IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 112 OF 2012

(Appeal from the judgment and decision of the RM's Court of Dar es Salaam Region at Kisutu, (Moshi, RM) in Criminal Case No. 22 of 2010)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

JERRY MURO ..... RESPONDENT
EDMUND KAPAMA @ DOCTOR ..... RESPONDENT
DEOGRATIAS MGASA @MUSSA ..... RESPONDENT

Date of submissions: *03/06/2013*
Date of ruling: *01/07/2013*

RULING

F. Twaib, J:

In Criminal Case No. 22 of 2010 at the Resident Magistrate's Court of Dar es Salaam Region at Kisutu, the Respondents herein were charged with three counts: conspiracy to commit the offence of corrupt transactions, contrary to section 32 of the *Prevention and Combating of Corruption Act*, 2007; corrupt transactions, contrary to section 15 (1) (a) of the *Prevention and Combating of Corruption Act*, 2007 and (as against the second and third Respondents) personating public officers, contrary to sections 100 (b) and 35 of the *Penal Code*, Cap 16 (R.E. 2002).

Upon conclusion of trial, the RM's Court (F.L. Moshi, RM) found all of them not guilty of the offences charged and acquitted them. The Director of Public Prosecutions was not satisfied, and filed the present appeal.

By an Amended Petition of Appeal lodged with this Court on 29th November 2012, the DPP raised four grounds of appeal. He set them out as follows:

1. The learned trial magistrate erred in law by failing to properly record the proceedings hence arrived at a wrong decision;

IN THE ALTERNATIVE AND WITHOUT PREJUDICE TO THE FOREGOING:

2. The learned trial magistrate erred in law by improperly and illegally admitting evidence and considering the same in his decision.

3. The learned trial magistrate grossly erred in law and fact by failing to properly evaluate the evidence on record and thereby reached erroneous conclusion that the prosecution failed to establish the case against the respondents beyond reasonable doubt.

4. The learned trial magistrate erred in law and fact in acquitting the Respondents while there was sufficient evidence against them.

On the strength of these grounds, the DPP prayed that the appeal be allowed, the entire trial proceedings be nullified and a retrial be ordered or, alternatively, the decision of the trial Court be quashed and a conviction be entered against the Respondents.

On 18th February, 2013, the hearing of the appeal began. The Appellants were represented by a team of four learned State Attorneys, led by Principal State Attorney Mr. Tibabyekomya, who was assisted by Ms Itemba, Senior State Attorney, Mr. Mbagwa and Ms. Msoffe, State Attorneys. On the Respondents' side were Mr. Richard Rweyongeza and Mr. Kamala, learned Advocates representing the 1st Respondent, and Mr. Majura Magafu, learned Advocate, for the 2nd and 3rd Respondents.

Mr. Mbagwa argued the Appellant's first ground of appeal, pressing the Court to order a retrial. He advanced two main reasons: that the record of the trial Court was unclear and incomprehensible, and that the trial was conducted by

two Magistrates (one hearing the prosecution case, the other the defence case), thereby occasioning a miscarriage of justice. When Mr. Mbagwa concluded his submissions, I made the following observations:

> "In view of the fact that the first ground of appeal may, if successful, result in an order for retrial, it might be more convenient to dispose of this ground first before we move to the remaining grounds, in case the first one does not succeed."

Counsel for all parties agreed with the procedure I proposed. I thus ordered that the appeal should proceed on the first ground only and would only proceed on the other grounds if the same is not successful. Whereupon, Mr. Rweyongeza and Mr. Magafu responded to Mr. Mbagwa's submissions on the first ground. After hearing counsel, I appointed the 18th of February 2013 for the matter to come before me for necessary orders. On that day, I made the following orders:

> "Having heard the parties' counsels' submissions on the first ground of appeal as contained in the Amended Petition of Appeal; having perused the record of the trial Court (both the original, handwritten record as well as the typed record) and having read the judgment of the trial Court from which this appeal arises, I am of the considered view that the first ground of appeal has no merit and I dismiss it. Reasons for this order shall be given in the judgment. The appeal shall proceed on the remaining grounds of appeal on a date to be appointed."

I then fixed the matter for hearing on 3rd June 2013. When we assembled for hearing on that day, however, Ms Lilian Itemba, learned Senior State Attorney who led the Appellant's team of learned counsel, informed the Court that following the Court's order of 18th February 2013, the DPP has lodged a Notice of Appeal to the Court of Appeal. She submitted that since a Notice of Appeal has the effect of instituting the appeal, the present proceedings should be stayed pending the Court of Appeal's decision.

Ms Itemba further submitted that the Court of Appeal's decision on the first ground of appeal may affect the other grounds in this appeal which are yet to

be decided. She contended that staying the proceedings would be more convenient because the Respondents are free and not in custody. She argued further that this Court has powers to order stay where it is convenient to do so. She cited the case of *R v Prof. Costa Mahalu* (Eco. Appl. No. 6 of 2009), in which this Court (Mruma, J.), held that where an application for stay of proceedings is made, one of the relevant factors to be considered is the parties' convenience.

Mr. Rweyongeza, learned counsel for the 1st Respondent (who also held brief for Mr. Magafu for the 2nd and 3rd Respondents, with instructions to proceed), resisted the prayer for stay. He noted that this is a unique situation, arguing that before this Court there is a single appeal, supported by four grounds. Ordinarily, parties would have addressed the Court on the first ground and the other, alternative, grounds. That would have enabled the Court to decide the appeal in its entirety. The decision of 29th April 2013 was in respect of a single ground. When one appeals, one would have the whole decision, and may opt to appeal against the whole decision or part of it. It would have been different, he said, if the Court had said, having dismissed the first ground, that the whole appeal is dismissed.

Mr. Rweyongeza further argued that a judgment is a decision of the Court that contains reasons, which can be read and challenged on appeal, a stage we have not yet reached. In his opinion, we are at the stage of continuation of hearing and that, legally, in the circumstances of this case, there is no decision that can be appealed against. The impugned decision, according to Mr. Rweyongeza, is an interlocutory one, which means that if the Appellant is not satisfied, he can appeal against it when the full judgment is delivered. He will not be time-barred. In fact, counsel quipped that if the Appellant succeeds in the alternative grounds, he would not be appealing.

Mr. Rweyongeza further submitted that the institution of appeal in the Court of Appeal by way of a Notice of Appeal does not prevent this Court from determining the remaining grounds of appeal. He opines that this is a novel situation that has not been considered by the Rules and thus the Court should feel free to decide the questions it poses on what it considers best. Otherwise, the appeal may give rise to duplicity of conflicting decisions. He

concluded by saying that even the nature of the order made by this Court does not constitute a judgment.

Ms Itemba's rejoinder contained two brief points: That much as the impugned decision was in respect of a single ground of appeal, it was still a judgment, and that it was not interlocutory; and secondly that, in view of the Notice of Appeal already filed, the issue as to whether we should proceed or not should be decided by the Court of Appeal. In other words, she is of the view that this Court no longer has jurisdiction to continue the proceedings relating to the other grounds of appeal.

As Mr. Rweyongeza says, this is, indeed, a novel issue. It poses a rare question that, to the best of my knowledge, has not been covered by any precedent. My research has not uncovered any.

The matter is centred on the question as to whether this Court, having made an order dismissing one of the grounds of appeal and reserving reasons therefor to be given in the judgment in which all the grounds of appeal would be determined, which order does not finally determine the appeal before me, and the Appellant, being aggrieved by that order, files a Notice of Appeal, which Notice has the effect of instituting the appeal in the Court of Appeal, can still proceed to determine the remaining grounds of appeal.

A careful look at the relevant law is apposite. Section 68 (1) of the **Tanzania Court of Appeal Rules**, 2009 provides for Notices of Appeal in criminal cases. It stipulates:

> Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in triplicate with the Registrar of the High Court at the place where the decision against which it is desired to appeal was given, within thirty days of the date of that decision, **and the notice of appeal shall institute the appeal**. [emphasis mine].

At this point, let me observe, by way of *obiter dicta*, that in the course of preparing this ruling, I realized one important difference in the Court of

Appeal Rules in the point in time of time when an appeal is deemed to have been instituted between criminal matters and civil matters. In civil cases, the point in time to be reckoned is in rule 90 of the Rules which provides that an appeal shall be instituted by lodging the Memorandum of Appeal. In fact, rule 91 provides for a sanction for a person who "fails to institute his appeal" after lodging his Notice of Appeal. In criminal cases, as already pointed out, it is the Notice of Appeal that institutes the appeal

Having transgressed a bit, I now return to the issue at hand.

The gist of counsel Itemba's contention is that by filing the Notice of Appeal, the appeal has already been instituted in the Court of Appeal. The effect of this, as has been held by the Court of Appeal in a number of its decisions, is to remove the case from the jurisdiction of this Court and place it in the Court of Appeal (see, for instance, **Aero Helicopter (T) Ltd. v F.N. Jansen** (1990) TLR 142 (Kisanga, J.A.). In **Komba Mkabara v Maria Luis Frisch**, Civil Application No. 2 of 2000 (unreported)).

Furthermore, this Court ceases to have jurisdiction to determine anything in relation to the case, except for applications for leave to appeal or for a certificate on points of law (see **Matsushita Electric Co. Ltd. v Charles George t/a CG Travers**, Civil Application No. 71 of 2001 (unreported)). This position has been recently re-affirmed by the Court of Appeal in **Tanzania Electric Supply Co. Ltd. v Dowans Holdings (Costa Rica) & Another**, Civil Application No, 142 of 2012 (unreported).

Could a continuation of criminal appeal proceedings to determine the remaining grounds of appeal once a Notice of Appeal has been lodged against a decision that determines one or more of the grounds of appeal fall under the category of issues that this Court can still entertain, despite a Notice of Appeal having been filed?

Admittedly, this question has occupied my mind considerably. In the end, I am inclined to conclude that it is not. It seems to me that the nature of the issues that may still be determined in such circumstances are those which, without their having been determined, the Appellant cannot file his

Memorandum of Appeal. This is so because, in such a case, the order granting leave or a certificate of point of law is an essential document that must accompany the Memorandum of Appeal (see rule 71 (1) and (4) of the Court of Appeal Rules). In an appropriate case, without one or both of them, the record of appeal would be incomplete. It is my humble view that this is the reason why this Court needs to continue to exercise jurisdiction in such matters even where the Notice of Appeal has been filed. After that process, the intended Appellant can complete his Memorandum of Appeal and lodge it with the Court of Appeal. Otherwise, the law would have clogged up the process, leading it to a dead end.

Is that the situation here? With respect, I do not think so. As earlier said, this is a novel situation. The novelty is in the fact that no reasons have, so far, been given for the order I gave. All I did was to simply resolve the first ground of appeal, but advanced no reason for that decision. I reserved the reasons for later, when I compose the judgment for the entire appeal. That could not have amounted to a judgment, as Ms Itemba has suggested.

However, I think the Appellant can still file a record of appeal with the order extracted from my order of 29th April 2013. How would he prepare his memorandum of appeal and argue the appeal without having the reasons for this Court's decision is a question that we will have to leave with him to brood over.

The situation begs the question as to whether the intended appeal would be competent. I would stop short of suggesting whether anyone can appeal against a decision on a ground of appeal which provides no reasoning upon which one could base one's appeal against it. I think that question relates to the competency of the Appellant's intended appeal to the Court of Appeal, a question I am convinced I have no authority to answer. That is, in my respectful view, a matter that lies wholly within the competency of the Court of Appeal.

For the above reasons, I am compelled to grant Ms Itemba's prayer and stay these proceedings, pending the outcome of the DPP's intended appeal to the Court of Appeal.

This would leave room for the Registrar to comply with rule 71 of the Court of Appeal Rules 2009 to enable the DPP to proceed with his appeal.

DATED AND DELIVERED AT DAR ES SALAAM this 3rd day of July 2013.

F. Twaib
JUDGE