IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., KWARIKO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 29 OF 2018

JUMA SAID.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Gwae, J.)

dated the 4th day of December, 2017

in

Criminal Appeal No. 222 of 2017

JUDGMENT OF THE COURT

26th November & 1st December, 2021

KWARIKO, J.A.:

This appeal is against the decision of the High Court of Tanzania (Gwae, J.) sitting at Mwanza. Originally, the appellant was arraigned before the District Court of Ilemela charged with the offence of forgery contrary to sections 333, 335 (a) (d) (iv) and 337 of the Penal Code [CAP 16 R.E. 2002; now R.E. 2019].

It was alleged by the prosecution that on 21st April, 2016 at Kigoto area within Ilemela District in the City of Mwanza, the appellant forged minutes of clan meeting dated 2nd March, 2015 purporting to show that it appointed him to be administrator of the estate of the late

Omary Hassan while knowing that all was not true. The appellant pleaded not guilty to the charge.

Subsequently, the prosecution brought a total of six witnesses to prove the charge against the appellant whilst the defence was comprised of five witnesses. At the end, the trial court found the prosecution case proved beyond reasonable doubt against the appellant. He was convicted and sentenced to imprisonment of five years.

Aggrieved by that decision, the appellant preferred an appeal before the High Court. In its decision, the High Court raised a legal point to the effect that the judgment and proceedings of the trial court were nullity for the reason of variance between the evidence and the charge. It therefore quashed the conviction and set aside the sentence. However, the court ordered a retrial of the appellant for the reason that the evidence was strong. The appellant was not amused by that decision, he thus filed this second appeal.

Before we determine the merit or demerit of the appeal, we find it proper at this point to give a brief background of the facts which led to the appellant's conviction.

According to Dotto Omary (PW1) and Mwanahawa Mlela (PW2), Omary Hassan, who was their father and grandfather respectively, disappeared in 1981 in an unusual circumstance following which PW1 was taken to Dar es Salaam by her uncle. Before his disappearance, Omary Hassan was staying in his house at Kirumba area together with the appellant, his nephew. PW1 returned to Mwanza in 2004 and found the appellant residing in that house and the appellant advised her to live somewhere else to avoid quarrelling with his wife and offered to pay rent for her. She, therefore, rented a house at Ghana area.

According to PW1, in June, 2016, she got information that the appellant had instituted a Probate and Administration Case No. 54 of 2016 for grant of the letters of administration of the estate of Omary Hassan, her father. Upon further follow-up, PW1 discovered that there was minutes of the clan meeting indicting that the appellant was nominated by the Kirumba Ward Committee members to petition in court for the said appointment. However, none of the family members was shown in the minutes. Further, while there was no evidence of the death of Omary Hassan, in the case file, there was a death certificate showing that he passed away in Kigoto area from high blood pressure.

Upon these findings, PW1 reported the matter to the police where No. F 2414 Detective Corporal Maiga (PW6) was assigned to

investigate the case. PW6 interviewed Ibrahim Hamisi Magongo (PW3) and Sadick Kariba (PW4) members of Kirumba Ward Committee and its Chairman one Badru Abdallah (PW5) who denied to have ever sat in the alleged clan meeting to nominate the appellant as administrator of the estate of Omary Hassan. The purported minutes of the clan meeting, death certificate of Omary Hassan and Form No. 11 were admitted in evidence and marked collectively as exhibit P1.

In his defence, the appellant denied the allegations. He testified that he bought a house on Plot No. 97 at Kirumba Area jointly with Omary Hassan and he had paid him off before he left in 1982. Two months later, he got information that Omary Hassan had died in the mining accident at Ulyankulu area. Thereafter, he went to RITA office and was issued with his death certificate. He admitted on cross-examination that, he indeed lodged the minutes of the meeting, exhibit P1 and that he did not involve other family members because they were all dead. To support his account, the appellant called four other witnesses, namely; Cleophacy Bihene (DW2); Veronica Andrea Misango (DW3); Abdulaziz Gwira (DW4); and Michael Nzinyangwa (DW5).

Before this Court, the appellant has raised the following two grounds of appeal:

1. *That the learned appellate judge erred in law for ordering a retrial as the evidence on record did not support such an order.*
2. *That the learned [appellate] Judge erred in law for not deciding properly the issues before him.*

At the hearing of the appeal, the appellant was represented by Mr. Antony Nasimire, whilst the respondent Republic had the services of Ms. Martha Mwadenya, learned State Attorney. The appellant was also in attendance.

When Mr. Nasimire was invited to argue the appeal, he first abandoned the second ground of appeal and decided to argue the first ground only. However, before the learned counsel went further to argue this ground, the Court wanted to satisfy itself whether the first appellate Judge properly decided the appeal on the basis of the legal issue of the variance of the charge and evidence he had raised *suo mottu* in the course of composing the judgment without hearing the parties on the same. We, thus, called upon the counsel for the parties to address us on this matter.

The counsel for both parties commonly submitted that the learned Judge erred to raise the matter in the course of composing the judgment without affording the parties opportunity to be heard on the same. The counsel thus argued that the omission vitiated the judgment which they urged us to nullify. As to the way forward, the counsel urged us to give an order remitting the record to the High Court for it to hear the parties on that matter before deciding the appeal as a whole.

For his part, Mr. Nasimire had another prayer to make. He contended that because the High Court had released the appellant from prison pending his retrial, it could be justifiable if he continued to enjoy that amnesty pending the determination of his appeal by the High Court. To that end, he urged us to grant the appellant bail pending appeal in terms of Rule 11 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

On the other hand, Ms. Mwadenya opposed the prayer. She argued that, the effect of the nullification of the judgment of the High Court is to restore the decision of the trial court and therefore the appellant to continue serving his sentence. She added that this Court lacks jurisdiction to determine bail pending appeal because there is no notice of appeal before it in respect of this case.

Having considered the foregoing submissions, we agree with the learned counsel for the parties that the High Court Judge did not involve the parties before he decided the alleged legal defect. The record of appeal shows that when the Judge concluded his determination in respect of the first ground of appeal, he noted as follows:

> *"I have however discovered a legal defect, that is variance of the date of commission of the offence...."*

The learned Judge discussed this issue at length and in the end, he found the defect to be incurable which vitiated the trial. He declared it a nullity and because he found the evidence to be heavy, a retrial *de novo* was ordered. The learned Judge also found that due to the nature of the case, the appellant deserved to be released from prison pending retrial of the case.

It is without doubt that the learned Judge adjudged the rights of the parties without affording them opportunity of being heard which was a violation of one of the principles of natural justice. The right to be heard before being adjudged is protected by Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 [CAP 2 R.E.

2002] as amended from time to time. Likewise, this Court has, in many occasions when faced with the situation similar to the present one had consistently found the omission to be fatal to the proceedings. One of such pronouncements is in the case of **Abbas Sherally and Another v. Abdul S. H. M. Fazalboy,** Civil Application No. 33 of 2002 (unreported), where the Court stated thus:

> *"The right to be heard before adverse action is taken against such party has been stated and emphasised by the courts in numerous decisions. That right is so basic that decision which is arrived at in violation of it will 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."*

Likewise, in another case of **The D.P.P v. Bernard Mpangala and Two Others,** Criminal Appeal No. 28 of 2001 (unreported), where the High Court decided the issue of limitation without involving the parties, the Court observed as follows:

> *"Admittedly, limitation is a legal issue which has to be addressed at any stage of proceedings as it pertains to jurisdiction. However, parties have to be given a right of hearing, especially as in this case where there was a need to give some explanation*

and even to tender proofs. As that was not done, the learned judge, with due respect, had erred."

See also- **Margwe Erro and Two Others v. Moshi Bahalulu,** Civil Appeal No. 111 of 2014; **R. S. A. Limited v. Hanspaul Automechs Limited and Another,** Civil Appeal No. 179 of 2016; **Barnabas s/o William Mathayo v. R,** Criminal Appeal No. 254 of 2018; and **Christian Makondoro v. The Inspector General of Police and Another,** Civil Appeal No. 40 of 2019 (all unreported).

In all these instances, having found that the parties were denied a right to be heard, the remedy has been to declare the decision and all subsequent orders nullity and remit the record to the High Court to hear the parties on the issue raised before decision is made. In the same vein, we have found in the present case that the learned Judge erred by not affording the parties opportunity to be heard in respect of the issue of the variance between the charge and evidence which he raised had *suo mottu* in the course of composing the judgment. That omission vitiated the judgment and subsequent orders thereto and in the circumstances of this case the whole appeal proceedings. Therefore, by our revisional powers under section 4 (2) of the Appellate

Jurisdiction Act [CAP 141 R.E. 2019] we nullify the appeal proceedings, quash the judgment and set aside all orders emanating therefrom.

As to the way forward, we agree with the learned counsel for the parties that the matter be remitted to the High Court for the determination of the appeal as a whole, and if necessary, along with the said legal issue which was raised by the learned Judge in the course of composing the judgment. The appeal shall be heard by another judge.

In the meantime, Mr. Nasimire urged us to grant the appellant bail in terms of Rule 11 (2) of the Rules, pending determination of the appeal before the High Court. This prayer was contested by Ms. Mwadenya for the reason that the Court has no jurisdiction to grant bail pending appeal because following the nullification of the judgment of the High Court, the notice of appeal to this Court ceases to exist upon which this Court can exercise jurisdiction to consider bail pending appeal. She argued further that what would be in force is the judgment of the trial court.

We have considered the rival submissions and find it apposite to reproduce Rule 11 (2) of the Rules upon which the prayer for bail pending appeal has been made as follows:

> *"Subject to the provisions of sub-rule (1), the institution of an appeal, shall not operate to suspend any sentence but the Court may in any criminal proceedings,* ***where notice of appeal has been given in accordance with rule 68, order that the appellant be released on bail*** *or that the execution of any warrant of distress be suspended pending the determination of the appeal."* [Emphasis supplied]

Therefore, according to this provision, it is only where a notice of appeal has been given in accordance with Rule 68 of the Rules, the Court may exercise its jurisdiction to grant bail pending determination of the appeal. If that is the law then, since the judgment of the High Court has been nullified and a re-hearing of the appeal thereat ordered, the notice of appeal which was lodged in accordance with Rule 68 of the Rules ceased to exist. The Court therefore has no base upon which to order bail pending appeal, in fact there is no pending appeal before the Court. The appeal is now pending before the High Court and if the appellant wishes to pursue his bail is at liberty to do so before that court.

In the event, it is now clear that it is the decision of the trial court which is in force where the appellant was sentenced to imprisonment

of five years on 24th February, 2017. Thereafter, on his first appeal, he was released by the High Court on 4th December, 2017 pending his trial *de novo.* It is our considered view that justice requires, and we hereby order, the appellant be remitted into custody to continue serving his sentence pending determination of his appeal by the High Court.

DATED at **MWANZA** this 30th day of November, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 1st day of December, 2021 in the presence of Mr. Steven Mhoja who is holding brief for Mr. Athony Nasimire, learned counsel for the Appellant and Ms. Sabina Chogoegwe, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL