IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., LILLA, J.A., And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 205 OF 2021

THE DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

FARIDI HADI AHMED AND 36 OTHERS.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar-es-salaam)

(Ismail J.)

dated 23rd day of April, 2020

Criminal Session Case No. 121 of 2020

RULING OF THE COURT

7th & 19th May, 2021

MUGASHA, J.A.:

In the High Court of Tanzania at Dar-es-salaam, the respondents herein stood arraigned with twenty-three counts under the Prevention of Terrorism Act, Act No. 21 of 2002 and two counts under the Armaments Control Act [CAP 246 RE. 2019]. In the respective charge, it was among other things, alleged that the respondents had conspired to commit terrorist acts in Mainland Tanzania and Zanzibar. In the same charge, 14 counts were in relation to the terrorist acts alleged to have been exclusively committed in the Region of Urban West in Zanzibar and the said

counts are briefly as follows: participating in a terrorist meeting (4th count); possession of property intended for the commission of a terrorist act (12th count); provision of a facility for a terrorist meeting (13th and 15th counts); causing death with terrorist intention (17th count); causing serious bodily harm with terrorist intention (18th to 21st counts); causing serious damage to property with terrorist intention (22nd and 23rd counts) and use of property for the commission of terrorist act (24th and 25th counts).

A preliminary point of objection was raised challenging the jurisdiction of the trial court to try offences alleged to have been exclusively committed in Zanzibar. Having considered the provisions of the Constitution of the United Republic of Tanzania, 1977 and the Constitution of Zanzibar, 1984 on the mandate of the High Court of Zanzibar to try criminal offences and the statutes governing the criminal procedure in either side of the Union, the learned trial Judge upheld the preliminary point of objection as reflected at page 189 of the record of appeal as follows:

> *"In view of the foregoing, I am convinced that this ground of objection raises a serious point of law that should partly succeed .... As introduced earlier on, these counts are in relation to incidents which are alleged to have occurred exclusively within Mjini Magharibi Region, Zanzibar, within the local limits*

for which Zanzibar has territorial jurisdiction. This means that, the rest of the counts whose aileged commission is a chain of multiple places and triable by this Court, shall continue to be tried by the High Court of Tanzania. ***Needless to say, this wiil entail this Court making an Order, as I hereby do, consistent with section 276 (2) of the CPA, for an amendment of the information with a view to chaiking off the counts which are not triabie by the Court....***"

[Emphasis supplied]

Aggrieved, the Director of Public Prosecutions, (DPP) lodged a notice intimating to appeal against the said order as reflected at page 194 of the record of appeal. Subsequently, the DPP filed a Memorandum of Appeal raising four grounds of complaint as follows:

1. The trial Judge erred in law and fact by ordering amendment of the information on the ground that the High Court of the United Republic of Tanzania has no jurisdiction to try terrorism offences that are committed in Zanzibar or consequences thereof ensued in Zanzibar.
2. That the trial Judge erred in law and fact in finding that the offences in respect of 4th,11th,12th,13th,14th, 17th ,18th, 19th, 20st,

22nd, 23rd, 24th and 25th counts in the information were exclusively committed in Zanzibar.

3. The trial Judge erred in law and fact by failing to properly interpret the meaning of the phrase "as the case may be" which appears in the definition of the word "Court" under section 3 of the Prevention of Terrorism Act, No.21 of 2002.
4. The trial Judge erred in law and fact by ignoring and failing to appreciate the import of section 2 (2) of the Prevention of Terrorism Act No. 21 of 2002.

At the hearing, the DPP brought a Supplementary Memorandum with two grounds of complaint as follows:

1. The trial Judge erred in law and fact by failing to appreciate the import of article 115 (2) of the Constitution of the United Republic of Tanzania, 1977 as amended.
2. The trial Judge erred in law and fact by upholding the respondents' ground of preliminary objection on a point of law that there was no proper consent of the Director of Public Prosecutions in respect of 17th, 18th, 19th, 20th, 21st, 24th and 25th counts in the information.

Following a short dialogue with the Court, the DPP abandoned the 2nd ground of appeal in the supplementary memorandum.

Before commencing to hear the appeal, a preliminary point of objection was raised by the respondents' counsel to the effect that, the appeal is not competent and it deserves to be struck out. We opted to hear both the preliminary point of objection and the substantive appeal with a view that if we decide against the preliminary point of objection, we shall proceed to determine the appeal before us.

At the hearing, the appellant was represented by Messrs. Biswalo Mganga, the DPP; Paul Kadushi and Faraja Nchimbi, learned Principal State Attorneys, Messrs. Robert Kidando, Abdalla Chavula and Ms. Mwahija Ahmed learned Senior State Attorneys and Messrs. Salim Msemo, Ignas Tirumanywa Majigo, learned State Attorneys. The respondents had the services of Mr. Juma Nasoro, learned lead counsel and Messrs. Salim Abdalla Juma; Jeremiah Mtobesya; Daimu Halfani; Rajabu Abdala Rajabu, Ubaid Hamidu, Hussein Hitu and Abdul Fatah Abdalla, learned counsel.

On taking the floor to argue the preliminary point of objection, Mr. Mtobesya submitted that, the appeal is not competent because the DPP no longer enjoys the right to appeal against the order of the High Court and

subordinate court exercising extended jurisdiction under section 6 (2) of the Appellate Jurisdiction Act [CAP 141 RE.2019]. He pointed out that the right ceased to exist after it was struck out upon being declared unconstitutional for offending articles 13 (1) and (2) and (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) in the case of **JOSEPH STEVEN GWAZA VS THE ATTORNEY GENERAL AND DIRECTOR OF PUBLIC PROSECUTIONS,** Miscellaneous Civil Cause No. 27 of 2018 (unreported). He relied on that case to support his propositions and urged the Court to strike out the incompetent appeal.

In response the DPP opposed the preliminary objection arguing that the present appeal is not against an interlocutory order considering that the impugned order to remove some of the counts was indeed a final determination of the criminal charge. To support this stance, he cited to us the case of **REPUBLIC VS HARRY MSAMIRE KITILYA AND TWO OTHERS,** Criminal Appeal No. 124 of 2016 (unreported) whereby the Court concluded that an order to strike out a count in a criminal charge is not interlocutory as it has the effect of finally determining the criminal charge. In the alternative, it was the DPP's contention that if the Court finds that the order appealed from is interlocutory and not finally determining the criminal charge, he invited us to consider that, the

Attorney General's notice of appeal is automatic stay against decision of the High Court in **STEVEN GWAZA** (supra) He argued this to be envisaged under section 14 (3) of the Basic Rights and Duties Enforcement Act CAP 3 RE.2019 which stipulates:

> *"Notwithstanding the provisions of the Civil Procedure Code or of any other law to the contrary, where in proceedings under this Act which do not involve continuous breach or personal injuries, the Government files a notice of intention to appeal against any decision of a court, the notice shall, when entered, operate as a stay of execution upon the decision sought to be appealed against."*

Thus, the DPP urged the Court to hold that, the decision of the High Court in **STEVEN GWAZA** (supra), is inoperative and prayed that the preliminary objection be dismissed and the hearing of the appeal should proceed.

In rejoinder, Mr. Mtobesya argued that the point of objection raised does not challenge the appeal to be based on the interlocutory order as conceived by the DPP. He reiterated his earlier stance that, since the DPP's right to appeal to the Court against the order was annulled way back in 2019, the case of **REPUBLIC VS HARRY MSAMIRE KITILYA** (supra) which was decided before the annulment is distinguishable from the

present matter. On the notice of appeal serving as automatic stay he challenged the same arguing that the said provision is about stay and not the validity of the decision of the High Court. Relying on the case of **STEVEN GWAZA** (supra), he maintained that the appeal is not competent and it deserves to be struck out.

As is the practice of the Court the preliminary objection must be determined first before dealing with the substantive matter. The crucial question to be answered is whether the present appeal is competent.

We begin with the provisions of the law regulating criminal appeals to the Court as stipulated by section 6 of the AJA which is reproduced hereunder:

> *"(1) Any person convicted on a trial held by the High Court or by a subordinate court exercising extended powers may appeal to the Court of Appeal–*
>
> *(a) where he has been sentenced to death, against conviction on any ground of appeal; and*
>
> *(b) in any other case–*
>
> *(i) against his conviction on any ground of appeal; and*
>
> *(ii) against the sentence passed on conviction unless the sentence is one fixed by law.*

(2) Where the Director of Public Prosecutions is dissatisfied with any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers he may appeal to the Court of Appeal against the acquittal, sentence or order, as the case may be, on any ground of appeal.

(3) Where, in proceedings under the proviso to subsection (1) of section 26 of the Penal Code relating to the conviction of a woman who is pregnant, the High Court or a subordinate court exercising extended powers has found that the woman in question is not pregnant, the woman may appeal to the Court of Appeal against the finding.

(4) An appeal shall lie to the Court of Appeal against any directions of the High Court or of a subordinate court exercising extended powers for the release of a person detained in proceedings for those directions in the nature of habeas corpus under section 390 of the Criminal Procedure Act against a refusal to give those directions.

(5) An appeal shall lie to the Court of Appeal from any order of the High Court awarding costs under section 350 of the Criminal Procedure Act and the

Court of Appeal shall have power to award the costs of the appeal as it shall deem reasonable.

(6) Any person sentenced by the High Court in pursuance of the provisions of section 171 of the Criminal Procedure Act may appeal to the Court of Appeal against the sentence, unless it is one fixed by law; but if the High Court imposes a sentence which the court which committed the offender had power to impose no appeal shall lie against such sentence.

(7) Either party–
(a) to proceedings under Part X of the Criminal Procedure Act may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact;

*(b) to proceedings of a criminal nature under Head (c) of Part III of the Magistrates' Courts Act *, may, if the High Court certifies that a point of law is involved, appeal to the Court of Appeal,*
but where the order appealed against is a declaratory order, the determination of the Court of Appeal on it shall also have effect only as a declaratory order".

Under section 6 (2) of the AJA, where the DPP is dissatisfied with any acquittal, sentence or order made or passed by the High Court or by a

subordinate court exercising extended powers, he may appeal to the Court of Appeal against the acquittal, sentence or order, as the case may be, on any ground of appeal. From what was submitted by the learned counsel for either sides, clarity is pertinent as to whether or not the order under section 6 (2) of the AJA envisages an interlocutory order. In *https//en.m.wikipedia.org.wiki* interlocutory orders are categorized as follows:

> *"Interlocutory orders are orders that are issued by a court while a case is going on. These orders are not meant to be final. When the case is concluded any aspect of an interlocutory order that has not become moot may be challenged in an appeal from final judgment."*

In the case of **DIRECTOR OF PUBLIC PROSECUTIONS v SABINIS INYASI TESHA AND RAPHAEL J. TESHA** [1993] TLR 237, the Court addressed its mind on the nature of order which can be appealed against by the DPP to the Court under section 6 (2) of the AJA and among other things, categorically held as follows:

> "The *D.P.P has the right to appeal against an interlocutory order in criminal proceedings; it is only the accused person who does not have such a right".*

The said provision was also considered by the Court in determining as to whether apart from the DPP any other person has right of appeal to the Court under section 6 (2) of the AJA and the nature of the order appealed against. In the case of **SEIF SHARIF HAMAD v S.M.Z** [1992] TLR 43. A regional magistrate, Mr. Mmilla (as he then was) on extended jurisdiction was duly assigned to hear and determine the case. Before hearing commenced the appellant raised a point of jurisdiction of the trial court. The court ruled that it had jurisdiction to try the case. The appellant filed an appeal with the Court challenging the ruling that the regional magistrate, with extended jurisdiction, if was legally competent to conduct the trial. Before the Court could entertain the appeal it considered whether it had jurisdiction to hear the appeal in view of section 6 of the Appellate Jurisdiction Act, 1979 and also whether the appellant was competent to lodge the appeal. The Court among other things held:

> *"(i) The ruling of Mr. Mmilla was a **specie of interlocutory order**, and following our decision in Alois Kula we have no jurisdiction to hear an appeal against it under the Appellate Jurisdiction Act, 1979;*
> *(ii) the Court of Appeal has no inherent power to exercise jurisdiction where no right of appeal is provided;*

(iii) our appellate jurisdiction derives from the Appellate Jurisdiction Act, 1979. Section 6 deals with criminal appeals like this one. Section 6(2) expressly permits only the D.P.P. to appeal against any order of the High Court or subordinate court in the exercise of extended jurisdiction;"

[Emphasis supplied]

In the light of the said decisions, basically, an interlocutory order is one made or given during the progress of an action, but which does not finally dispose of the rights of the parties. To digress a bit, in another case of **MURTAZA ALLY MANGUNGU VS THE RETURNING OFFICER FOR KILWA AND TWO OTHERS**, Civil Appeal No. 80 of 2016 (unreported), addressing its mind on the provisions of section 5 (2) (d) of the AJA, the Court considered the test to be applied in determining as to whether the decision is final in effect. The Court said:

"In resolving the controversy we have decided to adopt what is known as "the nature of the order test". This test was applied in a decision of the Privy Council in a decision of the PRIVY Council of BAZSON VS ATTRINCHAN URBAN DISTRICT COUNCIL [1903, IKB 948] which is:

"does the judgment or order as made, finally disposes of the rights of the parties? If it does

then... it ought to be treated as a final order, but if it does not it is then interlocutory."

From the above, it is our view that an order or decision is final only when it finally disposes of the rights of the parties. That means that the same order or decision must be such that it could not bring back the matter to the same court."

Basically, *the nature of the order test"* is what seemed to have been earlier embraced by the Court in **DIRECTOR OF PUBLIC PROSECUTIONS VS SABINIS INYASI TESHA AND RAPHAEL J. TESHA** (supra) whereby the Court concluded that, under section 6 (2) of the AJA, the D.P.P has the right to appeal against an interlocutory order in criminal proceedings.

In our jurisdiction, the principle of barring criminal appeals against interlocutory orders which do not have the effect of finally determining the rights of the parties was mainstreamed in legislation vide Written Laws (Miscellaneous Amendments) (No. 3) Act 2002 [Act No. 25 of 2002]. This witnessed the enactment of: section 5 (2) (d) of the AJA; section 42(3) the Magistrate's Courts Act CAP 11 RE. 2002 and section 378 (3) of the Criminal Procedure Act CAP 20 RE.2002. The operationalization of the said amendments has witnessed among others, the following:

In the case of **DPP (ZANZIBAR) VS FARID HADI AHMED AND 9 OTHERS,** Criminal Appeal No. 96 of 2013 (unreported), the DPP had filed an appeal to challenge the decision of the learned High Court Judge of Zanzibar who had nullified, quashed and set aside the decision of the Registrar of the High Court on ground that he had no jurisdiction to entertain an application for review of bail application. The DPP was dissatisfied and he appealed to the Court. The appeal was challenged on among others, a ground that it was incompetent and deserved to be struck out because it was barred by section 5 (2) (d) of the AJA as it preferred to appeal against an interlocutory order. Responding to the challenge, the DPP argued that the appeal is maintainable under section 6 (2) of the AJA. The Court having considered the provisions of sections 5 and 6 of the AJA and amendments in respect of interlocutory orders, observed that the objection raised was on a misapprehension of the statutory provision on which it is premised. Then the Court relying on the case of **YOHANA NYAKIBARI AND 22 OTHERS Criminal Reference No. 1 of 2006** (unreported) the Court said:

> *".... This list of amended sections has led us to the conclusion that s.6 (2) of the Act was by design left untouched by Parliament. In the face of unambiguous provisions of s.6 of the Act, we*

respectfully hold that the first preliminary objection premised on a statutory provision not related to appeals in criminal cases, as is the appeal under scrutiny, is totally misconceived. It is accordingly overruled……:

In yet another case of **REPUBLIC VS MWESIGE GEOFREY TITO BUSHAHU** Criminal Appeal No. 355 of 2014 (unreported) the Court was faced with a similar scenario whereby the appeal by the DPP was challenged on the ground that it was incompetent as it sought to challenge an interlocutory order. Subscribing to what was said in the cases of **DPP ZANZIBAR VS FARIDI AND 9 OTHERS** (supra) and **YOHANA NYAKIBARI** (supra) the Court overruled the preliminary objection and made a following observation:

"We only wish to observe that since there was no intention to bar criminal appeals of this nature then the words "criminal charge" appearing in s.5 (2) (d) of the Act should be deleted"

Subsequently section 5 (2) (d) was amended vide the written Laws (Miscellaneous Amendments) Act No 3 of 2016 whereby phrase criminal charge was removed and the resulting provision currently reads as follows:

"no appeal or application for revision shall lie against or be made in respect of any preliminary

interlocutory decision or order of the High Court unless such a decision or order has the effect of finally determining the suit".

In this regard, in terms of section 6 (2) of the AJA, the order to be appealed before the Court envisages one before us whereby the DPP is challenging the order of the High Court on the amendment of the charge so as to remove counts in respect of offences alleged to have been exclusively committed in Zanzibar.

The aforesaid notwithstanding, the question now to be addressed is the status of section 6 (2) of the AJA with the development in the case of **STEVEN GWAZA** (supra). In that case, the High Court sitting as a Constitutional Court earlier on entertained a petition which challenged the constitutionality or otherwise of provisions of section 6 (2) of the AJA under which the DPP solely enjoys the right of appeal to the Court against orders to the High Court and subordinate courts with extended jurisdiction. In the decision handed down by the High Court held as hereunder:

"In the end, we find that the provision of section 6 (2) of the AJA is, to the extent that it allows the D.P.P to appeal against any order of the court in a criminal case, unconstitutional for offending articles 13 (1) & (2) and 13 (6) (a) of the Constitution for reasons we have amply demonstrated above. In the

circumstances, we have no option but to hold in terms of article 64 (5) of the Constitution of the United Republic of Tanzania that section 6 (2) of the Appellate Jurisdiction Act (supra) is, to the extent it provides for the right of the DPP to appeal against ***any order*** *of the court in a criminal case, void; and is, accordingly struck out to such an extent without in any way affecting the right of the DPP to appeal against any acquittal or sentence...."*

With the above holding of the High Court the DPP has been barred to appeal to the Court against any order of the court in a criminal case and this was the line of Mr. Mtobesya's submission. On the other hand, the DPP equipped with the Attorney General's notice of appeal was of the view that in terms of the provisions of section 14 (3) of BRADEA, stay is automatic and as such, he argued that the decision of the High Court in **STEVEN GWAZA** (supra) is inoperative.

It is not disputed that, the constitutional court did strike out the DPP's right to appeal to the Court against the order of the High Court and subordinate courts with extended jurisdiction. What is contentious is whether or not the AG's notice of appeal operates as automatic stay in order to salvage the plight of the DPP in this appeal. A similar issue was dealt with by the full Bench of the Court in the case of **HON ATTORNEY**

GENERAL VS REVEREND CHRISTOPHER MTIKILA, Civil Appeal No. 45 of 2009 (unreported). This was an appeal against the decision of the High Court which had declared to be unconstitutional the provisions which barred a private candidate from taking part in General Election as a candidate. When the appeal was called for hearing, the Deputy Attorney General prayed for an adjournment which was acceded to by the Court. However, the Court made a following reminder to the Attorney General:

> *"However, for the avoidance of doubt we wish to refresh the memories of the learned Deputy Attorney General and his team* ***that the appeal does not operate an automatic stay. So, the law as it is at the moment and onward to the General Elections in October, is what the High Court has decided, that is, independent candidates are allowed."***

[Emphasis ours]

Therefore, in the light of the bolded expression, a notice of appeal which puts in motion an appeal process is not automatic stay of the decision of the High Court in a constitutional matter. On that account, the decision in **STEVEN GWAZA** (supra) which is yet to be reversed is currently operative to the effect of having annulled the DPP's right to

appeal to the Court against the order of the High Court and the courts subordinate to it exercising extended jurisdiction.

Since an appeal does not operate as automatic stay of execution of the decree or order appealed from, it was incumbent on the part of the Attorney General to invoke the provisions of Rule 11 (3) of the Court of Appeal Rules, 2009 (the Rules), and seek the indulgence of the Court to stay the decision of the High Court in **STEVEN GWAZA** (supra). We are fortified in that account on inspiration of what was underscored by our Kenyan neighbours whereby in the case of **RWW vs EKW** [2019] Eklr, the court addressed its mind to the purpose of stay of execution order pending appeal in following words:

> *"The purpose of an application for stay of execution* ***is to preserve the subject matter in dispute so that the rights of the appeiiant who is exercising the undoubted right of appeal if successful is not rendered nugatory."***

[Emphasis supplied]

In view of what we have endeavoured to discuss, in the wake of the decision of the High Court in **STEVEN GWAZA** (supra) which is yet to be reversed and in the absence of stay order, at the moment, the DPP right to appeal to the Court against the decision of the High Court or by a

subordinate court exercising extended jurisdiction is limited to sentence or acquittal. In this regard, we are not in a position to invoke neither "*the nature of order test*" nor "*the finality of the order test*" to scrutinize the impugned order. Finally, we agree with the respondents that the purported criminal appeal seeking to impugn the High Court order is thus rendered incompetent and it is hereby struck out. With this finding, there is no need to consider the grounds of appeal.

DATED at **DAR-ES-SALAAM** this 17th day of May, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. LILLA
JUSTICE OF APPEAL

W.B KOROSSO
JUSTICE OF APPEAL

The Judgement delivered this 19th day of May, 2021 via Video Conference from Ukonga Prison, In the present of Salim Msemo learned State Attorney for the appellant and Messrs. Abubakar Salim, Daimu Halfani, Abdallah Juma, Jeremiah Mtobesya, Ubaid Hamidu and Abdulfattah Abdalah for the Respondents is hereby certified as true copy of original

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL