

TANZANIA / JUDGMENT

japhet ngwandu vs republic

2008 tzhc 274 21 april 2008

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA AT TABORA APPELLATE JURISDICTION (Tabora Registry)
CRIMINAL APPEAL NO. 22 OF 2007 ORIGINAL CRIMINAL CASE NO. 64 OF 2006 OF THE
DISTRICT COURT OF MEATU DISTRICT ATM EATU. BEFORE: N.M. KASERERO, Esq; RESIDENT
MAGISTRATE JAPHET S/O NGW 'ANDU..... APPELLANT (Original Accused)
UEDOTTO THE REPUBLIC.....RESPONDENT (Original Prosecutor)

JUDGMENT

16th April, 08 & 21st April, 08 MUJULIZIJ. The Appellant, JAPHET S/O NG'WANDU who was at the material time a Village Executive Officer ("VEO") of Itaba village, employed by the Meatu District Council; was convicted by the Meatu District Court on two counts of; corrupt transactions contrary to section 4(1) of the Prevention of corruption Act, (Cap.329 R.E. 2002). He was sentenced to a five years jail term on each of the counts- the two terms running concurrently. Dissatisfied, he appeals against both conviction and sentence. His appeal commenced by way of a Memorandum, was lodged on 19.01.2007. However, he did not specify whether or not: he wished to be present at the hearing of his appeal. On 02/07/2007, the date fixed for the first hearing of the appeal, Mr. Rweyongeza learned State Attorney for the Respondent Republic, submitted that since the Appellant who was absent had not specified whether or not he wished to be present at the hearing of the appeal, it was in order to adjourn the matter to allow for summons to issue to enable the appellant to appear. The prayer was granted, but the summons did not reach the appellant. How p y p r o n 1 S /OR/900 7 tVip rtatp wVnVh tV>^ V>p o r m r r V>orl o rim n rno rl A/ft* Mulwambo learned State Attorney who appeared for the Respondent Republic submitted before me as follows; "....although the Appellant did not show whether or not he wanted to appear, on our part we do not support the conviction. The reasons are contained in a written submissions. With the leave of your Lordship. I pray to file the same Granting that prayer, I said that "In view of the stance taken by the Respondent Republic, I will proceed to consider the matter in the absence of the appellant and deliver judgment on 03/09/2007. " However, after reading the filed submissions, I reviewed my earlier order of 14/08/2007 saying; "Upon going through the submissions, filed by the Respondent Republic, I find that, in the interest justice the appellant be given opportunity to appear for the hearing of his appeal. I therefore review my order dated 14/08/2007 and order that the matter proceeds to hearing on 21/11/2007. The

Appellant be notified through the prison authorities to ensure his appearance to prosecute his appeal. After several adjournments, the appellant was finally brought to court, to confirm that Vip H id n n t +r» nmepnt ~- i ----- ----- in the first place, and that even after coming to court he did not have any additional arguments. Now, the stance taken by the Respondent Republic had presented two procedural difficulties for me. First of all, in terms of section 362 (1) for the Criminal Procedure Act, (Cap 20 R.E. 2002): L\ 1) Every appeal shall be made in the form of a petition in writing.. ” Now, in this case the appeal before me was commenced by way of a Memorandum. This Court, taking cue from decisions of the Court of Appeal: GOQDLUCK KYANDO V. T H E R E P U B L I C ...Criminal Appeal No. 118 of 2003 - CAT (Mbeya Sub Registry) (Unreported); has held that since the coming into force of The Interpretation of Laws Act, (Cap.1 R.E. 2002) on the 1/9/2004 vide Proclamation No. 312 of 2004, where in any written law the word “shall” is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed —section 53 (2). We have therefore interpreted section 362 (1) to prescribe that; appeals to this court under the Criminal Procedure Act, must be commenced by way of a Petition, and have proceeded to strike out appeals commenced by way of Memorandum;

----- - In this event I would still hold the same position and would not have hesitated to strike out the appeal. However, in view of the stance taken by the Respondent Republic: not supporting the conviction, I had to hesitate. Would I be justified to strike out the appeal even after the Respondent Republic had expressly decided not to support the conviction? and, In case I struck out the appeal in the absence of the appellant, who had not signified as to whether or not he wanted to be present at the hearing: would that amount to condemning him unheard? His appearance and signification that he did not intend to appear settles this issue. However, I still have to determine whether the circumstances revealed in this case, are prime for the invocation of Articles 107 ‘A (2) (b) and (e) of the Constitution of the United Republic 1977. The article provides; “107 A-(2) Katika kutoa uamuzi wa mashauri ya madai na jin ai kwa kuzingatia Sheria , , Mahakama zitafuata kanuni zifuatazo yaani;

- a) N/A
- b) Kutochelewesha haki bila sababuya kimsingi;
- c) N/A cl) N/A
- e) Kutenda haki bila kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka In regard to 107 A- (2) (b) after the Respondent Republic had signified that it did not support the conviction of the appellant, there was a high likelihood that, may be, an innocent man could be serving a sentence he did not deserve. Would that be reason enough to override the mandatory provision of section 362 (1)? In relation to 107 A (2)(e) could; section 362 (1) CPA (Cap. 20 R.E.

2002) be interpreted to be a mere technical rule of procedure which could be waived by the Court in the interest of justice. Fortunately, the Court of Appeal of Tanzania has had opportunity to interpret this sub article: In CIVIL APPEAL NO. 100/2004 ZUBERI MUSS A V.

SHINYANGA TOWN COUNCIL, (CAT MZA Unreported), when interpreting the effect of section 8 of the Notaries Public and Commissioners for Oaths Act, (Cap. 12 R.E. 2002) the Court held inter alia;) The requirement in the section 8 that; “ Every Notary Public and Commissioner for oath before whom any oath of affidavit is taken or made under the ordinance shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made, ” , ^ by the Commissioner for oath and failure to comply renders such affidavit incurably defective:” THEOBALD KAINAN V. GENERAL MANAGER, K.C.U (1990) LTD (BUKOB) CIV. APPN. NO. 3/2002 and THE REGISTERED TRUSTEES OF JOY IN THE HARVEST V. HAMZA SUNGURA - CV. APPN. NO. 3/2003 —Quoted with approval.

- b) Regarding the argument that such provisions could be overridden by Article 107 A(2) (e) held; "... In this case, as already indicated, the circumstances are such that we can hardly glean any element of technicalities involved. The role of rules of procedure in the administration of justice is fundamental. As stated by Collins, M.R. in *Re Coles and Raven* (1907) 1 K B 1, “rules of procedure are intended to be handmaids rather than mistresses. That is, their function is to facilitate the administration of justice. Here the omission in citing the proper provision of the rule relating to a reference and worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107 A (2) (e) of the Constitution. It is a matter which goes to the very root of the matter. ..” of *Cwjuwu. unucijuz. Ol Li 1C Criminal Procedure Act*, is a jurisdictional rule, that bars the Court from entertaining an appeal brought other than by way of a Petition and within the time limited as prescribed under sub section (2) of the same section. In the result therefore the position taken by the Respondent Republic would not render lawful and tenable an otherwise irregular and improper appeal wrongly placed before the Court. I will therefore proceed to strike out the appeal and order that in the interest of justice the prisoner be allowed to file his Petition of Appeal within ten (10) days of this judgment. It is only after such appeal that I will be clothed with the powers to consider the appeal and the corresponding arguments by the Respondent Republic. Upon reading the submissions, I was of the considered opinion that there was nothing raised therein to warrant this court to revise the proceedings suo moto. The matters raised can be dealt with on appeal. The appeal is struck off. The Appellant is at liberty to re file in accordance with the law as prescribed above. It is so ordered. 21/04/2008 Judgment delivered in the presence of the appellant and Mr. Mulwambo learned State Attorney for the Respondent Republic. K. A. MUJULIZI JUDGE 21/04/2008

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