

TANZANIA / JUDGMENT

HARUNA SAMSON NEW

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IN THE HIGH COURT OF TANZANIA DODOMA SUB - REGISTRY AT DODOMA PC. CRIMINAL APPEAL NO. 10024 OF 2024 (Arising from Criminal Revision No. 05 of 2022 in the District Court of Dodoma, originating from Criminal Case No. 74B/2021 in the Primary Court of Chamwino Ikulu) HARUNA SAMSON.....APPELLANT VERSUS DANIEL KIBUTI..... 1st RESPONDENT GLORY GENERAL SUPPLIERS AND CONSULTANCY CO. LTD.....2nd RESPONDENT

JUDGMENT

On 31st July, 2024 MUSOKWA, 3. The present appeal has its genesis in the Primary Court of Chamwino Ikulu (trial court), in Criminal Case No. 74B of 2021, whereby the appellant herein was charged and convicted of the offence of theft, contrary to section 265 of the Penal Code, Cap. 16 R.E. 2019 (Penal Code). The appellant was sentenced to serve six (6) months imprisonment. Being aggrieved, the appellant filed an application for revision in the District Court of Dodoma, vide Criminal Revision No. 5 of 2022. In the District Court, the respondents herein raised a number of preliminary objections. The said preliminary objections were argued by way of written submissions, and the parties complied with the scheduling orders. However, in the course of composing the ruling on the said preliminary objections, the District Court, suo mottu, raised the issue on time limitation. Consequently, the District Court struck out the application on the basis that the application for revision was time-barred. Before this court, the appellant has filed a petition of appeal based on the following grounds: -

1. That the trial district magistrate erred in law and in fact by raising the matter of time limitation suo mottu in his ruling without according the parties their right to be heard on the matter.
2. That the trial district magistrate erred in law and in fact in striking out the application for revision on the ground of time limitation, while the same was not time barred. On the date scheduled for the hearing of the appeal, the appellant was represented by learned advocate, Mr. Elias Machibya. The respondents engaged the services of Mr. Josephat Mbeba, also learned advocate. Submitting in support of the appeal, Mr. Machibya prayed and was allowed by this court to argue both grounds of appeal collectively. The counsel for the appellant vehemently challenged the procedure taken by the District Court in disposing the matter that was before it. The appellant asserted that the District Court ought to have

considered the submissions before it on the preliminary objections. However, the District Court raised the issue on time limitation suo mottu in the course of composing its decision and proceeded to determine the said issue. Mr. Machibya contended that the District Court struck out the application without affording parties their fundamental right to be heard. According to the learned advocate, this was a gross infringement of the principles of natural justice. The appellant averred that there are many decisions of this court and that of the Court of Appeal of Tanzania (CAT) that have deliberated on the principle of the right to be heard. Among these include the case of Pili Ernest vs Moshi Musani, Civil Appeal No. 39 of 2019. In this case, the CAT, sitting at Mwanza, held that the right to be heard is a constitutional right. In emphasis, the CAT stated that the infringement of the right to be heard should not, in any manner whatsoever, be tolerated. Based on the above, Mr. Machibya prayed that this court should allow this appeal and revert the matter to the District Court in order for the parties to be heard. On his part, Mr. Josephat Mbeba, counsel for the respondents, conceded to both grounds of the appeal including the submissions by the advocate for 3 the appellant. However, according to Mr. Mbeba, the possible remedies were two-fold. This court to allow the appeal, and to revert the matter to the District Court so that the parties can be heard on the issue that was raised by the court suo mottu. In the alternative, Mr. Mbeba submitted that the appeal should be allowed and the District Court be directed to consider exclusively the submissions on the preliminary objections, and proceed to issue the decision accordingly. In his rejoinder submission, the appellant's counsel essentially adopted his submissions in chief and stressed on the prayer to remit the case file to the District Court for hearing on the issue raised suo mottu. Notably, the appellant and the respondents herein are in agreement that this appeal is meritorious. The grounds of appeal that have been advanced by the appellant are centered on failure by the District Court, to afford the parties the right to be heard on the issue that it came across in the course of composing the ruling on the preliminary objections raised. The appellant further challenges the decision of the District Court, asserting that the application for revision that was before it was not time barred. Thus, the matter should not have been struck out. Upon perusal of the records, I find it necessary to refer to page 2 of the impugned ruling of the District Court which reads as follows: - "However before going into the merits of the preliminary objection raised and argued by the counsels from both sides I have noted that the main application was filed in this court on 2 J d day of September 2022, and that the main decision sought to be revised was delivered by Dodoma District Primary Court Chamwino Ikulu Station on 24/09/2021. I have further noted that the very application was made under the provisions of section 22 (1) (2) and (3) of the Magistrates' Courts Act [Cap. 11 R.E. 2022]. And that the provisions of section 22 (4) of the Magistrates' Court Act...provides for the limitation period of this court to revise any proceedings under section 22 of the Magistrates' Courts Act, to be twelve months from the date of termination of proceedings in the Primary Court. Thus, the provisions of section 22 (4) of the Magistrates' Courts Act settles this matter as the twelve months period expired on 23/9/2022 the date when the application was filed, and therefore at the moment even if this court goes on to deliberate on the raised preliminary, that will only be academical as this court's hands are

tied by law as the twelve months available for revising the proceedings under the Magistrates' Court Act have long lapsed. Thus, this application is overtaken by events by operation of the law. That said and done, the application is struck out no order as to costs as the reason for which the application was struck out was raised by the court suo mottu. [emphasis added] Sign: A.E. Katemana- PRM 30/6/2023" In light of the records, it is evident that the District Court raised the issue on time limitation suo mottu in the course of composing the ruling. Further, as 5 correctly submitted by both parties herein, the District Court proceeded to determine the matter, whereby it was struck out for being time-barred without hearing the parties. The right of a party to be heard, (in a Latin maxim-audi alteram partem) before the determination of their rights, is among the fundamental principles of natural justice. In the case of Scan -Tan Tours Ltd vs The Registered Trustees of the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (unreported), the CAT held that: - 'We are of the considered view that in line with the audi alteram partem rule of natural justice, the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit - See Shomary Abdallah v. Hussein and Another (1991) TLR 135; National Housing Corporation versus Tanzania Shoes and Others (1995) TLR 251 and Ndesamburo v. Attorney General (1977) TLR 137. The right to be heard is emphasized before an adverse decision is taken against a party, "[emphasis added] Moreover, the CAT, deliberating on the right to be heard as a constitutional principle that must be strictly observed by courts; stated as follows in the case of Severo Mutegeki and another vs Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (Duwasa), Civil Appeal No. 343 of 2019 (unreported) at pages 19 to 21: - 6 ".the right to be heard before adverse action or decision is taken against a party 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. This is so because the violation is considered to be a breach of natural justice. See- Abbas Sherali & another vs. Abdul S. H. M. Fazalboy, Civil Application No. 33 of 2002 (unreported). Thus, the failure to accord the appellants an opportunity to be fully heard was a breach of natural justice and a violation of a fundamental right to be heard under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) which provides: - Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..."[emphasis added] Further, in the CAT case of National Microfinance Bank PLC and Another vs Lello Laurent Sawe, Consolidated Civil Appeals Nos. 385 "A" & 339 of 2021 (unreported), dealing with a similar question, it was partly held as follows: - "In the instant case, the learned trial judge raised a new issue suo motu in the course of composing her judgment and determined it without affording the parties the right to be heard. On the authorities above cited, the learned trial judge's judgment cannot be left to stand. It is a nullity."[emphasis added] Looking at the records, and as unanimously submitted by the parties herein, clearly, the District Court did not afford parties the right to be heard on the issue of time-limitation, which it raised suo mottu. In the circumstances, and being guided by the above cited authorities, this is a crucial and apparent error on the face of the records. Consequently, the appeal is allowed, and the purported ruling dated 30th June, 2023 by

Katemana, PRM is hereby quashed and set aside for being a nullity. Regarding the consequential orders, I have carefully considered the proposal of Mr. Mbeba, on the alternative remedy. However, it is important to note that the court has freedom to raise issues suo mottu provided that the new issues are placed on record and the respective parties are given the opportunity to be heard by the court. The CAT case of Kumbwandunmi Ndemfoo Ndossi vs Mtei Bus Service Limited, Civil Appeal No. 257 of 2018 (unreported) is relevant and partly held that: - "Basically, cases must be decided on the issues or grounds on record and if it is by the court to raise other new issues either found on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing o f the appeal those new issues should be placed on record and parties must be given opportunity to be heard by the court...this Court has always emphasized that the right to be heard is a fundamental principle o f natural justice which should be observed by all courts in the administration o f justice..." [emphasis added] Therefore, the alternative remedy proposed by Mr. Mbeba is, with due respect, rejected. Accordingly, I order the case file to be remitted to the District Court, for the parties to be heard expeditiously, before Katemana, PRM or his successor in office, on the question of time limitation which was raised suo mottu. Each party to bear own costs as the irregularity was prompted by the District Court. It is so ordered. Right of appeal is explained. Judgment delivered in the presence of the learned advocate for the respondents, Mr. Josephat Mbeba, and in the absence of the appellant.

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