IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

DC. CRIMINAL APPEAL NO. 12 OF 2022

(Originating from Criminal Case No. 35 of 2016 before Tunduru District Court at Tunduru, Odira A. Amworo, Senior Resident Magistrate)

STEVEN D/O NKANYA BUHANZA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

RULING

Date of last Order: *01/08/2022*
Date of Ruling: *12/08/2022*

MLYAMBINA, J.

In this ruling, the Court is burdened to test the competence of our criminal justice system specifically in a situation where an Accused person is convicted in *absentia* by a Trial Court. Subsequently, the Accused absconds incarceration. The topical issues subject for discussion herein are: *First*, whether mitigation can be conducted and sentence be issued when the Accused is convicted in *absentia*. *Second,* whether an Accused person who was convicted in *absentia* has a right to appeal before he or she is apprehended and taken to Court for the judgement to be read before him. *Third,* whether such Accused person can instruct an Advocate through mobile phone call to represent him on an appeal. *Fourth,* whether

payment of the Advocate fee by a third party (wife of the Accused person) on behalf of the Accused is prohibited under the law? *Fifth*, whether it is wise to borrow leaf of the Court of Appeal Rules which requires an Appellant to state in a notice of intention to appeal on whether he or she wants to be present during hearing or not. *Sixth*, what is the remedy of this appeal as lodged by his Advocate?

All these presaged issues shall be demystified as I hereby proceed to tint and portray the answers. At the outset, I should state that; it is not appealing to me as to why the arrest warrant of the Appellant has remained un-executed for seven good months now. However, that not being among the focal issues for determination in this ruling, I shall desist from addressing the same.

Before disembarking into the legal jaunt, the facts *albeit* in brief triggering this ruling are imperative to be stated. On the 1st day of August 2022, I prompted Senior Counsel Wilson Edward Ogunde to address me on whether he was legally instructed to file this appeal and represent the Appellant. Whilst, Ms. Shose Naimani a Senior State Attorney represented the Respondent, Republic. Upon Mr. Ogunde's submission, followed by a reply submission from Ms. Shose which was countered by a rejoinder from Mr. Ogunde and supported by his fellow learned Counsel Henry Kitambwa

and surrejoinder of Ms. Shose, it became undisputable valid that: *One*, before the District Court of Tunduru at Tunduru there was *Criminal Case No. 35 of 2016* between the **Republic v. Steven Nkana Buhanza**. In that case, Counsel Wilson Edward Ogunde was engaged by the Accused (the Appellant in this appeal) to defend him. The Judgement was pronounced on 7th January, 2022 in *absentia* of the Accused. He was convicted and upon mitigation by Counsel Ogunde, the Accused was sentenced to serve two years imprisonment. The trial Court explained the Appellant's right of appeal under *section 361(1) of the Criminal Procedure Act [Cap 20 Revised Edition 2019]. Two*, the Accused (Appellant herein) attended the prosecution and defence proceedings before the trial Court. *Three*, the Appellant was present at the trial Court on 7th January, 2022 but he disappeared before the Judgement was pronounced.

With the afore brief facts in mind, I hereby proceed to layout the submissions from parties while answering every issue in seriatim alongside my in-depth analysis.

The first issue is; *whether mitigation can be conducted and sentence be issued when the Accused is convicted in absentia.* Perplexed, Counsel Ogunde had nothing substantial to submit on this point, whereas Ms. Shose submitted that it was not proper for the trial Court to allow mitigation and pronounce sentence in absence of the Accused. She argued

that, the trial Court should have ended in convicting the Accused and the rest could be done when the Accused is arrested.

The Court having gone through the provision of *section 227 of the Criminal Procedure Act (supra),* it is of the settled view that mitigation can be done by Advocate and sentence be issued by a Court in absence of an Accused person where sufficient cause for his non-appearance is lucidly demonstrated. To verify such point of view, the said *section 227 (supra)* is hereby reproduced in *verbatim*:

> Where in any case to which section 226 does not apply, *an Accused being tried by a subordinate Court fails to appear* on the date fixed for the continuation of the hearing after the close of the prosecution case *or on the date fixed for the passing of sentence, the Court may, if it is satisfied that the Accused's attendance cannot be secured without undue delay or expense, proceed to dispose of the case in accordance with the provisions of section 231 as if the Accused, being present,* had failed to make any statement or adduce any evidence *or, as the case may be, make any further statement or adduce further evidence in relation to any sentence which the Court may pass*:
>
> Provided that-
>
> (a) *where the Accused so fails to appear but his Advocate appears, the Advocate, subject to the provisions*

of this Act, be entitled to call any defence witness and to address the Court as if the Accused had been or is convicted, and the Advocate shall be entitled to call any witness and *to address the Court on matters relevant to any sentence which the Court may pass;* and

(b) where the Accused appears on any subsequent date to which the proceedings may have been adjourned, the proceedings under this section on the day or days on which the Accused was absent shall not be invalid by reason only of his absence. [Emphasis added]

Applying the above excerpt in the instant case, it follows that the mitigation and consequential sentence by the Trial Court are null and void respectively. The reason being that, it is vividly apparent from the record that Counsel Ogunde did not furnish sufficient reason as to why on the judgement date (i.e.,7th January, 2022), the Accused was present within the Court premises but absent in Court at the time of delivery of judgement. There is nothing in record to mollify the Court that the Accused attendance cannot be procured without undue delay and expense. As a matter of fact, there was no explanation as to how, where and why the Accused disappeared before receiving his judgement.

Moreso to say, such an oversight was overlooked by the Trial Court as it did not attempt to satisfy itself on the reason(s) for the absence of

the Accused or even elect to adjourn the case instead of proceeding with mitigation and sentencing. It must be recalled that, in our criminal law, there is no hard-and-fast rule regarding the interval between conviction, mitigation and sentence. To amplify such point, the wording in *Section 236 of the Criminal Procedure Code (supra)* is of much significance. The section provides:

> *The Court may before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed. [Emphasis added]*

The plain impression one can gather from the above provision is that the Court is required before passing sentence to afford the Accused a chance to give evidence in order to issue proper sentence. Needless, *section 236 (supra)* has to be read together with *section 227 (a) and (b) (supra). Although section 236 (supra)* requires the Court before passing sentence to afford a chance an Accused to give evidence in order to issue proper sentence, under the provisions of *section 227 (b) (supra)* an Accused may be convicted and sentenced notwithstanding his absence when it is deemed that the Accused forfeited his right to be heard for absenting himself/herself.

It is finding of this Court that *section 226 (2) of the Criminal Procedure (supra),* provides a chance to an Accused person who was convicted in *absentia* to be heard. Upon being satisfied by the reason of his absence, the Court may set aside the conviction and sentence entered against him. That is the essence of mitigation trial. This position was postulated in the case of **Marwa Mahende v. The Republic**, Criminal Appeal No. 133 of 1994, Court of Appeal of Tanzania at Mwanza. (unreported).

It is the further findings of this Court that, upon conviction of the Accused in *absentia* and an arrest warrant been issued and arrested, the Accused must be brought before the Court. It is at that particular time when the Republic has to state the aggravating factors and previous records of the Accused person. Thereafter, the Accused has to be given opportunity to mitigate before sentence is imposed to him/her. It is unfortunately that the Appellant herein denied his own right to be heard.

Up to this juncture, it needs not be over emphasised and clarified that the mitigation done by Counsel Ogunde was not proper because it was contrary to the law. *Section 227(a) of the Criminal Procedure Act (supra)* do not allow mitigation by an Advocate without accounting the nonappearance of the Accused. Hence, sentencing by Court upon

mitigation of the Accused's Counsel was to carter for circumstances where an Accused person is incapable to appear in Court for cogent reasons like stern personal sickness (eg. Covid 19), inconvenience relating to social issues such as attending funeral of a loved one or any other unforeseen emergencies like accidents. Thus, the law intended to put to an end in all cases whilst furthering complainant's rights including gratification. Otherwise mitigation, as a general rule, must be done in the presence of the Accused.

It should be noted that the burden of proof which must be met by an Accused with regard to mitigating circumstance is not, as with aggravating circumstances, proof beyond reasonable doubt but proof on balance of preponderance or probabilities.

Thus, in respect to the afore sequential arguments, I reiterate my stand that the Trial Court allowing mitigation been done by Counsel Ogunde in the absence of sufficient reason for non-appearance of the Accused was a flaw which rendered the mitigation proceedings null.

Regarding the second issue; *whether a person who was convicted in absentia has a right to appeal before he was apprehended and brought to Court for the judgement to be read before him.* Mr. Ogunde, stated that after the judgement being pronounced, he phoned the Accused and

explained to him the outcome of the case. He informed the Accused that he was convicted and sentenced to serve two years imprisonment.

Mr. Ogunde went on to tell the Court that he explained to the Accused that an arrest warrant was issued against him. Thus, he was required to report to the Court. He also informed him that he had the right to appeal in case he was dissatisfied with the decision of the Court. After that explanation, the Accused instructed Mr. Ogunde to appeal against the decision of the trial Court. For those reason, Mr. Ogunde strongly contended that he received proper instructions and lodged the notice to appeal on the same date of 7th January, 2022.

Moreover, Mr. Ogunde asserted that, in order to process the appeal, he requested for the copy of Judgement and proceedings, of which he received on 24th March, 2022 whereby he electronically uploaded and filed the appeal on 16th April, 2022 that being within 45 days.

To sum up, Mr. Ogunde insisted that the Accused has not complained that he acted without his instruction in this case. On that noting, he prayed that this Court find the appeal was filed by a competent person with proper instruction.

In reply, Ms. Shose Naimani, objected the submission by Mr. Ogunde that he was given proper instruction by the Appellant. She argued that the Appellant disappeared a short time before his Judgement was

delivered as it is reflected on page 152 of the typed proceedings of the trial Court. Ms. Shose claimed that, Mr. Ogunde was not informed why the Accused left the Court before the Judgement was delivered. That, following his disappearance, an arrest warrant was issued as against him but to-date the Appellant is yet to be arrested. It was the humble submission of Ms. Shose that in criminal cases the outcome is either a conviction or an acquittal. All these requires attendance of parties before the Court.

According to Ms. Shose, if this Court will entertain this appeal, it will open a pandora for Accused persons to disappear before the conviction is pronounced. They can escape to forest hoping that their appeal will be successful. Ms. Shose concluded that the Appellant cannot be allowed to challenge the conviction and sentence which was pronounced in his absence. That, he should first submit himself to the Court if he wants to challenge the conviction by way of appeal.

In rejoinder, Counsel Ogunde stressed that an Accused convicted in *absentia* can appeal before his arrest. The reason being that when the Judgement was delivered, the Court allowed mitigation and explained the right of appeal. In his view, that was proper and it is what gave the Appellant the right of Appeal.

I have dutifully considered the submissions of both learned Counsel. On the onset, I entirely agree with Counsel Ogunde that right of appeal arises immediately after conviction. Indeed, right of appeal is a Constitutional right under the provisions of *Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time.* The said *Article 13 (6) (a)* provides *inter alia* that:

> 13.-(6) to ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principle namely:
>
> > (a) when the right and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing and to the *right of appeal* or other legal remedy against the decision of the Court or of the other agency concerned; [emphasis applied]

By reading the above Article provision, it is clear that, as a general constitutional principle, any person aggrieved with the decision of the Court has a right to appeal but such right has to be exercised according to the procedures made by State Authority. The Parliament as a State Authority has enacted different law guiding the procedures on how, when

and where to appeal. As such, a right to appeal is also a statutory right enshrined under the provision of *section 359 (1) and (2) of the Criminal Procedure Act (supra).* The said *Section 359 (1) and (2) (supra)* provides for the right to appeal from Subordinate Court to the High Court. Also, *section 6 of the Appellate Jurisdiction Act [Cap 141 Revised Edition 2019],* provides for the right of appeal to the Court of Appeal to any person who desires to do so. The same laws provide for the procedure on how a person who want to appeal can exercise such right.

In the light of *sections 359 and 361 (1) (a) of the Criminal Procedure Act (supra) and Rule 68 (1) of the Court of Appeals Rules G. N. No. 344 of 2019,* all appeals have to be instituted by a notice of intention to appeal. The notice has to be filed in a Court where the impugned judgement was delivered.

From the record, the Appellant is appealing against the judgement which was pronounced in his absence and he has not been apprehended to-date despite of his knowledge to the judgement. *Section 311 (2) of the Criminal Procedure Act (supra)* requires the presence of the Accused when the judgement is being delivered. The provision is framed in mandatory terms due to the use of the word "shall." For easy of reference *Section 311 (2) (supra)* provides:

The Accused person *shall,* if in custody, be brought up or, *if not in custody, be required by the Court to attend to hear judgment delivered except where his personal attendance during the trial has been dispersed with and the sentence is one of fine only or he is acquitted. [Emphasis added]*

As hinted earlier on, the Appellant was present at the Court before the Judgement was pronounced. But he disappeared to an unknown place before delivery of the Judgement. As per the record, there are three important pieces of facts. *One,* it is unknown to Counsel Ogunde as to why his client disappeared as he could not substantiate the same. *Two,* the Accused is aware that the trial Court convicted him as he was soon thereafter informed by his Counsel. *Three,* the Accused is aware that he has to surrender himself before the trial Court so that the Judgement can be read before him but has opted to abscond for reasons best known to him.

Besides, in the instant case, the trial Court issued arrest warrant pursuant to *section 226 (4) of the Criminal Procedure Act (supra).* One would have expected for the Accused to appear before the trial Court so that the Magistrate could exercise his discretionary power as enshrined under *section 226 (2)* of *the Criminal Procedure Act (supra)* by affording

a right to be heard to the Accused person who was convicted and sentenced in *absentia*. In so doing, the Accused could explain the reason of his disappearance before the Judgement was pronounced. Thereupon, the trial Court could assess whether the absence was due to causes beyond the control of the Accused or was in sheer flagrant violation of *section 311 (2) of the Criminal Procedure Act (supra).*

Supplementary findings of this Court reveal that, as the law applies in according an Accused person a right to give defence on merits, such right can be given to the Accused who was heard conclusively on his defence to give mitigation to the conviction passed in his *absentia*. Where the Trial Court is satisfied with the mitigating factors, it can even reduce the sentence. There is ample analysis by the Court of Appeal of Tanzania which is uncontroversial on the same point. That, the Court has insisted on affording right to be heard to the re-arrested Accused person who was convicted and sentenced in *absentia*. One of such cases is the case of **Adam Angelius Mpondi v. The Republic**, Criminal Appeal No. 180 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported).

Before reaching the afore decision, the Court of Appeal in **Adam Angelius Mpondi's case** *(supra)* cited with approval its earlier decisions in the cases of **Olonyo Lenuma and Lekitoni Lenuna v. The Republic** [1994] TLR 54, **Marwa Mahende v. The Republic** [1998] TLR 249,

Severine Kimatare v. The Republic, Criminal Appeal No. 279 of 2006 (unreported), **Loning'o Sangau v. The Republic,** Criminal Appeal No. 396 of 2013 (unreported), **Magoiga Magutu @ Wansima v. The Republic,** Criminal Appeal No. 65 of 2015 (unreported) and **Mohamed Abubakar v. The Republic,** Criminal Appeal No. 273 of 2015(unreported).

The act by the Appellant of deliberately not submitting himself to the Trial Court while aware of the arrest warrant makes this Court to draw negative inference that his motive is to subvert justice. The Appellant disappeared while fully aware that the case in Court was coming for judgement.

Worse indeed, as alluded by Counsel Ogunde, the Appellant was informed of the judgement outcome and being asked to surrender himself to the trial Court but he neglected. Instead, the Appellant is remotely communicating with Counsel Ogunde for pursuing the instant appeal. I find such act was nothing other than an attempt to evade the course of justice. (See the case of **Tagara Makongoro and 2 Others v. The Republic,** Criminal Appeal No. 126 of 2015, Court of Appeal of Tanzania at Mwanza (unreported)). There is therefore undoubtedly temptations to have two firm findings: *One*, the Constitutional right of appeal under the provisions of *Article 13 (6) (a) of the Constitution (supra) and the*

statutory right of appeal under the provision of *section 359 (1) and (2) of the Criminal Procedure Act (supra)* is not a holiday of Accused persons who are legally convicted by a competent Court after abiding with due process of law. *Two*, though there is a statutory and constitutional right of appeal, legal justice requires that an offender of a crime must suffer punishment accordingly.

If an Accused person is convicted and sentenced but his conviction and sentence remain un-executed, it makes the criminal justice delivery insignificant and ineffectual. If such acts are given much chances, there would be social anarchy. Anyone would contravene the law with impunity, not attend the judgement delivery date and; if convicted, voluntary keep hiding but communicating with their Counsel to process an appeal. Condoning such acts would undermine the very foundations of democracy and rule of law in this Country which is the cornerstone of peace and tranquillity.

More so, though the right to appeal is a sacrosanct right, it is subject to honouring Court's orders. In the case of **Karori Chogoro v. Waitihache Merengo**, Civil Appeal No. 164 of 2018, Court of Appeal of Tanzania at Mwanza (unreported), the Court cited with approval the decision of this Court in the case of **TBL v. Edson Dhobe**, Miscellaneous

Civil Application No. 96 of 2006 which stressed compliance of Court's orders as follows:

> Court orders should be respected and complied with. Courts should not condone such failures. To do so is to set bad precedent and invite chaos. This should not be allowed to occur.

Once the conviction was made by the trial Court and the Accused becoming aware on the same date, the proper way was for the Accused to submit himself to the Court. For that reason, I agree with Ms. Shose that, if this Court will entertain this appeal, it will open a pandora for Accused person to dodge mitigation and sentencing by disappearing right before conviction hoping that their appeal might be successful. Such evasion will create disrespect of lower Court orders.

I further find it unpalatable correct that the act of the Appellant to appeal against the judgement which was pronounced in his absence but knowingly and without submitting himself to the Court, is an abuse of the Court process. From my perspective point of view, this appeal is a witticism and to act upon it, is to set a bad precedent in which people would disregard lawful orders of the Court and rule of law generally.

The Court reminiscences that the right to appeal guaranteed by *Article 13 (6) (a) of the Constitution (supra) and the* statutory right of appeal under the provision of *section 359 (1) and (2) of the Criminal Procedure Act (supra)* and *section 6 of the Appellate Jurisdiction Act (supra),* is not absolute. It may be subject to limitations, particularly regarding the legality of engaging an Advocate who lodges an appeal and compliance of the issued sentence by the Accused. One cannot be sentenced and start an appeal process without serving the sentence unless he got bail pending appeal. However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. The denial to appeal must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved. Otherwise, the right of appeal should not be curtailed.

The legitimate aim of curtailing the right to appeal in this case is to discourage those who intentionally knows they have been convicted, sentenced and arrest warrant been issued against them but don't want to comply with Court's orders.

It follows, therefore, that as per the findings of this Court, no criminal appeal proceedings might be brought in an Appellate Court in respect of judgement passed in *absentia* of the Accused who had

knowledge of the conviction and sentence but intentionally don't want to appear before the trial Court to receive his/her judgement.

In the premises, I entirely agree with the submissions of Senior State Attorney Shose Naiman and hold the second issue in the negative. The over arching basis of such conclusion is that, if this Court would entertain the appeal in absence of the Appellant and provide necessary orders as to the merits of the conviction, the Court processes will be in disrepute and wastage of time and resources.

Coming to third issue; *whether an Accused person who was convicted in absentia can instruct an Advocate through mobile phone call to represent him or her on appeal.* Mr. Ogunde submitted that he received instruction from the Accused person by way of phone call as the Accused was not present at the time of delivery of Judgement.

In response, Ms. Shose disputed the submission on instruction by way of phone call. It was her submission that the instruction of Mr. Ogunde by the Accused through phone call was not proper in Criminal Cases because any decision of this Court will affect the Appellant in Person and not his Advocate or his wife. For that fact, Ms. Shose maintained that there is no proper instruction to the Counsel Ogunde by the Appellant. To backup her argument, Ms. Shose cited the case of **Director of Public**

Prosecutions v. Godgift s/o Slaa and 4 Others, Criminal Appeal No. 149 of 2019 High Court of Tanzania at Mbeya (unreported). In that case, some of the Respondents did not appear in Court. The Advocate informed the Court that he was instructed with the first Respondent to represent the rest of Respondents. The Court refused such argument.

In rejoinder, Counsel Henry Kitambwa (assisting Mr. Ogunde) invited this Court to read a book by **Prof. Lawrence Lessig, Code and Other Laws of Cyberspace**. To him as a cyber lawyer, instruction by phone call is a proper instruction. After the advent of internet and convergence of technology for instance a landline converging to mobile, when we now have a real space and cyber space, and using teleconferencing, engagement of a Counsel by phone is proper instruction.

I have followed closely the submissions of the noble and learned Counsel, I entirely agree with Counsel Ogunde and Kitambwa that instruction of a Counsel by the client can be made through any mode of electronic communication device such as computerised device (instrument, equipment, or machine) with software that can compose, read, or send any electronic message using radio, optical or other electromagnetic systems. An electronic message can be a text message or mobile call, email, an instant message such as WhatsApp,

teleconferencing, social networking, skype, blogs, or even access to an internet site or by the used traditional way.

The lingering point here remains, however, as to; *whether the Accused person who disappeared from judgement pronouncement and who keeps deliberately absconding to show up before the Court in order for the Judgement to be pronounced in his presence could instruct Counsel Ogunde to lodge notice of appeal.*

I find correctly that instruction through mobile phone is not prohibited by the law. As such, and as held by this Court in the case of **Benson Benjamin Mengi, William Onesmo Mushi, Zoeb Hassuji, Sylvia Novatus Mushi (Petitioners) v. Abdiel Reginald Mengi And Benjamin Abraham Mengi (Caveators)**, Probate and Administration Cause No. 39 of 2019, High Court of Tanzania at Dar es Salaam (unreported), page 26-27, "everything is permitted except what is forbidden by the law."

Despite such general findings, I reiterate the findings in the second issue as they surpass whatever finding that can be obtained in the third issue. It was premature for the Accused person to engage Counsel Ogunde to lodge notice of appeal prior the Accused person appearing before the Court in order to receive his judgement and be conferred right to mitigate before sentence could legally be issued. In fact, the re-

engagement of Counsel Ogunde before proper termination or coming to the end of the first engagement was improper.

Needless, it would be anomalous to attach more significance on the mode of engagement of Counsel Ogunde by the Accused than to more important substantive portions of being engaged by the Accused who deliberately absconded judgement and serving the imposed judgement. It is the Court's found view that the first engagement of Counsel Ogunde could come to the end once the Accused is brought before the Court, given a right to be heard on the conviction entered against him through mitigation, and a proper sentence being entered as against him.

The cited case of **Godgift s/o Slaa and 4 Others** is distinguishable with the instant case. In **Godgift case** *(supra)* the Counsel of the Respondents was engaged by the 1st Respondent to act on behalf of the rest of the Respondents. There was no informed consent of the rest of the Respondents. In the instant case, Counsel Ogunde got instruction of the Accused himself, though his instruction was vitiated by the reasons stated earlier on.

It may now be useful, if I resort to the fourth issue which covers funding of litigation by a third party. *Whether payment of fees by a third party (wife of the Accused person) on behalf of the Accused is prohibited under the law?* For enlightenment, I could, of course, make a more

realistic example by citing the actualities of the world of today. Assuming that a son engages a Contractor to build a house of his parents. There is no law which bars him from paying the consideration thereof.

To make the point clear enough, third party funding (TPF) is a term mostly used in international arbitration but it is also used in domestic law subject to modification. It refers to an agreement by an entity or a person who is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party: (a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases. (b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment. (See Jarrett Lewis, Third Party Litigation Funding: 'A Boon or Bane to the Progress of Civil Justice? Available at www.law.georgetown.edu) Also, see Joseph J. Stroble and Laura Welkson, Third Party Litigation Funding: A Review of Recent Industry Developments; available at www.iadclaw.org) both lastly accessed on 12th August, 2022 at :9:45am).

In this appeal, Counsel Ogunde submitted that the Accused's wife was also in Court by the time the Judgement was pronounced. It is the

wife of the Accused who paid fees to Counsel Ogunde. As such, she is the one who furnished consideration. It was the legal submission of Counsel Ogunde that payment of fees by a third party on behalf of the litigant is not prohibited under the law.

On her part, Ms. Shose objected the submission of Counsel Ogunde as he did not state any provision of the law that allows a Third party to pay fees to the Advocate.

Having heard and thoroughly considered Counsel Ogunde and Ms. Shose's arguments as advanced, with respect, I find not persuaded by Ms. Shose's contentions, for reasons analysed hereafter. *The Advocates Act [Cap 341 Revised Edition 2019]* does not only permit payment of fees in contentious cases to an Advocate by a third party to the case but also allows a third party to claim for taxation. The provision however, bars an Advocate to fund litigation. *Section 55 (1) of the Advocates Act (supra)* provides that:

> An agreement made pursuant to section 54–
>
> (a) shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, *any person other than the Advocate, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to*

the rules for the time being in force for the taxation thereof:

Provided that the client shall not be entitled to recover from any other person under any order for the payment of any costs to which the agreement relates more than the amount payable by him to his Advocate in respect thereof under the agreement; and

(b) shall be deemed to exclude any claim by the Advocate in respect of the business to which it relates other than–

(i) a claim for the agreed costs; or

(ii) a claim for such costs as are expressly excepted therefrom.

(3) No action shall be brought upon any such agreement, but the High Court, after hearing the Remuneration Committee if it wishes to be heard, may, on the application of any person who is a party to, or the representative of a party to, the agreement, or who is, or who is alleged to be, liable to pay, *or who is or claims to be entitled to be paid,* the costs due or alleged

to be due in respect of the business to which the agreement relates, enforce or set aside the agreement and determine every question as to the validity or effect thereof. [Emphasis applied].

It is clear from the afore provision that a party may enter into agreement with another third party to pay fees to an Advocate. The same fees may be recoverable by such third party. The only requisite condition is that there should be an agreement in support or financing Court litigation but there cannot be exchange for remuneration. It has to be a reimbursement of the amount paid to an Advocate. The provision of *section 55 (1) (3) of the Advocates Act (supra)* in its ordinary parlance and grammatical construction, does not lead to manifest incongruity of the apparent purpose of the enactment of *the Advocates Act,* or some inconvenience or absurdity, hardship or injustice. There is no any absolute intractability of the language used. I can therefore state with certainty that third-party funding of a case litigation is not prohibited in Tanzania.

However, in this case, the Court is not told if there was an agreement between the wife of the Accused with the Accused to pay fees to Counsel Ogunde. What Counsel Ogunde told the Court is that he was instructed by the Accused through mobile call and the wife of the Accused who was in the Court paid him the fees.

Before expounding on the related ethical and professional challenges of Advocates accepting to be paid by a third party and prior to ironing out the postulation of this Court on the same point, I will revisit the *Advocates Remuneration Order, 2015 GN No. 263 of 2015 which was made under Section 49 (3) of the Advocates Act, Cap 341 (R.E. 2019). Order 2 of GN No. 263 of 2015 (supra)* applies to the remuneration of an Advocate by a client in contentious and non-contentious matters, for taxation thereof and the taxation of costs. The instant appeal is a contentious matter.

Above all, under *Order 5 (1) of GN. No. 263 of 2015 (supra),* an application to enforce, set aside, or determine any question as to the validity or effect of a remuneration agreement may be brought to the taxing officer within sixty days from the date on which the dispute arose by a party to the remuneration agreement or *any other person who has pecuniary interest on the agreement.*

Be as it may, though there is no dispute, the Court in this appeal is not told by Counsel Ogunde if his Client gave informed consent for the fees to be paid by his wife. It is not known if there is no interference by the wife of the Accused with Mr. Ogunde's independence of professional judgement or with the client-lawyer relationship. The rationale of raising such arguments is that, though the fees were paid by the wife of the

Accused, it remains a solid truth that the client-lawyer relationship remains between the Accused person (Appellant) and Mr. Ogunde.

In other words, the fact that the wife of the Accused person paid legal fees of the Accused does not itself make the wife of the Accused a client and that the wife of the Accused will have no right to instruct Mr. Ogunde in this appeal of which he is representing the Accused.

Another possible argument is on protection of information relating to representation of a client [confidentiality] as covered under *Part IV of The Advocates (Professional Conduct and Etiquette) Regulations, 2018 G. N. No. 118 of 2018. Under regulation 29 to 32 of GN. No. 118 (supra),* the fiduciary relationship between the Accused and Mr. Ogunde mandatorily requires Mr. Ogunde to: *One*, preserve and secure the Accused person (client)'s information unless there is an agreement or understanding to the contrary with Mr. Ogunde. *Two*, not to disclose information of the Accused unless it is required by the law or information expressly or impliedly authorized by the Accused person. *Three*, to keep confidentiality indefinitely even after Mr. Ogunde ceases to be the Advocate of the Accused. *Four*, not to use any confidential information acquired by him as a result of the professional relationship for *inter alia* benefit of a third party to the disadvantage of the Accused person. *Five*,

not even to gossip the information of the Accused to any other person including his wife.

Turning to the fifth issue; *whether it is wise to borrow leaf of the Court of Appeal Rules which requires the Appellant to state in his notice of intention of appeal on whether he wants to be present during hearing or not.* Ms. Shose argued that even in the notice of intention of appeal, the Appellant did not state on whether he wants to be present during hearing or not. The practice requires the Appellant to State whether he will be present or not. It is in the Court of Appeal Rules. If the Appellant will be absent, the appeal will proceed in his absence.

On his part, Mr. Ogunde told the Court that the issue as to *whether the notice states the Appellant would wish to be present or not at appeal,* it can be tackled during hearing of an appeal itself. It is an issue which will test the competence of the notice of appeal.

I am unable to agree with Counsel Ogunde because the competence of notice of appeal cannot wait hearing of the appeal itself especially in bizarre appeal like the one at hand where the Appellant was convicted but don't want to comply with the Court's order and without any bail order. This Court is aware that *FORM B (Rule 68) of the Court of Appeal Rules (supra)* which provides for the format of the notice of appeal before the Court of Appeal. It requires the Appellant to state *inter alia* if he

intends/does not intend to be present at the hearing of the appeal. FORM B of the Court of Appeals Rules is not applicable to this Court and subordinates Courts.

Even if is applicable, in the circumstances of this appeal, it could be not useful for the Appellant to have stated if he will be present or not. The Appellant's presence in this appeal would automatically cause him be re-arrested. By reason of being informed of the judgement of the trial Court, it could add no value if the Appellant could have stated that he will not be present in this appeal.

The sixth issue is; *what is the remedy of the appeal as lodged by his Advocate?* Mr. Ogunde referred this Court to the case of **Ngoni Matengo Cooperative Marketing Union Limited v. Ally Mohamed Osman** (1959) EA 577. He argued that dismissal implies the right between the parties have been determined. Here, the Republic is challenging competence of an appeal on the ground that the Advocate was not properly instructed.

In other words, if the Court will be satisfied that the Advocate was not properly instructed, the remedy is to strike it out and striking out is as good as there is no appeal. Therefore, once instruction is given properly the Appellant can start afresh his appeal process.

According to Mr. Ogunde, the burden to prove that he was not properly instructed is upon the Republic. He cited the provision of *section 110, 111 and 112 of the Evidence Act [Cap 6 Revised Edition 2022]*. It was Counsel Ogunde's view that the Republic was just assuming that he was not properly engaged. The Court cannot work under assumption.

I entirely agree with Counsel Ogunde that the Court cannot work on assumption. I further agree that the duty to prove beyond reasonable doubt as envisaged under *Section 3 of the Law of Evidence Act [Cap 6 R.E. 2022]* lies upon the prosecution side. The same postulation has been stated in a plethora of authorities including the case of **Godfrey Paulo, Frank Walioba, Nelson Mbwile v. The Republic** [2018] TLR 486, the case of **Hamis Mbwana Suya v. The Republic** [2017] TLR 160, and the case of **Fakihi Ismail v. The Republic**, Criminal Appeal No. 146 "B" OF 2017, Court of Appeal at Mtwara (unreported). In a case of **Godfrey Paulo** (*supra*) the Court insisted that:

> The burden of proof is always on prosecution side to prove their case beyond reasonable doubt. This means that the prosecution is duty bound to lead strong evidence as to leave no doubt to criminal liability of the Accused person

But as found earlier, through submission of Ms. Shose, the Republic proved that Counsel Ogunde was prematurely engaged. Despite of Counsel Ogunde being prematurely engaged, the remedy in this incompetent appeal is to strike it out. The Court of Appeal in Eastern Africa in the celebrated case of **Ngoni Matengo Cooperative Marketing Union Limited** *(supra)* at page 580 the Court distinguished the meaning of "striking out" and "dismissing" an appeal, thus:

> *...this Court, accordingly, had no jurisdiction to entertain it, what was before the Court being abortive, and not properly constituted appeal at all. What is this Court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of.*

Equally, in the case of **The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 Others**, Criminal Appeal No. 254 of 2009, Court of Appeal of Tanzania at Dar es Salaam (unreported), the Court stated:

"...this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all Courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings."

It follows therefore proper that the remedy of incompetent an appeal is to strike it out.

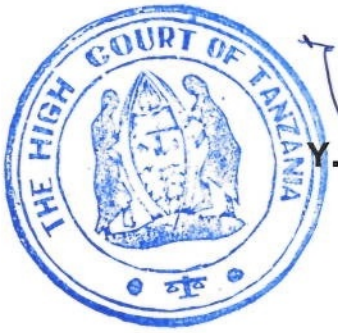
Considering that the mitigation done by Counsel Ogunde was illegal, I hereby invoke the revisionary powers of this Court under the provisions of *Section 373(1)(b) of the Criminal Procedure Act (supra)* by quashing and setting aside the sentence passed by the trial Court. Upon arrest of the Accused person, mitigation should be entertained and a proper sentence be imposed. Consequently, this appeal is struck out for being incompetent before the Court. Order accordingly.

Y. J. MLYAMBINA

JUDGE

12/08/2022

Ruling delivered and dated 12th August, 2022 in the presence of Learned Counsel Henry Kitambwa for the Appellant and Senior Learned State Attorney Tumaini Ngiruka for the Respondent.



Y. J. MLYAMBINA

JUDGE

12/08/2022