IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MBAROUK,J.A.,MMILLA,J.A., And MWARIJA, J.A.,)

CRIMINAL APPEAL NO. 243 OF 2014

1. RAJABU NGWADA
2. GODREY FRANK ....APPELLANTS

VERSUS

THE REPUBLIC...RESPONDENT

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

(Uzia, J.)

dated the 6th day of September, 2010
in
PC. Criminal Appeal No. 1 of 2010

RULING OF THE COURT

10th & 13th August, 2015

MMILLA, J. A.:

Criminal Appeal No. 243 of 2014 before this Court stems from a criminal case that originated from the Primary Court of Kimande in the District and Region of Iringa. Before that court the appellants, Rajabu Ngwada and Godfrey Frank, together with two others namely; Martin Kimemile and Mustafa Mazizi were jointly and together charged with armed robbery contrary to sections 285 and 286 of the Penal Code Cap. 16 of the Revised Edition, 2002. At the end of trial, that court acquitted Mustafa Mazizi but convicted the rest of them including the appellants. It sentenced them to thirty (30) years imprisonment term. They unsuccessfully appealed

to both, the District Court of Iringa and the High Court at Iringa. Undeterred, they preferred the present appeal to this Court.

Before us the appellants appeared in person and were not represented, while Mr. Abel Mwandalama, learned Senior State Attorney, appeared for the respondent Republic. He raised a preliminary objection on a point of law of which he had filed a notice thereof, based on the lone ground that they are wrongly joined and summoned to appear in this case.

In his submission in support of the ground raised, Mr. Mwandalama contended that in trials before the primary courts, prosecution is conducted by the parties themselves, so also at the level of appeals to higher courts. While stressing that the Director of Public Prosecution (DPP) cannot be forced to participate in such proceedings, he hastened to remark however, that in terms of section 34 of the Magistrates Courts' Act Cap. 11 of the Revised Edition, 2002 (the MCA), he may involve himself in such proceedings if he thinks it is in the public or national interest to do so. Since the DPP did not signify as such in the circumstances of this matter, Mr. Mwandalama urged the Court to remove them from the case in terms of Rule 4 (2) (a) of the Court of Appeal Rules, 2009 (the Rules) to enable issuance of service to the proper respondent, one Maneno Mkomange. Also,

while noting that the appropriate respondent did not participate in the proceedings before the District Court and in the High Court too and therefore that he was not afforded the opportunity to be heard, he invited the Court to invoke the power conferred on it under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) to quash the proceedings and judgments in both, the District Court and the High Court to pave way for all the parties to be heard, should the appellants re-instituted their appeal in the District Court.

On their part the appellants, who are lay persons as it happened to be had, understandably because the point raised is technical, nothing to say. They rested their fate in the hands of the Court.

After carefully weighing the submission made by Mr. Mwandalama, we hasten to appreciate that in primary courts, be it in civil or criminal cases; prosecution is conducted by the parties themselves. When it comes to appeals however, the provisions of sections 20 (1) and 25 (1) of MCA provide the requisite guidance. Under section 20 (1) of that Act, where any person may have been acquitted by that court (the primary court), the appeal may be instituted in the District Court by the complainant **or** the DPP. That section states that:-

"Save as hereinafter provided–

(a) in proceedings of a criminal nature, any person convicted of an offence by a primary court, or where any person has been acquitted by a primary court, ***the complainant*** *or* ***the Director of Public Prosecutions****; or*

(b) in any other proceedings, any party,

if aggrieved by an order or decision of the primary court*, may appeal there from to the district court of the district for which the primary court is established."* [Emphasis provided].

On the other hand section 25 (1) of that Act cover appeals from the District Court to the High Court. That section provides that:-

"(1) Save as hereinafter provided–

(a) in proceedings of a criminal nature, any person convicted of an offence or, in any case where a district court confirms the acquittal of any person by a primary court or substitutes an acquittal for a conviction, ***the complainant or the Director of Public Prosecutions****; or*

(b) in any other proceedings any party,

if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction *may, within thirty days after the date of the decision or order, appeal there from to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired."* [Emphasis provided].

We similarly wish to consider the provisions of section 10 (1) of the National Prosecutions Service Act No. 27 of 2008 which also throws light as regards the powers of the DPP. That section provides that:-

"Notwithstanding the provisions of any other law relating to appeals, revisions or applications, it shall be the function of the Director to –

(a) *institute, conduct and defend criminal proceedings in courts of law; and*

(b) ***take over an appeal, revision or application arising from private prosecution, whether as appellant, applicant or respondent*** *and where the Director takes over the appeal as appellant or applicant, he may continue or otherwise withdraw the appeal."* [Emphasis is ours].

In the light of the provisions quoted above, it is beyond dispute that the DPP may decide to involve himself in cases originating from the primary courts as contemplated by these provisions.

However, as properly submitted by Mr. Mwandalama, in terms of section 34 (1) (b) (iv) of the MCA, the DPP may involve himself as such where he was an appellant or had served notice that he wished to be heard. That section stipulates that:-

"(1) Save where an appeal is summarily rejected by the High Court and subject to any rules of court relating to substituted service, a court to which an appeal lies under this Part shall cause notice of the time and place at which the appeal will be heard to be given–

(a) to the parties or their advocates;

(b) ***in all proceedings of a criminal nature in the High Court, or in any such proceedings in the district court in which he is an appellant or has served notice that he wishes to be heard, to the Director of Public Prosecutions****:*

Provided that no such notice need be given–

(i) to an appellant in any proceedings of a criminal nature who is in custody, who does not state in the petition both that he wishes to be present and that he is in a position to pay the expenses of his transfer to the place of hearing;

(ii) to any party who has served notice on the appellate court that he does not wish to be present;

(iii) to any advocate unless the petition of appeal is signed by the advocate or the appellate court is otherwise informed that he is instructed to appear at the hearing; or

(iv) ***to the Republic or to the Director of Public Prosecutions except in the circumstances specified in paragraph (b) of this subsection.****"* [Emphasis provided].

We earnestly scanned the court record in the present case looking for indication if the DPP was a party in the proceeding in issue or that he served notice that he wished to be heard as contemplated by section 34 (1) (b) of the MCA but in vain. There is not a single clue of his involvement. That being the position, we are constrained to agree with Mr. Mwandalama that they were wrongly joined in this appeal. Thus, while upholding the preliminary objection raised, we consequently remove them from the case

service to the appropriate party, the said Maneno Mkomange.

As correctly observed by Mr. Mwandalama however, the appeals before the District Court and the High Court were determined in the absence of the appropriate party who was not served. Surely, the omission amounted to breach of the principle of natural justice of the right to be heard, the consequences of which are to make the proceedings null and void – See the case of **Rukwa Auto Parts and Transport Ltd v. Jestina George Mwakyoma** [2003] T. L. R. 251 and **Hamisi Rajabu Dibagula v. Republic** [2004] T. L. R. 181.

In view of that fact, we agree with Mr. Mwandalama that this requires our indulgence to rectify the defect which we consider to be grave. Thus, by virtue of the powers bestowed on us by section 4 (2) of the AJA, we quash the proceedings and judgments in both the District Court and the High Court and set aside the resultant orders. We direct that subject to compliance with requirements of the law regarding the aspect of limitation, the appellants should be at liberty to begin afresh the process of appeal against the judgment of the Primary Court. However, aware that they have been pursuing their rights since January, 1997 when they were convicted

and sentenced by the Primary Court, we direct that upon initiation of appeal proceedings in this regard, the District Court should consider itself duty bound to expedite the determination of their appeal without any further delays.

Order accordingly.

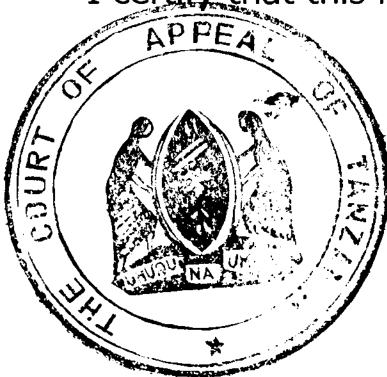
DATED at **IRINGA** this 12th day of August, 2015.

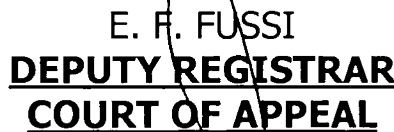
M. S. MBAROUK
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original





E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL