IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: KIMARO, J.A., MBAROUK, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 128 OF 2016

OMAR ISSA MOH'D .....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from the decision of the High Court of Zanzibar Holden at Vuga)

(Rabia H. Mohamed, J.)

dated the 25th day of February, 2016
in
Criminal Appeal No. 7 of 2015

.....

RULING OF THE COURT

29th November & 5th December, 2016.

MWARIJA, J. A.:

The appellant was charged in the Regional Magistrate's Court at Mfenesini with six counts of robbery contrary to sections 285 and 286 (2) of the Penal Act No. 6 of 2004 of the Laws of Zanzibar. It was alleged that on 27/7/2013 at about 8.00 pm at Kendwa, in the district and region of Kaskazini, Unguja, armed with different types of weapons, the appellant

stole from the house of one Adam different articles belonging to eight different persons.

After hearing the evidence of eight prosecution witnesses and the appellant's defence, the trial court found the appellant guilty and consequently sentenced him to seven years imprisonment. It was not specified whether the sentence was for each of the eight counts and whether the same was to run concurrently or otherwise.

Aggrieved by the decision of the trial court, the appellant appealed to the High Court. In its decision the High Court (Rabia H. Mohamed, J.) upheld both the finding of guilt arrived at by the trial court and the imposed sentence of seven years which she ordered to be for each count and that the same shall run concurrently.

Dissatisfied further by the decision of the High Court, the appellant preferred this appeal which is predicated on four grounds:-

> *"1. That, the trial Court erred in proceeding in a case in which the Appellant was undefended not with standing the facts that the offence charge is serious and carries a length prison sentence.*

2. *That, the learned trial Magistrate grossly misdirected her self in law and in facts in failing to hold that the totality of the evidence adduced by prosecution was such that it not only did not established that a crime been committed and (Sic) further that it was the appellant who committed it.*
3. *That, the learned trial Magistrate grossly misdirect him self in law in that instead of giving the benefit of doubt to the appellant, he arbitrarily expostulate on the prosecution evidence adduced, without having any actual basis of such expostulation or exclusions material evidence.*
4. *That, the learned trial Magistrate was also nullity because the appellant were not informed of their right to have legal representation as regard a sentence."*

At the hearing of the appeal, the appellant appeared in person and unrepresented. On the other hand, the respondent was represented by Mr. Maulid Amour Mohamed, learned Senior State Attorney assisted by Mr. Ali Yusuf Ali and Mr. Hamad Kombo, learned State Attorneys.

Since by a notice filed on 25/11/2016, the respondent had raised a preliminary objection, the same had to be heard first. The objection consists of two grounds as follows:-

> *"1. That, the purported Notice of Appeal is incurably defective; hence it fails to comply with the Court of Appeal Rules.*
>
> *2. That, the purported Memorandum of Appeal is incompetent on the jurisdiction of the Court of Appeal, hence it is incurably defective.* "

Submitting in support of the 1st ground of the preliminary objection, Mr. Mohamed argued that the notice of appeal is defective in that it does not comply with Rule 75(1) of the Court of Appeal Rules, 2009 (the Rules). He contended that since the appellant had filed his notice of appeal from prison, he ought to have complied with that Rule by including in the notice, all the requirements provided in Form B/1. The learned Senior State Attorney contended that the notice does not contain the part in which the officer-in-charge of the prison is required to provide an information concerning the appellant's intention to appeal. Because in law, it is a

notice of appeal which institutes an appeal, argued Mr. Mohamed, the omission renders the appeal incompetent.

In the course of hearing the preliminary objection, the Court drew the attention of the parties to existence of a serious discrepancy in the trial court's decision. According to the judgment, after having found the appellant guilty, the learned trial Resident Magistrate proceeded to impose sentence without having convicted the appellant first. The learned Senior State Attorney and the appellant were required to address the Court on the effect of the error.

Mr. Mohamed conceded that the omission is fatal having the effect of invalidating the judgment of the trial court. As to the appropriate remedy, he submitted that the proper move is for the Court to quash the proceedings of the High Court and set aside the judgment because the same were founded on the erroneous decision of the trial court. He said further that the record should be remitted to the trial court with an order requiring it to convict the appellant. From the position taken by the learned Senior State Attorney, the second ground of the preliminary objection became redundant. The need for arguing it did not arise.

In reply to the first ground of the preliminary objection, the appellant did not have much to say, understandably because, as stated above, he did not have legal representation. He contended that his notice of appeal is faultless thus the reason why it was received and used by the Court to register his appeal. On the point concerning the trial court's omission to enter conviction, he conceded that he was not convicted of the counts with which he was charged. He prayed, for this reason that his appeal be allowed.

Having heard the learned Senior State Attorney and the appellant, it is our considered view that the argued ground of the preliminary objection need not detain us. It is a correct position as argued by Mr. Mohamed, that the appellant's notice of appeal contravenes the provisions of Rule 75(1) of the Rules. To be competent, a notice of appeal must comply with Rule 68 of the Rules. Sub- rule (7) of that Rule provides that the notice shall substantially comply with Form B of the 1st Schedule to the Rules. According to Rule 75(1) where the appellant is in prison, he shall be deemed to have complied with Rule 68(7) if he fills in Form B/1 and hands it to the officer-in-charge of the prison. The Rule provides that:-

"If the appellant is in prison, he shall be deemed to have complied with the requirements of Rules 68, 72, 73 and 74 or any of them by filling Form B/1, Form C/1 and handing over to the officer-in-charge of the prison in which he is serving sentence his intention to appeal and the particulars required to be included in the memorandum of appeal or statement, pursuant to the provisions of the Rules,"

Form B/1 provides matters which must be contained in the notice. It has a part in which the officer-in-charge of the prison in which the appellant is held, is required to provide information regarding the date of judgment and conviction against which the appellant intends to appeal, the dates of entering the prisons and that of lodging the intention to appeal. That part has to show also the name and the signature of certifying officer-in-charge of the prison and the date of transmitting the notice to the Court. Since the appellant's notice of appeal does not contain that part of Form B/1 which ought to have contained the vital information shown above, there is no gain saying that the notice does not comply with Rule 68(7) of

the Rules. On account of the defect which is incurable, the appeal is rendered incompetent.

Where the appeal is found to be incompetent, the usual remedy is to strike it out. In the present case however, we refrain from taking that action because, from the error which is apparent in the judgment of the trial court as elucidated above, we need to be seized of the record to enable us exercise the Court's revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA) to correct the error. Refraining from striking out an incompetent appeal or application so that the Court can invoke its revisional powers to correct a glaring illegality or an error in a decision or proceedings is an appropriate method of serving the interests of justice where the need to do so arises. In the case of **Mkuki James Kiruma v. The Republic**, Criminal Appeal No. 163 of 2012 (CA) (unreported), the Court stated as follows on that procedure:

> *"Having adjudged, as we did, that the application is incompetent, ordinarily, this Court would have proceeded to strike it out without more. However on account of material improprieties which are manifest on the face of the High Court record, we deem it*

appropriate in the interest of justice to refrain from following the usual path. We propose instead to invoke our revision jurisdiction which we are seized under section 4(2) of the Appellate Jurisdiction Act. The purpose if need be, will be ***to correct the manifest illegalities so as to prevent a miscarriage of justice as well as to avoid their recurrence....***" [Emphasis added].

In that case, the Court cited some of the cases in which the said procedure was adopted - **Tanzania Heart Institute v. The Board of Trustees, NSSF.,** Civil Application No.109 of 2008 and **Chama cha Walimu Tanzania v. The Attorney General,** Civil Application No. 151 of 2008 (both unreported). That move was also taken in the cases of **Martin Swai v. The Republic,** Criminal Appeal No. 225 of 2008, **The Director Public Prosecutions v. Liku Manga,** Criminal Appeal No. 49 of 2009 and **Ezra Mkota & Another v. The Republic,** Criminal Appeal No. 23 of 2013 (all unreported).

As stated above, the nature of the error in the trial court's judgment is that the learned trial Regional Magistrate omitted to convict the

appellant. Under s. 219 of the Criminal Procedure Act No. 7 of 2004, it is a requirement that at the conclusion of hearing of a criminal case in a subordinate court, the court shall either convict the accused person and pass sentence or give an appropriate order or dismiss the case. The section provides as follows:-

> "219 – *The court having heard both the complainant and the accused person and their witnesses and evidence* ***shall either convict the accused and pass sentence upon or make an order against him according to the law, or shall dismiss the case.***"

[Emphasis added].

The corresponding provision in the Criminal Procedure Act, Cap 20 of the revised laws of Tanzania as regards that requirement is S. 235(1) thereto. The Court had the occasions of considering the effect of non-compliance by a trial court of that provision. It was consistently held that the omission to enter conviction before imposing sentence to the accused person renders the judgment invalid. For instance in the case of **Shabani Iddi Jololo & 3 other v. The Republic,** Criminal Appeal No. 200 of 2006, the Court had this to say:-

> *".... Having found the accused persons guilty of the offence charged, it was imperative upon the magistrate to* ***convict*** *them before passing sentence. In the absence of* ***conviction*** *one of the prerequisites of the judgment in terms of* ***section 312 (2)*** *of the* ***Act*** *was, therefore, missing .... Hence in the absence of a conviction entered in terms of* ***Section 235 (1)*** *of the* ***Act****, there was no valid judgment upon which the High Court could uphold or dismiss. In other words, the judgment of the High Court had no leg to stand on."*

The circumstances of the present case are similar and thus we hold that the High Court erred in upholding the decision of the trial court. The judgment was invalid for the learned Regional Magistrate's failure to convict the appellant. On the appropriate remedy, we agree with Mr. Mohamed that the appropriate move is to remit the record to the trial court for it to convict the appellant.

In the event, in the exercise of the Court's revisional powers under S. 4(2) of the AJA, we hereby quash the proceedings of the High Court and set aside the decision which is founded on an invalid judgment of the trial

court. The sentence that was imposed by the trial court is likewise, hereby set aside. The record shall be remitted to that court for it to convict the appellant and sentence him according to the law. We direct that in sentencing him, the period which he has spent in prison shall be taken into consideration.

DATED at ZANZIBAR this 2nd day of December, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL