IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MWANGESI, J.A., KOROSSO, J.A., And LEVIRA J.A.)

CRIMINAL APPEAL NO. 359 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS ---------- APPELLANT

VERSUS

HASSAN ABOUD TALIB @ KIRINGO----------RESPONDENT

(Appeal from the judgment and decree of the High Court of Zanzibar at Vuga.)

(Makungu, C.J.)

dated the 29th day of August, 2018
in
Criminal Appeal No. 25 of 2018

.....

JUDGMENT OF THE COURT

8th & 17th December, 2020

LEVIRA, J.A.:

This appeal originates from a long complex but interesting background worth tracing for better understanding of what transpired and appreciation of this decision. In the Regional Court of Zanzibar at Vuga (the trial Court) the respondent HASSAN ABOUD TALIBU @ KIRINGO was charged with two counts, to wit, kidnapping of a boy child contrary to section 130 (b) and defilement of a boy contrary to section 132 (1) both of Act No. 6 of 2004, the Penal Code of Zanzibar. When the charge was read

over and well explained to the accused (the respondent herein), he pleaded not guilty to both counts and the trial court entered as a plea of not guilty. However, the counsel for the respondent, Mr. Rajab Abdallah prayed to the trial court to release the respondent on bail. His prayer was objected to by Mr. Hassan Ali Mohamed, the learned State Attorney. It was the argument of Mr. Mohamed that since the investigation of the case was incomplete release of the respondent on bail would **first**, interfere with the investigation, **second,** it was in public interest for the respondent to remain in custody because offences in the likeness of the one committed by the respondent were rampant in the society; and **third,** that it was not safe for the respondent to be released on bail. Having heard the arguments for and against bail application from the counsel for both sides, the trial magistrate rejected the bail application and ordered the respondent to remain in remand in her ruling delivered on 27th February, 2018.

Being dissatisfied with the ruling of the trial court, the respondent through his advocate lodged another bail application (Criminal Application No. 20 of 2018) before the High Court of Zanzibar at Vuga (the High Court) under certificate of urgency. On 9th March, 2018, the Chief Justice of Zanzibar, Omar O. Makungu (hereinafter referred as the first High Court

Judge) assigned Judge Abdul – Hakim A. Issa (hereinafter referred as the second High Court Judge) the said application to proceed with the hearing and determination of the same. However, hearing did not take place immediately because of the preliminary points of objection raised by the appellant to the effect that:

> *"a) The purported application was incurably defective, hence it fails to comply with the rules and procedures of drafting an affidavit.*
>
> *b) That, the purported application was premature for failure to encompass with the proceeding, hence it fails to comply with the procedure of court proceeding".*

As a matter of practice, the High Court had to dispose of the points of preliminary objection first before dealing with the merits of the application. Counsel for both parties got an opportunity to argue for and against the preliminary points of objection raised. However, through its ruling delivered on 19th April, 2018, the second High Court Judge found that the points of preliminary objection raised by the appellant were lacking in merits and therefore dismissed them.

It should be noted that in the course of hearing the preliminary objections against the application, the applicant's (the respondent herein) counsel also raised a legal point that the respondent's (appellant herein) counter affidavit was incurably defective for containing improper *jurat* of attestation. Upon hearing both parties on this legal point, the second High Court Judge was satisfied that indeed, the *jurat* was incurably defective and thus proceeded to strike it out.

Following the dismissal of the appellant's preliminary objections against the application, as indicated above, the counsel for the respondent prayed to the High Court to proceed with the hearing of the bail application on merit. On his side, the counsel for the appellant was not ready to proceed instead, he prayed that the appellant be given time to file a fresh affidavit in reply. The High Court granted the appellant six (6) days to file the same from the date of that order; that is from 19th April, 2018 to 25th April, 2018 and the application was scheduled for hearing on 27th April, 2018.

When the application was called on for the hearing on the fixed date, the counsel for the appellant rose and requested the High Court to stop

hearing the said bail application because they had already lodged a notice of appeal on 25th April, 2018 to the Court against the ruling of the High Court which struck out the appellant's counter affidavit. The second High Court Judge acceded to the prayer despite its being opposed by the counsel for the respondent and stopped hearing of bail application having taken into consideration that, once a notice of appeal is lodged to the Court, the High Court becomes *functus officio.* Apart from that order, he went further by ordering the trial court to proceed with the hearing of the case against the respondent as he said, the proceeding in the trial court was not concerned with the intended appeal.

It is worthy noting that, the order of the second High Court Judge subject of the intended appeal confirmed what the parties to the case had agreed and endorsed by the trial court. For better understanding of why we say so, we prefer to go back to the record of appeal particularly on page 19 where the trial magistrate suggested to the parties' counsel that they should continue with the hearing of the case because bail application before the High Court had taken a long period of time without being decided and the pendency of the said application would not affect progress

of the case. Both counsel had no objection to the proposal and thus the case was scheduled for hearing on 30th April, 2018.

Unexpectedly, when the case came up for hearing as scheduled, the counsel for the appellant informed the trial court that they were not ready to proceed with the hearing because the appellant had lodged a notice of appeal to the High Court against that order of the trial magistrate to proceed with the hearing of the case. Besides, they had as well lodged a notice of appeal to the Court against the order of the High Court directing the trial court to proceed with the hearing of the case facing the respondent.

For that reason, the counsel for the appellant prayed for an adjournment of the hearing of the case pending hearing of those appeals. His prayer was vehemently opposed by the counsel for the respondent who pleaded with the trial magistrate to either continue with the hearing of the case or discharge the respondent as he argued that, the prosecution seemed not ready to prosecute the case. The trial magistrate did not give her decision on that day instead, she adjourned the case for ruling on 14th May, 2018. However, she did not prepare the ruling, instead on the ruling

date, she informed the parties that since the appellant had lodged the notice of appeal to the High Court against her decision to proceed with the hearing of the case; the trial should be stayed pending hearing and determination of the said appeal.

It is equally worth to note that, the appellant's appeal against the order of the trial court to proceed with the hearing of the case was also assigned to the same second High Court Judge (Abdul-Hakim A. Issa, J.) by his Lordship the first High Court Judge on 20th July, 2018.

On 30th July, 2018 parties appeared before the second High Court Judge and the appellant's counsel argued that since the said Judge had already given his decision to the effect that the trial court should proceed with the hearing of the case while he was dealing with bail application, it would not be proper for him to entertain that appeal. Instead, the appeal should be heard by another Judge. His suggestion was supported by the counsel for the respondent. The learned second High Court Judge agreed and he returned the appeal file to the first High Court Judge for reassignment to another Judge. The first High Court Judge reassigned that appeal to himself and on 24th August, 2018, he heard the parties.

On 29th August, 2018 the first High Court Judge delivered his decision wherein the appellant was condemned for delaying the case under the umbrella of appeals. However, he left it to the appellant to choose to proceed or otherwise with the hearing of the case before the trial court while awaiting for her appeal to be heard by the Court. In the meantime, he exercised the discretionary powers conferred upon the High Court under section 371 (1) of the Zanzibar Criminal Procedure Act, No. 7 of 2004 (the CPA) to grant the respondent bail pending appeal. Aggrieved, the appellant lodged a notice of appeal to the Court against the order of the first High Court Judge on a matter which was not brought before him for determination and for granting bail to the respondent.

In the current appeal, the appellant has presented the memorandum of appeal and supplementary memorandum of appeal comprising of two grounds each against the said decision of the first High Court Judge. The grounds of appeal in the Memorandum of Appeal are quoted hereunder:

> *"1. That, the Hon, Chief Justice erred in law for granting bail to the Respondent pending the hearing of the appeal while the matter was before another Judge for determination.*

2. *That, the Hon. Chief Justice erred in law by taking a stand of the High Court (Abdul -Hakim A. Issa) issued on 27th April, 2018 to order that the Regional magistrate should proceed with the hearing of the case facing the Respondent."*

The grounds stated in the supplementary memorandum of appeal are as follows:

"1. *That, Hon. Chief Justice erred in law for granting bail to the above named respondent while there was a special application for bail before Justice Abdul -Hakim A. Issa pending determination of appeal in the Court of Appeal of Tanzania.*

2. *That, the Hon. Chief Justice erred in law for granting bail to the above – mentioned Respondent pending the determination of appeal by wrongly assuming Jurisdiction under section 371 (1) of the Criminal Procedure Act No. 7 of 2004."*

At the hearing of this appeal, the appellant was represented by Mr. Khamis Juma Khamis and Mr. Mussa Kombo Mrisho, both learned Senior

State Attorneys, whereas the respondent had the services of Mr. Nassor Khamis Mohammed and Mr. Rajab Abdallah Rajab, both learned advocates.

When Mr. Khamis was invited by the Court to argue the appeal, he opted to combine and argue both first grounds of appeal as they appear in the memorandum and supplementary memorandum of appeal. Other grounds of appeal were argued separately.

Submitting in respect of both first grounds of appeal, Mr. Khamis stated that it was wrong for the first High Court Judge to grant bail to the respondent while there was bail application pending before the second High Court Judge. He referred the Court to page 61 of the record of appeal where the first High Court Judge assigned the second High Court Judge the respondent's bail application (Criminal Application No. 20 of 2018) to determine it, but later he proceeded to grant bail to the respondent without hearing parties in that respect. It was his argument that, by so doing, the first High Court Judge offended section 364 (1) of the CPA which requires the High Court when entertaining an appeal to peruse the record, hear the parties and give the decision. According to the learned counsel, the first High Court Judge rightly perused the record, heard the parties and he was satisfied that there was no ruling of the trial court

requiring the hearing of the case to proceed while there was pending appeal before the High Court. The first High Court Judge only found that there was an agreement of the parties with the suggestion of the trial magistrate to proceed with the hearing of the case.

The counsel for the appellant added that, upon further perusal of the record the first High Court Judge discovered that the second High Court Judge had ordered the trial Magistrate to proceed with the hearing of the case and he ordered the trial Magistrate to comply with that order as it is reflected on page 104 of the record of appeal. However, he argued that having made such order, it was wrong for the first High Court Judge to grant bail to the respondent and for so doing, he offended section 150 (4) of the CPA. He emphasized that, the first High Court Judge had no such powers under the law to grant bail to the respondent while bail application was pending before the second High Court Judge. Besides, he said, bail consideration was not an issue placed before the first High Court Judge, so it was wrong for him to decide on it without even according the parties an opportunity to argue on bail issues. He urged us to draw an inspiration from the decision of the Supreme Court of North Carolina, USA in **State v.**

Woolridge, 357 N.C. 544 (N. C. 2003) where Brady, J. stated *that no appeal lies from one Superior Court Judge to another.*

The learned counsel argued that, the first High Court Judge and the second High Court Judge who was assigned the bail application are with concurrent mandate as both of them are High Court Judges, so the first High Court Judge was not supposed to interfere with a matter which was pending before his colleague. He argued further that, when the first High Court Judge was granting bail to the respondent there was no pending appeal before the Court and the application before the second High Court Judge was on bail application only. Therefore, the first High Court Judge was not exercising appellate jurisdiction in terms of section 371(1) of the CPA. The learned Counsel insisted that, the first High Court Judge was not supposed to encroach the case which was before the second High Court Judge whom they have equal powers. To support his argument he cited the case of **The Attorney General v. Times Newspapers Ltd**, AII TR 3 [1973] 54.

Mr. Khamis went on arguing on the third ground of appeal to the effect that, it was wrong for the first High Court Judge to take the stand of

the other High Court Judge who ordered the trial Magistrate to proceed with the hearing of the case. He argued so basing on the fact that, the second High Court Judge had already declared that he was *functus officio* as it can be seen on page 72 of the record of appeal.

Finally, the counsel for the appellant urged the Court to allow the appeal, quash the proceedings before the first High Court Judge and set aside the respondent's grant of bail order. In lieu thereof, order the respondent to be remanded and the hearing of the bail application to proceed before the second High Court Judge in terms of Rule 4(2) (b) of the Tanzania Court of Appeal Rules 2019 (the Rules) in order to meet the ends of justice.

In his reply submission, Mr. Mohamed, counsel for the respondent stated that, two issues went before different judges which should not be mixed up. He said, in one hand, before the first High Court Judge there was an appeal against the order of the trial Magistrate to proceed with the hearing of the criminal case. On the other hand, there was a pending bail application before the second High Court Judge. However, he stated that,

the issue concerning bail application was decided by the Court and the respondent was granted bail as of two years ago.

On his part, Mr. Abdalla, also counsel for the respondent conceded to the submission by the counsel for the appellant in regard to the present appeal. He agreed that the first High Court Judge was wrong to invoke section 371 (1) of the CPA to grant bail to the respondent since it was inapplicable under the circumstances. Apart from that fact, he said, since when the respondent was released on bail, there has been no injustice occasioned because bail does not interfere with the case progress or cause threat to the victim. It was his argument that, although the first High Court Judge was wrong in his decision, but he could not find any justification to the appellant's counsel prayer that the respondent be remanded; more so, as he said, the evidence has already been given regarding the case facing the respondent.

In conclusion, he reiterated his position that they concede to all the grounds of appeal raised by the appellant and urged the Court to make a just decision.

Rejoining, Mr. Khamis reiterated the appellant's prayers that the appeal be allowed and the respondent be remanded pending conclusion of his case by the trial court.

We have dispassionately considered the submissions by the counsel for the parties, the grounds and record of appeal. The main issues calling for our determination are; whether the order of the first High Court Judge granting bail to the respondent while bail application hearing was pending before another High Court Judge was justified and whether it was proper for the first High Court Judge to adopt the order of the second High Court Judge that hearing of the case should proceed before the trial court.

It is settled position that, the law confers equal powers to Judges or Magistrates of the same level. No single Judge or Magistrate is allowed to usurp powers over the other in the administration of justice.

In the current case, the first High Court Judge despite being aware that he assigned the relevant bail application to be determined by the second High Court Judge he proceeded to grant bail to the respondent while entertaining appeal which was before him. In so doing, he was purportedly exercising the powers conferred upon the High Court Judge

under the provisions of section 371(1) of the CPA. For easy of reference the said provision provides as follows:

> *"A Judge of the High Court may, in his discretion, in any case in which an appeal from a decision of* ***the High Court in its appellate jurisdiction to the Court of Appeal is filed, grant bail pending the hearing of such appeal."*** *[Emphasis added].*

The above provision of the law is very clear that, the discretionary powers of the High Court to grant bail are exercised only when there is a pending appeal to the Court in a case which the High Court exercises its appellate jurisdiction. As intimated earlier on, the appeal before the first High Court Judge was against the decision of the trial Magistrate ordering hearing of the case to proceed while the case file was before the second High Court Judge for bail application following refusal of bail by the trial Magistrate.

In the course of determining the appeal before him, the first High Court Judge ordered the respondent to be released on bail. Since the decision of the first High Court Judge was yet to be known to the parties before its delivery, it is obvious that there was no appeal filed against it to

the Court. For that matter, as argued, correctly so, in our view, by the counsel for the appellant, the first High Court Judge was not justified to invoke the powers conferred upon the High Court under section 371 (1) of the CPA. A mere fact that, there was a pending appeal before the Court relating to bail application which was before the second High Court Judge could as well not justify the grant of bail under that provision of the law. The reason is simple, the decision of the High Court subject of appeal to the Court was made by the second High Court Judge in his ruling on points of preliminary objection raised in the cause of hearing the bail application. Therefore, while entertaining the bail application, the High Court was not sitting in its appellate jurisdiction. It should be understood that, although the respondent applied for bail to the High Court after the same was refused by the trial court, the application before the High Court was not an appeal; it can easily be referred to as a commonly known term, second bite application. Therefore, section 371 (1) of the CPA could not apply under the circumstances.

Another equally important thing to be noted is that, bail application was not a matter placed before the first High Court Judge. We agree with

the counsel for the appellant that the first High Court Judge made a thorough perusal of the records in terms of section 364 (1) of the CPA and that is when he discovered that the respondent's case was delayed for almost seven (7) months by then. Presumably, that was the reason which triggered him to exercise powers conferred by the law under section 371 (1) of the CPA. Be it as it may, whatever good reason might be stated, with due respect, we still find that it was a misdirection for the first High Court Judge to invoke powers conferred to the High Court under the said provision in the circumstances of the present case. Therefore, we agree with counsel for both sides that, this ground of appeal is merited and we allow it. The first issue is therefore answered in the negative that it was improper for the first High Court Judge to grant bail to the respondent under the circumstances.

We now revert to consider the other appellant's complaint that it was wrong for the first High Court Judge to take the stand of the second High Court Judge, that hearing of the case before the trial court should proceed. It is clear on page 104 of the record of appeal that the first High Court

Judge quoted what was stated by the second High Court Judge to the effect that:

> *"Hence the learned R. M. should proceed hearing (sic) the case facing the accused, Hassan Aboud Talib."*

Having quoted the above words, the first High Court Judge had this to say:

> *"That is the order of the High Court it has to be complied with by the trial court.* ***And that is the stand of this court.*** *In the premises the appeal can- not stand."* [Emphasis added].

Just as it was in the case entertained by the first High Court Judge, the second High Court Judge dealt with a matter which was not placed before him. It can be traced from the record of appeal that, Criminal Application No. 20 of 2018 was a bail application assigned to the second High Court Judge by the first High Court Judge as earlier on indicated. On page 70 of the record of appeal, having delivered the ruling on the preliminary points of law raised by the counsel for the parties, the second High Court Judge was requested by the respondent's counsel to proceed with hearing of bail application on merit. However, the prayer was not

granted as the appellant's counsel was not ready to proceed as he needed time to file a fresh counter affidavit. On the hearing date, the appellant's counsel was again not ready to proceed because the appellant had lodged a notice of appeal against the Ruling of the High Court on preliminary points of objection which were raised by the respondent. Thus, the second High Court Judge stopped hearing as he made the following observation:

> *"The principle of the law is very clear that once a notice of appeal is lodged, this court becomes functus officio and I cannot proceed with the hearing of this matter. The file is already with the Court of Appeal. Therefore, the hearing of the bail application is hereby stopped to allow the DPP to proceed with the appeal. But the proceedings in the RM's court is not concerned with the intended appeal.* ***Hence, the learned RM should proceed hearing the case facing the accused, Hassan Aboud Talib".*** [Emphasis added].

The above excerpt is self-explanatory. The issue before the second High Court Judge was whether hearing of bail application should stop or otherwise. In answering that question he strayed in making an order out of context. The said order is subject of appellant's complaint herein. We wish

to state that, since the said order was not properly pronounced, it was equally improper for the first High Court Judge to subscribe to it as final.

It is common knowledge that the appeal against the decision of the trial Magistrate ordering hearing of the case to proceed while the case file was before the High Court pending bail application was the main complaint before the first High Court Judge. Therefore, it was upon him to make his own findings as he rightly did on page 103 of the record of appeal that the trial Magistrate only gave suggestion to the parties and they both agreed to proceed with the hearing as suggested and give his decision accordingly, which was not the case. We agree with counsel for parties that, it was also a misdirection for the first High Court Judge to rely on the order of his fellow High Court Judge to ground his decision, more so, because the said order was improperly procured. We wish to observe that, although the first High Court Judge took the stand that the order of the High Court by another Judge should be complied with by the trial court, on page 105 of the record of appeal he created uncertainty when he stated that:

> *"I should leave the matter to the wisdom of the DPP to consider preferring to proceed with the hearing*

of the case awaiting for his appeal to be heard by the Court of Appeal of Tanzania."

The above excerpt implies that, the first High Court Judge had not concluded that the case should proceed with the hearing before the trial court. He gave the appellant an option whether to proceed or otherwise which we think, that was not proper because he ought to have given a proper direction to the trial court instead of leaving it to the appellant to choose how to proceed, while he had already ordered the trial court to comply with the order of the second High Court Judge. In the circumstances, the decision of the first High Court Judge was uncertain and the order that the trial court should comply with the order of the second High Court Judge to proceed with the hearing of the case was erroneous. The second issue is thus answered in the negative.

The counsel for the appellant urged the Court to allow the appeal and order the respondent to be remanded. The prayer to remand the respondent was challenged by the counsel for the respondent who argued, that the respondent is out on bail following the decision of the Court in Consolidated Criminal Appeals, No. 226 and 227 of 2018.

We had an opportunity to go through the records of both appeals. It was our observation that, Criminal Appeal No. 226 of 2018 was against the decision of the second High Court Judge ordering the Regional Magistrate to proceed with the hearing of the case against the respondent while the notice of appeal had already been lodged; while, Criminal Appeal No. 227 of 2018 was against the decision of the said second High Court Judge striking out the appellant's preliminary objections and ordering the appellant to file a fresh counter affidavit.

When Criminal Appeal No. 226 was called on for hearing on 3rd December, 2018, it came to the knowledge of the Court that the appellant had another appeal against the respondent (Criminal Appeal No. 227 of 2018) which was also scheduled for hearing on the same day. For convenience, the two appeals were consolidated during hearing as they both emanated from Criminal Application No. 20 of 2018 which was before the High Court.

While dealing with those appeals the Court entertained first the point of preliminary objection raised by the respondent regarding the competency of the notice of appeal in respect of Criminal Appeal No. 226

of 2018. The counsel for the appellant conceded to the preliminary objection and urged the Court to strike out the notice of appeal, a prayer which was supported by the counsel for the respondent and accordingly granted by the Court. Thus, Criminal Appeal No. 226 of 2018 was struck out.

Regarding Criminal Appeal No. 227 of 2018, the Court observed that the same had already been overtaken by events following the respondent's bail being granted by the first High Court Judge on 29th August, 2018 in Criminal Appeal No. 25 of 2018 and the notice of appeal lodged to the Court by the appellant against that order granting bail which was pending by then. As it can be observed, the said notice of appeal instituted the current appeal.

In the present appeal, the counsel for the appellant urged us to order that the respondent be remanded without further explanation on the reasons behind his prayer. On his part, the counsel for the respondent prayed that his client's bail not be disturbed. He added that the case against the respondent proceeded before the trial court and most of the witnesses have already testified. Therefore, there will be no danger of the

respondent interfering with the case if bail is granted. We wish to observe that, although the learned counsel for the appellant pressed for an order that the respondent be remanded, we are not ready to grant his prayer. As we indicated above, bail application is still pending before the second High Court Judge. Therefore, the prayer by the learned Senior State Attorney before us is inappropriate.

All said and done, we allow this appeal to the extent stated, quash the proceedings and set aside the orders made by the first High Court Judge. Ordinarily, we could as well nullify the proceedings of the trial court from when the respondent applied for bail to the High Court. However, having gone through the record of Criminal Case No. 35 of 2018 we have discovered that by 17th November, 2020 at least five (5) prosecution witnesses had already testified before the trial court. In the trial, the prosecution case is about to be closed as presently only two (2) prosecution witnesses have not yet testified and the next hearing of the case is scheduled on 6th January, 2021. Therefore, we find it in the interest to invoke the revisional powers conferred upon the Court under the

provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 to order hearing of the case to proceed as scheduled. It is so ordered.

DATED at **ZANZIBAR** this 16th day of December, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of December, 2020 in the presence of Mr. Khamis Juma Khamis, learned Senior State Attorney for the Appellant and Mr. Rajab Abdalla Rajab, learned counsel for the Respondent is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL