IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 254 OF 2018

BARNABAS S/O WILLIAM @ MATHAYO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from decision and order of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 15th day of May, 2018
in
Criminal Appeal No. 57 of 2018

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JUDGMENT OF THE COURT

31st March, & 2nd April, 2020

MMILLA, J.A.:

The subject of the charges in this case was a consignment of kerosene, the amount of which was 84,000 liters which were stolen at Irugwa area in Lake Victoria in the waters of Tanzania in Ukerewe District, Mwanza Region, en-route to Mwanza from Kenya. The owner of the consignment one Elias Abala (PW1), had hired a boat christened MV. Kalebezo from Pascal Julius (PW7), to ferry the said kerosene into the country at a price of Tzs. 5,800,000/=. According to PW1, the boat was scheduled to leave Nansio in Ukerewe for

Kenya on 29.7.2015, and was placed under the supervision of two persons; Acha Gerald and David Hinda (PW2 and PW3 respectively). The two persons were charged with duty to bring the said kerosene at the port of Mwanza.

After loading the kerosene shipment in Kenya (place of loading was not named), PW2 and PW3 began the journey back to Mwanza. Unfortunately, when they were at Irugwa area on 1.8.2015, they were hijacked by bandits who seized and took control of the boat and stole the entire consignment of kerosene they were carrying. While they were being held as captives in the lake in another small boat by some of the bandits, the other bandits led MV. Kalebezo to Kakukuru area at which the consignment was offloaded at a certain filling station.

On the other hand, PW1 was informed of that incident on 2.8.2015. Upon that information, he and his driver one Otwalo left Mwanza for Kakukuru. On the way, they saw a Tanker Reg. No. T.846 BUZ and its trailer Reg. No.T.207 BWE and stopped it. The said motor vehicle was being driven by Nyakubosa Mwita (third accused) who was in the company of Harrison Richard (the second

accused). On interrogating them, the third accused told PW1 that he was an employee of Barnabas William @ Mathayo (the appellant), and was carrying 36,000 litres of kerosene from Kakukuru area, and was heading to Mwanza.

On the basis of that tip, PW1 reported the incident to the police who sprang into action. The police took control of that track and trailer and the consignment. They interrogated the second and third accused persons who told them that they loaded that kerosene at Kakukuru Filling Station and mentioned the appellant as the one from whom they received orders to transport that consignment to Mwanza. Curiously, the police went to Kakukuru Filling Station and conducted inspection. They recovered thereat 47,000 other litres of kerosene.

The police investigation led them to believe that the appellant, and those two persons they were holding, Harrison s/o Richard and Nyakubosa s/o Mwita, were involved in that saga. Consequently, they charged them before the Resident Magistrate's Court of Mwanza at Mwanza (the trial Court) with two counts; conspiracy to commit an offence contrary to section 384 of the Penal Code Cap.

16 of the Revised Edition, 2002 (the Code), and receiving stolen goods contrary to section 311 of the Code.

After a full trial, on 13.10.2017, the trial court found all the accused not guilty and acquitted them in respect of the first count. However, while the second accused was similarly acquitted of the second count, the appellant and the third accused were convicted on that count. Luckily however, they were discharged upon condition that they would not commit any other offence within a period of three (3) months from the date of that sentence. The appellant was aggrieved with conviction, and appealed to the High Court of Tanzania at Mwanza.

On 15.5.2018, the record was placed before the first appellate judge (Hon. Bukuku, J.) who promptly made an order that the appeal was time barred and dismissed it. The dismissal of his appeal dissatisfied the appellant, hence the present appeal to the Court.

On the date of hearing of this appeal the appellant, who was also present in Court was represented by Mr. Vedastus Laurean, learned advocate; whereas the respondent/Republic was represented by Mr. Pascal Marungu, learned Senior State Attorney.

At the inception of hearing, Mr. Laurean prayed to adopt the memorandum of appeal and the written submissions which were filed by the appellant. The two point memorandum of appeal raised the following grounds:-

(1) That, the Hon. Judge erred in law in summarily dismissing the appeal denying the appellant the right to be heard.

(2) That, the Hon. Judge erred in law and in fact in making an order that the appeal was out of time.

Mr. Laurean proposed to discuss these grounds together. We welcomed the idea.

The appellant's learned advocate's oral submission was in all respects similar to the written submission earlier on filed. It is contended that the first appellate judge erroneously found that the appeal before her was filed out of time. He stressed that the appellant had strictly complied with the demands of section 361 (1) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). He remarked that the proviso to that section instructs that in computing the 45 days within which to file the appeal, the

period required for obtaining copies of the proceedings and judgment or order appealed against shall be excluded. He added that section 362 of the same Act explains how the appeal should be brought, and that it mandatorily directs that it must be accompanied by copies of proceedings and judgment subject of the appeal. We entirely agree with him.

In an endeavour to illustrate the point that the appeal was timeous, Mr. Laurean stated that the judgment of the trial court was handed down on 13.10 2017. While the appellant lodged a notice of intention to appeal in the trial court on 18.10.2017; a letter he wrote applying to be supplied with the proceedings and judgment was received by that court on 16.10.2017. Although there is no indication in the Record of Appeal as to when those documents were supplied to the appellant, he said, there is one clue showing that the proceedings were certified on 6.2.2018, following which he filed the appeal on 1.3.2018. On the basis of this, Mr. Laurean was confident that since 45 days had not elapsed from the date the certification was made on 6.2.2018, that is an indication that the appeal was within the required time. He relied on the Court's decision in **Sospeter Lulenga v. Republic,** Criminal Appeal No. 108 of 2006

(unreported). In that case the Court intervened, allowed the appeal, and directed the High Court to rehear the appeal it dismissed upon a finding that in dismissing the same, it did not exclude the time required for obtaining copies of the proceedings and judgment appealed against.

According to Mr. Laurean, the only problem which occurred is that after the appeal was placed before the first appellate court, the judge did not bother to give the parties the chance to be heard. Could be, he added, the judge was misled by an endorsement appearing at page 102 of the Record of Appeal which indicated that the appeal was time barred. Had the judge read the record before her, he added, she could have found that the said endorsement was incorrect and unreliable. He similarly submitted that had the judge given the parties an opportunity to be heard; most probably she could have escaped a stray into that error. He emphasized that it was not proper to have denied the parties the right to be heard. He cited the case of **A. B. N. @ A. A. v. Republic,** Criminal Appeal No. 462 of 2015, (unreported). Notably, that case stressed, among other things, the right of the parties to be heard.

For reasons he advanced, Mr. Laurean urged the Court to allow the appeal and direct the first appellate court to hear and determine on merit the appeal it dismissed.

On his part, Mr. Marungu informed the Court that he was supporting the appeal along the reasoning given by his learned friend, Mr. Laurean. He said he had nothing substantial to add.

We have dispassionately considered the submissions of both learned counsel. We will similarly tackle the grounds of appeal generally just like the counsel did.

A careful perusal of the Record of Appeal supports the arguments advanced by Mr. Laurean that after delivery of the judgment by the trial court on 13.10.2017, the appellant promptly did two things; he wrote a letter to the trial court on 16.10.2017 requesting to be supplied with copies of the proceedings and judgment for purposes of appeal, and on 18.10.2017 he lodged the Notice of Appeal. Looking at the dates, it is more than clear that he complied with the provisions of section 361 (1) (a) of the CPA which requires a person intending to appeal against the decision of the trial court to file a notice of intention to appeal within a period of ten

(10) days. Strikingly also is the fact that, though there is no indication in the Record of Appeal as to when the appellant was supplied with copies of the proceedings and judgment, there is one vital tip-off to help us gauge that since the proceedings were certified on 6.2.2018 as reflected at page 85 of the Record of Appeal, and because the appeal was filed on 1.3.2018, *ipso facto*, the appellant complied with section 361 (1) (b) of the CPA, read together with its proviso. Section 361 (1) (a) and (b) provides that:-

> *"(1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant–*
>
> *(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and*
>
> *(b) has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order,*
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> *save that in computing the period of forty-five days the time required for obtaining a*

copy of the proceedings, judgment or order appealed against shall be excluded."

As earlier on pointed out, because 45 days had not elapsed as at 1.3.2018 when the appeal was filed counted from 6.2.2018, the day on which the proceedings were certified by the trial court, it is certain that the first appellate judge erroneously held that the appeal was out of time.

We are impressed with the argument of Mr. Laurean that could be, the endorsement appearing at page 102 of the Record of Appeal informing that the appeal was out of time misled the honourable first appellate judge. We think that had she thoroughly read the record before her, she could not have strayed into that mistake. More so, she could have escaped that error had she given the parties chance to be heard before she made the decision to dismiss that appeal on account that it was time barred.

We need to emphasize here that all courts are enjoined to observe the cardinal principles of natural justice when conducting trials. No doubt, those principles are the very foundation upon which our judicial system rests, we should therefore put emphasis on fair trial; likewise measures to avoid bias and seeing to it that both sides

in a case are afforded opportunity to be heard before a final decision is reached, failing which there is a miscarriage of justice. We emphasized in **Mbeya-Rukwa Auto Parts and Transport v. Jestina Mwakyoma** [2003] T.L.R. 251 that:-

> *"It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard: audi alteram partem. In* ***Ridge v. Baldwin*** *[1964] AC 40, the leading English case on the subject, it was held that a power which affects rights must be exercised judicially, i.e. fairly.* ***We agree and therefore hold that it is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away.*** *As similarly stated by Lord Moris in* ***Furnell v. Whangarei High School Board*** *[1973] AC 660, "Natural justice is but fairness writ large and judicially."* [The emphasis is ours].

What is explained above is the spirit of Article 13 of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, on the basis of which we say, natural justice

ceased to be a mere principle of common law; but has become a fundamental constitutional right. Article 13 (6) (a) thereof includes the right to be heard among the attributes of equality before the law – Again, see **Mbeya-Rukwa Auto Parts** (supra).

Where such right may not have been observed as is the position in the present case, the decision resulting therefrom is abhorrent, it cannot stand – See the case of **Abbas Sherally and Another v. Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported) where it was held that:-

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it wiii be nullified,*** *even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice." [The emphasis is ours].*

That said and done, having said that the appeal was timeous as against the finding of the first appellate court; we find merit in this appeal and allow it. We reverse the decision of the High Court

and direct that court to hear and determine on merit the appeal it dismissed erroneously .

Order accordingly.

DATED at **MWANZA** this 1st day of April, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of April 2020, in the Presence of Appellant in person represented by Mr. Vedastus Laurean learned advocate and Ms. Mwamini Fyeregete Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL