IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 364 OF 2015

1. FRANK s/o MGALA
2. IBRAHIM s/o KASHINDE
3. FABIAN s/o FRANCIS @ KAKUNGURUME ..... APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Khaday, J.)

dated the 22nd day of July, 2011
in
DC. Criminal Appeal No. 23 of 2010

JUDGMENT OF THE COURT

6th & 21st February, 2018

LUANDA, J.A.:

The appellants namely, FRANK s/o MGALA, IBRAHIM s/o KASHINDE, FABIAN s/o FRANCIS KAKUNGURUME (henceforth the 1st, 2nd and 3rd appellants respectively) and another person who was acquitted because the prosecution did not establish a *prima facie* case against him, were jointly and together charged in the District Court of Mpanda at Mpanda with three counts of armed robbery. At the end of the trial, the above

named appellants were convicted as charged and each was sentenced to 30 years imprisonment for each count. The sentences were ordered to run concurrently.

Aggrieved by the finding and sentences of the trial court, they unsuccessfully appealed to the High Court of Tanzania (Sumbawanga Registry). Still dissatisfied, they have come to this Court on appeal.

However, before the hearing date, a preliminary objection on a point of law based on Rule 68 (2) of the Court of Appeal Rules, 2009 (the Rules) was taken to the effect that the notices of appeal are incurably defective. When the appeal came for hearing, we allowed Ms Hanarose Kasambala, assisted by Mr. Ofmedy Mtenga, both learned State Attorneys to argue the point of law they had raised. Ms Kasambala submitted that the Notices of Appeal of the 2nd and 3rd appellants are incurably defective as they bear different numbers of the case they intended to appeal from the one in which this appeal arises from. Clarifying, she said that the correct number of the High Court which ought to have been referred to is DC. Criminal Appeal No. 23 of 2010 and not DC. Criminal Appeals Nos. 24 and 25. She went on to say that since in terms of Rule 68 (1) of the Rules, a notice of appeal institutes an appeal, the appeals of the 2nd and 3rd appellants are incompetent. They are liable to be struck out. She cited **Maselo**

Nyakinyi vs R., Criminal Appeal No. 221 of 2012 where the Court said that in the absence of a valid notice of appeal, an appeal becomes incompetent.

As regards the appeal of the 1st appellant, she prayed his appeal to be adjourned to afford the two appellants to put back their appeals on the track and the same to be consolidated and heard together.

On the other hand the 2nd and 3rd appellants said that their numbers of appeals are correct. They prayed that the objection raised be overruled. The 1st appellant had nothing to say.

In rejoinder Mr. Mtenga insisted that the notices of the 2nd and 3rd appellants are defective.

Before we go into the merits or otherwise of the point of objection raised, we wish to state at this juncture that the Court also pointed out two irregularities which we think are vital and affect the trial proceedings. We decided to address them to the parties subject to our finding to the point of law raised. So, we shall discuss them at a later stage in this judgment, if need be.

Back to the point of law raised. Following their conviction and sentence in the District Court, each appellant had filed a separate appeal in the High Court of Tanzania (Sumbawanga Registry) as follows:-

1st appellant (DC. Criminal Appeal No. 23 of 2010); 2nd appellant (DC. Criminal Appeal No. 25 of 2010) and the 3rd appellant (DC. Criminal Appeal No. 24 of 2010).

On 31/3/2011 DC. Criminal Appeal No. 23 of 2010 of the 1st appellant came on for hearing. On that day, Mr. Kilanga, learned State Attorney, who appeared for the Republic/Respondent prayed for the three appeals to be consolidated. The 1st appellant who appeared to have spoken for his colleagues did not object to the request. The High Court (Khaday, J.) agreed and made an order to this effect:

> *"Order: Appeals No. 23, 24 and 25/2010 are consolidated to form a single appeal No. 23/2010*
>
> *Sgd P. B. Khaday*
>
> ***Judge***
>
> ***31/3/2011."***

Unfortunately, the heading of the judgment of the High Court in DC. Criminal Appeal No. 23 of 2010 does not incorporate those other two appeals to have been consolidated. It is there where the confusion lies. And it is likely than not that the 2nd and 3rd appellants, being laymen, we think, were under the impression that DC. Criminal Appeal No. 23 of 2010 is not their number so they resorted to filing the notices of appeal bearing

their respective numbers. The question is whether failure on the part of the 2nd and 3rd appellants to cite the number of the case in their respective notices of appeal to reflect the number of the appeal under which the order of consolidation was made was fatal.

The question posed above taxed our minds a great deal. However, we are alive to the demand of Rule 68 (2) of the Rules which requires among things, the number of the case in which the impugned decision intended to be appealed must be clearly shown. Further, we are also aware that in terms of Rule 68 (1) of the Rules a notice of appeal institutes an appeal.

In this case we have seen there is confusion. Since the appeals were consolidated then the heading of the judgment ought to have reflected that position. Since that was not done, it cannot be said the cases were actually consolidated. As we take the cases to have not been consolidated, then each of the appellants should fall back to their respective numbers of appeals before the High Court, though it is not the proper way of doing things. It follows therefore that the notices of appeal of the 2nd and 3rd appellants are deemed to have been properly lodged. In the circumstances explained above, we find the objection raised has no merit. The same is overruled.

Earlier on we hinted that there are two irregularities which we think are fatal to the trial. The first one is found on pages 8-9 of the record. The irregularity is that the pleas of the accused persons were shown to have not been taken as per the dictates of S. 228 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA). The section reads:-

> *228 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.*

In the instant case, the accused persons pleaded to charge as follows:-

"Date: *18/5/2009*

Coram: *D.A. Magezi – DRM*

Pros: *A/Insp Nyika*

B/c. *T.M. Kazimzuri*

Accd: *All present*

PP: *Your honour, it is for preliminary hearing, facts are ready, before we proceed, I pray to substitute charge in which criminal case No. 65 of 2009 has been withdrawn under section 98(a) of our CPA Cap 20 R.E 2002.*

Court: *Substitute charge sheet read over and explained to all accused persons who are kindly asked to plea there to>*

1st accused: Plea of not guilty to 1st count

2nd count

3rd count

2nd accused: Plea of not guilty to 1st count

2nd count

3rd count

3rd accused: Plea of not guilty to 1st count

2nd count

3rd count

4th accused: Plea of not guilty to 1st count

2nd count

3rd count

Court. *Plea of not guilty entered for all accused persons for all counts.*

PP. *Your honour, I pray for another preliminary hearing date slnce facts for preliminary hearing which was ready was in respect of the former charge sheet since the offences has been consolidated in the since that criminal case No. 65/2009 has been consolidated to Criminal Case No. 66/2009 I pray for time to prepare facts for consolidated charge sheet.*

Order. *1) Preliminary hearing 01/06/2009*

2) AFRIC

D. A. Magezi
DRM
18/05/2009

The words "plea of not guilty", if at all were uttered said by the accused persons, were not denials of the charge by them. In essence, the "pleas" as appearing on the record were paraphrased by the court. We find that the court ought to have recorded the actual words uttered by each one of them in answer to the charge read to them. The way it was, it implies that the accused refused to plead to the charge and the court recorded a plea of not guilty as provided under S. 228 (4) of the CPA, which reads:-

> *228 (4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.*

In our case the record shows, the accused persons pleaded to the charge. It was not proper to enter a "plea of not guilty" to the charge as if the accused did not plead. It is clear therefore that it cannot be said the accused persons pleaded to the charge.

We take it that no plea was taken. It is a trite principle that where no plea is taken, the trial is a nullity. (See **Akbaralli Walimohamed Damji vs Regina**, 2 T.L. R (R) 137).

That is one. Two the record shows at page 86 that the prosecution did not close its case. Rather the trial Resident Magistrate did it after he had refused to adjourn the case any further. The trial Magistrate has no such authority to close the prosecution case for whatever reason. The power to do so is exclusively vested only in the person who prosecutes the case as is provided under S. 231 (1) of the CPA (see **Abdallah Kondo vs R.**, Criminal Appeal No. 322 of 2015, CAT (unreported). The trial court was wrong to do so. In any case there is a danger of the court being not seen as impartial. A court of law must always strive to be seen impartial in adjudicating cases so as to win the confidence of the parties. However, we have seen the predicament the magistrate was facing after he had issued an ultimatum that no further adjournment would be granted. We think the best way out was to dismiss the charge and discharge the accused persons under inherent powers of the Court. (See **R vs Deemay Chrispin** [1980] TLR 116). We associate ourselves with the principle propounded in that case.

In view of the foregoing, we invoke our revisional powers as provided under S. 4 (2) of the Appellate Jurisdiction Act, Cap 141 and declare the proceedings and judgment of both lower courts as a nullity.

We quash them and set aside the sentence.

We order the appellants to be tried afresh before another Magistrate. Meanwhile the appellants are to remain in remand prison to await their retrial.

Order accordingly.

DATED at **MBEYA** this 20th day of February, 2018.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL