

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., LILA, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL CASE NO. 449 OF 2015

THE REPUBLIC..... APPELLANT

VERSUS

HANS AINGAYA MACHA RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Dar es Salaam.)**

(Kaduri, J.)

dated the 2nd day of September, 2015

in

Criminal Appeal No. 39 of 2015

RULING OF THE COURT

6th July, & 14th August, 2018

MUSSA, J.A.:

In the Resident Magistrate's Court of Dar es Salaam, at Kisutu, the respondent was arraigned for two counts of forgery and a third of uttering a false document.

The particulars on the first count alleged that on the 8th July, 2011, within the City of Dar es Salaam, the respondent forged a transfer deed to falsely show that the right of occupancy with respect to Plot No. 183 Block

A, situated at Kigogo area, Dar es Salaam, was transferred to him by its owner, namely, Ramadhan Sood Balenga.

On the second count, the contention was that the respondent forged a sale agreement which falsely told that Plot No. 183 Block A, situated at Kigogo area, Dar es Salaam was sold to him on the 2nd June, 2011.

The prosecution allegation on the third count was that on the 19th July, 2011, within the City Dar es Salaam, with intent to defraud, the respondent uttered to the Registrar of Titles, a transfer deed with respect to Plot No. 183 Block A, situated at Kigogo area, Dar es Salaam which was purportedly signed by the referred Ramadhan Sood Balenga.

The appellant refuted the accusations, whereupon the prosecution lined up 5 witnesses plus a host of documentary exhibits in support of its case. In turn, the respondent gave sworn testimony and called 9 witnesses as well as 4 documentary exhibits to support his case. At the height of the trial proceedings, the presiding Magistrate (Kisoka, RM) held the view that the case for the prosecution fell short and the respondent was, accordingly, acquitted.

The appellant herein was dissatisfied but, on the first appeal, the High Court (Kaduri, J.) found no cause to vary the verdict of the trial court and the appeal was dismissed in a judgment that was pronounced on the

17th August, 2015. Still discontented, on the 11th September, 2015 the appellant filed a Notice of Appeal and presently, he seeks to impugn the decision of the first appeal court by way of a memorandum of appeal which goes thus:-

"1. That the Honourable Judge grossly erred in law by holding that section 205 (1) of the Criminal Procedure Act (Cap. 20 R.E. 2002) requires qualification of the Handwriting Expert to be advanced in evidence.

2. That the Honourable Judge erred in law in holding that the particulars of Government Gazette that appointed PW3 as Handwriting Expert ought to be led in prosecution evidence.

3. That the Honourable Judge erred in law by holding that where there are two conflicting Handwriting Expert Reports, the Jurisdiction of the court is to admit only evidence of competent person dully appointed by Director of Public Prosecutions."

It is noteworthy that the memorandum of appeal was received by a certain Soud Omar who is a registry officer of the Court and lodged in the

Registry of the Court at Dar es Salaam on the 29th March, 2017. The same was palpably received on the 7th June, 2018 by a certain Hassan Salum Hassan of Ngudungi and Co. Advocates.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Awamu Mbagwa who was being assisted by Mr. Pius Hilla, both learned Senior State Attorneys. On the adversary side, the respondent had the services of Messrs Deus Nyabiri and Daniel Ngudungi, both learned Advocates.

At the very outset, Mbagwa rose upon a somewhat novel presentation. He sought the leave of the Court to lodge a supplementary memorandum of appeal under Rule 73 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) so as to add a claim to the effect that the trial courts' record of evidence was not a true reflection of what actually transpired at the hearing. Since the exercise, as he put it, may ultimately involve the lodging of an affidavit in support, the learned Senior State Attorney asked for our indulgence to adjourn the hearing of the appeal to a later date to enable the appellant to take into effect the desired amendment.

The appellant's quest was vigorously objected to by Mr. Nyabiri, the more so as the desired complaint was not, in the first place, raised at the

hearing of the first appeal. Whilst he fully supported his colleagues objection, on his part, Mr. Ngudungi raised a different concern with respect to the record of appeal. The record of appeal placed before the panel, he said, is captioned "AMENDED RECORD OF APPEAL" of which was certified by the District Register of the High Court, Dar es Salaam on the 27th June, 2018. According to Mr. Ngudungi, the so-called "AMENDED RECORD OF APPEAL" was not served upon the respondent, rather, what they have is plainly captioned "RECORD OF APPEAL". To that end, the leaned counsel for the respondent expressed the fear that the Court and the respondents are operating upon two different records of appeal. In the same vein, he could not comprehend as to how the appellant lodged the memorandum of appeal on the 29th March, 2017 with respect to a record of appeal which came in the offing, a good deal later, on the 27th June, 2018.

Mr. Mbagwa hardly explained away this apparent inexactitude and that being so, we had to dig deep into the background of the matter in pursuit for a resolve. In the course of the exercise, it came to our attention that on the 4th June, 2018 the appellant wrote a letter to the Registrar of the Court of Appeal which went thus:-

"RE: CRIMINAL APPEAL CASE NO. 449 OF 2015

REPUBLIC

VERSUS

HANS AINGAYA MACHA

Reference is made to the above captioned subject.

We are writing to inform you that while perusing the records of appeal supplied to us in relation to the above-cited case we have noted that pages 18, 29, 30 41, 55, 56, 78, 96, 141, 142, 246, 270 and 274 are missing. Further, some of the pages are so tied up together that we could not read them without tearing them apart.

Since the records of appeal are incomplete, we could not prepare memorandum of appeal. We are therefore requesting you to prepare and avail to us complete records of appeal to enable us prepare and file the memorandum of appeal.

We are forwarding, together with this letter, the records of appeal supplied to us.

Thanking you for your continued cooperation.

O. H. Tibabyekomya

*For: **DIRECTOR OF PUBLIC PROSECUTIONS***

[Emphasis supplied].

If we may express at once, it is not apparent from the tone of the extracted letter that the DPP was aware that his own law officer had already filed a memorandum of appeal as far back as the 29th March, 2017. That aside for the moment, upon receipt of the letter on the 6th June, 2018 the Registrar of Court of Appeal informed the DPP thus:-

"RE: CRIMINAL APPEAL NO. 449 OF 2015

REPUBLIC.....APPELLANT

VERSUS

HANS AINGAYA MACHA.....RESPONDENT

.....

Reference is made to your letter with Ref. No.

NPSC/DPP/CONF/140/148 dated 4th June, 2018.

We acknowledge to receive the above quoted letter together with the record of appeal. This is to inform you that, the record of appeal are prepared by the Deputy Registrar of the High Court. And in case of the above record was prepared by High Court of Tanzania, Dar es Salaam zone, would you please communicate with him so that he could prepare complete record and supply it to you as requested.

Returned herewith is the incomplete record sent to this officer for your necessary action please.

Kindly be informed.

E. F. FUSSI
For: REGISTRAR
COURT OF APPEAL (T)

In response, on the 11th June, 2018 the DPP wrote the Deputy Registrar of the High Court, Dar es Salaam and replicated to him the contents of his June 4th letter. The way it appears, almost immediately, the Deputy Registrar of the High Court embarked on the exercise of amending the record of appeal at the height of which he, on the 27th June 2018, he informed the Deputy Registrar of the Court of Appeal thus:-

"YAH: SHAURI LA RUFAA YA JINAI NA. 449/2015

JAMHURIMUOMBA RUFAA

DHIDI YA

HANS AINGAYA MACHA.....MJIBU RUFAA

Husika na somo tajwa hapo juu. Pia barua ya Mkurugenzi wa Mashitaka yanye Kumb. Na. NSPC/DPP/CONF/140/153 ya tarehe

11/6/2018 iliyonitaka kumpatia kitabu sahihi baada ya kurejesha na kurekebisha alichopatiwa awali kufuatia makosa aliyoyagundua.

Baada ya kukikagua kitabu kilichorejeshwa nimeridhika kuwa ni sahihi kulikuwa na kurasa zinazokosekana. Jambo ambalo tayari limesharekebishwa. Na kwa barua hii nakutumia kitabu kilichorekebishwa kwa hatua zako tafadhali.

Tunaomba radhi kwa usumbufu utakaojitokeza.

**C. M. KISONGO
NAIBU MSAJILI
KANDA YA DAR ES SALAAM"**

From the foregoing correspondence, it is beyond question that the matter at hand evolved upon four stages. The **first** stage involved the preparation of what we shall henceforth call "the original record" which was done by the Registrar of the High Court in the wake of the lodging of the Notice of Appeal. The begging question at this stage is as to whether or not the original record was served on the parties. Addressing the question, we regrettably noted that the movement of files system in the High Court Registry is wholly ramshackled to the extent that it is difficult for one to ascertain the particulars of the person or firm receiving a document for use in Court. Whereas, for instance, the appeal at hand was

entered in the dispatch book upon its transmission to the DPP on the 13th February, 2017, the signature abreast the entry is unsubstantiated by the stamp of the receiver.

But, in the matter at hand, it may be that it is discernible from the DPP's concession in his letters that he received the original record. The crunch is with respect to the respondent in whose regard there is a complete dearth of information that he received the original record. Before us, Mr. Ngudungi expressed that he is, actually, unaware of the original record of appeal which prompted the appellant to lodge her memorandum of appeal. According to him, the record of appeal which is in their possession was served on the 22nd May, 2017, that is, almost two months subsequent to the lodging of the appellant's memorandum of appeal. It is, indeed, the duty of the Registrar of the High Court to cause a copy of the record of appeal to be served on both the appellant and the respondent as is imperatively required by Rule 76 (1) of the Rules thus:-

"As soon as the record of appeal has been prepared, the Registrar of the High Court shall cause a copy of it to be served on the appellant and on the respondent and shall send four copies to the Registrar."

As we have already intimated, there was no proof of service of the original record of appeal on the respondent. We shall revert to a consideration of the effect thereof.

Coming now to the **second** stage, the same was taken by the appellant who brought to the fore the memorandum of appeal which was lodged in the Registry of the Court of Appeal on the 29th March, 2017. It is noteworthy, however, that, for some obscure cause, the memorandum of appeal was served on the respondent, a good deal later, on the 7th June, 2018, that is, close to a year and three months after its lodging. To say the least, the delayed service of the memorandum of appeal casts a shadow in the efficiency of the Registrar who is required, on the terms of Rule 72 (3), to serve the respondent "as soon as practicable".

That aside and, on a more serious note, we take the position that, upon the transmission of the original record to the Registrar of the Court of Appeal as well as the subsequent lodging of the memorandum of appeal and its service on the respondent; the Court was formally seized of the appeal, just as the mandate of the Registrar of the High Court with respect to the preparation of the record of appeal effectively came to the end. What remained of was for the Registrar of the Court of Appeal to cause a

notice to be given to the parties in terms of Rule 79 of the time and place at which the appeal was to be heard unless directed otherwise.

That in mind, we advance to the **third** stage which involved the complaint by the DPP to the effect that the original record was incomplete, as it were, unaware that his own law officer had, earlier on, actually lodged a memorandum of appeal. The complaint culminated in the exercise embarked by the Deputy Registrar of the High Court to amend the original record so as to supposedly cure its incompleteness. To us, this exercise begs the question as to whether or not it was within the powers of the Registrar of the High Court to embark on that exercise at that stage of the proceeding.

In this regard, we wish to clearly express that, on the terms of Rule 71 (1) of the Rules, it is the Registrar of the High Court who is mandated to prepare the record of a criminal appeal. To that extent, the general administrative and procedural powers of the Registrar of the Court of Appeal under part II of the Rules relating to handling documents for use in the proceedings of the Court have no bearing on the situation at hand.

From the paucity of the availed factual setting, the Registrar of the High Court embarked on the exercise of amending the record of appeal after the same had been transmitted to the Registrar of the Court of

Appeal as well as upon the same being served, at the very least, on the appellant. As to what is the Registrar of the High Court expectedly enjoined to do upon realizing, at that stage, that the record of appeal is incomplete, the Rules are inconveniently silent. We shall, again, revert to the way forward in the wake of our consideration of the **fourth** stage which relates to the so-called "AMENDED RECORD OF APPEAL".

To begin with, it is immediately discernible from the "AMENDED RECORD OF APPEAL" that its face does not constitute the usual stamp engraved with the words:-

"COURT OF APPEAL OF TANZANIA

DAR ES SALAAM

FILED ON"

Such an omission infringes Rule 14 (1) and (2) which requires that:-

"14 (1) Whenever a document is lodged by a party in the Registry or sub registry of the Court in accordance with these Rules, the registrar shall accept such a document and stamp it showing the date and time it was lodged and if a party so

requests shall similarly endorse any copy submitted for that purpose.

(2) For purposes of the provisions of sub-rule (1), documents to be lodged with the Registrar shall include, inter alia: a notice of appeal; notice of motion; notice to withdraw a Notice of Appeal; notice to withdraw an appeal; notice of preliminary objection; memorandum of appeal and record of appeal.”

What is more, there is no indication that upon the amendment exercise, the resultant “AMENDED RECORD OF APPEAL” was served on the parties. All what was done, was for the Deputy Registrar of the High Court to inform the Registrar of the Court, in his June, 27th letter that the amendments were ready followed by the transmission of the same to the Court of Appeal. Next, on the 6th July, 2018 the “AMENDED RECORD OF APPEAL” was placed before us for hearing.

In sum from the foregoing, the preparation of the record of appeal in the matter under our consideration was fraught by several disquieting

factors. To begin with, the original record which culminated the filing of the memorandum of appeal was incomplete and, as it were, there was no proof of service of it on the respondent. And, to add salt to the impairment, upon the original record being transmitted and seized by the Court of Appeal, the Registrar of the High Court embarked on an amendment of the original record without recourse to the leave of the Court. In the ensuing calamity, the resultant "AMENDED RECORD OF APPEAL" was on its face, flawed for lack of endorsement of the Court's stamp and the same was, similarly, not even palpably served on the parties.

To this end, in the face of such a messed up process, we are minded, under Rule 4 (2) (a) and (b) of the Rules, to invalidate the entire process of the preparation of the record of appeal and, in lieu thereof, the Registrar of the High Court is ordered to prepare afresh a properly constituted record of appeal. That is to say, the memorandum of appeal crumbles with the invalidated process. Upon the preparation of the record of appeal, the Registrar of the High Court should then, pursuant to Rule 72 (3) of the Rules, serve the same on the parties in the manner prescribed under Rule

22 of the Rules. Thereafter, the appellant may wish to lodge afresh a memorandum of appeal to initiate the hearing process.

Order accordingly.

DATED at **DAR ES SALAAM** this 10th day of August, 2018

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL