IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 256 OF 2015

1. **IBRAHIM SAID MRABYO @ MAALIM**
2. **SEBI HASSAN @ SHEBI** ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(De-Mello, J.)

dated the 30th day of December, 2013
in
H/C Criminal Appeal No. 93of 2012

JUDGMENT OF THE COURT

25th & 28th October, 2016

MUGASHA, J.A.:

The appellants, **IBRAHIM SAID MRABY @ MAALIM AND SEBI HASSAN @ SHEBI** were convicted as charged by the Resident Magistrate Court of Mwanza on two counts. These were, Armed Robbery (1st count) and Causing Grievous Bodily Harm (2nd count). They were each sentenced to

custodial sentences of 30 years in the 1st count and 2 years in the 2nd count. The sentences were ordered to run concurrently.

Dissatisfied with the convictions and sentences, they preferred an appeal to the High Court in Criminal Appeal No. 93 of 2013 of the Mwanza Sub-Registry ("the appeal"). Each appellant filed his own petition of appeal and in accordance with the provisions of section 365 (1) of the Criminal Procedure Act **[CAP 20 RE.2002],** they both stated in clear terms that they wished to be present at the hearing of their appeal. We have gathered from the record that the parties to the appeal were not given notice of the date of hearing or any other order, be it from the District Registrar or judge.

The record of the appeal shows that the appeal was before De-Mello, J. on 30th December, 2013. The record further shows that, neither the appellants nor the respondent were present and there is no indication either that either or both parties were summoned to appear in court on that day. However, the learned judge passed the following order:

"ORDER

The Appeal lately submitted in contravention with the law prescribing limitation.
It is incompetent and I dismiss accordingly."

Aggrieved by this order, the appellants have appealed to the Court praying for justice to be done according to law. Each appellant lodged his own memorandum of appeal, containing different grievances. Having perused each memorandum, we have found the one lodged by Sebi Hassani @ Sebi to be more articulate and focused. Although he has raised five substantive grounds of complaint, we have found the 3rd ground to be very telling as it affected both appellants and in due course we shall further explain, why we so believe. This complaint is to the effect:-

> *"3. That the appellant's appeal was erroneously dismissed in his absence."*

At the hearing, the appellants appeared in person and Ms. Judith Nyaki, learned Senior State Attorney, represented the respondent Republic. The respondent Republic did not oppose the appeal.

The appellants reiterated that, despite indicating their desire to be present at the hearing of the appeal at the High Court, they were merely served with the order which dismissed the appeal without being availed a right to be heard. They urged us to allow the appeal and return the matter to the High Court for a re-hearing of the appeal.

The other reason for our belief that, the 3rd ground of **SEBI** is the most telling is due to the dictates of the Criminal Procedure Act (supra). This being an appeal from the decision of a Court of Resident Magistrate, in a trial conducted under the provisions of the Criminal Procedure Act, it falls under Part X of this Act. The appellants' right of appeal is created under section 359 (1) of the Criminal Procedure Act. Section 363 of the Criminal Procedure Act provides that:

> *"If the appellant is in prison, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison, who shall thereupon forward the petition and copies to the Registrar of the High Court."*

Section 365 of the Criminal Procedure Act (supra) gives the following directions:-

> *"365 – (1) If the High Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his advocate, and to the Director of Public Prosecutions, of the time and place at which the appeal will be heard and shall furnish the Director of Public Prosecutions with a copy of the proceedings and of the grounds of appeal; save that notice need not be given to the appellant or his advocate if it has been stated in the petition of appeal that the*

appellant does not wish to be present and does not intend to engage an advocate to represent him at the hearing of the appeal.

(2) Where notice of time, place of hearing cannot be served on any person because he cannot be found through the address obtained from him by the court under section 228 or 275, the notice shall be brought to his attention in the manner prescribed by section 381."

Moreover, section 366(2) of the Criminal Procedure Act prescribes as follows in clear mandatory terms:

"An appellant, whether in custody or not, shall be entitled to be present at the hearing of his appeal."

In the light of the stated position of the law and what transpired in the first appellate court, the issue to be determined is if, the appellants were accorded their statutory right.

On her part, Ms Judith Nyaki, as earlier indicated, did not oppose the appeal. As both the appellants and the respondent were denied the fundamental right to be heard by the High Court, she asserted, the appeal should be allowed and the High Court be ordered to re-hear it in accordance with the provisions of the law.

The undisputed facts clearly establish that, the appellants were condemned unheard by the High Court, without regard to the natural, statutory and constitutional rights of the appellants to be heard. There are various decisions where the Court has categorically stated 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 AND ANOTHER VS ABDUL S.H.M. FAZALBOY,** Civil Application No. 32 of 2002 (unreported), and **ECO-TECH (ZANZIBAR) LIMITED VS GOVERNMENT OF ZANZIBAR, ZNZ** Civil Application No.1 of 2007 (unreported).

When confronted with a similar situation in **DISHON JOHN MTAITA VS THE DIRECTOR OF PUBLIC PROSECUTIONS,** Criminal Appeal No. 132 of 2004 (unreported), the Court said, 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. **In D.P.P VS SABINA I. TESHA AND OTHERS [1992] T.L.R 237,** the court held that a denial of a right to be heard in any proceeding would definitely vitiate the proceedings. But the Court went further in the **MBEYA –RUKWA AUTO**

PARTS AND TRANSPORT LIMITED VS JESTINA GEORGE MWAKYOMA, Civil Appeal No. 45 of 2000 (unreported) and definitely held that:

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and declares in part:*
>
> ***(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".***

The English rendering is to the effect that, when then rights and duties of any person are being determined by the court or any agency, that person shall be entitled to a full hearing.

In the circumstances of the case under scrutiny, there was no justification at all for the High Court to peremptorily dismiss the appellants' appeal without affording them opportunity to be heard as required by the law. We are of the settled view that, the decision of the High Court reached at in violation of the appellants' constitutional and statutory right to be heard, is a nullity and it cannot be allowed to stand. It is accordingly quashed and set

aside. The High Court is directed to re-hear the appeal in accordance with the dictates of the law. The appeal should be placed before another judge of competent jurisdiction.

We accordingly allow the appeal.

DATED at **MWANZA** this 28th day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL