IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., ORIYO J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 113 OF 2010

STEPHANO JOSEPH.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Bukoba)

(Mchome, J.)

Dated 4th day of March, 2003
in
Criminal Appeal No. 13 of 2001

JUDGMENT OF THE COURT

19th & 24th September, 2013

RUTAKANGWA, J.A.:

The appellant and two others were convicted by the District Court of Muleba District of the offence of Armed Robbery. They were sentenced to thirty years imprisonment. Aggrieved by the conviction and sentence they preferred an appeal to the High Court at Bukoba. In paragraph 8 of the appellant's petition of appeal, he categorically mentioned that he wished "to attend in person", at the hearing of his appeal. The petition was duly lodged on 20th April, 2001.

The record of appeal shows that the appellant's appeal in the High Court was called on for mention before the District Registrar, for the first time on 21/2/2003. It was fixed to be heard on 28/2/2003, that is seven (7) days later.

On the scheduled day of hearing, the appellant did not enter appearance. Without ascertaining whether or not the appellant had been served with a notice of hearing and in good time, the learned first appellate judge proceeded with the hearing. He heard submissions from Mr. Bulashi, learned State Attorney, in which he was resisting the appeal. The judgment on appeal was delivered on 4/3/2003. The appeal was found wanting in merit and was dismissed, hence this appeal.

There is no gainsaying here that the appellant was condemned unheard. As correctly submitted by Mr. Victor Karumuna, learned State Attorney for the respondent Republic, while supporting the appeal, this was a fundamental breach of the appellant's inalienable right to be heard. He accordingly urged us to allow the appeal and discharge the appellant as he has been in prison for almost twenty years.

We have found ourselves to one with the appellant and Mr. Karumuna on the undenied fact that the High Court denied the appellant of his fundamental right to be heard before an adverse decision was made against him. This error vitiated the entire proceedings in the High Court.

It has occurred to us also that the High Court heard the appellant's appeal in flagrant violation of the clear provisions of sections 365 and 366 (2) (a) of the Criminal Procedure Act (the CPA). Under s. 365, the appellant had a right to be informed of the time and place at which his appeal was to be heard. Section 366 (2) (a) prescribes that "an appellant whether in custody or not shall be entitled to be present at the hearing of an appeal."

We have at our disposal a plethora of the Court's decisions to the effect that a right to be heard "is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard": See, **Abbas Sherally & Another v. Abdul S. H. M. Fazalboy,** Civil Application No. 32 of 2002 (unreported), among others. In **Dishon John Mtaita v. The. D.P.P.,** Criminal Appeal No. 132 of 2009 (unreported), we thus observed:-

"May be the High Court was more concerned with a speedy disposal of the appeal without regard to both the natural, statutory and constitutional rights of the appellant to be heard. If that were the case, that would be a very dangerous trend which cannot be condoned by this Court... the right to be heard when one's rights are being determined by any authority, leave alone a court of justice, is both elementary and fundamental. Its flagrant violation will of necessity lead to the nullification of the decision arrived at in breach of it. Hence the impeccability of the earlier referred to saying of "More haste, less speed."

We subscribe fully to this salutary observation.

All said and done, consistent with settled law, we are of the firm view that the High Court judgment should not be allowed to stand. It is a nullity. It is accordingly quashed and set aside. The appellant's appeal in the High Court at Bukoba is hereby re-instated and it is directed that it should be

heard and determined within three (3) months of the date of this judgment.

In fine, the appeal is allowed.

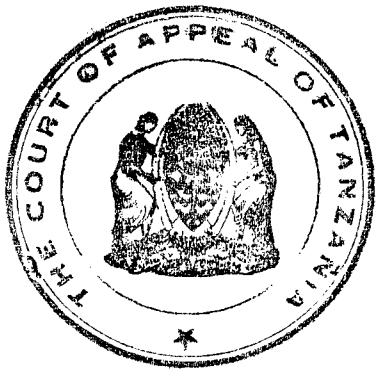
DATED at **MWANZA** this 20th day of September, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



P. W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL