

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: NDIKA, J.A., MWANDAMBO, J.A., And KENTE, J.A.)**

**CRIMINAL APPEAL NO. 125 OF 2020**

**JOHN HILARIUS NYAKIBARI ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

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

**(Arufani, J.)**

**dated the 26<sup>th</sup> day of April, 2016**

**in**

**Criminal Appeal No. 103 of 2013**

**.....**

**JUDGMENT OF THE COURT**

6<sup>th</sup> & 18<sup>th</sup> July, 2022

**NDIKA, J.A.:**

The appellant, John Hilarius Nyakibari, was tried in the District Court of Ilala at Kisutu for forgery, uttering false document and obtaining money by false pretence. To prove its case, the prosecution relied upon testimonial and documentary evidence adduced by seven witnesses. At the close of the prosecution case on 2<sup>nd</sup> January, 2013, the trial court (Hon. Katemana, RM) ruled, rather curtly, that:

*"I have gone through the submissions by the accused person as well as the testimony (sic) by all five prosecution witness (sic) and I am of the*

*strong view that, basing on the evidence on record and the accused person's submissions that **he has no case to answer** ...."*[Emphasis added]

The trial court, then, proceeded to acquit the appellant pursuant to section 230 of the Criminal Procedure Act ("the CPA").

On appeal by the Director of Public Prosecutions ("the DPP") in terms of section 378 of the CPA, the High Court of Tanzania at Dar es Salaam (Arufani, J.) vacated the trial court's ruling of no case to answer as it was satisfied that the evidence on record disclosed a *prima facie* case against the appellant. Accordingly, the court ordered that the case be remitted to the trial court for it to proceed with the defence hearing.

Resentful of the aforesaid outcome, the appellant has appealed to this Court. Initially, the appeal was predicated on two grounds but in the course of the hearing, Mr. Mluge Karoli Fabian, learned counsel for the appellant, only argued one ground of appeal and abandoned the other complaint. The solitary ground canvassed reads thus:

- 1. That the High Court Judge (Arufani, J.) erred in law in entertaining the appeal by the DPP (Criminal Appeal No. 103 of 2013) filed without notice of appeal contrary to section 379 (1)*

*(a) of the Criminal Procedure Act ("the CPA") relying on the erroneous ruling of Shangwa, J. dated 25<sup>th</sup> March.*

To be sure, the appellant had raised the same complaint before the High Court by way of a preliminary objection. It was contended that the appeal to the High Court by the DPP was lodged without a valid notice of appeal contrary the dictates of section 379 (1) (a) of the CPA, which stipulates as follows:

*"379.-(1) Subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions or a person acting under his instructions-*

*(a) has given notice of his intention to appeal to the subordinate court within thirty days of the acquittal, finding, sentence or order against which he wishes to appeal and the notice of appeal shall institute the appeal; and*

*(b) [Not applicable]."*

It is clear from the above provision that in order to institute the appeal in the High Court, the DPP or a person acting under his instructions must lodge notice of intention to appeal within thirty days of the decision intended to be challenged. Since in the instant case, the impugned ruling

of the trial court was rendered on 2<sup>nd</sup> January, 2013, the notice of appeal ought to have been lodged by 1<sup>st</sup> February, 2013.

It was the appellant's contention before the High Court that the notice of appeal vide which the DPP lodged the appeal in that court was improper in two respects: first, that the respondent's name in the appeal was wrongly stated as Hilarius Nyakibari instead of John Hilarius Nyakibari. Secondly, that it was doubtful that the notice was received by the trial court within the prescribed time because it bore two conflicting dates. In elaboration, it was argued that while at the foot of the notice it is shown to have been duly dated and presented to the trial court for filing on 18<sup>th</sup> January, 2013, it is embossed with the trial court's receipt stamp dated 8<sup>th</sup> March 2013 signifying that it was received by the court's registry on that date. It was, therefore, contended that if it was, indeed, received by the trial court's registry on 8<sup>th</sup> March, 2013, it was hopelessly out of time.

In its ruling, the High Court (Shangwa, J.) took the view that error in the citation of the respondent's name in the appeal was innocuous, hence curable. Accordingly, the court ordered the DPP as the appellant in the appeal to perfect the proceedings by lodging a fresh notice of appeal citing the respondent's name in the appeal in full.

As regards the other complaint that the notice was lodged out of time, the learned Judge held:

*"The respondent's doubts as to whether or not the notice of appeal bearing the name of Hilarius Nyakibari was received by the subordinate court such doubts should be resolved as I hereby do in favour of the appellant."*

Before us, Mr. Fabian focused his attention on the validity of the notice of appeal, stoutly contending that it was lodged by the DPP out of time. Referring to the notice, shown at page 229 of the record of appeal, he argued that the notice was received by the trial court's registry on 8<sup>th</sup> March, 2013 as per the acknowledgement stamp embossed on it by a registry clerk. He repeatedly downplayed the significance of the signature and statement at the foot of the notice that it was presented to the registry for filing on 18<sup>th</sup> January, 2013, which must have been well within the prescribed period of thirty days. He suggested that the said date was forged.

Replying for the respondent, Mr. Nassoro Katuga, learned Senior State Attorney, who was accompanied by Ms. Mwasiti Athuman Ally, learned Senior State Attorney, as well as Messrs. Tumaini Maingu Mafuru and Bahati Sebastian Jaribu, learned State Attorneys, strongly disagreed

with his learned friend. He submitted that the receipt stamp appears to have been wrongly and mechanically embossed and urged us to discount it and give weight, instead, to the signed certification by the registry clerk that the notice of appeal was presented by the DPP and received for filing on 18<sup>th</sup> January, 2013. On that basis, he contended that the notice was duly lodged in terms of section 379 (1) (a) of the CPA.

In a brief rejoinder, Mr. Mluge maintained that the stamped date was authentic and that it should prevail over what the registry clerk certified in the notice.

We have studiously examined the impugned notice of appeal and given due consideration to the contending submissions of the learned counsel. It is common cause that the notice exhibits two conflicting dates as the dates on which it was filed. Beginning with the embossed stamp, all that we note as the inscribed date of receipt is "8<sup>th</sup> March", but it is clearly incomplete because the year thereof is evidently omitted. Moreover, the stamp bears no signature of the registry clerk; the part of it provided for signature of the receiving clerk is left blank. Looked this way, the stamp is awkward and unreliable. This lends credence to Mr. Katuga's submission that the stamp was embossed rather perfunctorily without checking if the date on it was correct.

We stated earlier that Mr. Fabian downplayed the significance of the Registry Clerk's certification of the filing of the notice. With respect, we do not agree with him as we find the certification more credible and reliable than the stamp. This is because the date in the endorsement (18<sup>th</sup> January, 2013) was inscribed by the said clerk in his/her own handwriting and that it was duly signed. It was a conscious and careful process as opposed to the apparently casual and instinctive manner in which the stamp appears to have been embossed. It is, therefore, safe to say in the circumstances of this matter that the receipt stamp did not override the signed endorsement of the receiving registry clerk.

The foregoing apart, we are mindful that the mistake committed by the trial court's registry is a misstep that should not normally be visited on a litigant. For, it is settled that generally inefficiency of court staff in the performance of their duties should not penalize the unsuspecting litigant: **Msasani Peninsula Hotels Limited and 5 Others v. Barclays Bank Tanzania Limited**, Civil Application No. 192 of 2006 (unreported); see also a decision of the Supreme Court of India in **G. Raj Mallaiah and Another v. State of Andhra Pradesh** (1998) 5 SCC 123. The DPP had no hand in the mess caused by the trial court's registry and cannot be penalized for it.

In the premises, we uphold the High Court's holding that the doubt as to when the notice of appeal was lodged be resolved in the DPP's favour. The single ground of appeal falls apart.

For the reasons we have given, we find no merit in the appeal. We, therefore, dismiss and reiterate the High Court's order that the case be remitted to the trial court for it to proceed with the defence hearing.

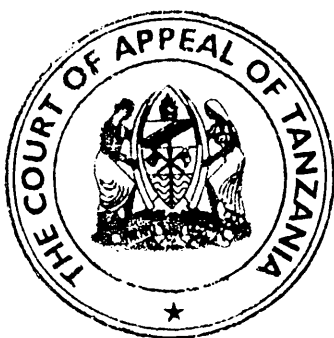
**DATED at DAR ES SALAAM** this 15<sup>th</sup> day of July, 2022.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

P. M. KENTE  
**JUSTICE OF APPEAL**

The Judgment delivered this 18<sup>th</sup> day of July, 2022 in the presence of Mr. Mluge Kalori Fabian, Counsel for the Appellant and Mr. Jaribu Sebastian Bahati, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "J. E. Fovo", written over a horizontal line.

J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**