IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A and KIHWELO, J.A.)

CRIMINAL APPEAL NO. 13 OF 2018

BERNARD MATUTU.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania,

(District Registry) at Mwanza

(Bukuku J.)

dated the 12th day of September, 2014

in

Criminal Appeal No. 82 of 2014

JUDGMENT OF THE COURT

6th &11th July, 2022

MUGASHA, J.A.:

This is yet another case of delayed trial as the appellant has been struggling for more than ten years to pursue an appeal before the High Court against the decision of the District Court of Bunda at Bunda. He was charged with two counts of unlawful possession of Government trophies and failure to report possession of Government Trophies contrary to section 86 (1) and (2) (c) (i) of the Wildlife Conservation Act of 2009 read together with

paragraph 14 (d) of the First Schedule to the Economic and Organised Crime Control Act [CAP 200 R.E 2002] and section 87 (1) and (2) of the Wildlife Conservation Act of 2009.

As gathered from the record before us, he was on 27/8/2012 convicted for both counts in *absentia* and sentenced to a jail term of twenty years which was ordered to commence upon his apprehension. Also, it can be discerned from the record at page 21 that on 7/2/2014, the appellant was committed to prison to serve the jail term. However, the record does not show if upon being apprehended and before being taken to prison, the appellant appeared before the trial court to show cause on the reason of his absence over which he had no control to enter appearance in court and that he had a probable defence on the merit. This is a mandatory requirement of the dictates of section 226 (2) of the Criminal Procedure Act [CAP 20 R.E 2019] which stipulates as follows:

> *"226 (2) If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit."*

However, we need to say no more on account of what will become apparent in the determination of this appeal.

Aggrieved, the appellant lodged a notice of appeal in the High Court and subsequently an appeal faulting the verdict of the trial court on among others, conducting the trial without having obtained the consent of the Director of Public Prosecutions and denying him opportunity to explain the reasons for non-appearance on the day fixed for judgment. Moreover, in the petition of appeal, the appellant stated in clear terms that he wished to be present at the hearing of the appeal which is evident at page 23 of the record of appeal. Moreover, page 26 of the record of appeal shows that, before the High Court on 12/9/ 2014, the appeal was before Bukuku, J. However, it is glaring that none of the parties to the appeal was given notice of the date of hearing, be it from the Registrar or Judge and thus, neither the appellant nor the respondent were present in court on that particular day. Yet, the learned Judge passed the following order:

"ORDER

Appeal is filed out of time. It is dismissed."

Aggrieved by that Order, the appellant has preferred an appeal to the Court praying that justice be meted on him. In the Memorandum of Appeal, he fronted ten grounds of complaint which we have not reproduced for reasons to be apparent in due course.

At the hearing the appellant appeared in person, unrepresented, whereas the respondent Republic had the services of Mr. Ignas Joseph Mwinuka, learned Senior State Attorney.

On taking the floor, following a brief dialogue with the Court on the grounds of appeal not relating to his grievance on what had transpired before the High Court, he abandoned all the grounds in the Memorandum of Appeal. Instead, with leave of the Court he was allowed to raise an additional ground now challenging the High Court in dismissing his appeal without according him the right to be heard and we treated this to be the sole ground of complaint. In elaboration of the complaint, he contended that, he was unware of the date of hearing of the appeal as he was not notified though he had expressed to be present at the hearing of the appeal.

On this, he argued to have been condemned by the High Court without being afforded an opportunity to be heard. He thus, sought the indulgence

of the Court to allow his appeal in order to pave way for his appeal to be heard by the High Court. On the other hand, Mr. Mwinuka supported the appeal. Apart from subscribing to what was said by the appellant he added that, the omission was in violation of the fundamental right to be heard and as such, the decision of the High Court is illegal. He thus urged us to nullify it and return the case file to the High Court for it to hear the appeal in the presence of both parties.

Having considered the record before us and the ground of complaint, the issue for or consideration is the propriety or otherwise of the order which dismissed the appeal in the absence of the appellant.

Section 363 of the CPA regulates the manner in which an appeal from the subordinate court may be presented before the High Court. It stipulates as follows:

> *"If the appellant is in prison, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison, who shall thereupon forward the petition and copies to the Registrar of the High Court."*

After the appeal has been filed, the provisions of section 365 (1) and (2) of the CPA gives the following guidance:

> *" (1) If the High Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his advocate, and to the Director of Public Prosecutions, of the time and place at which the appeal will be heard and shall furnish the Director of Public Prosecutions with a copy of the proceedings and of the grounds of appeal; save that notice need not be given to the appellant or his advocate if it has been stated in the petition of appeal that the appellant does not wish to be present and does not intend to engage an advocate to represent him at the hearing of the appeal.*
>
> *(2) Where notice of time, place of hearing cannot be served on any person because he cannot be found through the address obtained from him by the court under section 228 or 275, the notice shall be brought to his attention in the manner prescribed by section 381."*

Furthermore, the power of the High Court and the right of the appellant to appear at the hearing of the appeal are governed by the provisions of section 366 (2) of the CPA which categorically states that, an appellant,

whether in custody or not, shall be entitled to be present at the hearing of his appeal. Moreover, Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 [CAP 2 R.E.2002] embraces the right to be heard as among the attributes of equality before the law as it stipulates:

> *"Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kusikilizwa kwa ukamilifu."*

The English rendering is to the effect that, when the rights and duties of any person are being determined by the court or any agency, that person shall be entitled to a full hearing.

In the light of the stated position of the law and what transpired before the High Court, it is glaring that the appellant was condemned unheard without regard to the statutory and fundamental constitutional right. There are a number of decisions in which the Court has emphasized that, a right to be heard is so basic that a decision arrived at, in violation of it is a nullity even if the same decision would have been reached had the party been heard. See: **ABBAS SHERALLY VS ABDUL S.H.M FAZALBOY**, Civil Application No. 32 of 2002; **ECO- TECH (ZANZIBAR) LIMITED VS**

GOVERNMENT OF ZANZIBAR, ZNZ Civil Application No. 1 of 2007; **IBRAHIM SAID MRABYO @ MAALIM AND ANOTHER VS THE REPUBLIC,** Criminal Appeal No. 256 of 2015; **MUGENDI MANOTI VS REPUBLIC,** Criminal Appeal No. 460 of 2015; **MZUMBE UNIVERSITY VS DR. NOORDIN JELA,** Civil Appeal No. 23 of 2010 and **MARGWE ERRO AND TWO OTHERS VS MOSHI BAHALULU,** Civil Appeal No. 111 of 2014 (all unreported).

In the above cited decisions, the Court has all along emphasized and reiterated that, the right to be heard when one's right is being determined by any authority let alone a court of justice, is both elementary and fundamental and its flagrant violation offends article 13 (6) (a) of the Constitution. See: **MBEYA- RUKWA AUTOPARTS AND TRANSPORT LIMITED VS JESTINA MWAKYOMA,** [2003] TLR 251.

In the premises, from what transpired in the case at hand, there was no justification for the High Court to peremptorily dismiss the appeal without affording the appellant an opportunity to be heard as per the dictates of the law. We agree with the learned Senior State Attorney that the omission renders the order of the High Court a nullity and it cannot be spared. Thus,

it is hereby quashed and set aside. Therefore, we find the appeal merited and proceed to allow it. We direct the case file to be returned to the High Court for it to hear the appeal expeditiously and in accordance with the dictates of the law before another Judge with competent jurisdiction.

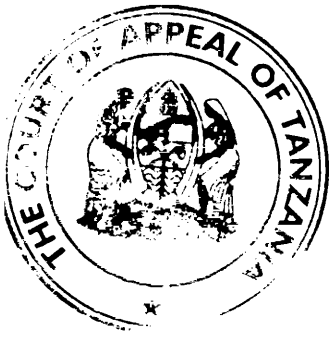
DATED at **MWANZA** this 8th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 11th day of July, 2022 in the presence of appellant in person and Ms. Maryasinta Lazaro Sebukoto, learned Senior State Attorney for Respondent/Republic, is hereby certified as true copy of the original.



H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL