IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 378 OF 2020

ISSA JUMA @ MAGONO ..... 1ST APPELLANT

BARAKA JUMA @ MAGONO ..... 2ND APPELLANT

ABDALLAH MOSHI LYANDI ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Tabora]

(Khamis, J.)

dated the 12th day of June, 2020

in

Misc. Criminal Application No. 207 of 2018

.....

JUDGMENT OF THE COURT

20th & 25th September, 2023

LILA, JA:

The Appellants are aggrieved by the decision of the High Court in Misc. Criminal Application No. 207 of 2018 which dismissed their application for revision basically on the ground that no good and or sufficient reasons were given by the appellants (then applicants) to prefer a revision application instead of an appeal. In that application the applicants were seeking for an order revising the decision of the Resident

Magistrates' Court of Tabora (the trial court) in Criminal Case No. 13 of 2015. Dismissal of the application aggrieved the appellants and are before the Court to challenge it.

The following facts, as may be discerned from the record of appeal, present the undisputed essential background to this appeal. It runs thus; The 1st and 2nd appellants who were then 3rd and 4th accused persons together with five other persons namely Francis Aloyce, Said Hamis, Juma Mkasiwa Makulila, Victoria Steven and Mashaka Athuman @ Tambwe (then 1st, 2nd, 5th, 6th and 7th accused persons) who are not parties to this appeal were arraigned before the trial court in Criminal Case No. 13 of 2015. Francis Aloyce and Said Hamis were jointly charged in the 1st count with the offence of stealing by agent contrary to section 273(b) of the Penal Code. The 1st and 2nd appellants were jointly charged with the offence of unlawful possession of goods suspected of having been stolen contrary to section 312(1)(b) of the Penal Code in the 2nd count. In the 3rd count of conspiracy to commit an offence contrary to section 384 of the Penal Code, all of the above were jointly charged. The subject matter of the charge was 1035 bales of tobacco worth TZS 135,002,016.00. The charge alleged that 500 bales of tobacco weighing 18,455 kilograms and worth 67,501,008.00 belonging to Athwal's Transport and Timber Ltd were

entrusted to Francis Aloyce and Said Hamis who were, respectively, a driver and turnboy of a motor vehicle make Scania with Registration No. T 830 AMY to transport them from Tabora to the company styled Tanzania Leaf and Tobacco Company at Morogoro Region. The said tobacco did not reach the destined station and the two went missing.

Upon the matter being reported to the police, a sombre manhunt was mounted leading to the arrest of Francis Aloyce and Said Hamis together with the motor vehicle. The Global Positioning System (GPS) assisted to lead the search team to discover that the said bales of tobacco were first taken to the godown of Juma Mkasiwa Makulila (then 5th accused) and were later shifted to the godown of Baraka Juma Magono (2nd appellant). A search in the latter godown found 1035 bales valued at TZS 155,216,000.00 and all were seized by police. This led to some members of the family of Magono (1st and 2nd appellant) and all the accused persons being arrested and charged as above.

The trial ended up with the 1st and 2nd appellants as well as Juma Mkasiwa Makulila (then 5th accused) being found not guilty and were acquitted. Francis Aloyce and Victoria Steven were convicted and each sentenced to serve two years imprisonment while Mashaka Athumani @ Tambwe was sentenced to a twelve months' conditional discharge. The

trial court did not end there but ordered the 1035 bales of tobacco (exhibit P4) found at the 1st an 2nd appellants' godown be given to the complainant (owner).

Francis Aloyce, Said Hamis and Victoria Steven appealed to the High Court in (DC) Criminal Appeal No. 119 of 2016 raising three grounds of appeal but not touching on the 1035 bales of tobacco. Luckily, their appeal was successful ending up with their respective convictions and sentences being quashed and set aside. The High Court decision is silent in respect of the 1035 bales of tobacco which the trial court had ordered to be returned to the owner. The decision was rendered on 30/8/2016.

Abdallah Moshi Lyandi (3rd appellant) testified for the defence before the trial court as DW8 stating that 400 bales of tobacco found in the godown belonging to the 1st and 2nd appellants and taken to police belonged to him as he had stored them therein waiting for the crops marketing season.

It is worth noting that the foregoing narrations reveal two crucial facts that; **one**, that the 3rd appellant was not a party to the former charge, that is in Criminal Case No. 13 of 2015 and in (DC) Criminal Appeal No. 119 of 2016 and, **two**; that the 1st and 2nd appellants who were acquitted by the trial court in Criminal Case No. 13 of 2015 did not appeal

to the High Court, hence they were not parties in (DC) Criminal Appeal No. 119 of 2016.

Despite the fact that the 1st and 2nd appellants were acquitted and DW8 being a mere witness, the trio resurfaced in the High Court in Misc. Cr. Application No. 207 of 2018, an application for revision they filed seeking revision of the trial court's decision in Criminal Case No. 13 of 2015. Parties were, on 16/10/2019, granted leave to argue the application by written submission to which they complied.

In his judgment, at page 462 of the record, the learned judge, after summarising the submissions by both sides, on his own motion, singled out two issues for determination stating that: -

> *"Two issues crop up for determination in this application: whether the application for extension of time is properly before the court and* ***whether the trial court's order of 15/4/2016 is subject to revision****." (Emphasis added)*

In answering the above issues, the learned judge held a long discussion on the revisional powers of the High Court citing the laws and several Court's decisions and concluded that: -

> *"In DPP V SALUM ALLI JUMA [2006] TLR 193, the Court of appeal held that revision could be*

resorted to even where there is a right of appeal if a good and sufficient reason for doing so is shown.

As no good and or sufficient reason(s) were given by the applicants in favour of revision avenue as against an appeal, I find no merit in this application which is hereby dismissed in its entirety..."

In the light of this order, the fate of the appellants' appeal ended there. The appeal was therefore not determined on merit.

It is crystal clear, looking at the substance of grounds 1 and 3 (the alternative ground) of appeal left after abandoning ground 2 of appeal, that the above order aggrieved the appellants triggering institution of the present appeal challenging it. The grievances are: -

"1. That, in misdirection and non-direction of the facts of the application the learned High Court Judge erred in law and fact to dismiss the appellants' application on the ground that no ground and or sufficient reason(s) were given by the appellants in favour of the revision avenue as against an appeal.

3. IN THE ALTERNATIVE the learned High Court Judge erred in law and fact to dismiss the application on the ground that no and or

sufficient reason(s) were given by the appellants in favour of the revision avenue as against the ground which was suo motu raised and determined without affording the parties their right to be heard on the same."

We, upon a serious examination of the complaints, are of the firm view that the alternative ground is decisive of this appeal as it touches on the violation of the right to be heard which is one of the cardinal rules of natural justice the resultant effect of which, if established, is to render the whole decision a nullity. We shall not, therefore, concern ourselves with the substantive ground of appeal.

Both parties entered appearance before us save for the 3rd appellant. All the appellants had the services of Mr. Kelvin Kayaga learned advocate and Ms. Grace Lwila, learned State Attorney, represented the respondent Republic.

Arguing in support of the alternative ground of appeal which, basically, alleges that the High Court order dated 12/6/2020 was issued in breach of one of the rules of natural justice, Mr. Kelvin argued that the learned judge who heard the appeal in the High Court decided the matter on an issue concerning the tenability of the revision application instead of

an appeal which he had raised and answered *suo motu* in the course of composing his judgment. He insisted that parties were not heard on it and he urged the Court to nullify the entire decision and order the appeal be heard afresh.

Ms. Lwila conceded that the appellants' constitutional right to be heard was violated. She opined that the High Court judgment should be quashed and the matter be remitted to the High Court for it to proceed with it in accordance with the law.

As indicated above, the application for revision (Misc. Cr. Application No. 207 of 2018) was heard by way of written submissions and the parties complied with the schedule of lodging them. We have read the affidavit in support of the application for revision found at pages 224 to 228, applicant's written submission in support of the application found at pages 434 to 437 and reply to the applicants' written submission in support of the application located at pages 453 to 454 and the applicants' rejoinder submission found at pages 455 to 456 of the record of appeal and satisfied ourselves that neither of the parties moved the court to determine that issue and or argued on that issue raised by the learned judge. We have, therefore, respectfully, found ourselves constrained to fully agree with the sentiments of both counsel that the learned judge raised *suo motu* the issue whether or not the applicants were proper to access the High Court

by way of revision application instead of by way of appeal. Worse still, he did not invite the parties, as he ought to have done, to address him on that issue if he found it to have been necessary in the determination of the application before him. Instead, he went ahead and *suo motu* ruled on it consequently dismissing the application. The parties were therefore denied the right to be heard which is a violation of one of the fundamental rules of natural justice.

It is established law that any judicial order made in flagrant violation of any cardinal rules of natural justice is void *ab initio* and vitiates the decision and must be quashed even if the same decision would have been arrived at if fully observed or even if made in good faith. The Court has consistently held so in various decisions, to mention a few; **Abbas Sherally and Another vs. Abdul S. H. M. Fazaboy**, Civil Application No. 32 of 2002, **Dishon John Mtaita vs. the Director of Public Prosecutions**, Criminal Appeal No. 132 of 2004 (both unreported).

In view of the above, we are constrained to allow the appeal and rule that the High Court ruling dated 12/6/2020 and its consequential orders were bad in law and therefore a nullity. Consequently, we are enjoined, as we hereby do, to remit the record of the High Court for it to proceed with the determination of the application for revision (Misc. Cr.

Application No. 207 of 2018) from the stage reached after filing of the written submissions according to law.

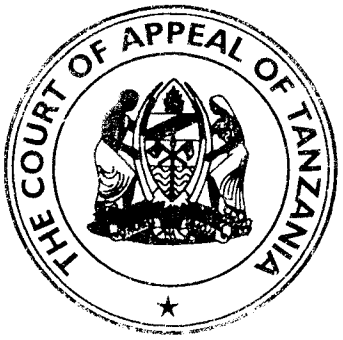
DATED at **TABORA** this 25th day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 25th day of September, 2023 in the presence of Mr. Saikon Justine Nokoren, holding brief for Mr. Kelvin Kayaga, learned counsel for the Appellants and Ms. Suzan Barnabas, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL