IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A.,ORIYO,J.A., And MUSSA,J.A.)

CRIMINAL APPEAL NO. 5 OF 2013

1. DEOGRATIAS MARTIN @ KACHANGAA
2. DIDAS DANIEL
3. PROCHES PETER @ PII **.....APPELLANTS**

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal From the Judgment of the High Court of Tanzania

at Moshi)

(Sambo, J.)

Dated the 5th day of July, 2012
in
Criminal Appeal No. 37 of 2011

.....

RULING OF THE COURT

21st & 25th June ,2013

MUSSA, J.A:

In the District Court of Arusha, the appellants were jointly arraigned for the armed robbery of, inter alia, a motor vehicle which was alleged to belong to a certain Melance Kisoka. In the alternative, the second appellant alone was arraigned for receiving the allegedly stolen motor

vehicle, knowing or having reason to believe that the same was feloniously obtained.

In the course of the trial, the prosecution featured a police witness who eventually sought to adduce into evidence an inspection report with respect to the vehicle. The attempt was successfully resisted by counsel for the appellants on account that the witness was not legally authorized to compile the inspection report. At the end of the trial the appellants were acquitted.

Dissatisfied, the Director of Public Prosecutions (DPP) preferred an appeal to the High Court against the acquittal of the appellants. In one of the grounds laid before the High Court, the DPP sought to challenge the decision of the trial court refusing the admissibility of the inspection report. In its verdict (Sambo, J;) the High Court allowed the appeal, quashed the acquittal of the appellants and overturned the decision of the trial court on the admissibility of the inspection report. It was further ordered that a new trial should be commenced before another Magistrate of competent jurisdiction. The appellants are presently aggrieved upon a memorandum of appeal which particularly seeks to impugn the order for retrial.

At the hearing before us, the appellants had the services of Mr. John Materu, learned Advocate, who, incidentally, also represented them in the proceedings below. The respondent DPP was represented by Mr. Innocent Eliawony Njau, learned State Attorney. At the outset, we required Mr. Materu to satisfy us on the competency of the appeal, more particularly, whether or not an appeal lies to this Court against the order handed down by the High Court. In response, the learned counsel for the appellants submitted that the appeal is predicated under the provisions of section 6(7)(a) of the Appellate Jurisdiction Act (AJA) which stipulates:

> *Either party to proceedings under part X of the Criminal Procedure Code may appeal to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact.*

Mr. Materu further submitted that the proceedings in the High Court were instituted under the provisions of section 378(1) of the Criminal Procedure Act which allows the DPP to appeal against an acquittal, finding, sentence or order passed by a subordinate court. That may be so, but in the situation at hand, the High Court did not substitute the subordinate court's acquittal with a conviction; rather, a new trial was ordered. That is

to say, in the aftermath of the High Court order, the charge against the appellants still stands. On the premises, a question immediately arises whether or not the appeal is properly before us particularly in the light of the provisions of section 5(2)(d) of the AJA which goes thus:-

> *Notwithstanding the provisions of subsection (1)- no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or* ***order*** *of the High Court unless such decision or order has the effect of* ***finally determining the criminal charge*** *or suit. (Emphasis is ours.)*

We have supplied emphasis on the provision purposefully to underscore that it is not only preliminary or interlocutory decisions that are aimed against; rather, the provision similarly targets any order of the High Court that does not have the effect of finally determining the criminal charge. Thus, to the extent that this appeal seeks to impugn an order of the High Court which did not effectively determine the criminal charge, it is obviously incompetent and we, accordingly strike it out.

DATED at ARUSHA this 24th day of June, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

(MALEWO M. A)
DEPUTY REGISTRAR
COURT OF APPEAL