IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: WAMBALI, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CRIMINAL APPLICATION NO. 03/02 OF 2023

LENGAI OLE SABAYA..... 1st APPLICANT

ENOCK TOGOLANI MNKENI.....2nd APPLICANT

JOHN ODEMBA AWEYO.....3rd APPLICANT

SYLVESTER WENCENSLAUS NYEGU.....4th APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Application for Revision of the proceedings, ruling and order of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

dated the 14th day of December, 2022

in

Criminal Appeal No. 155 of 2022

.....

RULING OF THE COURT

6th & 20th February, 2024.

FIKIRINI, J.A.:

The applicants and two others not part of this application were charged and acquitted before the Resident Magistrate's Court of Arusha at Arusha, in Economic Case No. 27 of 2021. Disgruntled, the Director of Public Prosecutions (the DPP) preferred an appeal to the High Court which was admitted and registered as Criminal Appeal No. 155 of 2022. Upon securing the lower court record, and the appeal was ripe for hearing it was

scheduled for 12th December, 2022. On that day, the appellant, the DPP was represented by Messrs. Patrick Mwita, Abdallah Chavula, Kevin Kihaka, Felix Kwetukia and Timothy Mmari all Senior State Attorneys. And on the respondent's side present in court was the first applicant, Lengai Ole Sabaya and Mr. Fridoline Bwemelo learned advocate who represented the third applicant. The second, third and fourth applicants and the fifth and sixth then respondents were not present in court.

At the commencement of the proceedings, Mr. Mwita informed the court that there was a report that summonses and petition of appeal were issued to the respondents' advocates, connoting that service had been dully effected. That was, however not the reality on the first applicant's side. He stated to have only been served on the very day with the summons but not a petition of appeal. Learning that the court ordered service right away in respect of the first applicant. Mr. Bwemelo on the other hand, admitted receiving summons but informed the court that he had not heard from his client if he was still interested in being represented by him.

The matter was adjourned with the order that the hearing of the appeal would proceed on the next day. On 13th December, 2022, set for

the hearing of the appeal, apart from the same set of the Senior State Attorneys appearing on behalf of the appellant, on the respondents' side there was the presence of the first applicant and team of learned advocates namely: Mr. Mosses Mahuna, Ms. Fauzia Mustafa and Mr. Fridoline Bwemelo, all representing him. The fourth applicant was present and he enjoyed the services of Mr. Sylvester Samwel Kahunduka, learned advocate. The second and third applicants and the fifth and sixth respondents were again not present.

Since Mr. Mahuna had raised preliminary points of objection on point of law (PO), that the appeal before the Court contravened the provisions of section 379 (1) (b) of the Criminal Procedure Act, Cap. 20 R. E. 2022 (the CPA), and that the appeal before the court was not supported by the notice or petition of appeal. Under the circumstances, the hearing of the appeal was to be preceded by a hearing of the PO.

The PO was heard and overruled in the court's ruling dated 14th December, 2022, in the absence of the second and third applicants. The hearing of the appeal was to continue after the ruling but could not as the court was informed that service on the second and third applicants was not dully effected, compelling the learned Senior State Attorney to seek for

substituted service by way of publication in the newspapers. The unobjected prayer was granted and order was accordingly issued. And that is the genesis of the present notice of motion predicated under rule 65 (1) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In their notice of motion, the applicants are moving the Court to nullify the High Court proceedings, ruling and order from 12th - 14th December, 2022, in Criminal Appeal No. 155 of 2022, on the paraphrased following grounds:

(i) That the learned Judge of the High Court proceeded to entertain PO raised by the first applicant in the absence of the second, third and fourth applicants who were not yet served with a notice of hearing, petition of the appeal, proceedings and the judgement.

(ii) That the High Court Judge denied the second, third and fourth applicants a right to be heard on the raised PO.

(iii) That the High Court Judge made inconsistent decision and overruling herself that there was no proper service of the notice of appeal to the second, third and fourth applicants.

(iv) That the respondent will not suffer any prejudice if the said decision is revised.

At the hearing of the application on 6th February, 2024, all the applicants were present in Court. Messrs. Mosses Mahuna, Sabato Ngogo and Sylvester Kahunduka learned advocates appeared for their respective parties. Mr. Bwemelo who was representing the fourth applicant, was stated to be engaged before another Court of Appeal Panel "A" also present in Arusha. Considering the application was by all the applicants, Mr. Mahuna prayed to go on record that they would hold brief of Mr. Bwemelo and pressed the hearing to continue as planned, the proposal approved by the fourth applicant.

Submitting on the application, Mr. Mahuna contended that the High Court proceedings from 12th – 14th December, 2022, were marred with irregularities consequently affecting the second, third and fourth applicants and infringed their right to be heard. Elaborating on what transpired, he submitted that even though the first applicant was present in court on the 12th December, 2022, after being served with the summons, he was however not yet been served with the petition of appeal. Order that he be

served was made and he was served straightaway. The hearing of the appeal was thus adjourned to the following day.

On 13th December, 2022 present in court was the first applicant accompanied by his advocates whereas the fourth applicant was present in court unrepresented. The applicant through Mr. Mahuna learned advocate had lodged a notice of a Preliminary Point of Objection (PO). He therefore proceeded to argue the PO. Surprisingly after he was done, the Judge did not bother to engage the fourth applicant to address the court on the raised PO, instead, she invited the respondent to respond, which they did. By denying the fourth applicant the opportunity to address the court, the fourth applicant was denied a right to be heard which is a fundamental and cardinal principle of natural justice, contended Mr. Mahuna. That was the first irregularity.

The ruling overruling the PO was delivered on 14th December, 2022, in the presence of the same set of learned Senior State Attorneys, the first and fourth applicants and their advocates and in the absence of the second and third applicants, who were not dully served and heard on the PO. This was the second irregularity.

As if what transpired was not sufficient to mar the proceedings, after the ruling was delivered on the 14th December, 2022, and the High court was about to commence hearing of the appeal, Mr. Chavula, Senior State Attorney rose and informed the court that according to the report received from the Deputy Registrar of the High Court, the efforts to procure the second, third applicants and fifth and sixth then respondents were futile hence urged the court pursuant to section 381 (2) of the CPA, to order publication of the notice of hearing to the respondents in the nation's widely circulated newspapers. The application was granted.

According to Mr. Mahuna, the likelihood that the second and third applicants were duly served did not seem to exist. His doubts germinated from the fact that there were two confusing and conflicting orders, of which the applicants would not know which to follow. To support his proposition, he referred us to the case of **Kubwandumi Ndemfoo Ndossi v. Mtei Service Limited,** Civil Appeal No. 257 of 2018 [2021] TZCA 23 (19 February, 2021, TANZLII), in which the Court observed that denial of the right to be heard in any proceedings vitiates them.

In addition, Mr. Mahuna also cited to us the case of **VIP Engineering** and **Marketing Ltd v. Mechmar Corporation** (**Malaysia**)

Berhad of Malaysia, (Civil Application No. 163 of 2004) [2004] TZCA 23 (12 May, 2005, TANZLII), where the Court admittedly concluded that when there were confusing and conflicting orders, it is hard for parties to know what order to abide with. On the strength of his submission, he implored the Court to nullify the proceedings from 12th-14th December, 2022. This was the third irregularity.

Mr. Sabato supported and adopted Mr. Mahuna's submissions while Mr. Kahunduka in his short submission on the one hand, criticized the Judge in proceeding with hearing of the PO while other applicants had not been served. And on the other, he brought to the Court's attention that the respondent had not filed an affidavit in reply.

In reply Mr. Mwita started by informing the Court there was affidavit in reply filed to counter Mr. Kahunduka's submission. From there he went on challenging the notice of motion for the applicants, for failure to state how they were prejudiced with the proceedings, ruling and order made by the High Court Judge. He considered lack of stating the prejudice suffered by the applicants rendered the notice of motion to only be for academic purposes.

Dwelling on the application itself, he argued it was lodged prematurely, giving the following reasons: **one,** the Criminal Appeal No. 155 of 2022 has not yet been heard and determined. **Two,** on the 13th December, 2022, the date set for the hearing the first applicant and his team of advocates were present while the fourth applicant was present in person. **Three,** the PO was raised by the first applicant and was argued by his team of advocates and not by the other applicants, therefore they were not denied any right to be heard and the Judge was correct in her approach.

Probed by the Court whether not allowing the fourth applicant to address the court on the PO was proper, Mr. Mwita, without hesitation, admitted that the fourth applicant was not given the opportunity to address the court but wondered how had that prejudiced him?

As for the second and third applicants were undeniably not before the court since they were not duly served and therefore could not exercise their right to be heard, but was dismissive of the submission arguing that the question which needed to be answered by the applicants was how were they prejudiced, considering they were not the one who raised the PO.

Advancing more on the issue of service, the learned Senior State Attorney submitted that the applicants were served through the Regional Crimes Officer (RCO) and after learning that there was no proper service, they asked the court for substituted service by way of publication. After the publication, the second and third applicants could have gone back to the Judge and asked to be heard rather than approaching the Court with the present application.

Queried by the Court about the two confusing orders, the learned Senior State Attorney, besides admitting the orders were confusing, maintained that the orders did not prejudice the applicants since the orders did not impact the pending appeal. He thus prayed for the application to be dismissed.

Briefly rejoining, Mr. Mahuna intensely argued that the applicants were hugely prejudiced as their right to be heard on the issue had already been determined conclusively. There is no way the applicants can bring an application of that nature again and that vitiated the proceedings on those mentioned dates. Moreover, the proceedings from 12th – 14th December, 2022 did not indicate that there was proof of service or Deputy Registrar's report on service, stressed Mr. Mahuna. Whilst, he admitted that speed is

good in the dispensation of justice but maintained that justice was better, and in the circumstances of the appeal before the High Court he wondered why was the appeal being handled speedily resulting into denial of the right to be heard by the second, third and fourth applicants.

Giving a helping hand, Mr. Ngogo took the floor and his enriching point was to challenge the position by Mr. Mwita that the applicants had not indicated how they were prejudiced in their notice of motion. Mr. Ngogo's take was that this kind of application predicated under rule 65 (1) of the Rules, only requires grounds for consideration to be stated and it was not a prerequisite to show how the applicants were prejudiced.

On the submission that the RCO's effected service and there was an affidavit deponed in that regard, Mr. Ngogo dismissed the submission as unfounded as there was no copy of the alleged affidavit on the record. He went on submitting that the only information availed and on the record was that the Officer Commanding the Criminal Investigation District (OC CID) communicated via phone that the applicants could not be procured. Insisting on the importance of service of summons, the learned advocate contended that it was crucial and necessary as stipulated under section 381 (1) of the CPA. It was therefore essential to prove that there was

service effected and received or not. He further submitted that by highlighting that there was no proper service to the applicants particularly the second and third and the Judge admitting that, while the PO had already been heard and determined is worrying. He wound up his submission by pointing out that the right to be heard is fundamental and in the present application it has not been observed hence prayed for the application to be allowed and the High Court proceedings of those mentioned dates to be nullified.

Mr. Kahunduka who was present on 12th December, 2022, was not left behind. He chipped in by questioning the correctness of Mr. Mwita's assertion that the applicants could have gone back to the Judge after the publication of the notice in the newspaper and asked to be heard. It was his submission that after the ruling the Judge was *functus officio,* and the remedy was approaching this Court by way of revision.

Having heard the submissions of the learned advocates on behalf of the applicants and that of the learned Senior State Attorney, and examining the record of proceedings on those three days, it is clear there are issues calling for our intervention.

We wish to start by touching a little bit on the subject, which has previously been dealt with by the Court extensively. Once a right to be heard is infringed, certainly it offends the rule of natural justice. This Court had in its numerous decisions such as **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma**, [2003] T. L. R. 251 and **The Principal Secretary, Ministry of Defence & National Service v. Devram Valmbhia** [1992] T. L. R 185, **Kubwandumi Ndemfoo Ndossi** and **VIP Engineering and Marketing Limited** (supra) cited by the applicants' counsel, to mention a few, underscored that the right to be heard is the basic principle of natural justice of which denial of it would vitiate the proceedings involved.

Apart from the above settled Court's stance, the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, in appreciating and showing how a right to be heard is fundamental, has enshrined it in its Article 13 (6) (a) which for ease of reference is reproduced below:-

> "*When the rights 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 added]

Now examining the application before us in that perspective, we cannot mince words and candidly state that the second, third and fourth applicants right to be heard was hampered and that is an irregularity which cannot stay unrectified. What can be obtained from the record of proceedings particularly those from 12th – 14th December, 2022 is that the second, third and fourth applicants were not heard when the PO raised by the first applicant was heard and determined. Specifically for the fourth applicant who was present in court, denying him opportunity to be heard and without any reasons advanced, cannot be painted with any other brush but patently that his right to be heard was infringed. In the case of **Anthony M. Masanga v. Penina (Mama Mgesi) and Lucia (Mama Anna)** (Civil Appeal No. 118 of 2014) [2015] TZCA 556 (18 March, 2015, TANZLII), the Court insisting that a person should be accorded right to be heard, stated thus:-

"In fact, nowadays, courts demand not only that a person should be given a right to be heard, ***but that he be given an "adequate opportunity"*** *to*

be heard so as to achieve the quest for a fair trial."

[Emphasis added]

In the referred case, the issue pertained to documents tendered and admitted in evidence collectively instead of one document after the other. The Court considered that the approach had denied the parties a right to be heard.

Even though the facts in the cited case and what is before us are different, but our focus is mainly on the principle that once a party is before the court, that party must be heard by being given adequate opportunity, be it, it is the issue pertaining to documents as in the cited case above or a mere oral account or submissions as was supposed to be before the High Court. The fourth applicant who was present in court was obviously denied that opportunity and no reason was given. In our view, this irregularity cannot be excused or glossed over.

Going by the record and the proceedings being questioned, whereas the respondent alleged the second and third applicants were dully served there was no proof of service. Guiding ourselves properly on the service, we find it pertinent to examine section 381 (1) of the CPA. The provision provides thus:-

> *"(1) Where a petition of appeal is lodged with the High Court in accordance with the provisions of section 380 the High Court shall cause notice to be* ***given to the respondent or his advocate, and every such notice shall state the time and place at which the appeal will be heard and shall be accompanied by a copy of the petition of appeal and a copy of the proceedings, judgment or order appealed against.***" [Emphasis added]

What is gathered from the provision is that, there are three major things to be accomplished, in order to ascertain service has been properly effected. First and foremost, the notice shall be served on a party or his advocate. Secondly, the notice should state time and place where the hearing of the appeal would take place. Thirdly, the said notice should be accompanied with a copy of petition and a copy of the proceedings, impugned decision or order.

While Mr. Mwita was content service was dully effected, we are not, and definitely in agreement with Mr. Mahuna and Mr. Ngogo's position that there was either no service dully effected or if effected then was incomplete. We shall explain.

Starting with Mr. Mwita's information to the court on 12th December, 2022, which we think speaks for itself that:-

> *"The matter is coming for hearing; we were served on 01/12/2022 and we were informed that the matter comes today for hearing.* ***There is a report showing that the summonses were issued to the respondent's Advocates together with grounds of appeal****..."* [Emphasis added]

Although, Mr. Mwita asserted service being dully effected, what the record depicts is that even the first applicant who was present in court, his service was incomplete forcing him to raise a concern. This is what he said:-

> *"1st Respondent: The summons was served to me today. It is true that I was acquitted but* ***I have not received any notice of appeal...****"*[Emphasis added]

From the dialogue the High Court seemed was satisfied that service was dully effected despite the first applicant's concern, when it stated in its order:-

> *"...However, given the fact that the appeal comes on a special session, parties were dully served and the fact that all parties are acquainted with record of appeal including, judgment, this matter is to*

proceed henceforth as the court has not received any notice from the respondents advocates that they will not represent them in this case."

Yet, the High Court ordered the first applicant to be served straightaway as indicated:-

"The 1st respondent is served with a copy of a petition of appeal here in court and received it."

This was alarming on our part, because if the one in court complained of not being fully served, how the Judge banked on the statement that the others had been duly served. Moreover, the record is silent if the first applicant was served with the copy of proceedings, judgment and order appealed against, to make sure there was compliance with section 381 (1) of the CPA.

Coming to the second and third applicants, their scenario is even worse. We say so because in a span of three days the High Court was informed differently leading to make two conflicting orders. Whereas on 12th December, 2022, Mr. Mwita learned Senior State Attorney who was in the company of Mr. Chavula, notified the High Court on the duly effected service, it was startling and unexpected on 14th December, 2022 to hear Mr. Chavula to inform it on the contrary. This happened when the High

Court was about to proceed with the hearing of the appeal, but could not as Mr. Chavula had an observation that:-

> *"The matter before you is for hearing, however, before you there is only 2 respondents. The 2nd, 3rd, 5th and 6th respondents are not in court. According to the report we received from the Hon. Deputy Registrar of the High Court, the efforts to procure the other respondents were fertile (sic!). Therefore, it I our prayer that u/s 381 (2) of the CPA Cap 20 R.E. 2022, we pray for this court to order publication of the notice of hearing to the respondent by way of publication in the newspapers. If it pleases the court, we pray that the matter is adjourned to the 21/12/2022 and the matter comes for mention. We also pray for this court to order the Hon. Deputy Registrar to publish the notice of hearing in a nation's circulating newspaper."*

It has been hard for us to comprehend how could that be possible in a span of three days, for the two learned Senior State Attorneys, who were present in court on both dates, to come up with such conflicting and confusing information. Although, both Mr. Mahuna and Mr. Kahunduka learned advocates who were present in court had no objection to the

prayer, we think the Judge's orders that followed, speaks volume. This is what she ordered:-

> *"Order:*
>
> *(1) Indeed, as submitted by Mr. Chavula the service of the 2nd, 3rd, 5th and 6th respondents was not properly effected. Since right to be heard is fundamental, it is prudent that all the respondents are afforded an opportunity to be heard by being properly notified.*
>
> (2) *Owing to the fact that notices were not properly served to the named respondents who are the 2nd, 3rd, 5th and 6th respondents, I hereby order that they should be properly notified pursuant to the provisions of section 381 (2) of the CPA, by publication in the nationwide circulating newspapers."*

The above order is by and large disconcerting.

From the turn of events, we find ourselves echoing Mr. Mahuna's adage that "speed is good but justice is better." Our position stems from the finding that there was no proof that the second and third applicants or their advocates were in receipt of the said notice of hearing. The avowal that there was the RCO's affidavit was simply an unsubstantiated

statement as argued by Mr. Ngogo, considering there was nothing on record in the form of an affidavit on the proof of service. At most there was an information that the OCCID via phone communicated on failure to procure the respondents. While we do not dispute that phones could be used as mode of communication, but for the sake of consistence there has to be proof to that effect that summons was dully served. We think a sheer phone call can in some instances not suffice to prove that service has been duly effected, especially, where a party has not shown up in court. More so, it is hard to even conclude in the present situation that the OCCID when he communicated, he was referring to the second and third applicants as parties not procured. More needs to be done to make phone communication unquestionably reliable, when it comes to service of notice or summons.

The importance of proper service cannot in any way be watered down. As acknowledged by the High Court Judge, that the right to be heard is fundamental and in order for that to occur there must be proper service to afford parties to enter court appearance and exercise their right to be heard. By issuing the order for substituted service as prayed by Mr. Chavula, the Judge was admitting that there was, irregularities. The

hearing on the PO conducted on the 13th December, 2022, in the absence of the second and third applicants was improper and unfair. They were essentially denied their basic right to be heard before being adjudged.

The fourth applicant's advocate was in court after receiving summons and was ready for hearing though he had not heard from his client. However, the record is silent if he was dully served with other documents as stipulated under section 381 (1) of the CPA to allow a party or his advocate be ready to defend the lodged appeal.

Mr. Mwita's submission that Criminal Appeal No. 155 of 2022 was still pending and the fact the first applicant who raised the said PO was heard, the second, third and fourth applicants were thus not prejudiced in any way, and that they could have gone back to the Judge after being served, is in our view absurd to say the least.

At this juncture, we need to pose and examine jurisdiction of this Court on revision, in the light of Mr. Mwita's submission and our findings that there was infringement on the right to be heard in respect of the second, third and fourth applicants.

The Court is conferred with revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA), when dealing with an appeal and section 4 (3) upon application by a party like in the present application. The powers in reference are designed to examine the record with the view to being satisfied with the correctness, legality or propriety of any finding, order or decision made. The provision of section 4 (3) reads as follows:-

> *"(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."*

It is trite law that revision is not an alternative to appeal, therefore a party approaching the Court could do so only when there is sufficient reason or peculiar circumstances. And this occurs when a party complaining has been able to highlight irregularities, incorrectness or inappropriateness of the proceedings or propriety of the record and proper application of the law. The Court, would then be justified to interfere and

exercise its revisional powers, especially if without such interference the pointed irregularity, incorrectness or inappropriateness will wrongly stay on.

In the case of **Tanzania Telecommunications Co. Ltd & Others v. Tri Telecommunications Tanzania Limited** (Civil Revision 62 of 2006) [2006] TZCA 83 (20th July, 2006, TANZLII) quoted **Hallais Pro-Chemie v. Wella A.G** [1995] TZCA 26; (27 October, 1995, TANZLII); 1996 T. L. R. 269, establishing the grounds upon which a revisional powers of the Court can be employed, amongst its grounds had this as a ground that:-

> *"(ii) Except under exceptional circumstances, a party to the proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court."*

We are inclined to believe there are exceptional circumstances in the present application, which if we do not interfere the order will remain intact. The proceedings and order in reference here are those from 12th – 14th December, 2022, in which the second, third and fourth applicants were denied a right to be heard. The reasons behind our position are, as follows:

justice demands that parties are adequately heard and that can only happen if they are properly served in order to permit them to be present in court on date and time set. In the present situation, regardless of the fact that they did not raise the PO, they were all part of the pending Criminal Appeal, it is our view that they all deserved proper service whether they would have joined in supporting or otherwise, the PO raised. See: **The Judge In Charge High Court, Arusha & Ano v. N.I.N Munuo Ng'uni,** (Civil Appeal No. 45 of 1998) [2002] TZCA 12 (5th March 2002, TANZLII).

Equally, the position that the applicants' notice of motion was lacking for not showing how they were prejudiced, is in our view, a fallacy. As rightly submitted by Mr. Ngogo, there is no such requirement of stating how the applicant has been prejudiced. Rule 65 (1) of the Rules requires the applicant to state the grounds of the application in the notice of motion and nothing else. Moreover, the learned Senior State Attorney could not cite to us a case law requiring fulfilment of that condition.

Furthermore, notwithstanding, that what was before the Judge was a PO by the first applicant, from which presumably the same would have been an outcome, if all the applicants were heard, still the principle requires a party to be afforded a right to be heard, because none of them

could bring that application again. And by overruling the PO the High Court had determined its finality. In **Abbas Sherally & Another v. Abdul S. H. M. Fazalboy** (Civil Application No. 183 of 2005) [2006] TZCA 82 (18th July 2006, TANZLII), the Court grappling with the issue on right to be heard insisted that:-

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.***" [Emphasis added]

There is no dispute at all that the second, third and fourth applicants were not heard. And this was caused by them not being dully served. By failing to allow them to be heard, the Judge was in breach of the cardinal principle of justice that one should not be condemned without being heard. Denial of a right to be heard in any proceedings would definitely vitiate those proceedings, since that would have caused miscarriage of justice. See. **The D.P.P. v. Sabina I. Tesha & Others** [1992] T. L. R. 237.

Besides, the right to be heard issue, we also considered the confusion and conflicting orders aspect, contended by Mr. Mahuna. **First,** it was not certain whether the second and third applicants were dully served or not. **Second**, between the two orders that of 12th December, 2022 and 14th December, 2022 which one should prevail, must have caused confusion to the parties. In our previous decision in **VIP Engineering And Marketing Limited** (supra), a general complaint by parties on the state of confusion as the proceedings were conducted in a haphazard manner was taken into consideration. The position in that case is akin to the one in the present application. The conclusion that parties would have had difficulties knowing which order to follow, is exactly our concern in the present application.

The High Court proceedings from 12th – 14th December, 2022 and ruling reached without participation of the second, third and fourth applicants cannot be left intact as it was reached at, in violation of the principle of natural justice. Pursuant to the powers bestowed on the Court under section 4 (3) of the AJA, the proceedings, ruling and order of the High Court in Criminal Appeal No. 155 of 2022, from 12th – 14th December, 2022, are declared a nullity, quashed and set aside.

The record should be remitted to the High Court for hearing of the raised PO after proper service of notice of hearing to the parties.

DATED at **ARUSHA** this 19th day of February, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of February, 2024 in the presence of Mr. Mosses Mahuna for 1st Applicant, Mr. Fridorine Bwemela for 2nd Applicant, Mr. Sabato Ngogo for 3rd Applicant, and Mr. Slyvester Kahunduka for 4th Applicant and Ms Caroline Kasubi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL