

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SLAAM

(CORAM: MMILLA J.A., MWANGESI J.A., And SEHEL J.A.)

CRIMINAL APPEAL NO. 282 OF 2017

DIRECTOR OF PUBLIC PROSECUTIONS----- APPELLANT

VERSUS

- 1. WAMBURA MAHEGA @ KISIROTI -----1st RESPONDENT**
2. HASSAN OTHMAN HASSAN @ HASSANOO -----2nd RESPONDENT
3. DOCTOR NAJIM MSENDA -----3rd RESPONDENT

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

(Dyansobera J.)

dated the 29th December, 2016

in

High Court Criminal Appeal No. 166 of 2016

RULING OF THE COURT

24th Feb & 10th March, 2020

MWANGESI J.A.:

The respondents herein were jointly charged in the resident magistrates' court of Dar es Salaam at Kisumu, with two counts of conspiracy to commit an offence contrary to section 384, and stealing contrary to sections 258, 265 and 269 all of the Penal Code, Cap 16 R.E 2002 **(the Code)**. Or, in the alternative, receiving stolen property or unlawfully obtained contrary to section 311 **the Code**. It was the case for

the prosecution that on the 26th day of August, 2011 at Bahari Beach Area, within Kinondoni District in the Region of Dar es Salaam, the appellants after having conspired to commit an offence, jointly stole 26.475 tons of copper minerals, all valued at TZS 333,467,848/13 from a motor vehicle with Registration No. T. 821 BCL/T. 659 BCZ, which were on transit from Zambia, the property of Liberty Express (T) Limited. Alternative, it was the prosecution's assertion that, the appellants received the property named above, while aware that it had been stolen or illegally obtained.

All charges were resisted by the appellants, a thing which necessitated the matter to go to full trial, wherein the prosecution summoned eight witnesses, and tendered seven exhibits to establish the guilt of all appellants. The trial court upon evaluating the evidence placed before it, was satisfied that the prosecution had failed to discharge its duty of establishing the guilt of the appellants beyond reasonable doubt. It thus acquitted all of them, an acquittal which was upheld by the first appellate court, in a decision that was handed down on the 29th December, 2016. Still believing that there was no triumph of justice, the appellant lodged a notice of appeal on the 20th January, 2017, which in terms of rule 68 (1) of the Tanzania Court of Appeal Rules, 2009 **(the Rules)**, instituted the

appeal to the Court, which was scheduled for hearing on the 24th February, 2020.

On the date when the appeal was called on for hearing, the appellant was represented by Ms. Cecilia Shelly, learned Senior State Attorney, whereas the first and second respondents had the services of Mr. Nehemiah Nkonko learned counsel, while the third respondent, was represented by Mr. Majura Magafu also learned counsel.

At the very outset, Ms. Shelly rose to inform the Court that the hearing of the appeal was not ready, because the appellant had not yet lodged the memorandum of appeal in terms of the provisions of rule 72 (1) of **the Rules**. Accounting on the failure to lodge the memorandum of appeal, she argued that the same was attributed by the fact that the record of appeal which they were supplied with by the Court, was incomplete in that some vital documents were missing. She named the missing documents to be, the written submissions from either side, which were lodged in the High Court, while arguing the appeal in the first instance. That being the case, they were unable to prepare their grounds of appeal.

The learned Senior State Attorney, submitted further that upon noting the anomaly in the record of appeal supplied to them, they wrote a letter to the Registrar of the Court of Appeal, requesting for the missing documents, and they were yet to be supplied with them. She exhibited before the Court, the letter of Reference No. NPS/PP/C.190/8/2776/5 dated the 25th June, 2018, which was addressed to the Registrar of the Court of Appeal, and copied to the Registrar of the High Court. In that regard, Ms. Shelly prayed to be supplied with the said missing documents, so as to enable them prepare the memorandum of appeal. And, in that regard, she asked the Court to adjourn the hearing of the appeal to another date.

Following the arrangement which had been made by the learned counsel for the respondents, Mr. Magafu, stood to respond to the submission made by their learned friend, on behalf of all respondents. In his response, he strongly resisted the prayer by Ms. Shelly, for adjournment arguing that, the appellant had no interest at all to pursue its appeal. It was the further submission of the learned counsel that, according to rule 72 (1) of **the Rules**, the appellant ought to have lodged its memorandum of appeal within twenty one days from the date when it was served with the record of appeal, a thing which it has failed.

While conceding to the fact that indeed, the written submissions which they lodged at the High Court while arguing the first appeal, did not form part of the record of appeal which was supplied to them, he placed the blames on the anomaly to the appellant's negligence in failing to alert the Registrar earlier, so that it could be rectified on time.

In regard to the letter alleged to have been written by the appellant to the Registrar of the Court of Appeal, requesting for the missing documents, the learned counsel submitted that it was doubtful if there was any such letter. This was so for the reason that first, there was no evidence to establish that the said letter was received by the addressee. Secondly, the said letter was not copied to the respondents, as per the requirement of the law.

At any rate, Mr. Magafu went to submit, the preparation of the memorandum of appeal did not require the presence of the written submissions. In his understanding, the grounds of appeal are prepared from the judgment and the proceedings. After all, such written submissions were exchanged between them when they were arguing the appeal in the High Court, and hence, they were already in the possession of the appellant. As such, they cannot constitute an excuse at all to the appellant.

He concluded his argument by stating that, what has occasioned the failure by the appellant in lodging the memorandum of appeal, is nothing other than un-readiness to pursue the intended appeal. He therefore prayed that it to be dismissed.

The brief rejoinder by Ms. Shelly was that, the appellant was entitled under the law, to be availed by the Court with complete record of appeal so that it could prepare its memorandum of appeal. The argument by his learned friend that the appellant, was not diligent enough or that, it is not prepared to pursue the appeal, has no basis. She reiterated her earlier prayer that, the appellant be supplied with the missing documents in the record of appeal so as to prepare and lodge the memorandum of appeal.

In view of the submissions from either side above, the issue that stands for our determination, is whether or not the prayer by the appellant, for adjournment of the hearing of the appeal is founded. To begin with, it is a requirement of law in terms of rule 71 (2) of **the Rules** that, after the appellant has lodged the notice of appeal, he has to be supplied by the Court with all the relevant documents relating to the case intended to be appealed against, in order to enable him prepare the memorandum of

appeal. And the supply of the documents has to be in full and not in piece meal.

Since in the instant appeal there is no dispute to the fact that the record of appeal supplied to the appellant was incomplete, apparently, he was not placed in a proper position to prepare the memorandum of appeal. Even though there was no cogent proof to establish that the letter which the appellant wrote to the Registrar of the Court of Appeal, requesting for the missing documents did reach the addressee, on the face of it, established that there were efforts made by it to ask for complete record. In any event, even if such effort on the part of the appellant, was not to be there, it did not erode the legal entitlement of the appellant, to be supplied with a complete record of appeal for purposes of preparing its appeal.

Based on what has been highlighted above, it is evident that adjournment of the hearing of this appeal is inevitable. We are therefore, constrained to adjourn the hearing of this appeal to another date as it will be scheduled by the Registrar. Meanwhile, we direct the Registrar to supply the appellant with complete record of appeal, to enable it prepare its memorandum of appeal.

Order accordingly.

DATED at **DAR ES SALAAM** this 9th day of March, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 10th day of March, 2020 in the presence of Ms Cecilia Shelly, learned Senior State Attorney for the appellant/Republic and Mr. Nehemiah Nkoko, learned counsel for the first and second Respondents also, Mr. Nehemiah Nkoko hold brief for Mr. Majura Magafu, learned counsel for the third respondent is hereby certified as a true copy of the original.




G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL