IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 420 OF 2018

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

1. **FREEMAN AIKAEL MBOWE.....1ST RESPONDENT**
2. **ESTHER NICHOLAS MATIKO.....2ND RESPONDENT**

(Appeal from the Ruling of the High Court at Dar es Salaam)

(Rumanyika, J.)

dated 30th November, 2018

in

Criminal Appeal No. 334 of 2018

JUDGMENT OF THE COURT

18th February & 1st March, 2019

MUGASHA, J.A.

The respondents were aggrieved by the decision of the trial court at the Resident Magistrates' Court of Kisutu following the cancellation of their bail bond on 23rd November, 2018 on the ground that they had defaulted appearance. On the same day, through their advocate Mr. Peter Kibatala they filed an appeal before the High Court under certificate of extreme

urgency to challenge the trial court's cancellation of bail. Before the High Court, on 27/11/2018 the learned High Court Judge having noted that, the appeal was under the certificate of extreme urgency, ordered that the calling for the records be issued urgently and the parties be notified to appear before the High Court for necessary orders and/ or hearing on 28/11/2018. On that date, while Mr. Kibatala prayed that the appeal be heard on the same day, Mr. Faraja Nchimbi, learned Principal State Attorney, appearing for the appellant herein, having acknowledged to have been served at 01.49 p.m. with a petition of appeal together with the certificate of extreme urgency promised to expeditiously handle the matter but insisted that, the provisions of section 362 (1) of the Criminal Procedure Act [CAP 20 RE.2002] (the CPA) be complied with. As such, he prayed for an adjournment of the hearing of the appeal to 29/11/2018 at 8.00 a.m. which was acceded to by the learned High Court Judge.

However, as it transpired, the appeal could not proceed for the hearing on the 29/11/2018 because the appellant (DPP) raised preliminary points of objection challenging the competency of the appeal as follows: **One,** that the petition of appeal offended the provisions of section 362 (1)

(the CPA) for not being accompanied by the trial court's proceedings and the order appealed against. **Two,** that, the appeal offended the provisions of section 361 (1) (a) of the CPA for want of the notice of appeal and **three,** that some of the grounds of appeal on the bail conditions contravened the provisions of sections 161, 359 and 361 (1) (a) and (b) of the CPA.

In his argument before the learned High Court Judge in support of the first limb of objection and a subject of the matter before us, Mr. Simon Wankyo, learned State Attorney on behalf of the DPP, relied on section 362 (1) of the CPA. The learned State Attorney argued that, the appeal before the High Court was not competent as it contravened the provisions of section 362 (1) of the CPA because the petition of appeal was not accompanied by copies of proceedings and order appealed against. He added that, notwithstanding that, the DPP was supplied with handwritten proceedings, the same were not readable and lacked portions of the copy of the proceedings on what had transpired before the trial court on 1/11 to 23/11/2018.This was flanked by Mr. Nchimbi, the learned Principal State Attorney who charged that, the non supply of the typed proceedings to the

DPP was to depart from the mandatory provisions of section 362 (1) of the CPA which was against the principles of fair hearing under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 [CAP 2 R.E. 2002] (The Constitution).

On the other hand, Mr. Kibatala resisted the preliminary objection arguing that, it was not based on a point of law since the High Court was seized with the record of appeal. Besides, he added that, since parties had consented to be supplied with handwritten record of the trial court's proceedings which was readable, the remedy was to give time to the DPP time to peruse the record and proceed with the hearing of the appeal. This proposition was supported by Dr. Rugemeleza Nshala, learned advocate who contended that, as the matter was of most extreme urgency and considering that the DPP had requested that the appeal be heard on 29/11/2018, the issue of non availability of the proceedings by the DPP could not be re-opened.

Mr. Nchimbi forcefully rejoined pressing that the handwritten proceedings were not readable even if the DPP was given time to peruse

the case file adding that, the court could thus be risking the danger of setting a bad precedent.

The learned High Court Judge found that, since the DPP had consented to be supplied with handwritten copies of the proceedings, the complaint on non supply was unfounded. Instead, the learned High Court Judge pointed out that, the DPP should have asked to peruse the original record in order to prepare for the hearing of the appeal given that four hours were enough.

The learned High Court Judge having acknowledged the discretion bestowed under section 362 (1) of the CPA, given the urgency of the matter and since the handwritten proceedings were supplied to the learned State Attorney at own instance, dismissed the question of setting a bad precedent or denial of fair hearing. However, having acknowledged the complaint raised by the DPP that the handwritten proceedings were not readable and lacked some portions of what transpired at the trial, the learned High Court Judge overruled the preliminary objection and directed that, the parties be supplied with complete typed copies of the impugned proceedings and ordered that the appeal be heard on the same day at 2.00

p.m. However, as it turned out, the appeal could not be heard because the appellant had lodged a notice of appeal in terms of Rule 68 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). This in terms of Rule 68 (2) of the Rules, technically meant that, the appeal was already instituted in this Court.

In the Memorandum of appeal the DPP had three grounds of complaint against the High Court decision as follows:

1. That, the Hon. High Court Judge erred in law and fact by scheduling and calling for hearing the appeal by the respondents in contravention of section 362 (1) of the Criminal Procedure Act.

2. That, the Hon. High Court Judge actuated with bias erred in law and fact by compelling the appellant to proceed with hearing the appeal in contravention of sections 362 (1) and 365 (1) of the Criminal Procedure Act.

3. That, the Hon. High Court Judge erred in law and fact by not affording the appellant sufficient right to be heard.

At the hearing of the appeal before us, the appellant was represented by Mr. Faraja Nchimbi and Mr. Paul Kadushi both learned Principal State Attorneys together with Mr. Salim Msemo and Mr. Wankyo Simon, learned State Attorneys. The respondents were represented by advocates Prof. Abdallah Safari, Mr. Peter Kibatala, Dr. Rugemeleza Nshala and Mr. Jeremiah Mtobesya.

When probed by the Court that, the 2nd ground of appeal raises a new issue which was not initially canvassed at the High Court, Mr. Nchimbi opted to abandon that ground of complaint.

In his submission on the 1st ground of appeal, Mr. Nchimbi faulted the learned High Court Judge into making an order in respect of scheduling the hearing of the appeal, without initially giving any directions since the petition of appeal was not accompanied by the proceedings. He contended that the course taken by the learned High Court Judge offended the provisions of section 362 (1) of the CPA and that, it occasioned a failure of

justice. To back up this proposition, Mr. Nchimbi referred us to the case of **MWITA GISE @JOSEPHAT AND MAIGE MWITA VS REPUBLIC,** Criminal Appeal No. 196 of 2006 (unreported). When probed by the Court if the omission, if any, was not curable under section 388 of the CPA because the word "shall" is not always mandatory in the light of what we decided in the case of **BAHATI MAKEJA VS THE REPUBLIC,** Criminal Appeal No. 118 2006 (unreported), he persistently maintained that the omission was incurable.

In addressing the 3rd ground of appeal, Mr. Nchimbi contended that, the appellant was denied the right of hearing for not being given sufficient time to make preparations for the hearing of the appeal. He faulted the High Court Judge in giving the appellant hardly two hours to proceed with the hearing of the appeal which was in his view an infringement of the appellant's right to be heard. To support his proposition he relied on the case of **ALEX JOHN VS REPUBLIC,** Criminal Appeal No 129 of 2006 (unreported).

When asked by the Court if they had requested for additional time to further prepare for the hearing of the appeal, Mr. Nchimbi pointed out that they never did so because they had already lodged the notice of appeal to

the Court. However, he urged the Court to find the respondents' appeal not competent before the High Court for non-compliance with the statutory condition and that a direction be given for respective compliance. To support this proposition he referred us to the case of **JADVA KARSON V HARMAN SINGH BHOGAL** (1953) 20 EACA 74.

On the other hand, Mr. Peter Kibatala resisted the appeal arguing the same to be misconceived since the appellant is not faulting that section 362 (1) of the CPA vests in the High Court the discretion to call for the record and direct otherwise in case the petition is not accompanied by the proceedings and the order appealed from. In addition, he pointed out that, the High Court was justified to attend the appeal promptly because the appeal was filed under a certificate of extreme urgency which was acknowledged by Mr. Nchimbi whose alternative prayer to have the appeal scheduled for hearing on 29/11/2018 at 8.00 a.m. was acceded to by the High Court. On that account, Mr. Kibatala argued that the complaint on the non supply of the typed proceedings before this Court is an afterthought. He charged that, the case of **ALEX JOHN** (supra) is distinguishable as none of the parties therein was seized with the proceedings and that is why the

High Court Judge in the instant case, having affirmed the urgency of the appeal proceeded to supply the parties with the proceedings in the subsequent supply which was uncontroverted. As such, he contended that there was no failure of justice on any of the parties. In the alternative he contended that even if there was any omission it was curable in the light of section 388 of the CPA as this Court decided in **BAHATI MAKEJA** (supra).

In response to the 3rd ground of appeal, Dr. Nshala contended that, the appellant was given sufficient time to argue the preliminary objections raised which were determined on the merits in order to pave way for the hearing of the appeal. However, instead of embarking on the hearing of the appeal, the DPP lodged the notice of appeal to the Court. He countered further that, the case of **ALEX JOHN** (supra) was distinguishable from the present matter as it dealt with the rights of an accused person at the trial. Finally, Dr. Nshala urged us to find the appeal misconceived and dismiss it to enable the High Court to hear the appeal before it decisively.

In a brief rejoinder, Mr. Kadushi reiterated what they had earlier submitted arguing that, the filing of an appeal under a certificate of

urgency was not a leeway for the learned High Court Judge not to comply with the mandatory provisions of sections 362 (1) and 365 (1) of the CPA.

To us admittedly, this was a peculiar appeal which taxed our minds. As such, in disposing of the first ground of appeal, we have opted to be guided by the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Departing from a clearly expressed legislative intention to the contrary, that language must be ordinarily regarded as conclusive. See - the **REPUBLIC VS MWESIGE GEOFREY AND TITO BUSHAHU** Criminal Appeal No 355 of 2014 (unreported) where the Court categorically said:

> *"Indeed it is axiomatic that when the words of the statute are unambiguous, judicial inquiry is complete. There is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation."*

Furthermore, in **BAHATI MAKEJA VS THE REPUBLIC** (supra) a full bench of the Court categorically said:

" ... We have no flicker of doubt in our minds that the criminal law system would be utterly crippled without the protective provisions of s.388. We are, therefore, of well decided view that the interpretation of the word "shall" given in section 53 (2) of Cap 1 must be subjected to the protective provisions of s. 388 of the CPA. And that is what the Legislature has done as expressed in s. 2 (2) (a) and (b) of Cap 1 in the following terms:

The provisions of this Act shall apply to, and in relation to, every written law, and every public document whether the law or public document was enacted, passed, made or issued before or after the commencement of this Act, unless in relation to a particular written law or document-

(a) express provision to the contrary is made in an Act;

(b) in the case of an Act, the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application.

It is clear to us that under either of the two paragraphs the definition of the word "shall" to be imperative where a function is imposed does not apply to the Criminal Procedure Act in view of s. 388 which subjects all mandatory provisions in that Act to the test whether or not injustice has been occasioned".

In view of the said account the Court thus concluded that:

"It is our considered view that the word "shall" in the CPA is not imperative as provided by s.53 (2) of Cap 1 but is relative and is subjected to s.388 of the CPA"

Recently, relying on what was decided in **BAHATI MAKEJA** (supra) in the case **VUYO JACK VS THE DIRECTOR OF PUBLIC PROSECUTIONS,** Criminal Appeal No. 334 of 2016 (unreported), the Court concluded that, though

section 38 (2) of the CPA requires an exhibit seized pursuant to a search and seizure to be submitted to the magistrate, failure to do so would not impeach the piece of documentary evidence because the use of word "shall" is not always mandatory but relative and is subjected to section 388 of the CPA.

We fully subscribe to the said holdings and the question to be determined in the present appeal whether section 362 (1) of the CPA was deliberately enacted as such.

At the outset we wish to point out that, it is undisputed that the appeal before the High Court was filed under a certificate of extreme urgency. We have also gathered from the record that, when the petition of appeal was filed, it was not accompanied by the proceedings and the order appealed against. However, the learned High Court was seized with handwritten copy of the trial court's proceedings and upon consent of the parties those proceedings were availed to them and they had agreed to proceed with the hearing of the appeal.

While it is the contention of the appellant that, section 362(1) of the CPA imposes a mandatory requirement and that there ought to be a prior

direction by the learned High Court Judge before notifying the respondent on the date of hearing, or else the appeal which is not accompanied by the proceedings would be rendered incompetent, it was the contention of the respondents' counsel that the provision bestows discretion upon the High Court and that its non compliance is not fatal having not occasioned a failure of justice.

In considering the rival arguments of the parties, we have carefully considered the crafting of section 362(1) the CPA which reads as follows:

> *"Every appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall,* ***unless the High Court otherwise directs,*** *be accompanied by a copy of the proceedings judgment or order appealed against."*
>
> [Emphasis supplied]

It is plain from the above provision and in particular the bolded expression, where the petition is not accompanied by a copy of proceedings and order appealed from, the High Court has discretion to order otherwise. In

addition, in the light of what we said in **BAHATI MAKEJA** (supra) it is our considered view that, the use of the word "shall" under section 362 (1) of the CPA is permissive and not mandatory in the circumstances. Furthermore, section 365 (1) of the CPA categorically states as follows:

> *"If the High Court does not dismiss the appeal summarily,* ***it shall cause notice to be given to the appellant or his advocate, and to the Director of Public Prosecutions, of the time and place at which the appeal will be heard and shall furnish the Director of Public Prosecutions with a copy of the proceedings and of the grounds of appeal;*** *save that notice need not be given to the appellant or his advocate if it has been stated in the petition of appeal that the appellant does not wish to be present and does not intend to engage an advocate to represent him at the hearing of the appeal."*
>
> [Emphasis supplied]

Our careful reading of section 365 (1) of the CPA shows that, since the learned High Court Judge did not dismiss the appeal summarily, on 27/11/2018 we cannot fault him that he did not comply with section 362(1) of the CPA having ordered that the parties be notified to appear for necessary orders and/ or hearing. It has occurred to us that, since the parties did not have the typed version of the proceedings, and being aware that the appeal was brought under a certificate of extreme urgency, by their consent, the learned High Court Judge availed them with a copy of handwritten proceedings in order to expedite the hearing of the appeal. This in our considered view was due to the exercise of **judicial discretion** bestowed upon him under section 362(1) of the CPA and not otherwise. Besides, without summoning the parties to enter appearance the learned High Court Judge could not have known that the DPP had difficulty to read the handwritten proceedings which she had initially readily asked for.

Apparently, we have gathered that our counterparts in some of the Commonwealth jurisdictions have similar provisions which are designed to expedite the hearing of the criminal appeals bestowing upon the High Courts with requisite discretion in case the petition of appeal is not

accompanied by a copy of proceedings, judgment or order appealed against. For instance section 382 of the Indian Code of Criminal Procedure of 1973 Act No 2 of 1974 provides as follows:

> *"Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall, (unless the court it is presented otherwise directs), be accompanied by a copy of the proceedings, judgment or order appealed against".*

Our neighbour in Kenya section 350 of the Criminal Procedure Code Cap 75 Rev 2018 states as follows:

> *"An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every such petition shall, (unless the high court otherwise directs), be accompanied by a copy of the proceedings, judgment or order appealed against".*

Besides, section 353 of the Kenyan Code which is similar to our section 365 (1) of the CPA states as follows:

> *"If the High Court does not dismiss the appeal summarily it shall cause notice to be given to the appellant or his advocate and to the respondent or his advocate of the time and place at which the appeal will be heard and shall furnish the respondent or his advocate with a copy of proceedings and of the grounds of appeal"*

In the present case, despite having acceded to the initial DPP's prayer that the appeal be heard on 29/11/2018, yet the learned High Court Judge before hearing the appeal opted to initially hear the preliminary objections raised by the DPP which is the correct practice obtaining in our jurisdiction.- See **BANK OF TANZANIA VS DEVRAN P. VALAMBHIA,** Civil Application No. 15 of 2002 (unreported). In our considered view, since the complaints by the appellant were remedied and the parties availed with the complete typed trial court's proceedings, the learned High Court Judge had fully complied with the provisions of section 365 (1) of the CPA. As

such, with respect, we do not agree with the learned Principal State Attorney. We found the appellant's argument that the learned High Court Judge ought to have given the prior direction before notifying the parties or else the appeal would be rendered incompetent to be interpolations of what is not stated under the statute and it was not an intendment of the legislature.

Since it is settled that the use of the word "shall" in section 362 (1) of the CPA is permissive, we also wish to clearly state that, a petition of appeal which is not accompanied by proceedings and an order appealed from cannot be rendered incompetent because section 362 (1) of the CPA bestows upon the High Court with judicial discretionary powers to direct otherwise in order to expedite the hearing of the criminal appeals. Such discretion was left intact and it was not interfered with by the Written Laws (Miscellaneous Amendments) Act No. 9 of 2002 which amended section 362 (1) of the CPA by merely adding the word "proceedings" before the word judgment.

We also had the opportunity of looking at the general principles upon which an appellate court can interfere with the exercise of discretion of an

inferior court or tribunal in **CREDO SIWALE VS THE REPUBLIC**, Criminal Appeal No. 417 of 2013 relying on the case of **MBOGO AND ANOTHER VS SHAH** (1968) EA 93 the Court said:

> *"(i) If the inferior Court misdirected itself; or*
>
> *(ii) it has acted on matters it should not have not have acted; or*
>
> *(iii) it has failed to take into consideration matters which it should have taken into consideration,*
>
> *And in so doing, arrived at wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable or unconscionable - See* ***PINKSTAFF VS BLACK & DECKTZ*** *(US) Inc, 211 S.W 361."*

In view of the stated principles and what transpired before the High Court we cannot fault the learned High Court Judge to have abused the **judicial** discretion bestowed under section 362 (1) of the CPA.

Ultimately, we found none of the cases cited to us by the appellant to be applicable in the present matter.

The foregoing apart, we curiously asked ourselves if at all the DPP before the High Court took a proper course of action to raise the preliminary objection that the appeal before the High Court offended the provisions of section 362 (1) of the CPA while pretty aware that the High Court had unfettered **judicial discretion** on the manner of presentation of the petition of appeal. In **MUKISA BISCUIT MANUFACTURING CO LTD VS WEST END DISTRIBUTORS LTD EALR** (1969) at page 702 the Court categorically among other things held:

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.* ***It cannot be raised if any fact has to be ascertained or if***

what is sought in the exercise of judicial discretion. *The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."*

[Emphasis added]

We fully subscribe to the said holding. Though the said principle is applicable in civil cases, we believe it equally applies to the present case. Since it is settled that section 362 (1) of the CPA bestows judicial discretion upon the High Court the raising of the preliminary objection by the DPP against the discretionary powers of the High Court was in our considered view not a proper course of action. In a similar vein, the first ground of appeal is not merited and is hereby dismissed.

Finally, we found the 3rd ground of appeal to have no grain of merit because the appeal was not heard on merits and instead the High Court dealt with the preliminary objection. In this regard, we are of a considered view that, the appellant's right to be heard was not infringed at all as the

High Court adhered to strict rules of natural justice having availed each of the parties an opportunity to be heard. Besides, since the record does not show that after delivery of the ruling on the preliminary objections, the DPP had requested but was denied more time to prepare for the hearing of the appeal, it is not safe to vouch that she was denied a right to be heard.

In view of the aforesaid we dismiss the appeal in its entirety. We direct that the case file be remitted to the High Court for the hearing of the appeal.

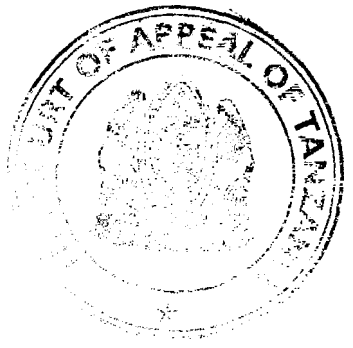
DATED at **DAR ES SALAAM** this 27th day of February, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL