CRIMINAL APPEAL NO. 132 OF 2004- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J.A.	**DISHON JOHN MTAITA Vs. DIRECTOR OF PUBLIC PROSECUTIONS- (Appeal from the Judgment and Order of the High Court of Tanzania at Moshi)- HC Criminal Appeal No. 60 of 2000- Mchome, J.**	Offence of rape contrary to sections 130 (1) (a) and 131 (3) of the "Sexual Offence Special Provision Act No. 4/1998". - Sentenced to life imprisonment. ***audi alteram partem"*** rule of natural justice **- Appellant's appeal had been heard and determined in his absence without being served with any notice of hearing-** the appellant was condemned unheard by the High Court, for no reason at all- that a denial of a right to be heard in any proceeding would definitely vitiate the proceedings: **The D.P.P.** vs **Sabina I. Tesha & Others [1992] T.L.R. 237.** Court of Appeal in **Mbeya-Rukwa Auto Parts & Transport Limited**

		vs **Jestina George Mwakyoma,** Civil Appeal No. 45 of 2000 and definitively held that:- *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law,* **High Court is directed to re-hear the appellant's appeal in accordance with the dictates of the law.**

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A., KAJI, J.A., And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 132 OF 2004

DISHON JOHN MTAITA ..... APPELLANT
VERSUS
THE DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

(Appeal from the Judgment and Order of the High Court of Tanzania at Moshi)

(Mchome, J.)

dated the 11th day of February, 2002
in
HC Criminal Appeal No. 60 of 2000

JUDGMENT OF THE COURT

9 & 15 October 2007

RUTAKANGWA, J.A.:

The appellant's case is a perfect vindication of the old English adage which says: *"More haste less speed".* We shall shortly demonstrate why we are saying so.

The appellant was convicted by the District Court of Moshi of the offence of rape contrary to sections 130 (1) (a) and 131 (3) of the "Sexual Offence Special Provision Act No. 4/1998". He was sentenced to life imprisonment. Being aggrieved by the conviction and sentence he appealed to the High Court at Moshi. In his seven-

point memorandum of appeal he unequivocally expressed his desire to be present at the hearing of his appeal. The appeal was assigned to Mchome, J. on 25/08/2000. On the same day it was ordered that the appeal be mentioned on 10/10/2000 and the parties be notified.

On 10/10/2000 the appeal came up for mention before Mchome, J. While the appellant was absent, the respondent Republic was represented by Mr. Mwaimu, learned Senior State Attorney. The learned appellate judge then ordered as follows:-

> "Order: Written submission by 4/11/2000. Mention 21/11/2000".

No submission was filed at all. Instead the appeal was adjourned on a number of occasions, and each time the matter was called on for mention the appellant who was serving his prison sentence was absent. On 14/09/2001 the High Court (Mchome, J.) fixed the appeal to come up for hearing on 9th November, 2001. As the appellant was not present, the learned judge ordered that he be duly notified of the date of hearing.

When the appeal was called on for hearing on 9th November, 2001, the appellant was absent, but Mr. Kakolaki, presumably a State Attorney (as the record does not show his designation) was present representing the Republic. The record of the High Court also does not show whether the appellant had been served or not. Without much ado, Mr. Kakolaki addressed the Court supporting the conviction of the appellant and the sentence imposed on him. The learned appellate judge reserved his judgement. It was to be delivered on 24th January, 2002. The judgement was probably delivered on 11th February, 2002. The appeal was dismissed in its entirety, again in the absence of the appellant. We have used the word "probably" deliberately, because it is only dated 11th February 2002, but the record does not show the exact date when the same was delivered.

When the appellant eventually became aware of the dismissal of his appeal on 2nd January, 2003, through his relative Peter Kiwale, he was aggrieved. By that date, however, he was patently time barred to lodge a notice of appeal. Through the services of Mr. Maro, learned advocate, he filed Miscellaneous Criminal Application

No. 4 of 2003 in the High Court at Moshi applying for extension of time to file a notice of appeal and for leave to appeal out of time. The application was heard by Mmila, J.

In a well reasoned ruling the learned judge found it as an established fact that the appellant's appeal had been heard and determined in his absence without being served with any notice of hearing. The learned judge also aptly observed that:-

> *"The record is very silent as to why the hearing had to proceed in absentia".*

He was, therefore, of the settled view that this offended the *"audi alteram partem"* rule of natural justice. Obtaining guidance from the decisions of this Court in the cases of **Mbeya-Rukwa Auto Parts & Transport Limited** vs **Jestina George Mwakyoma,** Civil Appeal No. 45 of 2000 (unreported) and **The Principal Secretary, Ministry of Defence & National Service** vs **Devram Valalmbhia** [1992] T.L.R. 185, the learned judge found this violation of the rule of natural justice, to be a point of law justifying him to grant the orders sought in the application. Leave to file a notice of appeal to

this Court out of time was accordingly granted. Hence this appeal which was duly instituted on 6th April, 2004.

The appellant, through the same Mr. Maro, has come to this Court with only one ground of appeal. The same reads as follows:-

> *"That the learned first appellate judge erred in entertaining and disposing the appeal without according the appellant a right/opportunity to be heard".*

Mr. Maro represented the appellant and Mrs. Neema J. Ringo, learned State Attorney, represented the respondent Republic at the hearing of the appeal. The respondent Republic did not oppose this appeal.

With a legion of authorities supporting his cause, Mr. Maro was brief and precise in his submission urging us to allow this appeal. He invited us to appreciate the naked fact that the appellant had plainly indicated his desire to be present at the hearing of his appeal in the High Court. That being the position, the High Court, in terms of section 365 of the Criminal Procedure Act, (the Act) was duty bound

to cause notice to be given to the appellant of the time and place at which his appeal would be heard, he argued. He also referred us to section 366 (2) (a) of the Act which provides that *"an appellant whether in custody or not shall be entitled to be present at the hearing of an appeal".* As the appellant was not informed of the day and place at which his appeal would be heard and the same was heard and determined without him being heard at all, he was condemned unheard, he contended. Failure to hear the appellant vitiated the entire proceedings in the High Court and its judgement, he concluded. He urged us, therefore, to allow the appeal, quash and set aside the High Court judgement and order a re-hearing of the appeal by the High Court. In support of his position he referred us to two cases decided by this Court. These are:-

(a) **Francis Kwaang Musei** vs **Honourable W.P. Slaa & Others**, Civil Application No. 2 of 1999 (unreported) and

(b) **The D.P.P.** vs **Sabina I. Tesha & Others** [1992] T.L.R. 237.

On her part, Mrs. Neema, as already indicated, did not oppose this appeal. As the appellant was denied his fundamental right to be heard by the High Court, she asserted, the appeal should be allowed as proposed by Mr. Maro and the High Court be ordered to re-hear it in accordance with the provisions of the law.

In view of the clear position of the law, this appeal should pose no difficulties. The undisputed facts clearly establish that contrary to his express wish and the mandatory provisions of the law (e.g. the C.P.A.) the appellant was condemned unheard by the High Court, for no reason at all, be it justifiable or unjustifiable. May be the High Court was more concerned with a speedy disposal of the appeal without regard to both the natural, statutory and constitutional rights of the appellant to be heard. If that were the case, that would be a very dangerous trend which cannot be condoned by this Court. It is anathema to the concept of the rule of law. As pointed out by both learned counsel in this appeal, the right to be heard when one's rights are being determined by any authority, leave alone a court of justice, is both elementary and fundamental. Its flagrant violation will of necessity lead to the nullification of the decision arrived at in

breach of it. Hence the impeccability of the earlier referred to saying of *"More haste, less speed"*.

That is why this Court unequivocally held in the case of the **D.P.P.** vs **S. I. Tesha** (supra) that a denial of a right to be heard in any proceeding would definitely vitiate the proceedings. But the Court went further in the **Mbeya-Rukwa Auto Parts & Transport Limited** case (supra) and definitively held that:-

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part:*
>
> ***(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".***

In yet another case, **Abbas Sherally & Another Vs Abdul S.H.M. Fazalboy** Civil Application No. 33 of 2002 (unreported) this Court did not hesitate to hold that:-

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice".*

This decision was followed very recently by the Court in the case of **ECO-TECH (Zanzibar) Limited** vs **Government of Zanzibar,** ZNZ Civil Application No. 1 of 2007 (unreported).

In the circumstances of this case, there was no justification at all for the High Court to hear and determine the appellant's appeal without affording him opportunity to be heard. Consistent with settled law, we are of the firm view that the decision of the High Court reached at in violation of the appellant's constitutional right to be heard cannot be allowed to stand. It was a nullity. It is accordingly quashed and set aside. The High Court is directed to re-

hear the appellant's appeal in accordance with the dictates of the law.

In fine, the appeal is allowed.

DATED at ARUSHA this 15th day of October, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

(I. P. KITUSI)
DEPUTY REGISTRAR