

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

(CORAM: MUSSA, J.A., LEVIRA, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 48 OF 2019

MAWAZO SIMON NGODELAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the Order of the Resident Magistrate Court
of Singida at Singida)**

(Lema, PRM- Extended Jurisdiction)

dated the 8th day of December, 2015

in

Criminal Appeal No. 16 of 2015

JUDGMENT OF THE COURT

24th & 26th September, 2019

LEVIRA, J.A.:

The appellant, Mawazo Simon Ngodela was charged with three counts of Unnatural Offence contrary to section 154(1)(a) of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). The prosecution side alleged that in June 2011 at unknown time at Kazikazi Village within Manyoni District in Singida Region, the appellant did unlawfully have carnal knowledge of three children, to wit, Paulo Julius, Elizabeth Edward and Mtena Julius aged two and a half, four and five years, respectively against the order of nature. Having been tried, the appellant was

acquitted in respect of the third count but, convicted on the first and second counts and he was sentenced to serve thirty (30) years imprisonment in respect of each count. However, the sentence was ordered to run concurrently. Aggrieved by both, the conviction and the sentence, the appellant appealed to the High Court and his appeal was assigned to the Principal Resident Magistrate (PRM) with Extended Jurisdiction, W. E. Lema. Due to the circumstances which will be revealed later in this appeal, his appeal was dismissed by the said PRM. The appellant was again aggrieved by the decision of the first appellate court and hence the current appeal wherein, the two grounds raised are summarised hereunder:

- 1. That, the first appellate court dismissed the appellant's appeal without according him a right to be heard.*
- 2. That, the first appellate court erred in law and fact by failing to evaluate, analyse and differentiate between written submission and the appellant's petition of appeal placed before it.*

At the hearing of this appeal, the appellant appeared in person, unrepresented whereas, the respondent, Republic was represented by Ms. Judith Mwakyusa, learned State Attorney.

The appellant preferred to hear first from the learned State Attorney regarding his appeal as he reserved his right to make a rejoinder. On her part, Ms. Mwakyusa supported the appeal. She submitted in regard to the first ground of appeal to the effect that, it is true that the appellant was denied his right to be heard despite the fact that he indicated his intention to be present during the hearing of his appeal. According to Ms. Mwakyusa, the learned PRM with Extended jurisdiction contravened Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time (the Constitution) which provides for the right to be heard. She referred us to the decision of the Court in **Fweda Mwanajoma and Johan Daniel v. Republic**, Criminal Appeal No. 174 of 2008 (unreported) where the Court stated at page 11 as follows:

"Article 13(6)(a) of the Constitution of the United Republic of Tanzania enjoins the state to ensure that there is in place a system whereby any person is afforded a fair hearing and the right of appeal against any decision on his rights..."

Ms. Mwakyusa argued that failure by the first appellate court to accord the appellant the right to be present and heard on appeal, amounted to a nullity proceedings and order of the said court. She thus prayed for this appeal to be allowed and under Section 4(2) of the Appellate Jurisdiction Act, Cap 141 (the AJA) the proceedings of the first appellate court be nullified, quashed and the order be set aside. She urged us to remit the case file back to the High Court to appoint another Magistrate with Extended Jurisdiction to hear the appellant's appeal afresh.

Having so prayed, Ms. Mwakyusa did not see the need of submitting on the second ground of appeal.

In rejoinder, the appellant had no much to submit, he only concurred with the position taken by Ms. Mwakyusa and prayed for the appeal to be allowed.

We appreciate the focussed submission made by Ms. Mwakyusa in regard to the first ground of appeal. We as well had an opportunity of perusing the record of appeal and in mind we had similar observation as made by Ms. Mwakyusa in respect of the said ground of appeal after discovering that, indeed, the appellant was not accorded fair trial.

It is trite law that parties to a case have equal rights to a fair trial which includes but not limited to, the right to be heard on appeal. The said right also extends to the right to appear during the hearing of the appeal. As rightly submitted by Ms. Mwakyusa, this right, among others, is provided under Article 13(6)(a) of the Constitution. For ease of reference, the said Article provides as follows:

"When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."

However, in the present appeal we observed that, at the hearing of the appeal the PRM with Extended Jurisdiction, for some reasons not apparent on the record of appeal, gave an order on the competence of the said appeal in the absence of the appellant who initially indicated his intention to be present during hearing of his appeal. The said order is reproduced hereunder:

"ORDER

*From the written submission which was filed by the appellant purporting to be petition of appeal, **the appellant indicated to be present during hearing.** Today he is not present his presence will not change what is already in record. Upon examining the alleged petition which serves as written submissions and not Petition of Appeal as required by the provision of section 362 (2) of the Criminal Procedure Act Cap. 20 where the Memorandum shall contain particular and facts of law which the trial Magistrate erred and hence the present appeal (sic). **Hence before this court there is no proper memorandum of appeal filed and hence the appeal is incompetent and be dismissed as it contravened the provision of section 362(2) of the Criminal Procedure Act Cap. 20 Revised Edition 2002.** Order accordingly.*

Signed and Stamped
(W.E. LEMA)
PRM. EXT. JURISD.
8/12/2015." [Emphasis added].

The above extract portrays a clear picture that, the first appellate court deliberately denied the appellant the right to be heard under the name of incompetent appeal. In the circumstances therefore, we find

and hold that, the first appellate PRM with Extended Jurisdiction erred in law by denying the appellant his right to be present and to be heard during determination of his appeal without justifiable reasons. We hold so because in the record of appeal, there is no proof that summons for appearance was issued and dully served to the appellant and yet, he failed to appear with no good reason. With respect to the learned PRM with Extended Jurisdiction, it is our considered opinion that, the defectiveness (if any) of what he referred to as the "purported petition of appeal" could not be cured by dismissing the appeal, more so, after stating that the appeal is incompetent. This opinion notwithstanding, it is a position of the law that, in the first place the said PRM with Extended Jurisdiction was not supposed to give any order which would have affected the rights of the appellant in his absence without proof of proper service on him (the appellant).

Having so stated, we agree with both parties that the appellant was denied his right to a fair trial and as stated by Ms. Mwakyusa, we do not see any need of determining the second ground of appeal since doing so will amount to acting on a nullity. Consequently, we allow this appeal. In exercise of the revision power conferred upon the Court under Section 4(2) of the AJA, we nullify and quash the proceedings of

the Resident Magistrate Court of Singida conducted under Extended Jurisdiction in Criminal Appeal No. 16 of 2015 and we hereby set aside the order made therefrom. We order the case file to be remitted back to the High Court of Dodoma for the appointment of another PRM with Extended Jurisdiction to undertake the conduct of the intended appeal. We further order that, in the meantime the appellant shall remain under custody pending the said process. Taking into consideration that this case is among the old cases, we direct the Registrar to give it priority for the interest of justice.

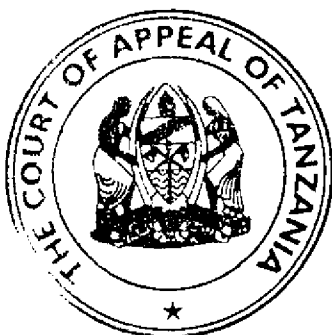
DATED at DODOMA this 25th day of September, 2019.


K. M. MUSSA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered on this 26th day of September, 2019 in the presence of the appellant in person, unrepresented, whereas, the respondent, Republic was represented by Ms. Judith Mwakyusa, learned State Attorney is hereby certified as a true copy of the original.




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL