IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPEAL NO. 42 OF 2015

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

EX- C. 6070 D/CPL SABATO KATONDO ..... APPELLANT

VERSUS

1. **THE INSPECTOR GENERAL OF POLICE .....1ST RESPONDENT**
2. **THE ATTORNEY GENERAL ..... 2ND RESPONDENT**

(Appeal from the Judgment/Decree of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

Dated 4th day of March, 2014
in
HC Civil Case No. 11 of 2003

.....

JUDGMENT OF THE COURT

24th & 30th November, 2015

RUTAKANGWA, J.A.:

The appellant sued the two respondents in the High Court at Mwanza claiming monetary reliefs as a result of an alleged unlawful dismissal from employment. The respondents jointly disputed the claim and prayed for its dismissal with costs.

Before the commencement of trial only three issues were framed and agreed on. These were:-

1. Whether the dismissal of the plaintiff from employment by the 1st Defendant was justified.
2. Whether the refusal by the 1st Defendant to re-instate the plaintiff to employment was justified.
3. To what reliefs are the parties entitled.

After a full trial, judgment was reserved for delivery on 27th February, 2014. That was on 19th December, 2013. Come 27th February, 2014, the judgment was **"yet to be accomplished."** The learned trial judge said:

"I commit myself to deliver on Tuesday the 4th March, 2014."

On 4th March, 2014, the parties were in attendance. One Ms. Angelina Nchalla, learned State Attorney, is on record saying:-

"The matter was rescheduled for judgment and we are ready to receive it."

The learned trial judge responded thus:

"Court: True as you say and I ably do so. The suit has no merit and dismissed with no cost."

Going by this terse statement, we are left wondering as to whether any written judgment of the trial High Court was delivered in terms of rules 1 and 3 of Order XX of the Civil Procedure Code, Cap 33 Vol. II, R.E 2002.

Be that as it may, we have found on record a duly signed written judgment dated 4th March, 2014, with no indication as to whether it was delivered in the presence of the parties. All the same, the written judgment tells why the suit was dismissed for lacking merit. It was all because the appellant had not exhausted all the remedies available to him, i.e. he had yet to appeal the IGP's decision to the Police Service Commission. The learned trial judge thus concluded:-

> *"What then is the position regarding steps owing and pending to the plaintiff? While I have no issues with the dismissal as entered by the 1st defendant for reasons that all the necessary steps where complied to (sic), the plaintiff, I should admit has jumped the ladder. Coming to any other Court prior to the Commission,* ***the Plaintiff is misplaced thus making this suit and the previous one misconceived.*** *What then is the effect of the said position?* ***Simply said, the Court's hands are tied and until the existing remedies have been fully exhausted."***

[Emphasis is ours].

We must point out at this juncture that we chose to put this emphasis deliberately. This is because if the suit was misconceived, then it was incompetently before the trial Court. In that case the only legal option open to the learned trial judge was to strike it out and not to dismiss it "for lack of merit", otherwise the appellant will be barred by the doctrine of *res judicata.*

Having pointed out these patent irregularities it behoves us now to deal with the merits or otherwise of the appeal.

Evidently, the appellant was aggrieved by the decision of the trial High Court, hence this appeal. Only one ground of appeal has been preferred challenging the validity of the High Court judgment. The complaint is to the effect:

> *"That the learned trial judge erred in law in dismissing the appellant's suit without determining the merits of the case."*

This sole ground of appeal was elaborated on in the appellant's admittedly highly illuminating written submissions. In short, the appellant is reproaching the learned trial judge for deciding and dismissing the sult on

the basis of an issue which she raised ***suo motu*** in the course of composing the judgment on which both parties to the appeal were not heard. On this complaint, the appellant was supported by the respondents. Accordingly they all urged us to quash the judgment and set it aside and remit the High Court record to the learned trial judge with directions to hear them on the competence or otherwise of the appellant's suit.

On our part, we have found a lot of merit in the appellant's complaint which has garnered support from the respondents. As correctly argued by the appellant and respondents, both natural justice and our Constitution of 1977 (Article 13 (6) (a)) require the courts to accord full hearing to parties in judicial proceedings before their rights and obligations are determined. It is trite law that a party should be heard before an adverse decision is taken against him/her/it. This was not done here. Deciding a case on an issue on which the party was not heard amounts to condemning him or her unheard. It is a denial of justice; see, for example, **Shomary Abdalla v. Hussein and Another** (1991) T.L.R. 135, **Peter Ng'homango v. The Attorney General** (CAT) Civil Appeal No. 114 of 2011 (unreported) among many others.

In view of the above, we find ourselves constrained to declare the impugned judgment a nullity. It is accordingly quashed and set aside. The High Court record is remitted to it with instructions that the learned trial judge re-summon the parties and hear them on the issue which led her to "dismiss" the suit and thereafter proceed to compose a fresh judgment.

In fine, the appeal is allowed, but as neither party is to blame, we order each side to bear its own costs in this appeal.

DATED at MWANZA this 26th day of November, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPEAL NO. 120 OF 2014

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

MARWA MICHAEL ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

Dated 19th day of February, 2014
in
Criminal Appeal No. 64 of 2013

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JUDGEMENT OF THE COURT

24th & 30th November, 2015

KAIJAGE, J.A.:

Before the District Court of Tarime at Tarime, the appellant was arraigned for robbery. Following a full trial, he was convicted as charged and consequently sentenced to serve a term of fifteen (15) years imprisonment. His appeal to the High Court against both such conviction and sentence was unsuccessful, hence the present appeal.

Before us, the appellant appeared in person, fending for himself. The respondent Republic had the services of Mr. Lameck Merumba, learned State Attorney.

When the appeal was called on for hearing, we raised, **suo motu,** a point of law touching on the propriety and the validity of the trial court's proceedings taken and recorded in violation of the provisions under section 214 (1) of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA).

Addressing the point we raised, the learned State Attorney hastened to concede that the trial was conducted in violation of the provisions under section214 (1) of the CPA, the successor trial Magistrate having acted on the proceedings and evidence recorded by his predecessor without there being any reason or reasons assigned and put on record to explain the latter's inability to complete the trial. Upon this unarguably incurable procedural infraction, the learned State Attorney urged us to nullify the proceedings conducted before the successor magistrate as well as the resultant judgement. In similar vein, he pressed us to nullify the subsequent proceedings and the judgement of the first appellate court based on the null proceedings and judgement of the trial court. In consequence thereof, he invited us to order a retrial.

Understandably, the appellant who is a layman made no significant response to the legal point we raised.

On our part, we are, with respect, in full agreement with the learned State Attorney. The law is now settled that the second or subsequent magistrate can assume the jurisdiction to take over, continue the trial and act on the evidence recorded by his/her predecessor only if the latter **is for any reason or reasons,** explicity shown in the trial court's record of proceedings, unable to complete the trial at all or within a reasonable time. That is the spirit of section 214 (1) of the CPA which provides:-

> *"S. 214 (1). Where **any Magistrate,** after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings, **is for any reason** unable to complete the trial or committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or committal proceedings."*
>
> *[Emphasis ours].*

In this case, it is gathered from the trial court's record of proceedings that a total of three (3) witnesses testified for the prosecution side. The trial commenced before Y.R. Ruboroga, R.M., who initially took and recorded the evidence of the first witness. The remaining two (2) prosecution witnesses testified before Odira Amworo, R.M., who completed the trial, composed the judgment and delivered the same. However, the record is dead silent on the reason/s why Ruboroga, R.M., could not complete the trial.

Consistent with the provisions of s. 214 (1) of the CPA, this Court in the unreported case of **PRISCUS KIMARO V. R;** Criminal Appeal No. 301 of 2013, had an occasion to underscore the need for putting on record the reasons for re-assignment of a partly heard matter to a successor trial magistrate. In that case, we said:-

> *"We are of the settled mind that where it is necessary to re-assign a partly heard matter to another magistrate,* ***the reason for the failure of the first magistrate to complete the matter must be recorded.*** *If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."*
>
> *[Emphasis ours].*

In this case, there being no such reason/s assigned and put on record, we firmly hold that Odira Amworo, R.M., the successor magistrate, had no authority in terms of section 214 (1) of the CPA to take over, continue and complete the trial earlier commenced by Ruboroga, R.M., his predecessor. For certain, this was a fundamental procedural infraction, incapable of being cured under section 388 of the CPA.

As correctly submitted by the learned State Attorney, the irregularity in question has rendered a nullity, the trial proceedings conducted before and the judgment composed and delivered by Amworo, R.M. By parity of reasoning, the subsequent proceedings and the judgment of the first appellate court based on the said null proceedings and judgment of the trial court were also a nullity.

The above considered and in the exercise of our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002, we hereby revise and quash all the proceedings beginning with those conducted before Amworo, R.M. as well as those of the first appellate court. That done, we consequently hereby set aside the conviction entered and the sentence meted out against the appellant and order that the appellant be expeditiously

retried, beginning from the date Amworo, R.M., took over the trial court's proceedings.

In the event Roboroga, R.M., before whom the trial commenced has ceased to have jurisdiction, we further hereby direct that the case be expeditiously tried afresh before another magistrate of competent jurisdiction.

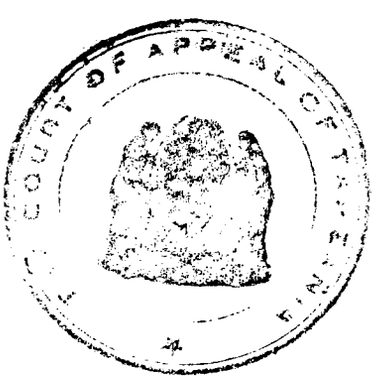
DATED at MWANZA this 27th day of November, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



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