IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MKUYE, J.A., GALEBA, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 409 OF 2021

KADEGE THABIT @ SHANKALA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the Resident Magistrates' Court of Tabora at Tabora)

(Kato, SRM Ext. Juris.)

dated the 9th day of July, 2021

in

DC Criminal Case No. 37 of 2021

.....

JUDGMENT OF THE COURT

21st September, & 4th October, 2023

GALEBA, J.A.:

The appellant, Kadege Thabit Shankala was charged before the Resident Magistrates' Court of Tabora at Tabora, in Criminal Case No. 61 of 2018. He was charged on a single count of unnatural offence contrary to section 154 (1) (a) and (2) of the Penal Code. Consequently, he was convicted and because the victim was allegedly, a toddler of one year and six months, the appellant was sentenced to life imprisonment. His first appeal in DC Criminal Appeal No. 37 of 2021 was dismissed by the Resident

Magistrates' Court, Kato SRM, with extended jurisdiction, (the first appellate court). This dismissal of his appeal before the first appellate court, and confirmation of his life sentence, is the substance of the appellant's complaint in this second appeal.

Before us, the appellant raised nine grounds of appeal, bitterly complaining about the decision of the first appellate court. However, for the reasons that will become obvious in due course, we will not exercise this Court's appellate jurisdiction in this appeal, and because of the manner we are likely to dispose of it, we feel compelled to make one general observation. Remarkably, this Court's appellate jurisdiction is traceable from multiple sources, but the basic ones are Article 117 (3) of the Constitution of the United Republic of Tanzania, 1977 and section 4 (1) of the Appellate Jurisdiction Act (the AJA). For this Court to exercise that jurisdiction over either a decision of the High Court, the Resident Magistrate with extended jurisdiction or any other statutory tribunal, that court, Magistrate or tribunal, must have exercised its jurisdiction under the applicable law and exhaustively heard and determined all issues or grounds of appeal presented before it, in the first place. That is to say, this Court's appellate jurisdiction may only legally be triggered into action by a properly initiated appeal against a decision in respect of a matter fully heard and determined according to law. The simpler way to put it, is this; where an appeal is

presented to the High Court, but for some reason, that court does not determine it, this Court's appellate jurisdiction cannot legally, be invoked to question the decision of the High Court so reached.

With that clarification on what this Court may hear on appeal, we will, from this point on, proceed to discuss generally the appeal that was presented to the first appellate court, and come to a definite conclusion on whether the court, fully determined the complaints in Criminal Appeal No. 37 of 2021 or not. And that is the only issue we think is fit for determination in this appeal.

As indicated above, when the appellant was sentenced to life imprisonment at the subordinate court, he lodged an appeal to the High Court, but on 16th June 2021, under the provisions of section 256A (1) of the Criminal Procedure Act (the CPA), the assigning authority at the High Court level, transferred the appeal to the Resident Magistrates' Court and was accordingly, assigned to the first appellate court. The petition of appeal before the said court had six grounds of appeal, which were very elaborate and were even supported with this Court's authorities. The following are the said grounds: -

> *"1. That the presiding Resident Magistrate wrongly convicted me (appellant) by relying on exhibit **P2**, the confession statement and exhibit **P3***

extra- judicial statement. My Lord Judge the said exhibit were admitted in evidence and acted upon illegally, because it was not read in Court before it could be admitted in evidence to permit the appellant to know its contents. In supporting my point see the case of ***SUMNI S/O AMMA @ AWENDA VS. REPUBLIC, CRIMINAL APPEAL NO. 393 OF 2013 CAT DAR ES SALAAM*** *and repeated in the case of* ***MASHAKA S/O PASTORY PAULO MAHENGI UHURU AND FOUR (4) OTHERS VS. REPUBLIC, CRIMINAL APPEAL NO. 61 OF 2016 CAT DAR ES SALAAM*** *(both Unreported). Therefore, the cautioned statement was supposed to be disregarded as was held in the case of* ***MORRIS AGUNGA AND TWO (2) OTHERS VS. REPUBLIC, CRIMINAL APPEAL NO. 100 OF 1995, JANTA JOSEPH KOMBA, ADAMU OMARY SEIF OMARY MFAUME AND CUTHBERT MHAGAMA VS. REPUBLIC, CRIMINAL NO. 95 OF 2006*** *(both Unreported).*

2. *That, the trial Resident Magistrate erred both in law and fact to ignore the defense evidence which was supported by three witnesses, such as* ***DW2, DW3*** *and* ***DW4****, therefore failure to consider any defense put up by the appellant is fatal and will vitiate the conviction, this stance was held in the*

case of ***ELIAS STEVEN VS. REPUBLIC, [1982] T.L.R. 313, HUSSEIN IDD AND ANOTHER VS. REPUBLIC [1986] T.L.R. 283, LOCKHART SMITH VS. REPUBLIC (1965) EA 211, LUHENDE BUSWELU VS. REPUBLIC, CRIMINAL APPEAL NO. 164 OF 2012, VENANCE NUBA AND ANOTHER VS. REPUBLIC, CRIMINAL APPEAL NO. 425 OF 2013 CAT TABORA.***

3. *That, the learned trial Resident Magistrate erred both in law and fact in finding that* ***PW1, PW2, PW4, PW5*** *and* ***PW7*** *gave a true and credible testimony.*
4. *That, the exhibit P3 the cautioned statement were received in evidence illegally, because it appeared that the said statement were recorded on* ***26th*** *day of June,* ***2018*** *which means that it is thirteen* ***(13)*** *days passed from the date when the said cautioned statement was recorded and seventeen* ***(17)*** *days from the date of the appellant he was arrested. My Lord Judge, this violated* ***section 50 (1) (a)*** *and* ***(b)*** *of the* ***Criminal Procedure Act,*** *Cap. 20 R.E. 2002.*
5. *That, the medical Doctor to whom transferred the victim to the Government Hospital at Urambo and the medical Doctor at Urambo Government Hospital all were not called or summoned to appear before the trial Court in order to*

authenticate the truth why? My Lord Judge, the medical officer of Usoke to he made a transfer of the victim from Usoke to Urambo and the medical officer at Urambo Government Hospital they were key witnesses in this case in order to remove any doubt in the prosecution case but I wonder why they were not called or brought before the Court of law to prove the truth. In conformity with the above point see the case of ***MKOMBOZI S/O EZEKIEL VS. REPUBLIC, CRIMINAL APPEAL NO. 129 FO 2008 CAT TABORA*** *(Unreported).*

6. *That, the witness* ***PW1*** *and* ***PW2*** *told the Court in their evidence that the victim was discharging blood stains and sperms. My Lord Judge, there was no even the proof or scientist to prove that it was the blood and sperms of the appellant or otherwise. See in the case of* ***KABATE KACHOCOMBA VS. REPUBLIC [1986] T.L.R. NO. 170*** *and in the case of* ***BAHATI MAKEJA VS. REPUBLIC, CRIMINAL APPEAL NO. 118 OF 2006 CAT MWANZA (UNREPORTED) AND YUSUPH KABONGA VS. REPUBLIC (1968) HCD NO. 188.*** *My Lord Judge, I swear again and again that I didn't commit the alleged offence and the one who knows is the God above."*

When the appeal came up for hearing on 25th June 2021, before the first appellate court, at page 76 of the record of appeal, the appellant stated:

"I pray for my grounds of appeal to be considered."

Mr. Miraji Kajiru, learned State Attorney, in about one and a half pages from page 76 to 77 of the record of appeal, replied to no specific ground of appeal. He did not distinguish or support any of the authorities cited by the appellant in his petition of appeal.

For a moment, however, and by way of a digression, we wish to observe that, we are not at all supporting the act of lumping numerous authorities in a petition or a memorandum of appeal; it is a practice we do not at all condone, but rather it is an informal routine we tolerate particularly in respect of legally unrepresented inmates incarcerated in prison. In such circumstances, a sound and functional judicial system operating on the basis of the Rule of Law, must favour unimpeded access to justice and a right to be heard, over technical rules which if not methodically observed, no party would be prejudiced.

When the learned State Attorney had replied to the grounds in a manner we just hinted on above, the matter was adjourned to 2nd July 2021 for judgment although it was eventually delivered on 9th July, 2021 dismissing the appellant's first appeal. It is this judgment which is challenged

before us and in which we are to resolve the issue we framed earlier on, that is, did the first appellate court, legally determine the grounds of appeal that were presented before it for determination?

We will start with grounds **one** and **four,** because, there was a consideration on them to the minimal extent, and we will explain. The complaint in those grounds was that, the appellant's cautioned statement exhibit P2 was tendered and admitted illegally because the confession was; **first**, not read out in court during its admission and; **second**, it was recorded 17 days after the appellant's arrest as opposed to 4 hours permitted by section 50 of the CPA. As for the extra judicial statement, exhibit P3 in ground one, the appellant's complaint was that, like the cautioned statement, the exhibit was not read out at its admission. As for the manner the exhibits were tendered, without any intention of deciding this or the other way, we will let the record speak for itself. The cautioned statement was tendered before the trial court at pages 13 and 14 of the record of appeal and this is the style in which the confession was admitted:

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> *"**PW3**...I pray to tender the cautioned statement dated 9/6/2018 as an exhibit for the prosecution.*
>
> ***Accused**: I have one objection that I did not sign the cautioned statement.*

Court: *Objection overruled, meanwhile the cautioned statement is hereby admitted in court and marked exhibit P1.*

PW3 further: *I pray to read this caution statement.*

Court: *Prayer granted, cautioned statement read over and fully explained to the accused person."*

That was for the cautioned statement. Come now for the extra judicial statement. This was from page 22 to 23:-

"***PW6****...I pray to tender the extra judicial statement as an exhibit for the prosecution.*

Accused: *I have one objection, that it is not me who gave the statement.*

Court: *Extra judicial statement admitted in court and marked exhibit P3 because the objection is not legally justifiable.*

PW6 further: *I read the statement before the accused in Swahili. I pray to read before the court.*
Court: *Extra judicial statement read over and explained before the court."*

In respect of the two grounds of appeal contesting admission of the above exhibits, the court made a determination at page 82 of the record of appeal, thus:-

"I have gone through the evidence on record and I have found that ***the cautioned statement was***

recorded according to law and was tendered before the court according to procedure and later it was read before the court by the recording officer, hence it was admitted procedurally.

The same, ***extra judicial statement was recorded procedurally and it was admitted according to law."***

[Emphasis added.]

Of course, burning within our mind is a massive urge and an enormous temptation to assert a legal position as to the status of the above two confessions, but because of the manner we will end this ruling, we choose to prudently contain ourselves. In the matter before the first appellate court, other than the above "decision on the two grounds," no other ground of appeal was effectively determined.

Because of that, at the hearing of the appeal, we asked Ms. Grace Lwila, learned State Attorney, who was appearing together with Mr. Merito Ukongoji, learned Senior State Attorney, for the respondent Republic, on whether, we can hear the appeal arising from a judgment in which the majority of the grounds were not resolved and those determined were not addressed intelligibly.

Ms. Lwila submitted that, a careful study of the judgment challenged in this appeal, reveals that the appellant's appeal was not legally heard and determined according to law. She contended that in such circumstances, the appellant's right to be heard was clearly violated. The learned State Attorney was quick to propose a way forward; her proposition was that the decision of the first appellate court ought to be nullified and the judgment quashed with orders remitting the original record to the High Court for hearing and determination of the appellant's appeal according to law. When we asked the appellant as to his comments, he agreed with the proposal by the learned State Attorney.

We will start with a brief description of the judgment challenged without intending to suggest that there is any minimum number of pages for a sound court judgment, but the one challenged in this appeal is 5 pages long, running from page 79 to 84 of the record of appeal. Of the 5 pages, pages 79, 80, 81 and part of page 82 reproduce the grounds of appeal. So, consideration and determination of the entire appeal, is contained in the remaining part of pages 82 and 83. Page 84 has a concluding part of the judgment dismissing "all grounds of appeal" for want of legal merit and confirming the appellant's conviction and his life sentence in prison. In our view, considering the number of grounds of appeal in the petition, and the discussion expected to go into resolving them, a space of less than two

pages as it was in this case cannot guarantee an elaborate consideration of the grounds raised.

It is significant that we highlight a few points at this juncture. According to section 359 of the CPA, it is the High Court or a Resident Magistrates' Court with extended jurisdiction, that has jurisdiction to determine ail criminal appeals preferred from subordinate courts.

That section does not say that the High Court or the Resident Magistrate with extended jurisdiction may hear part of the appeal and leave out the other. In this case, although grounds of appeal number one and four were, to the minimal extent, dealt with by dismissing them, but the judgment lacks an intelligible justification for doing so. Only the above quoted conclusions are made. For instance, in respect of the cautioned statement which was objected to but still was admitted; the first appellate court stated that it had gone through the court record and had noted that the cautioned statement was recorded properly and was tendered procedurally. What was needed is how was the exhibit recorded properly, and how was it tendered procedurally. Some labour, even the minimum of it needed to be seen as having been put in the judgment.

As for the extra judicial statement, the decision on it was this; "*the same, extra judicial statement was recorded procedurally and it was*

admitted according to law". Respectfully, we cannot agree, with this casual kind of determination of an appeal challenging a life sentence in prison. Determination of a point in a judgment, requires a judicial officer determining the matter to clearly and sufficiently address the issue before him and state in clearest of the terms, why is it that he decides the way he does.

Briefly, whereas all the grounds of appeal are shown to have been dismissed at page 84 of the record of appeal, the grounds were not, in law addressed as expected. Further, although grounds one and four seems to have been determined, legally, the grounds had only conclusions not determinations. In **France Michael Nyoni v. R**, Criminal Appeal No. 505 of 2020 (unreported), we observed that:-

> *"...we wish to restate a settled position of the law that, the appellate court is bound to consider the grounds of appeal presented before it, address and resolve the complaints of the appellant either separately or jointly depending on the circumstance of each case. The appellate Court needs to discuss all the grounds presented before it..."*

See also, the case of **Nyakwama Ondare Okware v. R,** Criminal Appeal No. 507 of 2019 (unreported) on the same point.

It is significant to make one observation as we conclude. An incarceration in jail, involves taking away a subject's constitutionally guaranteed fundamental rights, liberties and freedoms. It is therefore crucial that, where a man in jail, with all the vagaries of prison he is subjected to, follows a due process of law and challenges his detention, it is incumbent upon the courts of law to determine all complaints that he presents to them, and if such complaints in the form of grounds of appeal are to be dismissed, reasons for doing so, have, as a matter of law, to be clearly stated in the judgment. In court practice, any valid judgment must be well reasoned with capacity to speak clearly and communicate in defence of the reasoning behind its content. An incoherent judgment with no clarity as to how it was reached, or jumping to conclusions without any thorough and rational analysis on how the conclusions came about, is a dumb mute judgment because it needs aid and assistance from without it, rather than from within it, to explain why it is, the way it is. Such a judgment is like the one we are dealing with, and as for us, we cannot leave it to survive any one more minute.

For the above reasons, under the provisions of section 4 (2) of the AJA, we nullify the proceedings of the first appellate court in (DC) Criminal Appeal No. 37 of 2021 and quash the judgement emanating therefrom. We remit the original record to the High Court with orders that, the said

Criminal Appeal, be assigned to an appropriate judicial officer for hearing and determination of the appellant's appeal according to law. As the appeal to the High Court became due for hearing in 2019, determination of the same ought to be expedited.

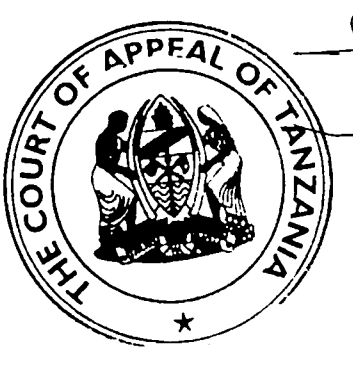
DATED at **TABORA** this 3rd day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 4th day of October, 2023 in the presence of the appellant in person, and Mr. Dickson Swai, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the Original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL