

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 114 OF 2014

SIMON KAYOYO MWALEMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ngwala, J.)

dated the 17th day of October, 2013

in

Misc. Criminal Application No. 11 of 2013

JUDGMENT OF THE COURT

28th August & 1st September, 2015

MASSATI, J.A.:

The appellant was charged with three counts of obtaining money by false pretenses contrary to section 302, one count of impersonation, contrary to section 369(1) and one count of stealing contrary to section 265, all of the Penal Code before the District Court of Mbeya. The last charge was substituted on 5th October 2010. The case was assigned to one M. Amos RM. After several adjournments, it was fixed for hearing before A.M. BATULAINÉ, RM, who recorded the evidence of one witness for

the prosecution. On 2/11/2011, it came before Z.A. MPANGULE, RM, who took the evidence of PW2. On 25/1/2012, when the matter came again before MPANGULE, RM, the appellant prayed for the recusal of the trial magistrate. The learned trial magistrate agreed with the prayer, but the appellant was not happy with the wording of the ruling. So he applied for revision of that ruling in the High Court.

The application for revision was placed before Mwangesi, J. The respondent raised a notice of preliminary objection followed by written submissions by the parties. The preliminary objection was, however, disposed of by Karua, J. who upheld the same and struck out the application. The applicant refiled the application for revision No. 11 of 2013. This was fixed before Ngwala, J.

On 16/9/2013, the parties assembled before Ngwala, J. for fixing a date of hearing. There the applicant told the learned judge that:

"Madam Judge, I pray that the matter should be heard by another judge, because amongst the reasons, is concerned under your decisions, which is the source of the dispute. Secondly, I pray for time to present a supplementary affidavit.

This was objected to by the respondent.

In her ruling dated 17/10/2013, the learned judge rejected the application for her recusal, but thereafter proceeded to write: -

"In the circumstances, I cannot disqualify from conduct of this suit at the instance of the applicant. Without hesitation I proceed to determine the application without undue delay because the arguments in support of the application have been deponed by the applicant."

Thereafter the learned judge went on to revise the proceedings of the district Court, after noting that those presided over by Zabibu Mpangule, RM, were "saturated with irregularities" and ordered the case to be remitted to the trial court to be dealt with on merit. The appellant is aggrieved by the decision of the learned judge and has filed the present appeal.

The appellant's memorandum of appeal comprises of three grounds of appeal. For ease of reference, they are reproduced below:

- (1) *That, the honorable judge went ahead to dispose my application despite my opposition of her on ground of bias.*
- (2) *That, the honorable judge disposed of the application without according me any hearing.*

(3) *That, the honorable judge opposed my prayer to file a supplementary affidavit that should have been part the material application.*

At the hearing of the appeal, the appellant who appeared in person, adopted his memorandum of appeal and his written submission and had nothing more useful to add.

Miss Catherine Gwaltu, learned Senior State Attorney, who appeared for the respondent agreed that the impugned decision was flawed by incurable irregularities arising from the denial of the right to be heard to both parties. She therefore urged us to allow the appeal.

We think that this appeal may be disposed of on a narrow compass. As demonstrated above, after the learned judge had refused to recuse herself, she went ahead to determine the application for revision on merit without according any of the parties the right to be heard. This was fundamentally wrong.

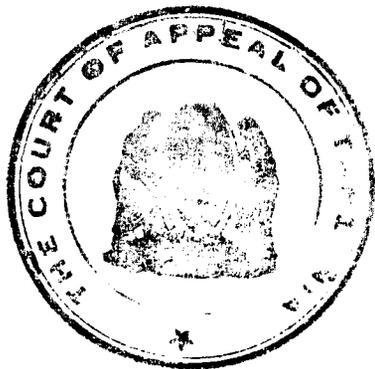
The right to be heard is not only a rule of natural justice, but a statutory/constitutional right in Tanzania. It is entrenched under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. This Court has held in a number of cases that failure to give any person a fair trial and

therefore in breach of Article 13(b) (a) of the Constitution nullifies the proceedings (See **MASOME ROBERT v R** Criminal Appeal No. 321 of 2007 (unreported)).

It follows therefore that part of the ruling of Ngwala, J. which purports to decide the application for revision on merit is a nullity. But since it is not possible to quash part of the ruling without affecting the rest, the whole ruling is accordingly quashed. We order that the application be set down for hearing before another judge of competent jurisdiction.

Order accordingly.

DATED at **MBEYA** this 31st day of August, 2015.



S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL