IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 158 OF 2015

RAMADHANI MLINDWA...APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

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

(Feleshi, J.)

dated the 29th day of October, 2014
in
(DC) Criminal Appeals No. 76 of 2014

JUDGMENT OF THE COURT

2nd & 4th December, 2015

MASSATI, J.A.:

Before the Court of the Resident Magistrate of Kigoma at Kigoma, the appellant and two other persons were charged with a total of 36 various counts sourced from the Prevention and Combating of Corruption Act No. 11 of 2007, and the Penal Code (Cap. 16 R.E. 2002) but tried under the Economic and Organised Crimes Act (Cap. 200 R.E. 2002). When the appellant and other accused persons appeared in Court on 19/1/2013, they all pleaded not guilty.

After a full hearing, the trial court convicted the appellant of the 9th to 36th counts inclusive, and acquitted the other two. He was sentenced to 4 years imprisonment on each count, which were to run concurrently. He was also ordered to refund Tshs. 5,050,000/= to his ex-employer, Kigoma District Council.

A brief background to the matter would be apposite. The appellant was a Village Executive Officer and was Chairman of the Agro-voucher Committee, and was thus entrusted to provide agricultural inputs to Kandage village by using vouchers in the season 2010/2011. He was employed and therefore the agent of Kigoma District Council.

Somehow, though there were some vouchers presented to Kigoma District Council, when the farmers of Kandage village were questioned, they denied to have received any agricultural inputs. It was contended that this was made possible by forged documents that were prepared and signed by the appellant and his colleagues. The short supply of the agricultural inputs was worth Tshs. 5,050,000/=. The appellant was arrested on 2/2/2012, and later charged as aforesaid.

At the trial Court, a total of 7 prosecution witnesses testified, and 7 documentary exhibits were tendered. The appellant gave sworn evidence, but had no witness or exhibits. For reasons that will be clear shortly, we shall not revisit the evidence adduced at the trial court in our judgment. This is because we intend to dispose of this appeal on a ground which will render it unnecessary to do so.

The appellant was aggrieved with the decision of the trial court. So, he filed an appeal in the High Court against that decision. The High Court (Feleshi, J.) dismissed the appeal. The appellant is still dissatisfied with the High Court decision and has come to this Court on a second appeal.

In his memorandum of appeal, the appellant has raised four grounds of appeal as follows:

1. *That the honourable judge erred in law on deciding the case acting as prosecutor and the same time as the judge hence unfair decision.*
2. *That the honourable judge erred in law and fact in convicting the appellant on weak and unproved evidence.*

3. *That the honourable judge erred in law and fact holding that the prosecution had proved the case beyond reasonable doubts.*
4. *That in the light of such finding the guilty of the appellant had not been proved beyond reasonable doubts.*

When he appeared in person at the hearing of the appeal he adopted those grounds, and opted to let the state attorney begin, reserving his right to reply if a need arose.

Mr. Juma Masanja, learned Senior State Attorney, who appeared for the respondent/Republic supported the first ground of appeal. He argued that it was true that the first appellate judge (Feleshi, J.) who was the Director of Public Prosecutions, before his elevation to the bench was the one who consented to the prosecution of the appellant, and as such, he could not have been free from bias. He therefore submitted that by hearing the appeal, Feleshi, J. acted against the rules of natural justice, among which include, that no person shall be a judge of his own cause. He referred to us the decision of **ABBAS SHERALLY VS ABDUL SULTAN HAJI MOHAMED FAZALBOY,** Civil Application No. 133 of 2002 (unreported). He also cited the decision of **ATTORNEY GENERAL OF THE REPUBLIC OF KENYA v**

ANYANG' NYONG'O AND OTHERS, decided by the East Africa Court of Justice, Application No. 5 of 2006 (published in **The Jurisprudence on Regional and International Tribunal Digest** p. 33). Mr. Masanja also referred us to the decisions of **R. v ATHUMANI RAJABU AND OTHERS** (1989) TLR. 44, and **R v ALBERT AWUOR AND 3 OTHERS** (1985) TLR 20. So, it was for this reason alone that Mr. Masanja supported the appeal. He said that this was enough to dispose of the appeal. He asked us to allow it and quash the proceedings of the first appellate court, and order a re-hearing of the appeal before another judge.

Asked to respond, the appellant agreed with the respondent, but asked that he be set free. He said that he did not object before Feleshi, J. because he did not know that he was the one who consented to his prosecution.

We agree with Mr. Masanja that the first ground of appeal is dispositive of the present appeal. It is not in dispute that the appellant was convicted of several offences under the Economic and Organised Crimes Control Act (the Act). There is also no dispute that under section 26(1) of the Act offences under the Act require the consent of the Director of Public Prosecutions for their prosecution. We also find that on the 15th July 2013, the charges to the prosecution of the appellant under the Act were consented

to by Dr. Eliezer Mbuki Feleshi who was the Director of Public Prosecutions. According to Mr. Masanja, and we take judicial notice that, Dr. Eliezer Mbuki Feleshi is the judge who presided over the present appeal. The question posed by the first ground of appeal is whether it was proper for the learned judge to sit in appeal in a case in which he has previously given consent to prosecute?

Long before the entrenchment of the right of fair hearing when the right and duties of any person are being determined by the courts in Article 13(6) (a) of the Constitution of the United Republic of Tanzania, it has always been considered, we think universally, that adhering to the principles of natural justice was so basic that if a court's decision was taken in violation of any of the said principles, it was considered to be no decision at all. This principle was well put in **GENERAL MEDICAL COUNCIL v SPACKMAN** (1943) AC. 627, in the following passage:

> *"If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."*

This decision was followed in **HYPOLITO CASSIANO DE SOUZA V CHAIRMAN AND MEMBERS OF THE TANGA TOWN COUNCIL** (1961) EA 377, **DPP V. I. TESHA AND ANOTHER** (1993) TLR. 237, **ABBAS SHERALLY AND MEHRUNISSA ABBAS SHERALLY V. ABDUL SULTAN HAJI MOHAMED FAZALBOY** *(supra).* It was also followed in **R v ALBERT AWUOR AND 3 OTHERS** (1985) TLR 20.

But what are those principles of natural justice? It has been said that the term **"natural justice"** has been identified with two constituents of fair hearing; which are:

(i) *the rule against bias (nemo iudex in causa sua potest*

(which means) no man shall be a judge in his own cause and

(ii) *hear the other side (audi alteram partem).*

The rule against bias, means that a person is barred from deciding any case in which he or she may be, or may fairly be suspected to be biased. This embodies the basic concept of impartiality, and applies to courts of law, tribunals, arbitrators and all those having a duty to act judicially. The purpose of maintaining impartiality is to maintain public confidence in the

legal system. As Lord Denning M. R. said in **METROPOLITAN PROPERTIES CO. (FGG) LTD. v LANNON** (1968) EWCA CIV 5:

> *"Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking "The judge was biased."*

And Lord Hewert, Lord Chief Justice of England and Wales, also said in **R v SUSSEX JUSTICES ex parte MC CARLTHY** (1924) IKB 256 at 259 that:

> *"It is not merely of some importance, but of fundamental importance that justice should not only be done, but should manifestly be seen to be done."*

However, the rule against bias has two exceptions, necessity, and waiver. Where a disqualified adjudicator cannot be replaced as no one else is authorized to act, natural justice has to give way to necessity in order to maintain the integrity of judicial and administrative systems. (See **GREAT CHARTE V KENNINGTON** (1795) 2 Str. 1173, P3 ER 1107; **WAKEFIELD LOCAL BOARD OF HEALTH VS. WEST RIDING AND GRINSBLY RLY CO.** (1865) LR. I QB 84. Secondly, an objection should be taken as soon as the prejudiced party has knowledge of the bias. If no such objection is raised, and the proceedings are allowed to continue without disapproval, it

will be held that the party has waived his right to complain about bias (See **R v BYLES exparte HOLLIDER** (1912) 77 JP. 40.

On the other hand, the rule that requires to hear the other side, only emphasizes the fundamental importance that both sides to a case should be heard, and applies to all types of decisions, judicial or administrative where the rights of the parties, are required to be determined. (See **RIDGE v BALDWIN** (1964) AC 40 (HL).

In this case Mr. Masanja submitted that Feleshi, J. violated the rule against bias which forbids him from sitting in judgment of a case for which he had earlier on given his consent. Unfortunately, Mr. Masanja did not cite any constitutional or statutory provision which forbids Feleshi, J. from having done, what he did.

As far as we are aware, it is only a Justice of Appeal, who, in terms of Article 119, is expressly forbidden from hearing matters which he/she had previously dealt with when he/she was sitting as a judge of the High Court. But does that mean that on appointment, judges of the High Court, are not bound by the rule against bias in respect of businesses they had previously conducted in their previous capacities? We do not think that this would commend well to reason and common sense.

In the first place, the general principle is that unless the contrary appears, it is implied that Parliament would not authorize the exercise of powers in breach of the principles of natural justice (See **FARMOUNT v ENVIRONMENT SECRETARY** (1976) TWLR 1255. But secondly, the rule against bias is prescribed in the Code of Conduct and Ethics for Judicial Officers, which every judicial officer is required to adhere to, in terms of the provisions of the Judiciary Administration Act No. 4 of 2014 and Rule 2(c) of the Code of Conduct for Judicial Officers of Tanzania.

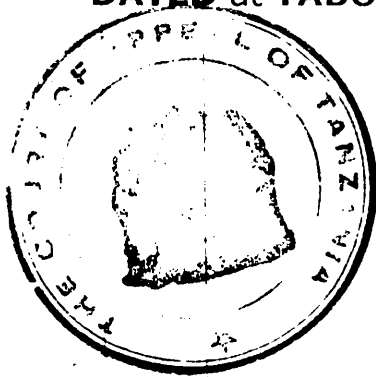
In the circumstances of this case, we have to agree with the appellant and Mr. Masanja that in deciding to hear the appeal lodged by the appellant to whose prosecution he had earlier on consented, the learned judge violated the rule against bias in that he sat in an appeal in which he had an interest in the outcome. It does not matter whether another judge would have reached the same decision. It does not matter whether Feleshi, J. was actually biased **"Apparent bias"** is enough. Since the appellant had intimated to the Court that he did not raise the objection before the learned judge because he was not aware that he was the one who consented to his prosecution; and since there is no material before us to show that Feleshi,

J. was the only judge qualified or had exclusive jurisdiction to hear the appeal, the two exceptions to the rule against bias, do not apply to him.

As earlier on held, the breach of any principle of natural justice renders a decision void. We therefore allow this appeal, and quash all the proceedings of the High Court on appeal, and remit the trial court's proceedings to the High Court for rehearing it which should be done with immediate dispatch. We direct that should the result of the appeal be the same, the period that the appellant had already spent in prison should be taken into consideration, in reviewing the sentence.

It is so ordered.

DATED at **TABORA** this 3rd day of December, 2015.

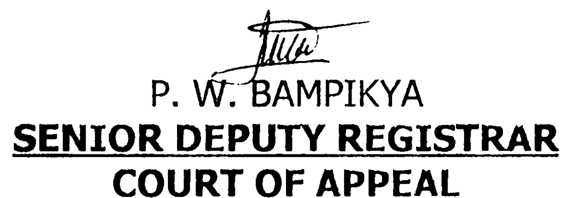


B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL