

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 404 OF 2017

KIBUNA MAKURI @ KIMWI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania,
at Mwanza)**

(Bukuku, J.)

dated the 19th day of April, 2017

in

Criminal Appeal No. 306 of 2016

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JUDGMENT OF THE COURT

20th & 23rd April, 2021

MWAMBEGELE, J.A.:

This was supposed to be an appeal from an order of the High Court (Bukuku, J.) dismissing the appellant's appeal on account that it is time barred. However, for reasons that will become apparent in due course, the appellant purports to challenge the decision of the District Court of Serengeti which tried and convicted him of the offences under the National Parks Act, Cap. 282 of the Revised Edition, 2002 (henceforth "the National

Parks Act”) and the Wildlife Conservation Act, 2009 (henceforth “the Wildlife Conservation Act”) read together with the Economic and Organised Crimes Control Act, Cap. 200 of the Revised Edition, 2002 (henceforth “the Economic and Organised Crimes Control Act”). The background material facts which we take the liberty to narrate hereunder, will help appreciate the facts leading to the appellant’s arraignment and the appeal before us.

The appellant Kibuna Makuri @ Kimwi, together with one Omahe Wansato @ Nyahiri who is not a party to this appeal, were arraigned in the District Court of Serengeti sitting at Mugumu for three counts; **one**, unlawful entry into the national park contrary to section 21 (1) (a) and (2) and 29 (1) of the National Parks Act; **two**, unlawful possession of weapons in the national park contrary to section 24 (1) (b) and (2) and 29 (1) of the National Parks Act read together with paragraph 14 (c) of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crimes Control Act and; **three**, unlawful possession of Government Trophies contrary to section 86 (1) and (2) (ii) of the Wildlife Conservation Act read together with paragraph 14 (d) of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crimes Control

Act. They pleaded not guilty to all the three counts. After a full trial, the trial court found them guilty as charged. They were convicted and sentenced to prison terms of two years in respect of the first count, two years in respect of the second count and twelve years in respect of the third count. The sentences were ordered to run concurrently.

The appellant was aggrieved by the decision of the trial court. He thus filed an appeal to the High Court on seven grounds of complaint as appearing at pp. 29 and 30 of the record of appeal. However, that appeal was dismissed by the High Court (Bukuku, J.) as appearing at p. 35 of the record of appeal on account that it was filed out of time. Aggrieved, the appellant timely lodged a notice of appeal appearing at p. 36 of the record of appeal seeking to assail the order of the High Court which dismissed his appeal. However, the appellant reproduced the grounds of appeal at pp. 29 and 30 above, *mutatis mutandis*, as the grounds of appeal in this Court. Both memoranda of appeal are prefaced with a similar preamble. The one before us has this preamble:

"I, the above named appellant being aggrieved by the decision of the District Court of Serengeti at

Mugumu in Criminal Appeal (sic) No. 18 of 2014, before Hon. I. E. Ngaile, DRM dated 28/01/2016 do hereby appeal in the C.A.T of Tanzania (sic) at Mwanza against the conviction and sentence of the whole judgment on the following grounds"

For easy reference, we also reproduce the preamble to the memorandum of appeal before the High Court which appears at pp. 29 and 30 of the record of appeal. It reads:

"I, the above-named appellant being aggrieved by the decision of the District Court of Serengeti at Mugumu in Economic Case No. 18 of 2014, before Hon. I. E. NGAILE - DRM dated 28/01/2016 do hereby appeal in the H/Court of Tanzania at Mwanza against the conviction and sentence of the whole judgment on the following grounds"

When the appeal was called on for hearing before us, the appellant appeared in person, unrepresented. The respondent Republic was represented by three trained minds; Ms. Mwamini Yoram Fyeregete, Senior State Attorney, Ms. Magreth Bernard Mwaseba, learned State Attorney and Mr. Frank Nchanila, also learned State Attorney.

When we called upon the appellant to argue his appeal, he simply adopted the seven ground memorandum of appeal he earlier filed and waited for the response of the Republic. He reserved his right of rejoinder, need arising.

It was Ms. Mwaseba who argued the appeal for the respondent Republic. She started her onslaught by stating at the very outset that the appeal was filed prematurely and therefore misconceived. She clarified that the notice of appeal dated 27.04.2021 appearing at p. 36 of the record of appeal seeks to challenge the order of the High Court dated 19.04.2017 dismissing the appellant's appeal for being time barred. However, the memorandum of appeal filed by the appellant seeks to challenge the decision of the trial court; the District Court of Serengeti. It was expected that the grounds of appeal would challenge the order of the High Court, she contended.

The learned State Attorney went on to argue that in terms of section 4 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 (henceforth "the AJA"), the Court does not have jurisdiction to entertain and hear appeals from subordinate courts without their being

determined first by the High Court or a subordinate court with extended jurisdiction. For this proposition, Ms. Mwaseba referred us to our decision in **Damiano Qadwe v. Republic**, Criminal Appeal No. 317 of 2016 (unreported) in which we held that the Court is not a first appellate court from the District Court.

Ms. Mwaseba went an extra mile to propose what should have been the appropriate course of action to be taken by the appellant; that he should have assailed the order of the High Court or if he was satisfied that his appeal was indeed time barred as ordered by the High Court, and he still wished to challenge the decision of the District Court, he should have applied for enlargement of time within which to assail the same.

In view of the above, the learned State Attorney implored us to strike out the appeal for being premature and therefore misconceived.

Given the above response by the learned State Attorney, the appellant had nothing useful to add in rejoinder. He simply told the Court that he was a layperson who could not read and write. He thus put trust in the Court to do justice as circumstances dictate.

We have dispassionately considered the learned arguments by Ms. Mwaseba in the light of the record of appeal. Having so done, we think we are decidedly prepared to swim her current. We think that is the proper exposition of the law in our jurisdiction in terms of Article 117 (3) of the Constitution of the United Republic of Tanzania, 1977 (henceforth "the Constitution") as well as those of section 4 (1) of the AJA. In joining hands with the learned State Attorney, we shall start our determination by reproducing the provisions of Article 117 (3) of the Constitution as well as those of section 4 (1) of the AJA. Article 117 (3) of the official Kiswahili version of the Constitution reads:

"(3) Kazi ya Mahakama ya Rufani itakuwa ni kusikiliza na kutoa uamuzi juu ya kila rufaa inayoletwa mbele ya Mahakama ya Rufani kutokana na hukumu au uamuzi wa namna nyingine yoyote wa Mahakama Kuu au Mahakama ya Hakimu."

Its corresponding unofficial English version provides:

"The functions of the Court of Appeal shall be to hear and determine every appeal brought before it arising from the judgment or other decision of the

High Court or of a magistrate with extended jurisdiction."

Likewise, section 4 (1) of the AJA reads:

"The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction."

Having reproduced above the provisions of the Constitution and the AJA which provides for the jurisdiction of the Court, we wish to state at this stage that it is not the first time the Court grapples with the point. In **Damiano Qadwe** (supra) we were faced with an analogous situation. In that case, the appellant was convicted by the trial court of the offence of rape and sentenced to a prison term of two years. The High Court called for the record to satisfy itself as to the correctness, legality or propriety of the sentence. Using its revisional powers, the High Court found and held that the sentence was illegal and enhanced it to one of thirty years in prison. The appellant in that case was aggrieved by the enhancement of the sentence by the High Court and thus filed an appeal to the Court. However, like in the present case, the memorandum of appeal sought to challenge the conviction and sentence of the trial court. In determining

the matter in that case, we relied on our previous decision in **Mohamed Said v. Republic**, Criminal Appeal No. 9 of 2014 (unreported) in which the Court reiterated its jurisdiction under Article 117 (3) of the Constitution and section 4 (1) of the AJA as reproduced above. We also reproduced an excerpt from our previous decision in **Asael Mwanga v. Republic**, Criminal Appeal No. 218 of 2001 (unreported) which we cannot resist the urge of reproducing it here once again. It is this:

*"Now, all those grounds, whatever may be their merits, should have been argued in the High Court had the appellant lodged an appeal to that Court. In the event the High Court failed to discuss and decide them satisfactorily, the appellant could resort to this Court. **What the appellant is now trying to do is to turn this Court to the first appellate court after the judgment of the District Court***

*We must, therefore, **decline to turn this Court into a first appellate court from decisions of the District Court. In the result, we express no opinion on the grounds of appeal which the appellant brought to this Court.***

[Emphasis supplied].

We find guidance in the position we took in **Mohamed Said** (supra) and **Asael Mwangi** (supra) as followed in **Damiano Qadwe** (supra). In the case at hand, as submitted by Ms. Mwaseba, and to our mind rightly so, this Court cannot legally entertain and hear an appeal from the trial court before the same is heard by the High Court. The Court is not a first appellate Court from the District Court; rather, it is an appellate court from the High Court and from subordinate courts with extended jurisdiction as provided for by the provisions of Article 117 (3) of the Constitution and section 4 (1) of the AJA.

We wish to add, again as rightly put by Ms. Mwaseba, if the appellant was aggrieved by the dismissal order of the High Court, he should have filed a memorandum of appeal to assail it. However, if he agreed with the High Court order that his appeal was indeed filed out of time and he still wished to assail the decision of the District Court of Serengeti, the proper path to have been taken in our considered view, was to apply for extension of time within which to do that. Assailing the decision of the District Court

of Serengeti in the Court is plainly misconceived and makes the appeal before us incompetent.

In the upshot, we find and hold that this appeal is misconceived and therefore incompetent. For being misconceived and therefore incompetent, it is struck out.

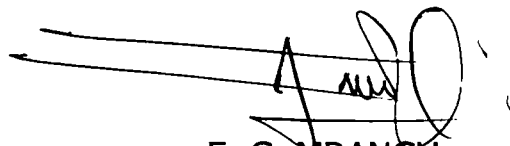
DATED at **MWANZA** this 22nd day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 23rd day of April, 2021 in the presence of the appellant in person, and Miss Revina Tibilengwa, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

A handwritten signature in black ink, appearing to read 'E. G. MRANGU', is written over a set of horizontal lines. The signature is stylized and somewhat abstract.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL