IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 351 OF 2018

MENYENGWA TANDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Masanche, J.)

dated the 12th day of December, 2007
in
Misc. Criminal Application No. 34 of 2005

RULING/REASONS FOR ORDER OF THE COURT

23rd September & 2nd October, 2019

MUSSA, J.A.:

This appeal was placed before us for hearing on the 23rd day of September, 2019. Having heard the parties on the appellant's two grounds of appeal, we, at once, nullified the entire proceedings of the High Court (Masanche, J.) and extended time for the appellant to lodge a fresh appeal before the High Court within 30 days from the date of the order. We, however, reserved our reasons for so ordering which we now give.

The appellant, along with four others were arraigned in the District court of Kondoa upon an indictment which was comprised of two counts. More particularly, in the charge sheet, the appellant stood as the second accused person, whereas his co-accused persons were, namely, Jumanne Silvesta @ Teleza, Mosi Mahanze @ Marasta, Sinyauo Akbu and Maria Mando who were, respectively, arraigned as the first, third, fourth and fifth accused persons.

As it were, the first count was drawn against the first four accused persons, whereas the second count was directed against the fifth accused alone. On the first count, the appellant along with the other three co-accused persons were arraigned for armed robbery whilst on the second count, the fifth accused person was charged for receiving stolen properties.

When the charge sheet was read and explained by the trial court on the 8th October, 2002 all accused persons refuted the prosecution accusation, save for the appellant who admitted it. In consequence, the trial Magistrate recorded a plea of guilty with respect to the appellant alone. Thereafter, the prosecutor

outlined the facts which were acknowledged by the appellant and in the end result he was, on that same date, convicted and handed down a custodial sentence of thirty years with 12 strokes of a cane.

The appellant was dissatisfied but, apparently, he could not prefer an appeal to the High Court within the prescribed time. Thus, on the 6th July, 2007 he lodged an application seeking an order of the High Court to enlarge time within which to file the appeal belatedly. In his affidavit in support, he indicated that he would wish to be present at the hearing. On the 31st October, 2007 the application was placed before Masanche, J. and, for purposes of clarity, we will let the record speak for itself on what transpired in Court: -

> *"Date: 31/10/2007*
>
> *Coram: Hon. J.E.C. Masanche – Judge*
>
> *Applicant: Present*
>
> *Respondent: R. Nchimbi – S/A*
>
> *CC: Ijinji*
>
> *Applicant: I did not plead guilty*

Nchimbi: The plea was unequivocal

J.E.C. MASANCHE – JUDGE

31/10/2007

Order: Ruling 12/12/2007".

In the Ruling, the application for extension of time was rejected for two main reasons: **First**, having gleaned from the appellant's supporting affidavit, the judge was of the view that the appellant did not disclose reasonable cause for the delay and; **second**, the court took the position that even if the matter went on full trial, there were no chances of a successful appeal. The appellant is dissatisfied upon a memorandum of appeal which goes thus: -

> *"1. THAT, your honor Justice of Appeal the presiding Judge erred in law and fact when rejected (sic) the appellant application when (sic) directed himself on the issue of evidence that the appellant pleaded guilty and his appeal could not succeed while the matter before the court was an application for leave to appeal and not appeal.*

2. *THAT, your honor Justice of appeal the presiding Judge erred in law and fact when directed (sic) himself that when the application for leave to appeal out of time where there is no chance of success, in the intended appeal such application must be rejected without considering that the matter before the court was not an appeal."*

At the hearing before us, the appellant entered appearance in person, unrepresented, whereas the respondent Republic had the services of Mr. Morice Sarara, learned State Attorney. When we invited him to address us in support of the grounds of appeal, the appellant opted to let the respondent to submit first and retained his right to make a rejoinder, if need be.

On his part, Mr. Sarara criticized the High Court for handling the appellant's application for extension of time as if it was an appeal and, thereby, rejecting it on account that the appeal stands no chances of success. At that moment in time, he said, there was, as yet, no appeal before the High Court and the

question, for instance, whether or not the appeal was meritorious was not open for consideration.

In his rejoinder, the appellant went along with the submission of the learned State Attorney and just as well criticized the High Court judge for, seemingly, summarily closing the door to his appeal without hearing him on the quest for extension of time.

Having heard either side on the issue of contention, we were, at once, satisfied that the cardinal principle of natural justice was not adhered to at the hearing of the application for extension of time before the High Court. Granted that the appellant was present at the hearing but, his presence made no difference if, as here, he was not accorded an opportunity to express the reasons tied to his quest for extension of time. As has been previously reiterated by the Court, in this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right under the provisions of Article 13(6) (a) of the Constitution which stipulates in part: -

"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 case of **Mbeya – Rukwa Autoparts and Transport Ltd V. Jestine George Mwakyoma** [2003] TLR 251, the Court construed the bolded portion of the referred Article to mean that Mrapata (the acronym of Mbeya – Rukwa Autoparts and Transport Limited) had the right not only to be heard but **to be heard fully**. The Court went on to hold that a decision reached without regard to the principles of natural justice and/or in contravention of the Constitution is void and of no effect.

In the matter at hand, as we have already intimated, the cardinal principle of natural justice was contravened, hence our nullification order which we promptly gave in terms of section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Laws as well as Rule 39(6) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Having done so, we *suo motu* invoked the provisions

of Rule 47 of the Rules and extended time for the appellant to lodge the appeal within 30 days from the date of the Order

The appeal against conviction and sentence, we now accordingly order, should be heard on the merits by the High Court before another Judge of competent Jurisdiction.

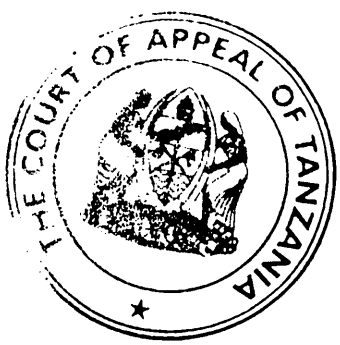
DATED at **DODOMA** this 2nd day of October, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling/Reasons delivered on this 2nd day of October, 2019 in the absence of both parties, is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL