IN THE HIGH COURT OF TANZANIA

IRINGA SUB - REGISTRY

AT IRINGA

DC CRIMINAL APPEAL NO. 81 OF 2023

(Originating from Economic Case No. 1 of 2022 of the District Court of Mufindi at Mafinga)

ISACK PATRICK @ MASASI.....1st APPELLANT

GEORGE JULIUS @ NGÚMBI.....2nd APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

RULING

LALTAIKA, J.

The appellants herein **ISACK PATRICK @ MASASI** and **GEORGE JULIUS @ NGÚMBI** are dissatisfied with the decision of the District Court of Mufindi at Mafinga in Economic Case No. 1 of 2022. As this ruling will explain, their journey to protest against such a decision has not been a smooth one. Nevertheless, such challenges are not uncommon. Whenever such challenges happen, they remind us of the need to think in terms of the big picture, to ensure that we do not lose the forest for a tree. More on as an *obiter* on legal reasoning and counsel to learned Advocates later.

When the appeal was called for hearing on the 21st of February 2024, the appellants enjoyed legal representation **of Messrs. Vedastus**

Chonya and Florian Makinya, learned Advocates. The respondent Republic, on the other hand, appeared through **Mr. Yahaya Misango, learned State Attorney**.

Before the hearing could commence, Mr. Misango raised an objection. He stated that he had observed two notices, one filed personally by the second appellant and the other filed by the learned counsel Mr. Chonya on 21st July 2023. He further elaborated that the second appellant lodged his notice of intention to appeal independently, indicating that he believed they were two different appeals as the notice initiated the appeal.

Mr. Misango emphasized the necessity for two separate appeals, as per their records showing one petition bearing the names of both appellants. He argued that the appeals were supposed to be consolidated as they arose from the same transaction. Furthermore, he noted the absence of any authorization for a single appeal, concluding that he thought this rendered the appeal incompetent.

Mr. Chonya, the learned Advocate, on his part, acknowledged that two notices were filed, one by the lawyer and another by the second appellant. He mentioned that while making a follow-up for the judgment and proceedings of the trial court, he was consulted by relatives of the second appellant, who asked him to represent him. He inquired if the second appellant had lodged an intention to appeal, as the law required the same to be filed 10 days after the judgment followed by a petition within 45 days.

Mr. Chonya pointed out that the appellants were charged with the same counts, convicted, and sentenced on the same, and in the same transaction. He argued that it was not unlawful for them to lodge a joint

notice. Moreover, he emphasized that this court was not supposed to be overtly tied up to technicalities as per Article 107(2)A (e) of the **Constitution of the United Republic of Tanzania** of 1977 which requires courts to deal with substantive justice.

This Court thought it prudent to adjourn the matter to allow counsel for both parties to research on the same and make their submissions accordingly. The next part of this ruling is a summary of such submissions made this morning on **the 06th day of March 2024.**

Mr. Misago expressed that from his standpoint, he still believed that the appeal before the court was erroneous. He noted that there were two notices of appeal lodged differently, but only one petition of appeal for both appellants. He explained that he expected each appellant to lodge his own petition, as per section **361(1) (b) of the Criminal Procedure Act Cap 20 RE 2022** (the CPA).

Mr. Chonya, for his part, conveyed that he remained of the same opinion that the learned State Attorney was misleading himself. He cited section 361(1) (a) and (b), of the CPA (supra) which provided that there must be a notice of appeal and a petition of appeal. He asserted that the appeal was competent.

Leaning towards his fellow learned friend Mr. Makinya who was busy perusing the CPA, taking notes and probably looking for authorities, Mr. Chonya emphasized that in their research, they came across the Court of Appeal case of **JAPHET MBILINYI, BENITO MOSES MAHENGE, EPHAS KYANDO v. REPUBLIC**, Crim App. 499 of 2021 (unreported) 16 &23 March 2023, where a similar scenario had occurred.

In that case, Mr. Chonya narrated, there were five appellants who had been convicted. The first accused lodged a notice of appeal through

a counsel. Later, the second and third appellants lodged a joint notice through another counsel. Unfortunately, another counsel lodged a petition of appeal for all five. The High Court judge proceeded with the appeal and convicted them. Three of them appealed to the Court of Appeal. The apex Court raised the issue as to whether the High Court was right in entertaining the joint petition of appeal that included all five while the other two had not lodged a notice of intention to appeal.

In the present appeal, Mr. Chonya reasoned, there were two different notices but one joint petition. He emphasized that what was required was that the notice was lodged timely.

Mr. Misago, in a brief rejoinder, stated that he would begin with the cited case, noting that it was distinguishable. He pointed out that in the matter at hand, the notice lodged before the High Court did not include the other parties who were also included in the petition of appeal. He continued by mentioning that the decision was based on the issue that there was no notice. Since it was a notice that initiated the appeal, there was no appeal. However, he noted that in their case, the notice was proper and lodged within the prescribed time. Yet, upon lodging two notices, there were two appeals.

The learned State Attorney emphasized his stance that each party was supposed to lodge his own petition, and now consolidation was not possible as the time had lapsed as per section 361(1) (b), which required the petition of appeal to be lodged within 45 days. Mr. Misago concluded by stating that the appeal was incompetent and should be struck out.

I have **dispassionately considered the rival submissions.** Admittedly, no sooner had both counsel finalized their submissions than I projected in the computer monitor, right before their faces, my reasons

for upholding Mr. Misago's objection. Promising a more elaborate ruling later in the day, as I hereby do, I stated that there is no doubt that an appeal is a constitutional right. However, like any other right it must be pursued according to specific governing principles and procedural laws. In our jurisdiction, appeals against conviction by courts in criminal cases are initiated by a notice of appeal within 10 days followed by a petition of appeal within 45 days as provided for by the relevant sections of the Criminal Procedure Act.

I did that more or less extemporal ruling in order to send a message to both the learned State Attorney and the appellants' Advocates that to a remandee or an appellant in custody, more than any other litigant, time spent in dealing with his/her matter is vital. While the lawyers were arguing this morning, I looked at the appellants seating by their side. They appeared perplexed and totally lost. Apparently, the objection was purely geared to technicalities.

In the end, I explained to the appellant that the decision reached was in no way an abrogation of their right to appeal. I also intimated with the learned Advocates on what if they had conceded and refiled the appeal on 21st of February 2024 instead of waiting to bombard me with even more technicalities two weeks later. Let me get back to the reasons for my decision even though the aftermath is already clear.

There is no doubt that the crux of the issue lies in the procedural irregularities surrounding the lodging of the notices of appeal and petitions of appeal. It is evident from the submissions that two notices of appeal were filed separately, one by the lawyer and another by the second appellant. While this action may not be inherently flawed, the subsequent

filing of a joint petition of appeal for both appellants, in my opinion, presents a procedural inconsistency.

Reference has been made to section 361(1) (a) and (b) of the Criminal Procedure Act, which unequivocally stipulates the necessity of both a notice of appeal and a petition of appeal for the initiation of an appeal.

The Court is cognizant of the argument put forth by the appellants' counsel regarding the timeliness and proper lodging of the notices. However, it remains incumbent upon each appellant to individually lodge their petition of appeal, particularly when separate notices of appeal have been filed.

The Court of Appeal's decision in the cited case underscores the importance of adherence to procedural requirements, emphasizing that the absence of a notice of appeal by all appellants renders the appeal incompetent. In the end, the Court stated:

> *"It must be emphasized that there cannot be an appeal unless the appellant has given notice of appeal against conviction by the trial court as required by section 361(1) (a) of the CPA...it follows, therefore, that where there is no notice of appeal lodged by the intendant appellants, the appeal should be struck out."*

Additionally, and probably more importantly, the highest Court of this land has been emphasizing that rules of procedure be considered and applied with the big picture perspective. Speaking through Lubuva JA (with concurrence of Kisanga and Ramadhani JJA) in the case of **OLONYO LEMUNA AND LEKITONI LEMUNA v. REPUBLIC** [1994] T.L.R. 54 the apex Court stated:

> *"In our view, in order for the courts to apply these rules properly, firstly it is necessary to have a clear understanding of such provisions and the rationale behind them. Secondly, the rules must be looked into within the whole context and not singly. If a*

particular rule of procedure is considered in isolation, there is the danger of applying such a rule in circumstances which are otherwise inappropriate."

I commend the learned Advocates for the Appellants for demonstrating uttermost commitment to the interests of their clients, but I think they overstretched their demands. Invocation of Articles of the Constitution of the United Republic of Tanzania should have been left to more serious issues. Strategic litigation does not mean winning every argument in court.

As I windup, I am inclined to state albeit in passing that as a matter of sound legal reasoning, learned Advocates for the appellants needed only to realize that they were entangled in the **double counting fallacy**. Mr. Chonya repeatedly stated that the appeal was initiated by a Notice of Appeal. Fair enough! However, he did not dare to confront the double counting fallacy by explaining what happened to two notices or rather which process (chemical, biological, physical, or administrative) that somehow condensed them up leading to the birth of one appeal. Was Mr. Misango double counting the same appeal? If the answer is to the affirmative, how can one plus one still be one?

Considering the foregoing, this Court concurs with the submissions made by Mr. Misago, that the present appeal cannot stand in its current form. Said and done, the appeal is hereby struck out.

It is so ordered.

E.I. LALTAIKA
JUDGE
06.03.2024