IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 248 OF 2013

MAIGA S/O LUCAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Iringa)

(Werema, J.)

Dated the 9th day of February, 2007
In
Criminal Appeal No. 1 of 2007

JUDGMENT OF THE COURT

18th & 22nd July, 2016

MWARIJA, J.A.:

In the Primary Court of Kimande in Iringa district, the appellant, Maiga Lucas together with three other persons, Masumen Sekemi, Abdul Mpululu and Nganye Kiding'ai were jointly charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged that on 1/12/2005 at about 11.00 pm at Ludanga Village within Iringa district, Iringa region, the appellant and the three other persons (the other persons) did steal

Shs.600,000/= from Pascal Katamile and that in the course of committing the offence, they used a firearm.

The prosecution case was anchored on the evidence of four witnesses including Pascal Kitamile (PW1) who was the complainant in the case. The appellant and the other persons denied the charge. They gave their defence and in addition called a total of four witnesses to give evidence on their behalf. After a full trial, the appellant and two of the other persons (Abdul Mpululu and Nganye Kiding'ai) were found guilty and sentenced to an imprisonment term of 30 years. Masumen Sekemi was found not guilty. He was as a result, acquitted.

The appellant and the two convicted persons were aggrieved by conviction and sentence. They preferred an appeal to the District Court. In their appeal, they cited the Republic as the respondent. On 13/6/2006, the District Court quashed the conviction and set aside the sentence imposed by Primary Court on Abdul Mpululu and Nganye Kiding'ai. They were consequently set free. The appeal by the appellant was however dismissed. Undaunted, he unsuccessfully appealed to the High Court. His appeal was summarily dismissed on 9/2/2007. Following dismissal of his appeal, the

appellant who was dissatisfied with the decision, filed this third appeal after he had duly obtained the leave of the High Court on 30/4/2014.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent/Republic was represented by Ms. Kazana Maziku, learned State Attorney.

Before the appeal could proceed to hearing on merit, Ms. Maziku sought and obtained leave to argue a preliminary point of law concerning propriety or otherwise of joining the Republic as the respondent in the appeal both in the district court and the High Court. Indeed this is one of the issues which prompted the High Court to grant leave to the appellant to appeal to this Court.

Submitting on the issue, the learned State Attorney argued that since the case was tried in the primary court, it was an error to join the Republic as the respondent, in both the district court and the High Court. Elaborating, Ms. Maziku submitted that the Republic could be joined in the appeal had the Director of Public Prosecution (the DPP) served a notice that he wished to be heard. This, she said, is by virtue of S. 34 (1) (b) of the Magistrates' Courts Act [Cap. 11 R.E. 2002] (the Act).

Since the DPP did not wish to be heard, Ms Maziku argued, the Republic was erroneously joined in the appeals filed in the two appellate courts below. She therefore urged us to exercise the Court's revisional powers under Section 4 (2) (a) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA) and revise the proceedings conducted in the district court and the High Court. She prayed that those proceedings be quashed and the decisions arising therefrom be set aside. She prayed also for an order directing that the record be returned to the district court for the appeal to proceed against the proper respondent. On the situations under which the Republic may be joined in an appeal originating from the primary court and the remedy where the Republic has been improperly joined in the appeal, the learned State Attorney cited the case of **Rajabu Ngwanda and Another v. The Republic**, Criminal Appeal No. 243 of 2014 (unreported) to bolster her argument.

The appellant who, as stated above was unrepresented, did not have anything in reply to the learned State Attorney's legal arguments. He supported the arguments and the way forward proposed by Ms. Maziku.

Having heard the submission and after having gone through the record, we are satisfied that the point of law raised by the learned State Attorney has merit. As submitted by Ms. Maziku, this appeal has its origin in the decision of the primary court in which the Republic was not a party. The complainant in the case was Pascal Katamile. After his conviction, he exercised his right under S. 20 (1) of Act and appealed to the District Court against his conviction and sentence. The section provides as follows:

"20-

(1) Save as hereinafter provided-

(a) in proceedings of a Criminal nature, any person convicted of an offence by a primary court or where ***any person has been acquitted by a primary court,*** *the complainant or the Director of Republic Prosecutions;*

(b) ...

if aggrieved by an order or decision of the primary court, may appeal therefrom to the district court of the district *for which the primary court is established.*

[Emphasis added].

With regard to the issue whether or not in an appeal preferred by the convicted person, the Republic should be joined as the respondent, the answer is found under S. 34(1) (b) of the Act which states as follows:-

"34-

(1) Save where an appeal is summarily rejected by the High Court and subject to any rules of court relating to substituted service, a court to which an appeal lies under this part ***shall cause the notice of the time and place at which the appeal will be heard to be given-***

(a) to the parties or their advocates;

(b) in all proceedings of a criminal nature in the High Court, or in any such proceedings in the district Court ***in which he is an appellant or has served notice that he wishes to be heard, to the Direction of public prosecutions....***"

[Emphasis added].

It is imperative from the above cited provisions that where, like in this case, a person convicted of an offence appeals against the decision of the primary court, the parties in the primary court and who shall be served

with the notice of the time and place of hearing, are the same parties as in the original case. As clearly stated in paragraph (b) of that section, the Director of Public Prosecutions shall be served to appear as a party only where he is an appellant or where he wishes to be heard in an appeal. This condition is emphasized under the proviso to S. 34 (1) of the Act which states that:

> *"Provided that no such notice need be given –*
> *(i) ....*
> *(ii) ....*
> *(iii) ....*
> *(iv) to the Republic or to the Director of Public Prosecutions except in the circumstances specified in paragraph (b) of this section."*

In the case of **Rajabu Ngwanda and Another** (supra) cited by Ms. Maziku, the Court had occasion to consider the situations under which the DPP may become a party in an appeal originating from the primary court. Apart from the provisions referred to above, we observed that the DPP may become a party to such an appeal by exercising the powers conferred to him by S. 10 of the National Prosecution Service Act, No. 27 of 2008. The section reads as follows:-

"Notwithstanding the provisions of any other law relating to appeals, revisions or application, it shall be the function of the Director to:-

(a) ....

(b) take over an appeal, revision or application arising from private prosecution, whether as appellant applicant or respondent and where the Director takes over the appeal as appellant or applicant, he may continue or otherwise withdraw the appeal."

In the present case, the DPP did not issue a notice that he wished to be heard in the appeal. He did not also take over the appeal so as to appear as the respondent. The Republic was, as a result, improperly joined in the appeal both in the District Court and the High Court. The infraction did therefore render the proceedings in the District Court to have been improperly conducted. Although the Republic was joined in the appeal, the appeal proceeded in its absence. According to the record, there is no evidence that the Republic was served. Worse still, the complainant's case was determined without being given the opportunity of being heard. That was a serious breach of the complainant's right to be heard. The effect is to render the proceeding in the District Court a nullity.

It follows as consequence, that the decision of the High Court which arose from that decision of the District Court, cannot, as well stand. In the exercise of the powers conferred to the Court by S.4 (2) of the AJA, we hereby quash the proceedings of the two appellate courts below and set aside the decisions arising therefrom. We order that the record be remitted to the District Court for the appeal to proceed to hearing after substituting the complainant as the respondent and after due service to the parties. We also direct the District Court to expedite the hearing of the appeal bearing in consideration the time which the appellant has taken in pursuing his right.

DATED at **IRINGA** this 21st day of July, 2016.

S. MJASIRI
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL