

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT ZANZIBAR**  
**(CORAM: KOROSSO, J.A., KEREFU, J.A., And MLACHA, J.A.)**

**CRIMINAL APPEAL NO. 561 OF 2023**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT**

**VERSUS**

**MOHAMED MUSSA USSI ..... 1<sup>ST</sup> RESPONDENT**  
**ISSA BARAKAT ABDALLA ..... 2<sup>ND</sup> RESPONDENT**  
**SAID SHAABAN MINTANGA ..... 3<sup>RD</sup> RESPONDENT**  
**SULEIMAN HAMAD RASHID ..... 4<sup>TH</sup> RESPONDENT**

**(Appeal from the decision of the High Court of Zanzibar  
at Tunguu)**

**(Kazi, J.)**

**dated the 15<sup>th</sup> day of May, 2023**

**in**

**Criminal Case No. 86 of 2022**

.....

**JUDGMENT OF THE COURT**

23<sup>rd</sup> April & 8<sup>th</sup> May, 2024

**KOROSSO, J.A.:**

A ruling by the High Court of Zanzibar sitting at Tunguu in Criminal Case No. 86 of 2022 dated 15/05/2023 rejecting the admission of various documents intended to be tendered by Abdulla Mohamed Juma who appeared as PW1 during the hearing of the above-mentioned case is what founds the instant appeal. The documents whose admission was rejected by the High Court Judge include voucher list No. PO1 VL00000775; PO1 VL00000792; PO1 VL00000757; and PO1 VL00000817.

Briefly, the background giving rise to the current appeal is that the respondents faced charges comprising 22 counts which bridged, appear as follows: In the first to seventh counts, Mohamed Mussa Ussi and Issa Barakat Abdallah (1<sup>st</sup> and 2<sup>nd</sup> respondents) are charged with misappropriation of property and revenue contrary to sections 42(2)(a)(iii), 60(1), (2)(a) and 61 of the Zanzibar Anti-Corruption and Economic Crimes Act, No. 1 of 2012 of the Laws of Zanzibar (ZACECA). It was alleged that the two respondents on various dates between 19/4/2021 to 29/6/2021 within West "B", District in Urban West Region of Unguja, being Chief Accountant and Assistant Chief Accountant of the Ministry of Works, Communication and Transport respectively, fraudulently, did make payment of Tshs. 416,643,104/36, the property of the Revolutionary Government of Zanzibar to PBZ Account No. 0451700000 of SAS CONSTRUCTION LIMITED for service not rendered.

In the eighth to tenth counts, the same respondents faced the charge of Abuse of Office contrary to sections 53 and 61 of ZACECA. Allegedly, they intentionally abused their positions and obtained an undue advantage of Tshs. 218,069,807/=. In the eleventh and twelfth counts, Said Shaban Mintanga (the 3<sup>rd</sup> respondent) was charged with misappropriation of property and revenue contrary to sections

42(2)(a)(iii), 60(1), (2)(a) and 61 of ZACECA. as the Director of SKILFARU INVESTMENT and ENGINEERING LIMITED, did unlawfully acquire Tshs. 218,069,807/=, the property of the Revolutionary Government of Zanzibar as payment for inexistent work or service.

In the thirteenth count, Suleiman Hamad Rashid (4<sup>th</sup> respondent) was charged with Misappropriation of Property and Revenue contrary to sections 42(2)(a)(iii), 60(1), (2)(a) and 61 of ZACECA, that he did unlawfully acquire Tshs. 216,930,666/=, the property of the Revolutionary Government of Zanzibar as payment for non-existent work or service. The fourteenth count was for all four respondents charged for money laundering, contrary to sections 7(1), (2) (a) and 8(a) of the Anti-Money Laundering Act, No. 10 of 2009 and 49 of the ZACECA. It was alleged that the respondents jointly acquired a total of Tshs. 1,335,730,534/=, the property of the Revolutionary Government of Zanzibar.

In the fifteenth to eighteenth counts, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were charged with Forgery contrary to sections 333, 335(a) and 338 of the Penal Act, No. 6 of 2018 of the Laws of Zanzibar (Penal Act), jointly with intent to defraud, forged the signature of the Accounting Officer, Amour Hamil Bakar on the voucher list number PO1 VL00000792

purported to be genuine voucher list which was not. In the nineteenth to twenty-second counts, the 1<sup>st</sup> and 2<sup>nd</sup> respondents faced the charge of uttering false documents contrary to section 342 of the Penal Act. The allegations are that on different dates from 19<sup>th</sup> April to 29<sup>th</sup> June 2021 in the area and holding the positions specified in the above counts, the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly, knowingly and fraudulently uttered false documents to wit, voucher list number PO1 VL00000775 to the Ministry of Finance and Planning of Zanzibar.

The information was filed before the High Court of Zanzibar at Tunguu and when called upon to plea, each of the four respondents pleaded not guilty to relevant counts facing each of them. On the 15/5/2023, the trial commenced. The coram found on page 49 of the record of appeal, shows the appellant, Director of Public Prosecutions (DPP) to have been represented by Messrs. Suleiman Yussuf Ali, Mohamed Hadi Kombo and Nassor Zahran, learned State Attorneys whereas, Messrs. Rajab Abdalla, Salum Bushiri and Ramadhan Chemasuet, learned Advocates, entered appearance for the respondents.

When the trial began, Abdulla Mohamed Juma (PW1) was called to testify and during his testimony, he prayed to tender into evidence 4 voucher lists listed earlier. Mr. Chemasuet objected to the admissibility of

the said four voucher lists arguing that apart from the lack of the Government seal, PW1 had not laid out the proper foundation for their admission into evidence especially being electronically generated documents. He thus prayed for the trial court to reject admission of the same.

In response, Mr. Zaharan argued that the voucher lists were not electronic evidence and thus they should be admitted as prayed. Mr. Kombo implored the trial court to be guided by section 64 of the Evidence Act, No. 9 of 2016 of the Laws of Zanzibar (the Evidence Act) which states that all facts except for the contents of documents of electronic records may be proved by oral evidence. He urged the trial court to consider that what is relevant is the content of the documents that PW1 wanted to tender as they were not electronically generated as inferred by the counsel for the respondents.

In its ruling, the High Court held that by their nature all the four voucher lists were electronic documents as defined under section 3 of the Evidence Act. He observed that the admissibility of such documents is dependent on compliance with the conditions expounded in section 73 of the Evidence Act. The learned trial Judge rejected PW1's prayer for admission to all four voucher lists. The DPP was aggrieved by the decision

of the High Court, hence the instant appeal. The memorandum of appeal filed by the DPP on 28/7/2023 is premised on two grounds of appeal which paraphrased faults the trial court for: **One**, considering documentary evidence to wit four voucher lists bearing numbers PO1 VL00000775; PO1 VL00000757; PO1 VL00000792; and PO1 VL 00000817 as electronic documents; and **two**, rejecting to admit documentary evidence to wit, four voucher lists bearing numbers PO1 VL00000775; PO1 VL00000757; PO1 VL00000792; and PO1 VL00000817 for reason of falling short of meeting the laid conditions stipulated under section 73 of the Evidence Act.

The record shows that on 17/4/2024, in terms of rule 107(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the respondents filed a notice of preliminary objections stating thus:

- a. That, the appellant's appeal is incompetent as the order which the appellant has appealed against is non-appealable, hence the Court lacks jurisdiction to entertain the appeal.

Alternatively,

- b. That, the notice of appeal is defective as the same contravened the requirement of rule 68 of Tanzania Court of Appeal Rules, 2009 as amended.

When the appeal was scheduled for hearing before us on 23/4/2024, Messrs. Mohamed Saleh Idd, Suleiman Mohamed Maulid and Suleiman Yussuf Ali, learned Principal State Attorneys, entered appearance for the appellant Director of Public Prosecution (DPP) assisted by Messrs. Nassoro Zaharan Mohamed, Shamsi Yasin Saad and Mohamed Haji Komba, learned Senior State Attorneys. The respondents enjoyed the services of Messrs. Salum Bushir Khamis and Rajab Abdallah Rajab, learned Advocates.

Before the hearing commenced in earnest, Mr. Rajab informed the Court of the death of Mohamed Mussa Ussi, the 1<sup>st</sup> respondent who passed on 21/2/2024. He thus prayed for the Court to apply rule 78(1) of the Rules and abate the appeal against him. On his part, Mr. Idd did not object to the prayer as the appeal does not relate to a sentence of fine, costs, or compensation. In the circumstances and having considered the letter from the Commissioner of the Offenders' Training Centre, Zanzibar (*Chuo cha Mafunzo*) to the Registrar of the High Court with Reference No. KM/BRMVOL.IV/03/2024 dated 15/4/2024 informing him about the death of the 1<sup>st</sup> respondent, we granted the prayer sought. In consequence, in terms of rule 78(1) of the Rules, the appeal against Mohamed Mussa Ussi, the 1<sup>st</sup> respondent, hereby abates.

As is the usual practice of the Court where there is a notice of preliminary objection before us, we invited the parties to first address us on the same before venturing on the merits of the appeal. Mr. Rajab argued that the issue for the determination of the Court is the competence of the instant appeal in light of the decision of **Joseph Steven Gwaza v. The Attorney General and Another**, Misc. Civil Cause No. 27 of 2018 (unreported), a High Court decision and the observation of the Court in **Director of Public Prosecutions v. Faridi Hadi Ahmed and 36 Others**, Criminal Appeal No. 205 of 2021, on the import of the case of **Joseph Steven Gwaza** (supra). He contended that their stance that the appeal against the respondents is incompetent is founded on the fact that the decision in **Joseph Steven Gwaza** (supra), which removed the powers of the Director of Public Prosecutions to appeal against an interlocutory order, remains intact not having been overturned or vacated.

He further argued that since the present appeal is not challenging an acquittal or imposed sentence, therefore, there was no finality in the decision of the High Court, hence, no appeal can lie against that decision. The appellant should have proceeded to the conclusion of the case and then exercised his right to appeal if the decision would not be in his favour, because then, the right of appeal would be open to him. He thus prayed



for the appeal to be struck out for reason of incompetence. To note is the fact that the learned counsel did not address us on the point in the alternative which alleged incompetence of the notice of appeal in contravention of rule 68 of the Rules. He urged us to determine it as we deem fit and just.

Mr. Ali who was the lead counsel in addressing the Court in response to the points of the preliminary objection raised, began by asserting the fact that the DPP was resisting the points of objection raised. He contended that section 4(1) of the Appellate Jurisdiction Act, Cap 141 (the AJA) and rule 4(2)(e) of the Rules mandate the Court to better meet the ends of justice all the time. According to him, the case of **Faridi Hadi Ahmed and 36 Others** (supra) did not confirm the findings in **Joseph Steven Gwaza** (supra). Thus, the issue for determination would be whether the High Court in **Joseph Steven Gwaza** (supra) discussed and determined the operations of sections 6(2) of the AJA, he argued. Which according to him the Court did not.

He urged us to ponder the fact that the decision of **Joseph Steven Gwaza** (supra) is not binding to the High Court of Zanzibar and it only has a persuasive stance and thus the Court may proceed with hearing the appeal. On the argument that the finality of the decision is the test for

competency of an appeal in the Court, he argued that the finding of the High Court which has given rise to the instant appeal, has essentially given a final determination on the admissibility of essential documents that found the prosecution evidence in the trial. Since there was no other avenue to ensure their admissibility, for that purpose, the decision of the High Court was final. When engaged by the Court on whether there were no other avenues available for admissibility of the said documents, although at first, the learned Principal State Attorney was adamant that there was no other remedy available under the circumstances. However, upon further reflection, he preferred not to submit on the matter and decided to kick the ball to the Court to determine this.

On his part, Mr. Saad submitted that the decisions of the High Court (Tanzania Mainland) are not binding to the High Court (Zanzibar). He argued that the gist of the contention in the case was the infringement of basic rights founded in Articles 13(1)(2) and (6) of the Constitution of the United Republic of Tanzania, 1977 as amended (the Constitution) and was thus governed by the Basic Rights and Enforcement of Duties Act, Cap 3 of the Laws of Tanzania (BRADEA) which applies to Tanzania Mainland only and not in Zanzibar where the instant appeal is founded. He thus reiterated the argument by his colleague above that the holding in

**Joseph Steven Gwaza's** case (supra) is not binding to this Court in the determination of the instant appeal.

The rejoinder by the learned counsel for the respondents was brief. He contended that the argument that the decision in **Joseph Steven Gwaza** (supra) is not applicable in the present appeal is misguided since in that case what was struck out was section 6(2)(1) of the AJA and thus, it is no longer functional. He further contended that, in such circumstances, the provision having been struck out is thus no longer there. In consequence, the said decision cannot be restricted or partitioned to apply to only one side of the equation. Mr. Rajab concluded by imploring us to strike out the appeal for being incompetent.

Having heard the rival arguments from the counsel for the parties amplifying and confronting the first point of the preliminary objection raised, we will address the objection understanding that it implores us to determine the competence of the appeal before us. The argument advanced by the respondents is that the appeal is incompetent since it is against an order which did not determine Criminal Case No. 86 of 2022 to its finality.

Indeed, the right to appeal is provided by a statute. Criminal appeals to this Court are governed by section 6 of the AJA. The provision

underscores the fact that when aggrieved with a decision of acquittal, sentence, or order passed by the High Court or a subordinate court with extended jurisdiction, the DPP may appeal on any ground of appeal. We find it appropriate to reproduce section 6(2) of the AJA and it stipulates:-

*"S. 6 (2)-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 the acquittal, sentence or order, as the case may be, on any ground of appeal."*

The above cited provision guides the procedure to be taken by the Director of Public Prosecutions when proceeding with an appeal as explicated earlier. Suffice it to say, the contents of section 6(2) of the AJA allude to the position of the law for the DPP in criminal appeals to the Court that are initiated by his office before the decision of **Joseph Steven Gwaza** (supra), in criminal matters, the DPP was allowed to appeal against any order, unlike other parties. The position of the law then had been discussed in various decisions of the Court, including **DPP v. Sabinis Inyasi Tesha and Raphael J. Tesha** [1993] T. L. R. 237, where the Court addressed the nature of the order that can be appealed against, and held:

*"The DPP has the right to appeal against an interlocutory order in criminal proceedings, it is only the accused person who does not have such right."*

In considering the rival submissions before us, we are of the view that the issue of contention is whether the DPP's right to appeal against any order when aggrieved found in section 6(2) of the AJA ceased to be operational after the decision of **Joseph Steven Gwaza** (supra) as argued by the learned counsel for the respondent.

Certainly, in **Joseph Steven Gwaza** (supra), the High Court sitting with a panel of three Judges addressed a petition that challenged the constitutionality of the provisions of section 6(2) of the AJA that allowed the DPP alone to enjoy the right to appeal to the Court against orders of the High Court and subordinate courts with extended jurisdiction. The High Court stated as follows:

*"In the end, we find that the provision of section 6(2) of the AJA is, to the extent that it allows the DPP to appeal any order of the court in a criminal case, unconstitutional for offending articles 13(1) and (2) and 13(6)(a) of the Constitution for reasons we have amply demonstrated above. In the circumstances, we have no option but to hold in terms of article 64(5) of the Constitution of the*

*United Republic of Tanzania that section 6(2) of the Appellate Jurisdiction Act (supra) is, to the extent it provides for the right of the DPP to appeal against any order of the court in a criminal case, void; and is, accordingly struck out to such an extent without in any way affecting the right of the DPP to appeal against any acquittal or sentence....”*

Flowing from the above holding, essentially the DPP’s right to appeal to the Court against orders of the High Court and subordinate courts with extended jurisdiction was annulled to the extent stated.

Moreover, the other issue of contention for our consideration and determination is whether the decision of the High Court in **Joseph Steven Gwaza** (supra) binds appeals to the Court from DPP Zanzibar to render the current appeal incompetent. Messrs. Suleiman Yussuf Ali and Shamsi Yasin Saad submitted that the findings in **Joseph Steven Gwaza** (supra) are not binding to the Court on appeals from the High Court of Zanzibar. A contention which was adamantly resisted by Mr. Rajab on the other part.

It is our considered view that the argument is misconceived and it should not take much of our time. This is because, as correctly argued by Mr. Rajab, the decision in **Joseph Steven Gwaza** invariably held section

6(2) of the AJA to be unconstitutional for offending articles 13(1) and (2) and (6)(a) of the Constitution of the United Republic of Tanzania. The import of the said decision was essentially to take away the right to appeal against orders from the High Court or subordinate court with extended jurisdiction to the extent stated and thus section 6(2) of AJA was not operational for that purpose.

In deliberating on the issue above, as intimated by both learned counsel for the respondents and DPP, since the decision in **Joseph Steven Gwaza** (supra) has yet to be reversed by the Court its holding thus stands as it is. In the case of **DPP v. Faridi Hadi Ahmed and 36 Others** (supra) addressing this issue, we stated:

*"... in the wake of the decision of the High Court in STEVEN GWAZA (supra) which is yet to be reversed is currently operative to the effect of having annulled the DPP's right to appeal to the Court against the order of the High Court and the court's subordinate to it exercising extended jurisdiction."*

The Court further observed that what it means is that any such appeal by the DPP is limited to the sentence and acquittal. (See also, **DPP v. Iddi Chumu and Another**, Criminal Appeal No. 430 of 2019 (unreported)). Therefore, in those circumstances, wondering whether or

not the decision of **Joseph Steven Gwaza** (supra) is binding to an appeal arising from the High Court of Zanzibar is not a pertinent issue for consideration unless for academic purposes. We thus reject the invitation to venture into that terrain, finding the concern to be a non-issue in the present appeal.

Considering the above-stated legal position on the application of section 6(2) of the AJA on appeals from the DPP to the Court against orders which has been reiterated in the cases cited above, we are now constrained to deliberate on whether the impugned order is appealable in the wake of the decision in **Joseph Steven Gwaza** (supra). When challenging the competence of the appeal, the learned counsel for the appellant argued that as the impugned decision did not finalize the matter before the trial court, since it was a mere rejection of admission of documents, the decision being appealed against is interlocutory and thus not appealable. The learned Principal State Attorney argued to the contrary, stating that the rejection to admit voucher lists sought to be tendered was a finality to their case, since the documents are essential to prove the prosecution case, thus their rejection finalized the case against the respondents before the trial court. In the case of **DPP v. Faridi Hadi**



**Ahmed and 36 Others** (supra), the Court strived to define an interlocutory order and stated:

*"... basically, an interlocutory order is one made or given during the progress of action, but which does not finally dispose of the rights of parties."*

The principle excluding criminal appeals arising from interlocutory orders is found in section 5(2)(d) of the AJA which upon the amendments of 2016 by Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 states:

*"no appeal or application shall lie against or be made in respect of any preliminary interlocutory decision or order of the High Court unless such a decision or order has the effect of finally determining the suit".*

In the criminal case subject to the instant appeal, the order appealed against is one where the DPP has challenged the order of the High Court rejecting the admission of four voucher lists for the reason that no proper foundation was made by the witness (PW1) for their admission into evidence as they had been electronically generated documents. It is pertinent to reproduce the impugned order by the High Court Judge that states:

*"... before tendering all the voucher lists in evidence (which are electronic records) PW1 was required to satisfy the court that the documents sought to be tendered are authentic. He was therefore expected to lead evidence that rules out the possibility of manipulation of the said document before seeking to tender it. In the strength of what is observed herein, since PW1 did no lead or provide any evidence. That rules out the possibility of manipulation of all four voucher lists as per the requirement of section 73 of the Evidence Act. All four voucher lists cannot be admitted in evidence."*

We have carefully scrutinized the challenged order. Since one of the elements to be an interlocutory order is not being able to finally dispose of a case, it follows that it is essential to address when it can be said a judgment or order finally disposes of the rights of parties as held in the case of **Murtaza Ally Mangungu v. The Returning Officer for Kilwa and 2 Others**, Civil Appeal No. 80 of 2016 (unreported),

In our examination of the impugned decision of the High Court reproduced above, we have found nothing to lead us to conclude that it displays finality leaving no pending matter before it as argued by the learned Principal State Attorney. Certainly, the rejected voucher lists were

only part of the evidence to prove the prosecution case. However, that fact alone does not elevate the impugned decision of the High Court to be one of finality. We therefore find that the impugned decision has failed the test of finality of the decision and essentially falls in the ambit of an interlocutory order, and thus not appealable. Consequently, we find the point of objection raised by the respondents meritorious.

For the foregoing, we are of the firm view that the appeal before us is incompetent and we strike it out. We further order that the matter before the High Court proceed from the stage it had reached before filing this appeal.

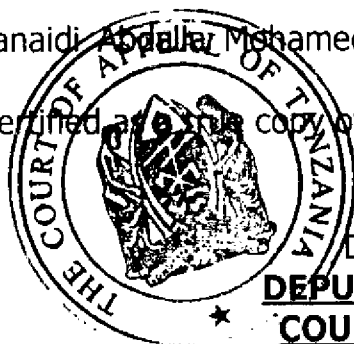
**DATED at ZANZIBAR** this 8<sup>th</sup> day of May, 2024.


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

R. J. KEREFU  
**JUSTICE OF APPEAL**

L. M. MLACHA  
**JUSTICE OF APPEAL**

The Judgment delivered this 8<sup>th</sup> day of May, 2024 in the presence of Mr. Shamsi Saad, learned Senior State Attorney for the respondent Republic and Mwanaidi Abdulla Mohamed, learned counsel for the respondents is hereby certified as a true copy of the original.



  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**