DIRECTOR OF PUBLIC PROSECUTIONS v. SABINIS INYASI TESHA AND RAPHAEL J. TESHA

COURT OF APPEAL OF TANZANIA

(Kisanga, Ramadhani and Mfalila, JJ.A.)

CRIMINAL APPEAL NO. 127 OF 1993

8 November, 1998 – ARUSHA

(From the acquittal by the High Court of Tanzania at Arusha, Nchalla, J.)

Criminal Practice and Procedure – Appeals – Appeals against Interlocutory Orders – Whether appellable by the Director of Public Prosecutions – Appellate Jurisdiction Act 1979, s 6(2).

Criminal Practice and Procedure – Incomplete trial within a trial Whether Court can make a ruling on it.

Natural Justice – The right to be head in criminal trials – The right of the prosecution to be heard.

The appellant was aggrieved by the ruling of the Trial Court that the respondents had no case to answer to the charge of manslaughter. Three grounds of appeal were advanced: firstly, refusal of the Judge to admit extra-judicial statements of both respondents and the cautioned statement of the first respondent; secondly, refusal to give the appellant right to reply to objections by the respondents' advocate; and lastly, the ruling of no *prima facie* case.

Held:

(i) Since the Justice of the Peace was the only witness in the trial within a trial, and his testimony was not controverted even by the respondents, and since the Trial Judge rejected his evidence, the trial within a trial was incomplete; therefore, the Judge erred in making a ruling on it;

(ii) It is a cardinal principle of natural justice that a party should not be condemned unheard; the appellant was not given an opportunity to respond to the allegation that the cautioned statement made by one of the respondents was illegally obtained;

(iii) Failure to conduct a second trial within a trial was a fundamental error;

(iv) The D.P.P has the right to appeal against an interlocutory order in criminal proceedings; it is only the accused person who does not have such a right.

Appeal allowed. The proceedings are quashed and a retrial ordered before another Judge.

Cases referred to:

1. *General Medical Council v Spackman* [1943] AC 627.
2. *Hypolito Cassiano De Souza v Chairman and Members of the Tanga Town Council* [1961] EA 377.
3. *Alois Kula and Another v Republic*, Criminal Appeal No. 120 of 1990 (unreported).

J. Mono, for the appellant.
C.J. Maruma, for the respondents.

Ramadhani, J.A., read the following considered judgment of the Court:

The High Court of Tanzania at Arusha (Nchalla J), on 4 November 1992, made a ruling that the two respondents, Sabinis Inyasi Tesha and Raphael Jacob Tesha, had no case to answer. Thus they were acquitted of the charge of manslaughter c/s 195 of the Penal Code.

That ruling aggrieved the Republic and so the Director of Public Prosecutions has come up with this appeal. At the hearing Mr *Mono*, the learned Principal State Attorney, appeared on behalf of the appellant Republic, while Mr *Maruma* learned Counsel, represented both respondents, just as he had done at the trial.

Mr *Mono* filed three grounds of appeal. First he attacked the refusal of the learned Trial Judge to admit as evidence the extra-judicial statements of both respondents and the cautioned statement of the first respondent. Secondly, Mr *Mono* said that Nchalla J erred when he refused to give DPP the right to reply to the objections of Mr *Maruma* to the production of the cautioned statement of the first respondent. Lastly it was submitted that the ruling of no *prima facie* case was wrong since the evidence of the remaining prosecution witness PW1 was sufficient to make out a case for the respondents to answer.

In the course of hearing the appeal, four fundamental omissions vividly stood out, and Mr *Maruma* was very quick to admit them when he came to address the Court. We intend to dispose of this appeal in those four errors.

Firstly, the record is patently clear that the trial within a trial that was conducted was incomplete and yet the learned Trial Judge made a ruling on it. Secondly, the DPP was denied his right of reply after the defence made its objection. Thirdly a second trial within a trial was not held while it ought to have been conducted. Lastly the DPP was denied a stay of proceedings he requested so that he could appeal against the rejection of the cautioned statement of the first respondent.

Both respondents recorded extra-judicial statements before a Justice of the Peace (PW3). When these statements were about to be tendered as exhibits, Mr *Maruma* objected. So a trial within a trial was held. PW3 became the first prosecution witness in the trial within a trial. In fact PW3 was the only witness. After examination-in-chief, cross-examination and re-examination the learned Trial Judge went on to make his ruling rejecting both statements. What the Justice of the Peace deposed was not controverted even by the respondents. We just wonder on what other evidence did the learned Judge reject that of the Justice of the Peace. This is why we say that the trial within a trial was incomplete.

The first respondent had also recorded a cautioned statement before PW4 and when that was about to be tendered, the defence objected alleging that s 53 to s 58 of the Criminal Procedure Act 1985 had not been complied with. After that address by Mr Haruma, the learned Judge made his ruling rejecting the cautioned statement for failure to comply with the mandatory provisions of the Criminal Procedure Act.

Mr *Mono* is recorded to have said:

> 'I have not been given opportunity to reply to the objection by my learned friend on the admissibility of the statement which PW4 recorded from first accused. For that reason I apply to appeal against the ruling. The proceedings be stayed.'

Thus Mr *Mono* registered two points. Firstly he pointed out that he was denied his right of reply. Secondly he wanted to exercise his right of appeal and so asked for the proceedings to be stayed.

We shall deal with the first point first. With respect, the learned Judge erred. It is a cardinal principle of natural justice that a party should not be condemned unheard. In the issue of objecting to the admission of the cautioned statement, tables were turned; Mr *Maruma* was the prosecutor accusing Mr *Mono* of producing a document which had been illegally obtained. Mr *Mono* had to defend the Republic against that allegation but was not given opportunity.

Lord Wright had this to say in *General Medical Council v Spackman* (1), at 644:

> 'If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. That decision must be declared to be no decision.'

That was quoted with approval by the Court of Appeal for Eastern Africa in *De Souza v Tanga Town Council* (2) at 388. We think it is a sound principle.

However, in the present case, 'in the absence of the departure' from that rule of natural justice, namely the right to be heard, the learned Judge would not have arrived at the same decision. More likely he would have ordered a trial within a trial which is the test a statement has to pass before it is admitted as evidence. So the departure here is even more offensive. This is the third fundamental error: the failure to conduct a second trial within a trial.

To go back to the second point of Mr *Mono*, that is, his request for staying the proceedings so that he could appeal, the learned Judge responded with the following order:

> 'As the ruling is on an interlocutory point I rule out the application to stay the proceedings. I order accordingly.'

Mr *Mono* complied in the only way open to him: 'In that case my Lord, I close the Prosecution case.' That, of course paved the way for the ruling of no case to answer which gave birth to this appeal.

At the appeal Mr *Mono* submitted that the learned Judge erred in his opinion that an interlocutory order in criminal proceedings is not appealable by the DPP. He relied on our decision in *Alois Kula v Republic* (3). The learned Principal State Attorney said that the DPP has a right of appeal even against such orders. With respect, that is so. In *Alois Kula* (3) we were just interpreting the provisions of s 6(2) of the Appellate Jurisdiction Act 1979 which says:

> '(2) Where the Director of Public Prosecutions is dissatisfied with any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers he may appeal to the Court of Appeal against the acquittal, sentence or order, as the case may be, on any ground of appeal.'

Here the DPP wanted to appeal against the order of the learned Judge in rejecting the cautioned statement of the first respondent. That order was appealable by the DPP. It is only the accused person who does not have a right of appeal against an interlocutory order in criminal proceedings. That is what we decided in *Alois Kula* (3).

The learned Judge certainly had his reasons, rightly or wrongly, in conducting the proceedings in the way he did, however, the four errors pointed out are uncomfortably glaring. Justice must be seen to be done both to the accused person as well as to the prosecution.

Here it cannot be said to have been so on the part of the Republic. A

As Mr *Mono* prayed the only remedy is to direct a new trial. The proceedings are quashed and a retrial be conducted by another Judge. It is so ordered.

The appeal is allowed.

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