IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A, KOROSSO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 457 OF 2017

SIMON MARTIN.....APPELLANT

VERSUS

THE D. P. P.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania

at Mbeya)

(Wambura, J.)

Dated the 12nd December, 2011

in

(PC) Criminal Appeal No.8 of 2011

.....

JUDGMENT OF THE COURT

25th March & 3rd April, 2020.

LILA, J.A:

This is a third appeal. The appellant was initially arraigned before the Primary Court of Iyunga in Mbeya District for the offence of robbery with violence contrary to section 285 of the Penal Code, Chapter 16 of the Revised Edition 2002 (the Penal Code). So as to appreciate the essence of the present appeal to impugn the High Court decision, we let the charge itself tell.

*"**Kosa na Kifungu cha sheria:** Unyang'anyi wa kutumia nguvu k/f. 285 K/A, sura 16.*

***Maelezo ya Kosa**: Wewe Simon s/o Martin unashtakiwa kuwa mnamo tarehe 30/9/2010 muda wa saa 20:00 hrs usiku huko airport katka makorongo ya makaburi ya Lyela kwa makusudi ulimnyang'anya Jenipha d/o Ndomba Tsh.200,000/= pamoja na simu aina ya Nokia ya Camera yenye thamani ya Tshs.160,000/=. Ulimnyang'anya baada ya kumkaba shingoni na kumtishia kumchoma kisu na kasha kumtumbukiza korongoni, kitendo ambacho ni kinyume cha sheria ya nchi."*

Before the primary court were Jenipha Ndomba as complainant and the appellant as the accused. Trial ensued and the complainant's case was founded on the evidence of five witnesses including the complainant herself who testified as SM1. Others were Gwamaka Mwandosi (SM2), E. 6574 D/C Rashidi (SM3), Suzo Ndomba (SM4) and WP 2939 D/SGT Sponsor (SM5). For the defence, the appellant was the sole witness.

At the conclusion of the trial, the appellant was convicted as charged and was sentenced to serve a fifteen (15) years' jail term and was also ordered to pay the complainant TZS 200,000/= he had robbed her. He was

aggrieved and his appeal to the District Court of Mbeya was found to be devoid of merit. Unluckily, even his appeal to the High Court was barren of fruits as it was dismissed in its entirety and worse still, having realized that the facts disclosed the use of a knife in threatening the complainant in effecting the robbery, the jail term was enhanced to thirty (30) years.

For a person struggling to prove his innocence, the High Court decision would not rightly click to his mind. The appellant was aggrieved and preferred the present appeal to fault the decision of the second appellate court.

It is, however, worth noting at the very beginning that, in his notices of appeal and petitions of appeal to both courts below as well as in his application to the High Court for certification of points of law for consideration by the Court, the appellant cited the Republic as the respondent. Even, in the present appeal, the appellant maintained to cite the Republic (now the D.P.P) as the respondent. Consequently, in both courts below, the learned State Attorneys entered appearance representing the respondent and even before us, the learned State Attorney entered appearance. Jenipha Ndomba (PW1), the complainant, did not come to picture ever since the appellant was sentenced by the trial primary court on

21/12/2010. Also on record are nine grounds of appeal instead of a single ground of appeal that was certified by the High Court for our consideration.

The foregoing anomalies drew our attention and we were keen to, at first, hear from the parties on the propriety of the appeal before us and the consequences thereof. After taking that course, we accordingly find it needless to belabour on narrating the background facts of the case and the appeal grounds advanced by the appellant. We are convinced that the scanty background stated above suffices in the determination of the matter before us.

Before us, at the hearing of the appeal, the appellant, as it was the case before the lower courts, appeared in person and was unrepresented. On the other hand, Mr. Baraka Mgaya, learned State Attorney, represented the respondent D.P.P.

Submitting on the first legal issue we raised, Mr. Mgaya conceded that the appearance by the learned State Attorneys before both courts below was faulty. He contended that as the matter originated from the Primary Court where appearance is by the parties in person or through their relatives permitted by the Primary Court concerned in terms of section 33(1)(2) of the Magistrates' Courts Act Chapter 11 of the Revised Edition 2002 (the MCA) then in both the first and second appeal courts, the same

parties ought to have entered appearance unless the Director of Public Prosecution issued a notice to those courts that he had interests in the matter and he wished to be heard. He was, however, unable to refer us to any law or authority to that effect understandably on account of the issue having cropped up in Court.

When we drew his attention to section 34(1)(b) of the MCA, Mr. Mgaya hurriedly argued that appearance of the D.P.P. in criminal proceedings is conditional in that he must either be an appellant or has served a notice that he wishes to be heard. In both appellate courts, he asserted, the D.P.P. was not the appellant and neither did he serve a notice that he wished to be heard. Therefore, he argued, the proceedings before both appellate courts below are a nullity. He implored on us to invoke the powers of revision under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the revised Edition 2019 (the AJA) to nullify the proceedings and judgments of both appellate courts below and let the appellant abide by the law if he still wishes to pursue his right of appeal from the primary court decision.

In respect of the grounds of appeal before us, Mr. Mgaya was quite brief stating that the sole ground as certified by the High Court was supposed to have been raised by the appellant. Arguing further, he said,

the grounds of appeal reflected in the memorandum of appeal are new and neither of them whether it be directly or indirectly, touch on the certified ground of appeal. In the circumstances, he argued, there is no ground of appeal before the Court to be considered and the Court should proceed to strike out the appellant's appeal.

As expected, there was no arguments from the appellant understandably new to the matter under discussion he being a layperson in legal matters. He, at most, agreed with the views expressed by the learned State Attorney.

On our prompting about the just way forward considering that the appellant has already served close to ten years of the sentence, the learned State Attorney having glanced on the enhancement of sentence done by the learned High court Judge which he said was improper, changed goal posts and said the term already served is sufficient lesson to the appellant. He accordingly proposed the appellant be set free which view, seemingly favourable to the appellant, was earnestly welcomed by him.

We, on our part, are not ready to be held too much on the issues before us. The areas under discussion are not virgin for this Court had

occasions to deal with them and set some guidelines hence we shall not be sailing on an unchartered vessel.

In the recently decided case of **Gaspari Simon Shutuhu and Another vs Republic**, Criminal Appeal no. 124 of 2017 (unreported), the Court faced a very identical issue. In that case, the matter, like the present one, originated from the primary court and upon an appeal to both the District Court and High Court and even to the Court, the appellant cited the Republic as the respondent and in all those courts the State Attorneys entered appearance representing the Republic. The Court elaborately indicated how the D.P.P may find his way into the case and be heard as hereunder explained.

First, for him to be a party to proceedings of a criminal nature in the District Court the procedure is provided under section 20(1) (a)(b) of the MCA that he may appeal, instead of the complainant, against the decision of the primary court. Section 20(1) states:-

> "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*

complaint 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."

On the basis of those provisions, through an appeal the D.P.P may become an appellant in the district court.

Second, for him to appear and be heard by the High court, the procedure under section 25(1)(a)(b) of the MCA applies in that he may appeal against the decision of the District Court in the exercise of its appellate or revisional jurisdiction. That section provides:-

"25- Save as hereinafter 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 there from to the High Court."

That way, the D.P.P. may be heard by the High Court on a matter originating from the primary court.

It is clear, from the above provisions of the law, that in both situations the D.P.P. must appeal against either the Primary Court or District Court decisions instead of the complainant. The D.P.P. will, therefore feature as the appellant.

The Court went on to elaborate that while the provisions of section 25(1)(a)(b) of the MCA permits the D.P.P to appeal against the District Court decision on a matter originating from Primary Court, his right to be heard in the High Court is governed by the provisions of section 34(1) of the MCA whereby he is required to serve notice to the High Court that he wishes to be heard. That section states:-

"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].

We entirely agree with the propositions made by our learned brothers as they set the proper position of the law on the ways the D.P.P. may become a party in the proceedings originating from the Primary Court.

In the circumstances, we have no qualm with the learned State Attorney's assertion that the appearance of the D.P.P. before the first two appellate courts on a matter originating from the Primary Court is

conditional. While the right to appear and be heard before the District Court is by way of appealing against the Primary Court decision, such right is exercisable in the High Court upon service of notice to the High Court that he wishes to be heard. It is noteworthy here that the D.P.P. may appear perpendicularly with the complainant, that is to say, together with the complainant if he also appeals.

Failure by the D.P.P to appeal to the District Court against the decision of the Primary Court, in the instant case, disentitled him to appear and be heard by the District Court. Similarly, failure to serve notice to the High Court that he desired to appear and be heard on the matter which originated from the Primary Court denied him the right to be heard by the High Court on the matter under our consideration.

That said, we agree with Mr. Mgaya that the proceedings before both first and second appellate courts were illegal for, the Republic/D.P.P. entered appearance in contravention of sections 20(1), 25(1) and 34(1) of the MCA. They are a nullity. A similar stance was taken in the case of **Gaspari Simon Shituhu and Another vs Republic**, (supra) in which the case of **Rajabu Ngwanda and Another vs Republic**, Criminal appeal No. 234 of 2014 (unreported) was cited with approval. In the later case the Court pronounced itself thus:-

> *"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."*

We now turn to consider the second issue we had raised. It concerns, as hinted above, validity of the grounds of appeal raised by the appellant.

It is on record that the appellant sought and was granted a certificate on a point of law and the certified point of law was couched this way:-

> *"The statement of offence reveals the ingredients of armed robbery which the Primary Court is not vested with jurisdiction to entertain."*

The provisions of section 5(2)(c) of the AJA puts it clear that appeals to the Court from matters originating from the Primary Courts are not automatic. A party wishing to appeal has to seek and obtain from the High Court, a certificate certifying that there is a point of law worth consideration by the Court. In that sense, a point or points of law so certified form the grounds of appeal before the Court. No more no less. That stance was cemented by the Court in the case of **Haji Mradi vs Linda Sadiki Rupia**, Civil Appeal No. 24 of 2016 (unreported) where the appellant, apart from the sole certified point of law, presented another two grounds not certified by the High Court. The Court rejected those two grounds and insisted that:-

> *"In this regard, before the Court, there was nothing placed for determination in respect of the second and third grounds of appeal which were lodged in clear violation of the provisions of section 5(2)(c) of the AJA which requires an appeal originating from*

the Primary Court to be upon a certified point of law."

We fully associate ourselves with the above position which, although pronounced in a civil matter, it applies even to criminal matters. In our view, that is the proper import of section 5(2)(c) of the AJA.

In the instant case, the appellant has presented nine grounds of appeal, which as alluded to above, neither have any bearing with the sole ground certified by the High Court. On the authority above, we are inclined to find that there is no ground of appeal for our consideration. The appeal deserves to be struck out.

Ordinarily, we would have, either after nullifying the proceedings and judgments of both appellate courts below and setting aside the sentences, left it to the appellant to process an appeal to the District Court afresh and in accordance with the law and definitely subject to limitation, or we would have struck out the appeal before us for want of memorandum (grounds) of appeal and again leave it to the appellant to process an appeal to this Court upon presenting a proper ground of appeal as certified by the High Court. But, like the learned State Attorney, we find it unjust to adopt either

of those two courses. We have a reason for that which we hereunder propound.

The learned second appellate judge enhanced the sentence from fifteen (15) years to thirty (30) years on what she referred to as "*in view of the amendment of the Minimum Sentences Act, 1972 by Act No. 10 of 1989...*" Much as we appreciate the existence of such amendment, we are with respect, unable to go along with the learned judge for a simple reason that the offence with which the appellant was convicted was robbery with violence and not armed robbery which the learned judge took it by herself and convicted the appellant on it without affording the appellant an opportunity to comment. This was done in total contravention of the provisions of section 29(a)(i) of the MCA. Such an enhancement was illegally done and cannot be left to stand. It is a nullity. With that finding, the appellant's sentence remains to be fifteen years. However, the appellant, having been sentenced on 21/12/2010, by now has, as rightly argued by the learned State Attorney, already served close to ten years jail period. Like the learned State Attorney, we find it just to set him free.

In fine, we accept the invitation by the learned State Attorney and hereby invoke powers of revision under section 4(2) of the AJA, to quash the proceedings and judgments of the first and second appellate courts as

well as the conviction, set aside the sentence and the order to pay the complainant the money allegedly robbed. The appellant be released forthwith unless held behind bars on account of another lawful cause.

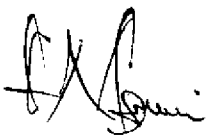
DATED at **MBEYA** this 3rd day of April, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of April, 2020 in the presence of the appellant in person and Ms. Sara Anesius learned State Attorney for the Respondent is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL