

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: WAMBALI, J.A., KENTE, J.A. And KHAMIS, J.A.)

CRIMINAL APPEAL NO. 245 OF 2021

BARNABAS JAMESAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the decision of the Court of the Resident Magistrate of
Bukoba with Extended Jurisdiction at Bukoba)**

(Luambano, SRM Ext. Jur.)

Dated the 17th day of March, 2021

in

Criminal Appeal No. 4 of 2021

RULING OF THE COURT

6th & 13th December, 2023

WAMBALI, J.A.:

The appellant, Barnabas James together with Erick Mathias @ Yaulimwengu (not a party of this appeal) were charged in the District Court of Biharamulo (the trial court) with three counts of Armed Robbery contrary to section 287A of the Penal Code, Cap 16.

It was alleged in the particulars in respect of the three counts that the said robberies occurred on 21st July, 2019, 6th August, 2019 and 17th August, 2019 at Kaniha Village within Biharamulo District, Kagera Region in which sixteen batteries valued at TZS 17,100,000.00, four batteries

valued at TZS 4,000,000 and seventeen batteries valued at TZS. 17,100,000.00, respectively, all make NorthStar, the property of Vodacom Company were stolen by the appellant and his colleague. It was further alleged that during the robberies bush knives and sticks were used by the said bandits to threaten the victims.

The appellant also faced a separate count of being in possession of instruments for commission of the offence, namely, one plier, two G clamps, two hack saws and three blades contrary to section 298 (d) of the Penal Code and that the incident occurred at about 10.30hours at Runzewe Uyovu within Bukombe District in Geita Region on 18th August, 2019.

The appellant denied the charge; hence a full trial was conducted. In the end, the trial court convicted him and his colleague in respect of all counts. It thus sentenced the appellant and Erick Mathias @ Yaulimwengu to thirty years imprisonment in respect of each count to run concurrently. In the separate count, the appellant was sentenced to serve a sentence of three years in prison.

Aggrieved, the appellant lodged an appeal to the High Court which was registered as Criminal Appeal No. 20 of 2020. However, the said appeal was transferred to the Court of the Resident Magistrate of Bukoba

at Bukoba (the first appellate court) and assigned to Luambano, Senior Resident Magistrate with Extended Jurisdiction and registered as Criminal Appeal No. 4 of 2021.

According to the record of appeal, on 25th February, 2021 when the said appeal was called on for hearing before the first appellate court, the appellant did not show up to prosecute his appeal and it was reported that he had escaped from custody. It is only Erick Mathias @ Yaulimwengu who entered appearance through video conference as he was at Bangwe Prison in Kigoma. The first appellate court thus invoked the provisions of section 383 (1) of the Criminal Procedure Act, Cap 20 (the CPA) and dismissed the appeal in respect of the appellant. It however proceeded to hear the appeal by Erick Mathias @ Yaulimwengu and delivered judgment dismissing the same.

Notwithstanding the appellant's non-appearance and not being heard by the first appellate court, he lodged the instant appeal contesting the decision fronting fourteen grounds of appeal. For purpose of this ruling, we do not intend to reproduce the respective grounds herein.

When the appeal was called on for hearing before us, the immediate question which arose revolved on the competence of the appeal. Parties made brief submissions for and against.

Though the appellant conceded that before the hearing he had escaped from custody and that his appeal was dismissed by the first appellate court for non-appearance, he urged us to hear the appeal and determine it in accordance with the law. He contended that, since the first appellate court made a decision concerning his colleague, Erick Mathias @Yaulimwengu, the appeal before the Court is competent.

Ms. Edith Tuka, learned State Attorney assisted by Ms. Matilda Assey and Mr. Kanisius Ndunguru, learned State Attorneys, who appeared for the respondent Republic contested the appellant's submission and urged the Court to strike out the incompetent appeal.

Ms. Tuka submitted that, since the appellant's appeal was dismissed by the first appellate court for non-appearance under section 383 (1) of the CPA, the remedy is for the appellant to apply to the same court under subsection 3 of the same section for re-admission of his appeal and if he succeeds, the said appeal may be re-admitted. She emphasized that the appellant cannot appeal directly to this Court while his appeal was not heard on merit and determined by the first appellate court. In the end, she implored the Court to strike out the appeal for being incompetent.

From the foregoing, it is not disputed that the appeal in respect of the appellant was dismissed by the first appellate court under section 383

(1) of the CPA. Therefore, there is no decision of that court in respect of the appellant. In the circumstances, the appellant is bound by the law, in terms of section 383 (3) of the CPA, to apply for re-admission of his appeal instead of appealing directly to this Court. For clarity, section 383 (1) and (3) provides thus:

"383 (1) Where, on the day fixed for the hearing of an appeal under section 366 and 378 or any other date on which the hearing may be adjourned, the appellant or his advocate as the case may be, does not appear when the appeal is called on for hearing, the High Court may make an order that the appeal be dismissed.

(3) When an appeal is dismissed under subsection (1), the appellant or his advocate, as the case may be, may apply to the court for readmission of the appeal and, where he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court may readmit the appeal."

It is thus apparent from the reproduced provisions that the appellant cannot come directly to this Court to contest the decision which has not been made by the High Court or subordinate court exercising extended jurisdiction, as in this case. This is so because, the Court has jurisdiction to hear and determine an appeal in which the decision has been made by

the said courts as provided under section 4 (1) of the Appellate Jurisdiction Act, Cap 141 (the AJA). So far, in the appeal at hand, there is no decision of the subordinate court with extended jurisdiction confirming or upsetting the decision of the trial court in respect of the appellant before us. Particularly, section 4 (1) of the AJA provides:

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

It is in this regard that when the Court was confronted with an akin situation in **Jackson Zebedayo @ Wambura and Charles Wambura Itembe v. The Republic**, Criminal Appeal No. 419 of 2018 [2021] TZCA 86 (1 April 2021, TANZLII) it observed thus:

"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."

In the circumstances, we have no hesitation to hold that, the appellant was supposed to approach the first appellate court to apply for re-admission of his appeal which was dismissed for non-appearance on 25th February, 2021 instead of appealing to this Court. We cannot

therefore exercise the jurisdiction of the Court under section 4(1) of the AJA to determine the appellant's appeal as there is no decision from the first appellate court upsetting or upholding that of the trial court.

In this regard, we agree with the learned State Attorney that the appeal before us is incompetent.

In the result, we strike out the appeal for being incompetent.

DATED at BUKOBA this 12th day of December, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 13th day of December, 2023 in the presence of the appellant in person and Mr. Kanisius Ndunguru, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL