

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

(CORAM: MWARIJA, J.A., SEHEL, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 419 OF 2018

1. JACKSON ZEBEDAYO @ WAMBURA
2. CHARLES WAMBURA ITEMBE } **APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

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

(Mgaya, J.)

dated the 3rd day of March, 2015

in

HC Criminal Appeal No. 150 of 2012

JUDGMENT OF THE COURT

23rd March, & 1st April, 2021

LEVIRA, J.A.:

The appellants, JACKSON ZEBEDAYO @ WAMBURA and CHARLES WAMBURA ITEMBE were arraigned before the Resident Magistrate's Court of Dar es Salaam at Kisutu facing three counts; to wit, armed robbery contrary to section 287A, unnatural offence contrary to section 154 (1) (a) and gang rape contrary to section 131A (1) all of the Penal Code, [Cap 16 RE 2002]. Upon full trial, the first appellant was convicted

of armed robbery and gang rape and the second appellant was convicted of all the three counts he was charged with. The appellants were accordingly each sentenced to serve thirty (30) years imprisonment in respect of each count and the sentences were ordered to run concurrently. Aggrieved by the conviction and the sentences, they unsuccessfully appealed to the High Court (Mgaya, J.) vide Criminal Appeal No. 150 of 2012, hence the current appeal.

In this appeal, the appellants have presented a total number of twelve (12) grounds in their memorandum and supplementary memorandum of appeal. For convenience, the grounds of appeal are summarized here under as follows:

- 1) That, the learned first appellate Judge erred in law and fact in upholding the conviction without determining that the trial court erred in law to convict the 1st and 2nd appellants by relying on the discredited evidence of PW5 whose name was not listed in the list of prosecution witnesses.
- 2) That, the first appellate Judge erred by failure to determine that the trial court convicted the appellants of rape without proof of penetration.

- 3) That, the first appellate Judge erred by failure to determine that the trial court convicted the appellants by relying on exhibits P1 (the sketch map) and P2 (PF 3) whose contents were not read out after being admitted in evidence.
- 4) That, the first appellate Judge erred in law by failure to determine that the trial court erred to convict the appellants by relying on discredited visual identification of PW1, PW2 and PW3.
- 5) That, the first appellate Judge erred in law and fact in upholding the conviction of the appellants erroneously entered due to trial court's failure to evaluate and analyse the evidence tendered before it.
- 6) That, the first appellate Judge erred in law in upholding the appellants' conviction in respect of the third count on a wrong provision of the law.
- 7) That, the first appellate Judge erred in law and fact in upholding the 2nd appellant's conviction in the second count whereas no medical document was tendered to establish the same.
- 8) That, the first appellate Judge erred in holding that the appellants were the prime culprits whereas no investigatory evidence was led to establish their apprehension in connection with the crime.

9) That, the first appellate Judge erred in law and fact by failing to determine that the prosecution evidence before the trial court was not credible.

At the hearing of this appeal, the appellant appeared in person, unrepresented via virtual link from Ukonga Central Prison, whereas, the respondent, Republic had the services of Ms. Janethreza Kitily, learned Senior State Attorney assisted by Ms. Nancy Mushumbusi, learned State Attorney.

Before commencement of the hearing, the Court *suo moto* invited the parties to submit on the competence of the appeal.

Ms. Kitily submitted that according to the record, this appeal is against both the conviction and the sentence. She referred us to page 105 of the record of appeal where the notice of appeal from the subordinate court to the High Court is found. According to the said notice, she said, the appellants indicated that they were intending to appeal against the conviction and sentence on the armed robbery only although they were respectively convicted of other counts as indicated above.

However, she added, that when the High Court was dealing with their appeal, it considered all the three counts. Ms. Kitany submitted further that, the High Court considered the ground of appeal presented before it, which included the other offences which were not mentioned in the notice of appeal. She argued that, since the notice of appeal institutes appeal, it was wrong for the learned Judge to consider other offences which were not mentioned in the notice of appeal. It was her further argument that, there was no appeal before the High Court on gang rape in respect of both appellants and on unnatural offence against the second appellant. Therefore, the current appeal has no legs to stand on as the High Court had no jurisdiction to entertain those other two offences.

Following that shortcoming, Ms. Kitany submitted that there is no proper appeal before us. According to her, on page 146 of the record of appeal, the appellants' notice of appeal to this Court indicates that they are appealing against the conviction and sentences in respect of all the three counts (armed robbery, gang rape and unnatural offence). In the circumstances, she argued, legally there is no proper appeal before the Court because the two offences entertained by the High Court were not

appealed against. As such, she said, the Court also has no jurisdiction to entertain the current appeal.

Ms. Kitaly went further arguing that, the Court cannot even deal with the appeal against conviction and sentence in respect of armed robbery because the notice of appeal to the Court mentions all the three counts. She insisted, the nature of evidence adduced in this case does not allow the Court to deal with one count (armed robbery) in isolation of the other two (gang rape and unnatural offence).

Therefore, she urged the Court to nullify the proceedings of the High Court, quash the appellants' convictions, set aside the sentences and order the appellants to pursue their appeal in the High Court as they intended, if they so wish. In the alternative, she urged the Court to apply the overriding objective principle and proceed to determine this appeal.

On his part, the first appellant submitted that the High Court convicted him of the three counts while at the trial court he was convicted of only two counts (armed robbery and gang rape). It was his further submission that much as he agreed that the notice of appeal indicated only one offence of armed robbery, his intention was to appeal

against both counts he was convicted of. Thus, he pleaded with the Court that he was not at fault because as a prisoner, he depends entirely on the prison's officers in preparation of documents to be filed in court. Specifically, on the current appeal, he said, he informed the prison admission officer that his intention was to appeal against both counts but the officer mentioned only one offence in the notice of appeal. In the circumstance, he argued, since he had no control of the documents filed in Court, the Court should exercise lenience and proceed to hear this appeal on merits.

The second appellant shared the same argument with the first appellant. He submitted further that, he was convicted of all the three counts and his intention was to appeal against convictions and sentences. He as well prayed for the Court to proceed with the hearing of this appeal on merit.

Having heard both parties, we wish to determine the competence of the current appeal. It is settled law that criminal appeals from subordinate courts to the High Court are initiated by the notice of appeal. Section 361(1)(a) of the Criminal Procedure Act, Cap 20 RE (the CPA) provides that:

"Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant-

a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence." [Emphasis added].

The above quoted provision uses the word '*shall*' meaning that it is mandatory for the appellant to give notice of intention to appeal for his appeal to be entertained by the High Court. In the current appeal, the notice of appeal lodged by the appellants in the High Court was against convictions and sentences on armed robbery only. Impliedly, the appellants did not intend to appeal against other counts or they were satisfied with the convictions and sentences meted out by the trial court. While addressing the Court in respect of the competence of the appeal at hand, the appellants stated that their intention was to appeal against all the three counts. The defect that has been highlighted which they do not object was not a result of their own fault but, it was caused by the

prison admission officer who did not record properly their intention in the notice of appeal.

On her part, Ms. Kitaly, was at one with the appellants that indeed, the notice of appeal to the High Court was against armed robbery only and thus it was wrong for the High Court to determine the appeal basing on the grounds of appeal without considering the notice of appeal. By so doing, she said, the High Court exercised jurisdiction which it did not have rendering the proceedings and the judgment a nullity. We agree with both parties that the appellants' notice of appeal was against convictions and sentences on only armed robbery. Therefore, it was not proper for the High Court to consider the other two counts.

We as well observe that, although the appellants pleaded with the Court to disregard the notice of appeal to the High Court and the one filed in this Court so as to proceed with the hearing of the present appeal on merit, we are unable to grant the prayer. We are aware that the overriding objective principle can be invoked in certain circumstances to facilitate speedy delivery of justice, however, we do

not agree with the proposal made by Ms. Kitany that the said principle should be invoked in the circumstances of the current appeal.

This is due to the reason that, basically, the Court entertains appeals from the High Court. If a matter originating from a subordinate court is not appealed against before the High Court, it cannot be brought directly to the Court on appeal unless it is from subordinate court with extended jurisdiction. The jurisdiction of the Court is provided under section 4(1) of the Appellate Jurisdiction Act, Cap 141 in the following terms:

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

In the light of the above provision and as earlier intimated, the appellants did not appeal against gang rape and unnatural offence in the High Court. Therefore, their appeal before the Court in respect of those offences is misplaced. If at all the Court decides to apply overriding objective principle, what will be a legal base of the appeal before it? There is nothing on the record of appeal justifying the Court to entertain the appeal coming directly from the decision of the subordinate court,

more so as the decision under consideration was not from the subordinate court with extended jurisdiction.

Having so clarified, we revert to another position suggested by Ms. Kitaly, that since the High Court dealt with a matter which was not appealed against, the whole proceedings and the judgment are nullity. We partly agree with her in regard to the two counts which were not indicated in the notice of appeal. It is our considered observation that, the notice of appeal filed in the High Court had no problem at all. The High Court Judge ought to have directed the determination of the appeal on what the appellants had indicated in their notice of appeal and not otherwise. It is our finding that the learned Judge was swayed out by the grounds of appeal which the appellants stated in their memorandum of appeal. It should be noted that the fact that the grounds of appeal touched other offences in itself could not overrule the requirement of the law of filling a notice of intention to appeal. In **Samson Marco & Another v. Republic**, Criminal Appeal No. 446 of 2016 (unreported) the Court stated as follow:

'It is a notice of intention to appeal under section 361(1)(a) of the CPA, and not a Petition of Appeal, that

*initiates criminal appeals from subordinate courts to the High Court. Oftentimes this Court has struck out criminal appeals arising from subordinate courts for having been filed without obtaining notice of intention to appeal under section 361(1)(a) of the CPA: see **ALLY RAMADHANI SHEKINDO & SADICK SAID @ ATHUMANI vs. R., CRIMINAL APPEAL NO 532 OF 2016 (unreported).***

We are settled in our minds that the High Court wrongly entertained grounds of appeal on offences which were not indicated in the notice of appeal, as a result, its decision became a nullity. This Court is not prepared to turn a blind eye to step on a nullity and decide a matter which is not properly before it.

For the reasons state above, we invoke the Court's power under section 4 (2) of the Appellate Jurisdiction, Cap 141 RE 2002 and proceed to nullify the proceedings and the decision of the High Court. The appellants are at liberty to pursue their appeal before the High Court in accordance with the notice of appeal they filed on 16th April, 2012 or they may follow the proper procedure to amend the same as they deem

fit to accommodate their intention to appeal against the other two counts.

In the meantime, the appellants shall remain in custody pending hearing and determination of their appeal by the High Court.

It is so ordered.

DATED at DAR ES SALAAM this 29th day of March, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 1st day of April, 2021 in the presence of Appellant via Video Conference from Ukonga Prison and Mr. Yusuf Aboud, State Attorney for the Respondent is hereby certified as a true copy of the original




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL