IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUANDA, J.A., MMILLA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 460 OF 2015

MUGENDI MANOTI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bukuku, J.)

Dated the 31st day of July, 2015
in
HC. Criminal Appeal No. 25 of 2015

.....

JUDGMENT OF THE COURT

4th & 15th December, 2017.

MMILLA, J.A.:

Mugendi Manoti is appealing against the order of the High Court of Tanzania at Mwanza dated 31.7.2015 whereby his appeal was dismissed on the ground that the notice of appeal was filed out of time.

The brief facts of the case were that the appellant and another person who is not a subject of this appeal, were charged in the Resident Magistrates' Court of Musoma at Musoma in Mara Region with the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 of the Revised Edition, 2002. It was alleged that on 21.8.2013 at Kagongo

area in Lake Victoria, he and his colleague stole one (1) engine machine make Yamaha HP 15 valued at T.shs. 4,800,000/= and one (1) fuel tank and its fuel line valued at T.shs. 200,000/=, all valued at T.shs. 5,000,000/=, the property of Kaswamila s/o Charles.

The case proceeded to full trial. On 20.3.2014, the appellant and his colleague were found guilty, convicted, and were each sentenced to serve 30 years imprisonment. The appellant felt aggrieved; he prepared a Notice of Appeal on 24.3.2014 which was forwarded and reached the High Court Registry on 1.4.2014. When the admission form was placed before the judge on 31.7.2015, the latter composed an order which she dismissed the appeal. It is that order which triggered the present appeal to the Court.

The appellant's memorandum of appeal has raised four grounds which may nevertheless be conveniently bridged into two main grounds; **one** that, the learned High Court judge erred in law in dismissing the appeal on the account that it was out of time instead of striking it out; and **two** that; the learned High Court judge erred in law in dismissing the appellant's appeal without affording him the chance to be heard.

Before us, the appellant appeared in person and unrepresented, while the respondent Republic enjoyed the services of Ms Judith Nyaki, learned State Attorney.

The appellant chose for the Republic to commence.

On taking the floor, Ms Nyaki hurried to inform the Court that she was supporting the appeal. She submitted briefly that the learned judge misdirected herself in dismissing the appeal instead of striking it out. She referred the Court to the case of **Juma Nhandi v. Republic**, Criminal Appeal No. 289 of 2012 CAT, (unreported). She prayed for the Court to find merit on this ground appeal.

Ms Nyaki submitted similarly that in the course of dismissing that appeal, the appellant was not given opportunity to be heard. She contended that that was improper, and that the first appellate judge breached one of the principles of natural justice on the right to be heard (*audi alterem partem*). Likewise, she prayed the Court to allow this ground of appeal.

In conclusion, Ms Nyaki urged the Court to allow the appeal, and quash the dismissal order to pave way for the appellant to organize himself and re-institute the appeal in the High Court.

On his part, the appellant told the Court that he was in agreement with the learned State Attorney. He requested the Court to allow his appeal.

The order under consideration is reflected at the 42 of the Record of Appeal. Looking at that order, it is obvious that the learned judge did not determine the appeal on merit. She dismissed the same immediately after the file was placed before her in the process of admission of the appeal. Worse more, she did so in the absence of the parties. The order of the first appellate judge read:-

> *"Appeal is out of time for want of notice of appeal. It is thus dismissed."*

With great respect to the learned judge, the manner in which that appeal was dismissed prejudiced the appellant because he was denied the right to submit on it before the fate of his appeal was determined. Surely,

that breached one of the fundamental principles of natural justice on the right to be heard.

The law is clear that an accused person should not be condemned unheard. This has been emphasized in a range of cases, including those of **Mbeya – Rukwa Auto-parts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R.251, **Hamisi Rajabu Dibagula v. Republic** [2004] T.L.R. 181, and **Emmanuel Luoga v. Republic,** Criminal Appeal No. 281 of 2013 CAT (unreported), among others.

In the case of **Hamisi Rajabu Dibagula v. Republic** (supra), the learned High Court Judge conducted the revisional proceeding in the absence of the appellant, therefore denied him the opportunity to be heard. The Court cited the old English case of **R. v. University of Cambridge,** 1723, 1 Stra. 557, which was cited with approval by Megarry, J., in **John v. Rees and others**, [1969] 2 All E.R. 274, Vortescue, J., where the emphasis on the importance of the right to be heard were expressed in the following words:

> *"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned* ***man upon such an occasion***

that even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."

We also wish to revisit the case of **Dishon John Mtaita v. The. D.P.P.,** Criminal Appeal No. 132 of 2009 CAT (unreported) in which the Court observed that:-

"May be the High Court was more concerned with a speedy disposal of the appeal without regard to both the natural, statutory and constitutional rights of the appellant to be heard. If that were the case, that would be a very dangerous trend which cannot be condoned by this Court... 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. Hence the impeccability of the earlier referred to saying of "More haste, less speed."

See also the case of **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** (supra) in which the Court pronounced itself that in this country, the right to be heard is a constitutional right. It said:-

> *"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 among the attributes of equality before the law, and declares in part:*
>
> *(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu . . ."*

In the circumstances, the right to be heard is both a fundamental and constitutional right, and must be observed by all courts.

Since the appellant's appeal in the present case was dismissed without affording him chance to be heard, it is obvious that in doing so, the High Court violated that cardinal principle of the right to be heard.

Consequently, the dismissal order was *ipso dure* illegal. Thus, this complaint has merit and we allow it.

It is also important to stress here that even where it was to be said that the learned judge heard the parties on the point, which we have said was not so, still the outcome of the appeal which is time barred would not have been to dismiss it, but rather to strike it out. We endeavour to explain.

We would like to expound that the terms **dismissal** and **striking out** of an appeal are two distinct terms as they have different connotations and consequences in law. The reason is clear that by dismissing the appeal, it implied that there was a competent appeal before the court which was heard and determined on merit which is not the case. Guidance is sought from the case of **Ngoni Matengo Cooperative Marketing Union Ltd. v. Alimohamed Osman** [1959] E.A. 577 in which at page 580, Court had occasion to discuss the distinction between the phrases **"striking out"** and **"dismissing"** the appeal. It said:-

> *"This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to*

"strike out" the appeal as being incompetent, rather than to have "dismissed" it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used..."

See also the case of **Juma Nhandi v. Republic**, *(supra)*

On the basis of the above, this ground too has merit and we allow it.

For reasons we have assigned, we find and hold that the present appeal has merits and we allow it. Consequently, we quash and set aside the order of the High Court which dismissed the appellant's appeal.

However, on a thorough perusal of the record, we discovered that the appellant gave his notice of his intention to appeal in time. This is because the judgment was delivered on 20.3.2014, and he gave notice of his intension to appeal on 24.3.2014. As such, the appeal was in time. In the circumstances, we direct the High Court to revive his appeal. We further direct that it should be assigned to another judge. Likewise, we

direct that his appeal should be fast tracked to pave way for expeditious hearing.

We accordingly order.

DATED at **MWANZA** this 14th day of December, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL