IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MWARIJA, J.A., MZIRAY, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 124 OF 2017

1. GASPARI SIMON SHITUHU
2. ALOIS HAMSINI MCHUWAU ..... **APPELLANTS**

VERSUS

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

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

(Lukelelwa, J.)

dated the 26th day of August, 2004

in

PC Criminal Appeal No. 1 of 2002

RULING OF THE COURT

13th & 27th February, 2019

MWARIJA, J.A.:

The appellants, Gaspari Simon Shituhu and Aloisi Hamsini Mchuwau together with another person, Mathias Focus Abeid were charged in the Primary Court of Nanyamba with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 17/1/2002 at about 18.00 hrs at Kitama Bondeni area in Mtwara rural district, the appellants and the said person (the appellant's co-

accused) stole TZS 20,000.00 from one Hamadi Hasani Liyamata and immediately before such stealing, they injured him by cutting his left hand with a knife in order to obtain the said amount of money.

At the trial, the prosecution relied on the evidence of two witnesses including the complainant who testified as PW1. The appellants and their co-accused depended on their own evidence. Having considered the tendered evidence, the trial primary court found them guilty as charged. They were consequently sentenced to thirty (30) years imprisonment. Aggrieved by the judgment and sentence, they unsuccessfully appealed to the District Court of Mtwara.

In his decision, the learned appellate Resident Magistrate found that the case against the appellants was proved beyond reasonable doubt. He found that they were properly identified at the scene of crime as the persons who robbed PW1. Aggrieved further, the appellants appealed to the High Court. The appellants' co-accused did not however, live to know the outcome of his appeal. According to the proceedings dated 21/8/2003, he passed away while the appeal was pending in the High Court. With regard to the appellants, their appeal was dismissed for lack of merit.

Undaunted, the appellants have preferred this third appeal. They did so after having obtained a certificate from the High Court that their appeal involves a point of law worth consideration by the Court. The relevant application is Miscellaneous Criminal Application No. 2 of 2017. In the order dated 17/5/2017 in which the certificate was granted the High Court (Twaib, J.) stated as follows:-

> *"... I am satisfied that the matter deserves to be referred to the Court of Appeal on at least one basic issue, namely whether or not the Primary Court had jurisdiction to entertain the case, in which the applicants were charged with armed robbery, contrary to sections 285 and 286 of the Penal Code, Cap. 16."*

Earlier on, vide Miscellaneous Criminal Application No. 2 of 2016, the appellants applied for extension of time to institute a notice of appeal. That application was granted on 15/2/2017.

At the hearing of the appeal, the appellants appeared in person, unrepresented while Mr. Kauli George Makasi, learned State Attorney appeared for the respondent. From the nature of the proceedings, the

respondent was supposed to be Ahmad Hassan Liyamata, the complainant in the primary court.

For the reasons which will be apparent herein, we will not proceed to determine the appeal on merit. Since the case giving rise to the appeal originated in the primary court where parties prosecute or defend their own cases in person, we required the learned State Attorney to address us on the propriety or otherwise of the DPP's appearance as the respondent in the proceedings at the level of the High Court in the applications mentioned above.

In response, the learned State Attorney conceded that, although the DPP became the respondent in the High Court in the two applications, he did so without issuing a notice that he wished to appear as a party to the proceedings. It was Mr. Makasi's submission that in their applications, the appellants cited the Republic as the respondent. As a result, the Hon. Attorney General was accordingly served to appear. Mr. Makasi contended that, it was under the above stated circumstances that the DPP appeared in the High Court in the mentioned applications.

On the propriety or otherwise of the DPP's appearance in the case in which the proper party should have been the complainant, Mr. Makasi argued that in criminal cases, the DPP may appear as a party in any court and defend or conduct prosecution in criminal cases. He relied on the provisions of section 97 of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA) which provides as follows:-

> *"A public prosecutor may appear and plead without any written authority before any court in which any case of which he has charge is under inquiry, trial or appeal; and if any private person instructs an advocate to prosecute in any such case the public prosecutor may conduct the prosecution and the advocate so instructed shall act therein under his directions."*

Mr. Makasi argued therefore that on the basis of the above stated provision of the CPA, the DPP is empowered to appear in any proceedings originating in any court including the primary court and his appearance as a respondent in the High Court was for that reason, proper.

The appellants did not have any arguments in response, understandably because the raised issue involved a point of law.

Having considered Mr. Makasi's submission, we were, with respect, unable to agree with him. Since the case originated in the primary court the provisions which empower the DPP to appear in the proceedings is subject to the procedure stated under sections 20(1) and 25(1) of the Magistrates' Courts Act [Cap 11 R.E. 2002] (the MCA). Section 20 (1) provides as follows:-

> *"20 –*
>
> *(1) Save as hereinafter provided-*
>
> *(a) in proceedings of criminal nature, any person convicted of an offence by a primary court, or where any person has been acquitted by a primary court, the complainant or the Director of Public prosecution; or*
>
> *(b) In any other proceedings, any party,*
>
> *if aggrieved by an order or decision of the primary court, may appeal therefrom to the district court of the district for which the primary court is established.*

As for S. 25 (1), the same provides as follows:-

"25 –

(1) Save as hereunder provided-

(a) in a proceedings of a criminal nature, any person convicted of an offence or, in any case where a district court confirms the acquittal of any person by a primary court or substitutes an acquittal for conviction, the complainant or the Director of Public prosecution; or

(b) in any other proceedings any party, aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal therefrom to the High Court...."

With regard to appearance of the DPP in the High Court in an appeal originating in the primary court, the procedure is regulated by section 34 of the MCA. Section 34 (1) (a) and (b) which provides as follows:-

"34-

(1) Save where an appeal is summarily rejected by the High Court and subject to any rule of court

relating to substituted service, a court to which an appeal lies under this part shall cause notice of the time and place at which the appeal will be heard to be given-

(a) to the parties or their advocates

(b) in all proceedings of a criminal nature in the High Court, or in any such proceedings in the district court in which he is an appellant or ***has served notice that he wishes to be heard, to the Director of Public Prosecutions provided that no such notice need be given-***

(i) .....

(ii) .....

(iii).....

(iv) ***to the Republic or to the Director of Public Prosecutions except in the circumstances specified in paragraph (b) of this subsection.***

[Emphasis added].

It is clear from the above cited provisions of the MCA that the DPP may only be served to appear in the High Court as a party in a case which

originates in the primary Court only if he is the appellant or when *"he has served notice that he wishes to be heard."* In the present case, the DPP was served after the appellants had cited him as the respondent in the High Court. He did not serve a notice that he wished to be heard. As it turned out, both the applications for extension of time and certification of a point of law were heard in the absence of the complainant. There is no gainsaying therefore, that the irregularity occasioned injustice to the complainant for having been denied the right to be heard. The proceedings of the High Court were for that reason, vitiated.

In the case of **Rajabu Ngwanda & Another v. The Republic**, Criminal Appeal No. 243 of 2014 (unreported) in which a similar situation occurred, the Court observed as follows:-

> *"We earnestly scanned the court record in the present case looking for indication if the DPP was a party in the proceeding in issue or that he served notice that he wished to be heard as contemplated by section 34(1) (b) of the MCA but in vain.... That being the position, we are constrained to agree with Mr. Mwandalama that they were wrongly joined in this appeal."*

The Court went on to State as follows on the effect of the irregularity:-

> *"... the appeals before the District Court and the High Court were determined in the absence of the appropriate party who was not served. Surely the omission amounted to breach of the principle of natural justice of the right to be heard, the consequences of which are to make the proceedings null and void- See the case of* ***Rukwa Auto Parts and Transport Ltd v. Jestina George Mwakyoma*** *[2003] TLR 251 and* ***Hamisi Rajabu Dibagula v. Republic*** *[2004] TLR 181."*

The effect of appearance by the DPP in contravention of S. 34(1) (b) of the MCA was also underscored by the Court in the case of **Maiga Lucas v. The Republic**, Criminal Appeal No. 248 of 2013 (unreported).

We have found above that the joining of the DPP amounted to an irregularity which vitiated the proceeding of the High Court in the above mentioned applications. In the event, we exercise the powers of revision conferred in the Court by S. 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002], and hereby quash the proceedings in Miscellaneous Criminal Applications No. 21 of 2016 and 2 of 2017 and set aside the rulings arising

therefrom. The end result is to render the appeal incompetent. The same is hereby struck out.

On the way forward, we order that the record be remitted to the High Court so that the appellants may initiate the necessary process for pursuing their intended appeal in accordance with the law.

DATED at **MTWARA** this 26th day of February, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL