of Section 5, it was possible to appeal or apply for revision against a preliminary or an interlocutory decision of the High Court in a civil matter. But by that amendment to the Section appeals or revision of preliminary or interlocutory decisions of the High Court was prohibited. Paragraph (d) of Section 5 (2) of the Act reads: -

"(d) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit".

As was rightly pointed out by Mr. Makange, regardless of whether or not the decision appealed against was interlocutory or preliminary, the appeal is not affected by the 2002 amendment of the Appellate Jurisdiction Act, 1979 simply because this appeal was instituted well over two years

before the amendment Act No. 25 of 2002 was enacted. There is nothing in the amendment Act to suggest that it had retrospective effect. This appeal, therefore, is unaffected by Act No. 25 of 2002. We also agree with Mr. Makange that the decision of this Court in the **Seif Shariff Hamad** case cited by the respondent does not in any way support the preliminary objection.

In the **Seif Shariff Hamad** case a resident magistrate with extended jurisdiction to try High Court Cases ruled that he had no jurisdiction to try the case. The appellant in that case was dissatisfied with that ruling and appealed to the Court of Appeal because he believed that the magistrate had jurisdiction to try the case.

This Court held that as the appeal would appear to have been filed under Section 6 (2) of the Appellate Jurisdiction Act, 1979, the appellant could not appeal under that provision because only the Director of Public Prosecutions – The DPP – could appeal under that provision. So, the Court had no jurisdiction to hear that appeal. Secondly, since the ruling of the resident magistrate with extended jurisdiction was *"a specie"* of an interlocutory order, the Court also had no jurisdiction to hear it, basing that decision on the case of **Alois Kula and Another v R,** Criminal Appeal No. 121 of 1991.

In the **Alois Kula** case supra there was an appeal to this Court against a decision of the High Court which, like in the appeal now before us, the appellant was resisting a decision of the High Court refusing an application for an order for change of venue in a case which was being tried in a resident magistrate's court. This Court said:

"We do not think that an appeal lies to this Court from a decision of the High Court regarding an interlocutory order or ruling in a criminal case."

The **Alois Kula** decision itself relied on a decision of the Court of Appeal for Eastern Africa in **Uganda** v **Lule,** [1973] EA 362 where it was *inter alla* held that:-

"There is no appeal from orders of the High Court incidental to a criminal appeal but not involving the decision of the appeal" (Our emphasis).

In the present appeal it cannot be said that it arose from an order of the High Court which was incidental to an appeal before the High Court. Instead it arose from a decision in a revision matter before the High Court.

Section 6 (7) (a) of the Appellate Jurisdiction Act, 1979 provides that:-

(7) Either party –
(a) to proceedings under Part X of the Criminal Procedure Act may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not a matter of fact;"

Revisions come under Part X of the Criminal Procedure Act, 1985 and the appeal before us is on a point of law arising from a decision of the High Court in a revision matter before it.

The decision in the revision which was before the High Court was not "interlocutory" but was final in that nothing further would be done in the High Court subsequent to the ruling. What was to happen was that the trial of the case which was still pending in the subordinate Court would proceed before the same trial magistrate.

It was for the above reasons that we overruled the preliminary objection and we would have immediately proceeded with the hearing of the appeal. However, the learned State Attorney appeared to have been so sure he would succeed on the Preliminary Objection that he did not consider preparing for the hearing in case his preliminary objection did not succeed. So, we have had to adjourn the hearing of the appeal to the next sessions of the Court in Arusha because these sessions were drawing to a close in a few days after our order.

GIVEN at DAR ES SALAAM this 8th day of November, 2007.

A.S.L. RAMADHANI
CHIEF JUSTICE

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(I. P. KITUSI)
DEPUTY REGISTRAR

Delivered under my hand and Court Seal in Open Court/Chambers at ..... this ..... day of ..... 2007.

.....
DISTRICT REGISTRAR