

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 691 OF 2020

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

STEERE TEMANAO.....1ST RESPONDENT

DAUD GAGI KIYALA2ND RESPONDENT

NGINANU OLODOMUNGE.....3RD RESPONDENT

**(Appeal from the Judgment of Resident Magistrate's Court of Dodoma
at Dodoma**

(Hon. Nyembele, PRM. EXT. J)

dated the 26th day of October, 2020

in

DC. Criminal Appeal No. 85 of 2020

JUDGMENT OF THE COURT

29th November & 6th December, 2022

MAKUNGU, J.A.:

In this appeal, the appellant, the Director of Public Prosecutions is challenging the judgment of Resident Magistrate's Court of Dodoma (Nyembele, PRM, EXT. J.) dated 26th October, 2020 dismissing the appellant's appeal on account that it was time barred. The background material facts which we take liberty to briefly narrate hereunder, will help to appreciate the facts leading to the respondents' arraignment and the appeal before us.

The respondents were charged with the offence of corrupt transaction contrary to section 15(1) (a) and (2) of the Prevention and Combating of the Corruption Act No. 11 of 2007. It was alleged that on diverse dates between 29th June and 30th June, 2018 at Mkungunero game reserve the respondents did solicit corruption of an amount of Tanzania Shillings Four Million (4,000,000/=) from two pastoralist one is Karim Swalehe Kusa and the other, Twalib Issa Nyange each of them to pay Tshs Two Million (2,000,000/=) as an inducement to, so they may forbear to the legal action against them for grazing 88 cows at Mkungunero game reserve without having permit.

It appears that the respondents received Tshs 3,000,000/= from the cattle's owners without issuing receipt which prompted the payers to smell corruption and they reported the matter to the office of the Prevention and Combating of the Corruption Bureau (PCCB) which summoned the respondents for interrogation, hence charged.

After a full trial, the respondents were discharged at a no case to answer stage, and the trial court proceeded to dismiss the charge against them.

The appellant was aggrieved by the decision of the trial court. He then filed an appeal to the High Court which was placed before the Resident Magistrate with Extended Jurisdiction for hearing on 2 grounds of complaint as appearing at pages 71 – 72 of the record of appeal. However, that appeal was dismissed as appearing at page 82 D of the record of appeal on account that it was filed out of time.

The appellant was aggrieved by the decision; hence this appeal before the Court upon the following three grounds of appeal:

1. That, the First Appellate Court erred in law and fact by ruling on the arguments which are not in court records.
2. That, the First Appellate Court erred in law by not considering the fact that the Director of Public Prosecutions had complied with the provisions of section 379(1) (b) of the Criminal Procedure Act, [Cap 20 R.E. 2019].
3. That, the First Appellant Court erred in law by dismissing the appeal instead of striking it out on the basis that it was time barred.

At the hearing, the appellant had the services of Mr. Ahmed Athumani Hatibu, learned State Attorney whereas the respondents were represented by Mr. Leonard Mwanamonga Haule, learned counsel.

Before proceeding to argue the appeal, Mr. Hatibu abandoned the 1st and 3rd grounds of appeal and retained the 2nd ground of appeal alone as amended above.

In confronting the above ground of appeal, Mr. Hatibu argued that the first appellate court miscalculated the dates on the record of appeal as per section 379 (1) (b) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (the CPA). He faulted the holding of the first appellate court that the time limit for filing an appeal started to run on 9/4/2020 when Mr. Haule received the documents. He argued that this was erroneous because the appellant received the documents on 23/5/2020 and on 15/6/2020 the petition of appeal was filed as per the admission form located at page 70A on the record of appeal. He argued further that the Deputy Registrar was not sure that Mr. Haule was provided with the documents on 9/4/2020, so he supplied another copy to them on 23/5/2020. He submitted that under the circumstances this being what transpired it was erroneous on the part of the first appellate court to find that the appeal was time barred. He ended by imploring us to find

the appeal has merit and to allow it, quash the impugned ruling and to order restoration of the appeal filed in the High Court so that it can be heard on merit.

Mr. Haule vehemently resisted the appeal. He supported the ruling of the first appellate court and contended that the appellant failed to file the appeal within prescribed time. He pointed out that the record of appeal shows that the ruling of trial court was delivered on 30/09/2019 and on 4/10/2019 the appellant filed a notice of an intention to appeal and he requested to be supplied with a copy of ruling and proceedings for the purpose of appeal. He went on to submit that on 9/04/2020 the appellant through Mr. Haule who prosecuted the case before the trial court was supplied with the documents and on 15/06/2020 the petition of appeal was filed which was 67 days beyond the proscribed time. He implored the Court to find the appeal lacking merit and dismiss it.

In rejoinder, Mr. Hatibu reiterated what he submitted earlier on and requested the Court to find out whether Mr. Haule was supplied with the document on 09/04/2020 because there is no proof of service.

Now the issue for our determination is whether the appellant was out of time when the petition of appeal was lodged in the High Court.

The appellant substantially is faulting the first appellate court that his appeal was not time barred as per section 379 (1) (b) of the CPA and contended that the time spent waiting to be supplied with copies of proceedings, ruling and decree are automatically excluded. For clarity we wish to reproduce the provisions of section 379 (1) (b) of the CPA. It states:

" 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 instruction: -

(a)

(b) has lodged his petition of appeal within forty-five days from the date of such acquittal, finding, sentence or order; save that in computing the said period of forty-five days the time requisite for obtaining a copy of the proceedings, judgment or order appealed against or of the record of proceedings in the case shall be excluded."

In the case of **Registered Trustees of Mariam Faith Healing Centre @ Wanamaombi v. The Registered Trustees of the Catholic Church Sumbawanga Diocese**, Civil Appeal No. 64 of 2007 (unreported), it was held that:

"... the period between 2/5/2003 and 15/12/2003 when the appellant eventually obtained a copy of the decree ought to have been excluded in computing time."

Suffice to say, section 379 (1) (b) of the CPA and the holding in the decision cited above reinforce the principle that the computation of the period of limitation prescribed for an appeal is reckoned from the day on which the impugned judgment is pronounced and the appellant obtains a copy of the decree or order appealed from by excluding the time spent in obtaining such decree or order.

In the case at hand, despite the appellant seemingly, avoiding to directly admit that the documents were received on 9/04/2020 while the petition of appeal was filed on 15/06/2020. He maintained that on 09/04/2020 Mr. Haule from PCCB was the one who received the documents but his office received them on 23/05/2020. These are two different offices, he added. However, the first appellate court found that they are one person. The learned Magistrate with Extended Jurisdiction rejected their submissions and stated at page 82D of the record of appeal that:

"It is not in dispute that Mr. Haule and the National Prosecution Office are both representing

the Republic, in other words they are one person. It is no doubt to say that appeal after almost 14 days since he was supplied with the copy of ruling, through one Haule the prosecutor from the Office of PCCB."

From the above finding of the first appellate court, we are of the firm view that the learned Magistrate was justifiable in dismissing the appeal.

Before this Court, the appellant's counsel denied that Mr. Haule did not receive the documents on 9/04/2020 for the reason that the court supplied another copy on them on 23/05/2020 which was the basis of the DPP's appeal. He told us that there is no proof of service is shown that Mr. Haule from PCCB received the documents on that date. We find that his argument has no basis because the issue was not raised during the hearing of appeal in the first appellate court. This means that the appellant failed to establish his claim as guided by the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap 6 R. E. 2019. We accordingly agree with Mr. Haule that the appeal to the High Court was filed outside the prescribed time.

For the foregoing reasons, we agree with the finding of the first appellate court that the appeal was filed out of time.

Having so found, we dismiss the ground of appeal and the appeal is, therefore dismissed.

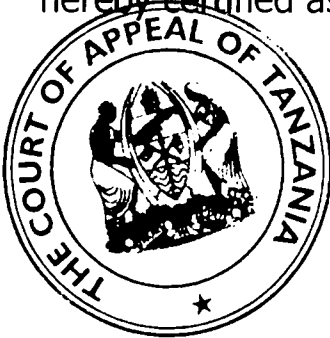
DATED at DODOMA this 6th day of December, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 6th day of December, 2022 in the presence of Ms. Tausi Subwa, learned State Attorney for the Appellant / Republic and Mr. Majaliwa Wiga, learned counsel for the respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL