

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MMILLA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 304 OF 2016

HASSAN ABDALLAH APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the conviction and sentence of the High Court of Tanzania
at Arusha)**

(Moshi, J.)

dated 24th day of March, 2016

**in
Criminal Appeal No. 11 of 2016**

.....

JUDGMENT OF THE COURT

10th & 12th October, 2018

MMILLA, J.A.:

The appellant in this case, Hassan Abdallah @ Sadam, was charged before the District Court of Monduli with unnatural offence contrary to section 154 (1) (a) of the Penal Code Cap. 16 of the Revised Edition, 2002. The victim of sodomy was a child who was then 4 years old (name withheld). After a full trial, the trial court convicted and sentenced him to a term of life imprisonment. He unsuccessfully appealed to the High Court, Arusha Registry, hence this second appeal to the Court.

The appellant filed a memorandum of appeal which raised three grounds that; the judgment of the trial court cited a wrong provision of law; that there was variance between the particulars in the charge sheet and the evidence on record; and lastly that he was wrongly denied the chance to defend himself.

When the appeal was scheduled for hearing before us on 10.10.2018, the appellant appeared in person and was not defended. He elected for the Republic to submit first, but reserved the right to make a rejoinder if need would arise.

On the other hand, Mr. Halili Nuda, learned Senior State Attorney, represented the respondent/Republic. Upon being invited to make his submission, he successfully prayed for leave to submit on a fundamental observation he detected on the Record of Appeal.

The concern of the learned Senior State Attorney is that there is a problem regarding the identity of the criminal case which was appealed against by the appellant in the High Court. In his observation, the judgment of the trial court appearing at page 33 of the Record of Appeal indicates that the appellant's case was Criminal Case No. 67 of 2012. That

case number is also reflected in the Notice of Appeal to that court appearing at page 32 of that record.

On the other hand however, Mr. Nuda exhibited that the endorsement on the top right hand side corner of the charge sheet at page 1 of that record shows that the appellant's case was Criminal Case No. 69 of 2012. The same number is indicated in the petition of appeal to that court appearing at page 31 thereof, as well as the judgment of the High Court at page 98 of that record.

In view of this scenario, Mr. Nuda submitted, there was an obvious confusion which resulted into the High Court hearing the wrong appeal because the Notice of Appeal in the Record of Appeal referred to Criminal Case No. 67 of 2012 and not 69 of 2012. He referred us to the case of **Salim Alphan v. Republic**, Criminal Appeal No. 547 of 2016, CAT (unreported). In the circumstances, he requested the Court to invoke the powers it has under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) and quash the proceedings and judgment before the High Court. If that is done, he said, the only valid and surviving decision will be that of the trial court, for which the appellant will be at liberty to still appeal against it, subject to the law of limitation.

On his part, the appellant said that he was in agreement with the learned Senior State Attorney, and left the matter in the hands of the Court.

On our part, after carefully going through the Record of Appeal, particularly pages 1, 31, 32, 33 and 98 cited to us by the learned Senior State Attorney, we agree with him that there was an apparent confusion as to the actual case which was the subject of appeal before the first appellate court. This is because the Notice of Appeal cited Criminal Case No. 67 of 2012 as having been the subject of the appeal to the High Court, while the memorandum of appeal and the judgment of the High Court indicate that it was Criminal Case No. 69 of 2012 which was heard and determined by that court. Consequently, the proceedings and judgment of the High Court were a nullity because there was no proper appeal before it - See the case of **Salim Alphan v. Republic** (supra).

In view of the above, we invoke the powers obtaining under section 4 (2) of the AJA, in respect of which we quash the proceedings and judgment of the first appellate court. That means, the fall-back is to the decision of the trial court. In the circumstances, the appellant is at liberty,

subject to the law of limitation, to re-file his appeal to the High Court against that decision if he so wishes.

DATED at **ARUSHA** this 11th day of September, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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


B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL