

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KWARIKO, J.A.,)

CRIMINAL APPEAL NO. 254 OF 2012

EMMANUEL NGUNJAAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Twaib, J.)

dated 28th day of November, 2011

in

(DC) Criminal Appeal No. 97A of 2011

REASONS FOR THE DECISION

24th March & 28th May, 2020

KWARIKO, J.A.:

This appeal was called on for hearing on 24/3/2020. After hearing the submissions from the learned State Attorney and the appellant, we ordered the appellant's immediate release from prison. We deferred the reasons for that decision which we are now set to give.

The background to this appeal is as follows. The appellant was arraigned before the District Court of Morogoro for unnatural offence contrary to section 154 (1) (a) of the Penal Code [CAP 16 R.E. 2002]. At the end of the trial he was convicted and sentenced to thirty years in prison. Aggrieved by that decision, the appellant preferred an appeal to the High Court of Tanzania at Dar es Salaam. The appeal was duly heard and, in its decision, the High Court quashed the appellant's conviction, set aside the sentence and ordered the appellant to be set free.

In a bizarre turn of events, the appellant filed this appeal against the decision of the High Court. In his memorandum of appeal, the appellant raised four grounds to "challenge" the decision of the first appellate court, which for the reasons that will be apparent soon, we find no need to reproduce all of them here.

At the hearing of the appeal, the appellant appeared in person, fended for himself whereas the respondent Republic was represented by Ms. Grace Mwanga, learned State Attorney. When he stood to argue his appeal, the appellant adopted his grounds of appeal and elected to give

room to the learned State Attorney to respond to his grounds of appeal reserving his right to rejoin later if the need to do so would arise.

In her response, the learned State Attorney canvassed the first ground only which she said it is sufficient to dispose of the appeal. This ground of appeal is to the effect that:

"The judgment of the first appellate court is ambiguous and confusing".

The learned State Attorney prefaced her submission by supporting the appeal. Arguing the first ground, the learned counsel conceded that the judgment of the first appellate court is confusing. She explained that at first the judge nullified the proceedings of the trial court, quashed conviction, set aside the sentence and ordered release of the appellant. However, surprisingly, that judgment contained other matters after that pronouncement. She argued that according to that decision, the appellant ought to have been released from custody unless he was otherwise lawfully held. The learned State Attorney submitted that she was surprised that the appellant continued to serve the sentence. She urged us to allow the appeal and order the release of the appellant from custody.

In his rejoinder, the appellant only concurred with the submission of the learned State Attorney. On being prompted by the Court, the appellant submitted that the impugned judgment was delivered in his presence but he was taken back to prison to wait for the release order which did not come until he decided to appeal to this Court.

We have keenly considered the submissions of the parties. As regards the first ground of appeal, we hasten to say that, we are equally surprised that the appellant had to continue serving the sentence for the last nine or so years after the judgment of the first appellate court. This is so because that court had allowed his appeal and ordered his release from prison. We find it deserving to let the words of the Judge speak for themselves: -

"In the final analysis, I nullify the proceedings before the District Court, quash the conviction and set aside the sentence. There shall however be no retrial and the appellant is set free forthwith unless otherwise lawfully held."

With the foregoing pronouncement quashing the conviction, setting aside the sentence coupled with an order to set the appellant free, no one

would have expected the appellant to go back to prison. What would have followed is the release order prepared by the Registrar to be sent to prison as an authority for the release of the appellant. This was not done; to the detriment of the appellant. We are confident that this conduct is unacceptable and it should not happen to any other person in the future. Those who are entrusted with the duty to deal with matters concerning persons who are under restraint are urged to adhere to their calling. Therefore, the stay of the appellant in prison while his release had been ordered offended the ends of justice and was illegal. He was not even required to appeal against the decision of the first appellate court because there was nothing to appeal against on his part.

For the avoidance of doubt, we have scanned the original court record and having so done, we think the confusion was brought by the inclusion in the typed script of a text which is not part of the decision of the High Court. We therefore find that it has no legal effect in as far as that decision is concerned.

It is the foregoing reasons which prompted us to order the appellant's release from prison.

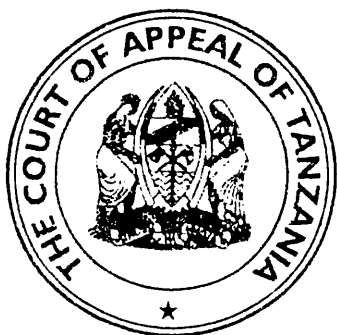
DATED at DAR ES SALAAM this 17th day of April, 2020

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 28th day of May, 2020 in the absence of the appellant and in the presence of Mr. Faraja George, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL