

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT KIGOMA**

CRIMINAL APPEAL NO. 7 OF 2020

*(Originating from Kigoma District Court Criminal Appeal No. 4/2020 and
Criminal Case No. 1/2020 of Uvinza Primary Court)*

MADUSHI NZUKI.....APPELLANT

VERSUS

DUNIA JOHN..... RESPONDENT

RULING

7th & 7th September, 2020

A. Matuma, J

The appellant was charged for an offence of "**WIZI WA MIFUGO KINYUME NA K. 268 KANUNI YA ADHABU/SURA YA 16 [R.E 2002]**", in the Primary Court of Uvinza at Uvinza. At the end of the trial he was acquitted of the offence.

The respondent was aggrieved of the acquittal hence appealed to the District Court of Kigoma under the services of advocate Silvester Damas Sogomba.

The District Court (K.V Mwakitalu -RM) heard the appeal ex-parte as the current appellant who was the respondent by then could not be traced. The summons was ordered to be affixed to his home, subsequently thereof an ex-parte hearing of the appeal. At the end, the appellant was found guilty of the offence, his acquittal by the trial Court was substituted with the conviction and a five years custodial sentence was entered against him in his absence.

The Appellant who is now serving his sentence at Bangwe prison is aggrieved with the conviction and sentence hence this appeal.

In the course of hearing this appeal, it transpired that the respondent is no where to be seen, his address is unknown and therefore service of summons cannot be effected accordingly.

In the circumstances, I summoned advocate Silvester Damas Sogomba who appeared on record to have represented him during the appeal in the District Court to tell me how could that person/respondent be procured for service of summons and how was he communicating with him at the time of the appeal in the District Court.

The learned advocate explained to me that he met with the respondent only once when he approached him in a company of his relative one **Chama** when the judgment of the trial Court was entered to their dissatisfaction.

At the time they had no a copy of the judgment of the trial court and he therefore instructed them to trace and bring him a copy of the judgment so that he could know what should exactly be done. That the two went off and he did not see the respondent again.

The learned advocate further submitted that it is **Chama** who came again to him after five days with a copy of the judgment and part of the instruction fee. He then drew the Petition of Appeal and represented the respondent but at all times the one who was in follow up of the case and who was in touch with him was the said **Chama**. He does not therefore know the where about of the respondent.

With the herein submission of the learned advocate and the records of the District Court, I find two issues to discuss and determine;

- i. Whether the learned advocate was properly instructed by the respondent to appeal against the appellant to the District Court.*

- ii. *In the circumstances that the appeal was heard ex-parte, whether the law was complied with, upon the apprehension of the appellant after the delivery of the ex-parte judgment.*

Starting with the first issue, it is a settled law that only parties who appeared and were involved in the case at the lower Court can appeal to the superior Court.

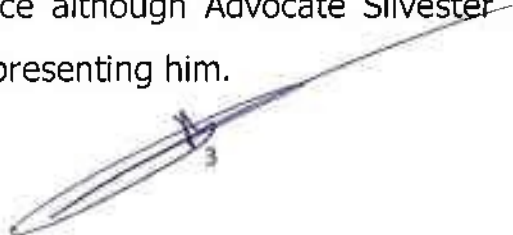
Advocates cannot therefore appeal unless properly and dully instructed by the parties to the case. If the instruction to appeal is given to the advocate by a third party or stranger to the impugned judgment, and the advocate subsequently acts on such instruct to appeal, such appeal would be incompetent as it is as good as an appeal by a stranger to the case even if it is prepared in the names of relevant parties thereof.

In the case of ***Venance Kabwebwe versus The Republic, Criminal Appeal No. 228 of 2014***, the Court of Appeal held that;

"The law is settled, it is only the person who is aggrieved or directly affected who has the right to move the Court seeking justice. Therefore only, parties named in the matter may file appeals to the Higher Courts".

In the instant matter, the record suggests that it was **Chama** a third party who brought the copy of judgment to the learned advocate and it is him who paid the learned advocate the instruction fee for drawing the Petition of Appeal and representing the then "**Appellant**".

It is again Chama who was throughout in follow up of the matter and the records of the District Court show that the appellant now the respondent was absent throughout the proceedings thereof. He did not even a single day entered appearance although Advocate Silvester Damas Sogomba was always present representing him.



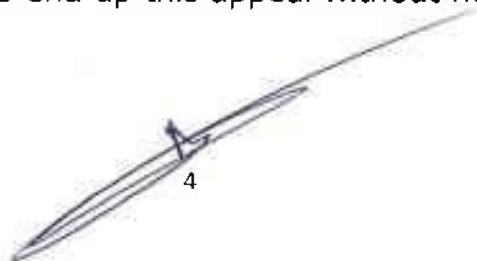
In the circumstances, it is doubtful whether it was really the respondent who accompanied Chama to the advocate's office in the first instance. It might have been someone else purporting to be the Respondent.

Again, it is doubtful whether the Respondent was aware of the appeal to the District Court in his name as the appellant. That is risky in the administration of justice as busy bodies might pick up cases and litigate to the detriment of the parties themselves and without their knowledge and or their consent. That was as well observed in the case of **Venance Kabwebwe** (supra) when the Court of Appeal at page 11 held;

"As pointed out by Mr. Matuma, this process if allowed, would open up a floodgate of litigation from all and sundry in the name of the aggrieved parties".

That being the case, even the purported service of summons to the then respondent now appellant is doubtful as it was not the respondent who took the summons for service but a third party "**Chama**". Who was **Chama** in this matter! and what was his interest in it? How could he be relied by both the Advocate and the District Court to the detriment of the appellant!

I therefore, find out that the learned advocate Mr. Silvester Damas Sogomba was not properly instructed in the name of the respondent as he dealt with one Chama at all times who was a third party and stranger to the case. In the circumstances, I rule out that the appeal of this case at the District Court was wrongly entertained for want of locus standi of the appellant (Chama) who camouflaged himself in the name of the current respondent Dunia John. The appeal was thus incompetent. With such finding it suffices to end up this appeal without necessarily dwelling into the second issue.



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The Court of Appeal in the case of ***Paul Jacob versus The Republic, Criminal Appeal No. 2 "B" of 2010*** held that whenever there is unpleasant features in the records of the lower Court, the appellate Court is justified not to consider the appeal on merit and invoke its revision powers to remedy the situation. I therefore, in the exercise of my Revisional powers as it was held in the above cited case, quash the appellant's conviction and set aside the sentence of five years meted upon him. That being the case, the judgment of the trial Primary Court is restored.

I order his immediate release unless otherwise held for some other lawful cause.

I further reserve to the Respondent of his right to re-appeal to the District Court subject to the law governing time limitations. Whenever he appeals he must personally appear in Court and be reflected on record. If he shall have service of an advocate, he must show up at least once so that the Court ensure itself that he is personally behind his appeal and not some one else purporting to act in his name for undisclosed interests.

It is so ordered.



A. Matuma

Judge

7/9/2020