

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 303 OF 2011

THE REPUBLIC APPELLANT

VERSUS

MT. 29887 WO II KOMBA GUSTAVU RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Iringa)**

(Jundu, J.)

dated 29th day of October, 2008.

in

Criminal Appeal No. 39 of 2007

JUDGMENT OF THE COURT

26th & 29th March, 2012.

MBAROUK, J.A.:

In the Court-martial at Makambako, the respondent MT. 29887 WO. II Komba Edward Gustavu was charged with the offence of stealing contrary to section C. 51 (1) of the National Defence Act, Cap.192 R.E. 2002 (the Act). He was convicted and sentenced to

twelve (12) years imprisonment. Dissatisfied, he appealed before the High Court of Tanzania at Iringa (Jundu, J. as he then was) where his appeal was allowed. His conviction and sentence were quashed and set aside. Undaunted, the Republic has preferred this appeal.

In this appeal, the appellant/Republic was represented by Mr. Maurice Mwamwenda, learned Senior State Attorney. The respondent appeared in person unrepresented.

Only one ground of appeal was preferred by the appellant/Republic which is:-

- 1. That the court was not properly constituted.*

At the hearing, Mr. Mwamwenda submitted that the High Court which entertained the respondent's appeal was not properly constituted as required under section C.143 (1) (a), Cap. 192 R.E. 2002. He submitted that the appeal should have been heard by the Court-martial Appeal Court, which under section C. 146 (2) and (6) is

constituted by three judges of the High Court. Mr. Mwamwenda further submitted that as the appeal was not before the Court-martial Appeal Court but before the High Court and was heard by only one judge, hence the proceedings and decision before it were a nullity. He added, that means there was no appeal.

For those reasons, Mr. Mwamwenda urged us to quash the decision of the High Court and restore the decision of the Court martial at Makambako.

On his part, the respondent submitted that, he simply appealed before the High Court after being dis-satisfied by the decision of the Court-martial at Makambako. He argued that, he had no power to direct where the appeal should go and be heard. Apart from that he said, the State Attorney who represented the Republic at the High Court, remained silent without commenting anything concerning non-compliance with the said provisions of the law. As it was not his mistake, the respondent urged us to uphold the orders of the High Court and dismiss the appeal.

Starting with, section C. 143 (1) (a) of the Act, the same states that every person found guilty of an offence by a Court-martial may appeal to the Court-martial Appeal Court against the finding or against the legality of the sentence. That means all appeals from a Court martial have to be sent to the Court-martial Appeal Court. Whereas section C. 146 is very clear on **which court** is a Court-martial Appeal Court and a quorum which constitutes the Court-martial Appeal Court, where it is stated as follows:-

"C. 146 (1) There shall be a Court-martial Appeal Court, which shall hear and determine all appeals referred to it under this part.

(2) **The Judges of the High Court shall be the judges of the Court-martial Appeal Court.**

(3) The Court-martial Appeal Court may sit and hear appeals at any

place or places, and the senior judge of the Court shall arrange for sitting and hearings as may be required.

- (4) **Three judges of the Court-martial Appeal Court constitute a quorum**, and the decision on any appeal shall be determined by the vote of the majority of the judges present, and in the event of an equality of votes, the appeal shall be dismissed." [Emphasis added].

This means that the Court-martial Appeal Court is the High Court, and its quorum is complete when three judges of the High Court sit to determine the appeal. In the instant case, only one judge of the High Court sat to dispose of the appeal. That surely is in

contravention of the provisions of section C. 146 (4) where three judges of the High Court are required to sit so as to constitute a quorum. We are of the considered opinion that, that defect renders the appeal heard by a single judge of the High Court at Iringa in Criminal Appeal No. 39 of 2007 be a nullity.

As to the respondent's claim that the State Attorney took part in the proceedings at the High Court and remained silent without commenting anything concerning non-compliance of the said provisions of the law, we are of the opinion that, those are statutory provisions, and it is an established principle of law that there can be no estoppel against a provision of a statute. See: **Tarmal Industries Ltd. V. Comm. of Customs and Excise** (1968) E.A 479.

The said principle in **Tarmal case** (supra) was applied by the DPP in the decision of this Court in **The Director of Public Prosecutions v Marwa Mwita and Two Others** [1980] TLR 306 where it was held that:

'estoppel does not lie against the performance of a statutory duty.'

In the case of **DPP v. Marwa** (supra), a State Attorney also participated without objection in the proceedings of the trial for murder in the High Court without "*information*", like in the present case, the DPP in **Marwa's Case** (supra) also appealed to the Court of Appeal complaining about the irregularities of proceedings in the High Court.

We are of the considered opinion that, by relying on the established principle of the law as stated in the **Tarmal Case** (supra) we are constrained to find no merit in the respondent's complain^t.

In the event, we are constrained to quash the said defective decision of the High Court of Iringa and restore the decision of the Court -martial at Makambako. Hence, we hereby set aside and quash the High Court decision. Furthermore, we order the respondent to be

arrested immediately to continue to serve the sentence imposed on him by the Court-martial at Makambako. If he so wishes to appeal to the Court-martial Appeal Court, he is at liberty to pursue his right of appeal. It is so ordered

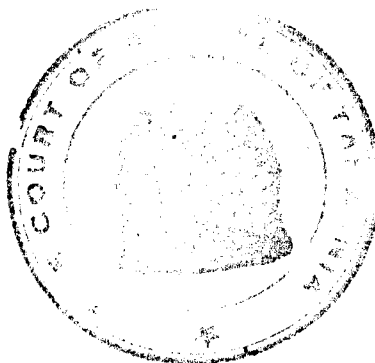
DATED at **IRINGA** this 28th day of March, 2012.

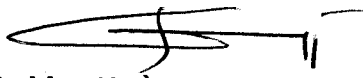
M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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




(J. S. Mgetta)
DEPUTY REGISTRAR
COURT OF APPEAL