**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: MKUYE, J.A., KOROSSO, J.A. And KIHWELO, J.A.)**

**CRIMINAL APPEAL NO. 430 OF 2019**

**DPP ..... APPELLANT**

**VERSUS**

**IDDI HASSANI CHUMU ..... 1ST RESPONDENT**
**EPHRAIM JOHNSON MMASA ..... 2ND RESPONDENT**

**(Appeal from a Ruling of the High Court of Tanzania at Moshi)**

**(Mlacha, J.)**

**dated the 7th day of October, 2019**
**in**
**Criminal Session Case No. 30 fo 2017**

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**RULING OF THE COURT**

28th September & 23rd December, 2021

**MKUYE, J.A:**

In this appeal, the appellant, the Director of Public Prosecutions (the DPP) is appealing from the Ruling of the High Court of Tanzania at Moshi in Criminal Sessions Case No. 30 of 2017 (Mlacha, J.) dated 7th October, 2019. In the said case, the respondents herein, Iddi Hassan

Chumu and Ephraim Johnson Mmasa (hereinafter the 1st and 2nd respondents) were charged with the offence of trafficking in narcotic drugs contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap 95, R.E 2002 as amended by section 31 of the Written Laws (Miscellaneous Amendments) Act, 2012 (No. 6 of 2012). It was alleged in the particulars of offence that the appellants, on 2nd March, 2013 at Kilimanjaro International Airport within Hai District in Kilimanjaro Region, were found trafficking 5418.78 grams of Heroin Hydrochloride or Diacetylmorphine Hydrochloride valued at Tanzania shillings two hundred forty-three million eight hundred forty-five thousand and one hundred (Tshs. 243, 845,100/=) only.

The brief facts leading to this appeal are as follows: On 2nd March, 2013 the 1st respondent was travelling to Budapest in Hungary via Doha by Qatar Airlines Flight No. QR 545 while having a bag labelled "Bon Voyage Japan Express." He was to depart through Kilimanjaro International Airport (the KIA). On arrival at the Airport, he checked in and proceeded to the departure lounge while his bag was taken to the Holding Baggage Screening. Meanwhile, the 2nd respondent who was an employee of KADCO stationed at KIA, on the material day was responsible for the security check of passengers' luggage as he was in control of the X-ray machine to which passengers' luggage were

screened. When the bag with the name "CHUMA" passed through the X-ray machine, something unusual was detected. It was alleged that the 2nd respondent had let the luggage pass through security even after he had seen the existence of suspicious substance and made effort to have the bag not to be inspected contending, they were normal substances. However, upon inspection of the said luggage, it was found to contain a substance which later was revealed to be narcotic drugs known as Heroine Hydrochloride weighing 5418.78 grams. This led to the respondents' arrest and their arraignment before the court.

On 21st September, 2018 plea taking and preliminary hearing was conducted before the High Court (Khamis J.) in which among others the prosecution indicated that they would call sixteen (16) witnesses and to produce fourteen (14) exhibits as listed in the facts of the case. For the defence side, they indicated to call witnesses and to tender some exhibits as well.

The trial began on 1st October, 2019 (Mlacha J.) whereby No. F 1157 D/SSGT Hashimu (PW1) adduced his evidence which was concluded on 3rd October 2019, the date when Twalib Abulaziz Ibrahim (PW2) also testified and tendered the CD containing CCTV recording footage which was admitted as Exh. P10 and concluded his testimony on

4th October, 2019. On that date also Machibya Ziliwa Peter (PW3) testified followed by No. WP 3052 Cpl Janet (PW4) who testified up to 7th October, 2019. On that date, in the course of trial, when PW4 was continuing with her testimony, as shown at page 97 of the record of appeal, the State Attorney sought leave of the trial court to use Exh. P.10 so as the witness (PW4) could identify the 1st respondent. The State Attorney's prayer was received with an objection from counsel for the 1st respondent (Mr. Magafu). The objection was prefaced on the ground that it was not shown how the witness was involved in the preparation of the CD (Exh. P10) and that it had not been shown that the witness had access to it after its preparation. The trial court/judge in his ruling at page 101 of the record of appeal sustained the objection barring PW4 from giving her evidence based on Exh. P10. In sustaining the objection, the trial judge stated among others:

> *"... PW4 was not involved in the preparation of the CD. She actually does not know its contents. She has not seen it before. Allowing her to speak on it at this stage may be very misleading. I think the best witness on this aspect was PW2. Allowing other witness to come and speak on the issue which should have been said and clarified by PW2 may not only be dangerous but may go against the principles of fair*

*trial. That said, the objection is sustained. PW4 is barred from giving her evidence based on the CD."*

Dissatisfied with that decision, which is a Ruling of the High Court made while the hearing of the matter was still going on, the appellant has appealed to this Court on three grounds of appeal to the effect:

1. *That, the trial judge erred in law and fact by barring PW4 (WP 3052 CPL Janeth) from giving her evidence basing on CCTV footage contained in the CD which was already admitted in evidence as exhibit P10.*
2. *That, the trial judge erred in law and fact by holding that, it is only PW2 (Twalib Abdulaziz Ibrahim) who can speak and clarify on the contents of the CD (Exhibit P10) without considering the fact that PW2 already testified as an expert witness of extraction of the CCTV footage (the CD) not as a witness who can explain the meaning of the footage images contained in the CD (exhibit P10).*
3. *That, the trial judge erred in law and fact by holding that "allowing other witnesses to come in and speak on issues which should have been said and clarified by PW2 may not only be dangerous but may go against the principle of fair trial" barring other intended or would be prosecution*

*witnesses from using exhibit P10 while they have not testified in court.*

When the appeal was called on for hearing, the appellant had the services of Mr. Kassim Nassir Daud, learned Senior State Attorney; whereas both respondents appeared in person without any legal representation.

Before we could embark on the hearing of the appeal on merit, we required the parties to address us on the competence or rather propriety of the appeal regard being whether it was proper for the appellant to appeal against an interlocutory order and particularly in view of the decision of the High Court sitting as a Constitutional Court in an unreported Misc. Civil Cause No. 27 of 2018 between **Joseph Steven Gwaza** and **The Attorney General** and **Another.** In the said decision the Constitutional Court had an opportunity to deliberate on the constitutionality of section 6 (2) of the Appellate Jurisdiction Act, Cap 141 [R.E 2002; now R.E.2019] (the AJA) which allowed the DPP to appeal against among others any order (a preliminary or interlocutory order inclusive). In the end, it declared the said provision unconstitutional to the extent of allowing the DPP to appeal against any order of the High Court or subordinate court with extended jurisdiction

that is not based on an acquittal or sentence. To our knowledge there is an appeal against the decision lodged in this Court which is yet to be determined.

In response to the issue raised by the Court, Mr. Kassim submitted that the appeal is competent and that this Court has jurisdiction to hear it arguing that the notice of appeal thereof was lodged on 8th October, 2019, prior to the pronouncement of the decision in **Joseph Steven Gwaza** (supra), that was delivered on 22nd October, 2019. He, therefore, contended that the decision did not affect the appeal. To bolster his argument that the appeal was not affected, he sought reliance on the case of **Farijala Shabani Hussein & Another v. Republic,** Criminal Appeal No. 274 of 2012 (unreported) in which the appellants lodged notice of appeal before the Court pronounced the manner the notice of appeal should be prepared and lodged. There arose an issue of whether or not the said notice was valid. The Court held that the changes in the law in the preparation of a notice of appeal would not apply to the appellants as the changes came after the appellants had already lodged their notice of appeal. Further to that, the Court pronounced that such changes would come into operation six months thereafter.

Mr. Kassim, therefore, concluded by stating that, since the notice of appeal which instituted the appeal was lodged before the declaration that section 6 (2) of AJA was void through the case of **Joseph Steven Gwaza** (supra), then, the appellant was entitled to appeal against that order.

In response to the appellant's submission, the 1st respondent was fairly brief that the appeal is incompetent before the Court and argued further that the case of **Farijala Shabani Hussein** (supra) relied upon by the appellant is distinguishable.

On his part, the 2nd respondent was in agreement with the 1st respondent that the appeal is incompetent. He further raised a concern about their case taking too long while they are still in custody.

Having heard the rival arguments from both parties, we think, now this Court is in a position to make a determination on whether or not the appeal is competent before it or put it differently, whether it is barred taking due regard to the decision in **Joseph Steven Gwaza** (supra).

In addressing this issue, we deem appropriate to begin with extracting the provisions of section 6 (2) of the AJA which was partially declared void in the case of **Joseph Steven Gwaza** (supra). It provides as follows:

*"Where the Director of Public Prosecutions is dissatisfied with any acquittal, sentence* ***or order made or passed by the High Court or by a subordinate court exercising extended powers he may appeal*** *to the Court of Appeal against acquittal, sentence or* ***order, as the case may be, on any ground of appeal."***
[Emphasis added]

We have purposely supplied emphasis on the extracted provisions to demonstrate that: **One,** under the said provision of the law before **Joseph Steven Gwaza's** case (supra), the DPP, unlike the other party / parties was allowed to appeal on any order in criminal matters. **Two,** in essence, the provision gives guidance on the procedure to be taken by the DPP when he is aggrieved by the acquittal, sentence **or any order made** or passed by the High Court or subordinate court exercising extended jurisdiction. It means that even if the impugned order does not have the effect of finally determining the matter the DPP was allowed to appeal and not the other party.

In this case, as was rightly contended by Mr. Kassim, the decision in **Joseph Steven Gwaza's** case (supra) was pronounced on 22nd October, 2019. In that decision, the Constitutional Court declared section 6(2) of the AJA partially void to the extent of allowing the DPP to appeal on orders of the High Court and subordinate court with extended

jurisdiction. The appellant lodged the notice of appeal in respect of this matter on 8th October, 2019 which was before the said decision was pronounced.

It is important to note that following the decision in **Joseph Steven Gwaza's** case (supra) that provision became inoperative because until to date it is not yet reversed. This leads us to the follow up issue whether or not the change that was pronounced by the Constitutional Court covered the notice of appeal which was lodged before its pronouncement. In other words, whether or not such change, being procedural had a retrospective effect.

In dealing with this issue, we wish to begin with stating the position of the law regarding changes or enactment of the law. Ordinarily, in terms of section 14 of the Interpretation of Laws Act [Cap. 1 R.E. 2002; now R.E. 2019] the law or Act comes into operation on the date of publication in the *Gazette* except if the law provides otherwise. It is also important to note that the law would not apply retrospectively if it affects substantive rights of the victim/ party. However, where such change(s) affects procedure only, it can operate retrospectively.

Luckily enough, this issue has been canvassed by this Court in numerous cases. Just to mention a few they include: **Makorongo v.**

**Consigilio** [2005] 1 EA 247 (CAT); **The Director of Public Prosecutions v. Jackson Sifael Mtares & Three Others**, Criminal Appeal No. 2 of 2018; **Jovet Tanzania Limited v. Bavaria N.V,** Civil Application No. 207 of 2018; **BIDCO Oil and Soap Ltd v. Commissioner General Tanzania Revenue Authority,** Civil Appeal No. 89 of 2009; and **Lala Wino v. Karatu District Council,** Civil Application No. 132/02 of 2018 (all unreported). For instance, in the case of **Jackson Sifael Mtares and Three Others** (supra), when the Court was faced with a similar situation it cited the case **Makorongo** (supra) where the Court had *suo motu* invited the parties to address it on whether the appeal was properly before them in view of the amendments which were made in the law. In addressing such issue, the Court while citing the case of **Makorongo** (supra) quoted with approval the statement of principle made by Newbold, J.A, of the defunct East Africa Court of Appeal in the case of **Municipality of Mombasa v. Nyali Limited** [1963] EA 372, at 374 where it was held that:

> *"The general rule is that unless there is a clear indication either from the subject matter or from the working of Parliament that Act should not be given a retrospective construction. One of the rules of construction that a Court uses to ascertain the intention behind the legislation is that if the legislation affects*

*substantive rights, it will not be construed to have retrospective operation, unless a clear intention to that effect is manifested,* ***whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary."*** [Emphasis added]

A similar position has been stated in the works of **A. B. Kafaltiya,** in the book titled **Interpretation of Statutes,** 2008 Edition, Universal Law Publishing Co., New Delhi – India in which at page 237 thereof, the learned author stated that:

*"No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues.* ***When the legislature alters the existing mode of procedure, the litigant can only proceed according to the altered mode.*** *It is well settled principle that* ***"alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."*** *The rule that "retrospective effect is not to be given to laws"* ***does not apply to statutes which only alter the form of procedure or the admissibility of evidence. Thus, amendments in the civil or criminal trial procedures, law of evidence and limitation etc.,***

***where they are merely the matters of procedure, will apply even to pending cases. Procedural amendments to a law, in the absence of anything contrary, are retrospective in the sense that they apply to all actions after the date they come into force even though the action may have begun earlier or the claim on which action may be based accrued on an anterior date.*** *Where a procedural statute is passed for the purpose of supplying an omission in a former statute or for explaining a former statute, the subsequent statute relates back to the time when the prior statute was passed.* ***All procedural laws are retrospective, unless the legislature expressly says they are not."***

Also, the Supreme Court of Ireland had an occasion to consider the issue of retrospectivity on another dimension particularly, in relation to judicial decisions, in the case of **A v. The Governor of Arbour Hill Prison** [2006] 1 ESC 45 where it was stated as follows:

*"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all the persons who, prior to the decision, suffered the same*

*wrong or a wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitation.* ***It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined.*** *But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position."* [Emphasis added]

This decision was followed by the Seychelles Court of Appeal in the case of **Suzarra Jorrede St Jorre and 4 Others v. Nacisse Stevenson,** Civil Appeal SCA 5 and 6 / 2015 (consolidated) where it was stated that:

*"There is indeed a general presumption under the rule of law principle that statute and judicial decisions do not have retrospective effect on decided cases but that presumption against retrospectivity is not absolute"*

The Court went further to state that:

*"As regards judicial decisions, recent authorities have* ***reaffirmed the principle that a judicial decision which establishes a precedent has***

***retrospective effect in the case being decided and in other cases which are pending or still to come before the courts."***

Yet, the decision in **The Governor of Arbour Hill Prison** (supra) was followed in January 2021 by the Kenyan High Court in the case of **John Gichovi Muturi v. Republic,** Misc Criminal Application No. E 011 of 2021 in which we wish to draw inspiration where that court basically endorsed **The Governor of Arbour Hill Prison's** (supra) decision in that judicial decisions which set a precedent in law do have retrospective effect; and that they will also apply to cases pending before the courts, meaning that they may be relied upon in matters or cases not yet finally determined with an exception that the retrospective effect of a judicial decision is excluded from cases already finally determined.

Therefore, guided by the above cited authorities it is clear that judicial decisions like the one under discussion which establish precedents have retrospective effect in the cases being decided and other cases which are pending or still to come before the court. More importantly, such decisions do not have such effect on the decided cases.

We are aware that the above position is different from the one in **Farijala Shabani Hussein's** case (supra) which the learned Senior

State Attorney implored us to seek inspiration. In the said case the Court discussed on the manner/format the notice of appeal from the subordinate courts to the High Court has to be filed the more so when the notice in question was titled *"In the Resident Magistrates Court of Dar Es Salaam at Kisutu"* and no format was prescribed under section 361(a) of the CPA. Then the Court pronounced that the notice of intention to appeal under that provision should be titled *"In the High Court of Tanzania."* Then the Court directed that since the prescription for the preparation of a notice of appeal was made when the appellants had filed their notices of appeal before that prescription would not apply to the appellants as the changes came after the appellants had already lodged their notice of appeal. The Court further ordered that such prescription should become operative six months from the date of delivery of the Ruling.

However, we find that the case of **Farijala Shabani Hussein** (supra) is distinguishable to the present matter because: **One,** there was no law or judicial decision that had laid down a particular format of notice of appeal from the subordinate court to the High Court under section 361(a) of the CPA. **Two,** the counsel for the appellant sought and the prayer was granted that should the Court be minded to

pronounce a format of a notice of appeal, it should set time when the prescribed format should become operative. In this case, **one,** there was an existing law, a procedural one, which was declared unconstitutional by the Constitutional Court. **Two,** unlike in **Farijala Shabani Hussein's** case (supra) where the Court prescribed the period of six months after the decision when the changes were to become effective, in this case no specific time was prescribed by the Constitutional Court for the pronounced change to become operative. If we may add, the changes brought about to section 6(2) of AJA was not a result of an enactment but rather it arose from a decision of the court (caselaw) which becomes binding upon pronouncement unless there is a statement regarding the time for implementation as was done in **Farijala Shabani Hussein's** case (supra). These are the reason why we find that **Farijala Shabani Hussein's** case (supra) does not squarely fit in the present circumstances.

In the matter at hand, there is no gainsaying that the impugned order was made in the course of the trial when the trial court disallowed PW4 to use Exh. 10 to identify the 1st respondent on 7th October, 2019. Also as already alluded to earlier on, the decision in **Joseph Steven Gwaza** (supra) was delivered on 22nd October, 2019. The appellant

lodged a notice of appeal on 8th October, 2019, that is, before the said decision had been delivered meaning that the appeal process in this matter had begun before the said decision.

However, based on our discussion that the provisions of section 6(2) of the AJA which was declared void was procedural in the sense that it governed the procedure which the DPP was entitled to invoke, we are satisfied that the decision **Joseph Steven Gwaza** (supra) also covered the circumstances of this case. Though the appellant seemed to convince us to seek the inspiration of what was decided in **Farijala Shabani Hussein** (supra) and apply it in the present matter, we think, the argument may be attractive. However, we are of the considered view that, applying that principle to the present matter, may suggest inviting this Court to unconsciously overrule the decision in respect of **Joseph Steven Gwaza** (supra) which appeal is not before it. On the other hand, by proceeding to determine the present matter, for whatever reason that may have been advanced by the appellant, the Court would unwittingly be dragged into by-passing the decision in **Joseph Steven Gwaza** (supra). And, assuming, just for the sake of argument, that the present matter is heard, **Joseph Steven Gwaza**

(supra) would lack relevance more so when taking into account that there is an appeal in this Court which is still pending.

It is, therefore our considered view that, based on what we have endeavoured to explain, the appeal is incompetently before the Court as the DPP is not allowed to appeal against the order of the trial court which declined PW4 to identify the 1st respondent through Exh. P10.

In the final analysis, we find that the appeal is incompetent before the Court, and hence, it is hereby struck out

**DATED** at **ARUSHA** this 21st day of December, 2021.

**R. K. MKUYE**
**JUSTICE OF APPEAL**

**W. B. KOROSSO**
**JUSTICE OF APPEAL**

**P. F. KIHWELO**
**JUSTICE OF APPEAL**

The Judgment delivered this 23th day of December, 2021 in the presence Ms. Monica Mbogo Senior State Attorney of the appellant and Mr. Iddi Hassan Chumu, 1st respondent appeared in person and Ephrahim Johnson Mmasa, 2nd respondent appeared in person, is hereby certified as a true copy of the original.

C. M. MAGESA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**