IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT ARUSHA

CRIMINAL APPEAL NO. 43 OF 2018

(Originating from the District Court of Arushain Criminal Case No. 1258 of 2015 before Hon. D.K. Kamugisha, RM)

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT
VERSUS
LILIAN GERALD MGEYE.....1ST RESPONDENT
LIVINGSTONE JULIUS.....2ND RESPONDENT
DAUDI PETER NHOSHA.....3RD RESPONDENT
DOROTHY HAPINESS CHIJANA.....4TH RESPONDENT
TUNTUFYE AGREY.....5TH RESPONDENT
GENES MASAWE.....6TH RESPONDENT
CHRISTOPHER LYIMO @ CHRIS LYIMO.....7TH RESPONDENT
DEUSDEDITH CHACHA.....8TH RESPONDENT

RULING.

S.M. MAGHIMBI, J:

The appeal before me was filed by the appellants on the 16/04/2018 and emanates from the decision of the District Court of Arusha at Arusha in Criminal Case No. 1258 of 2015. The appeal is against acquittal of some of the respondents as well as the sentence passed on some of the respondents who were convicted by the trial court. It is pertinent to note that in its judgment, the trial court convicted the 1st, 3rd, 4th, 6th, 7th and 8th Respondents who have already lodged before this court Criminal Appeal No. 08/2018. The appellants herein have lodged an appeal against the same respondents on the sentence so passed by the trial court. In due course of the turn of these events, subsequent to the lodging of this

appeal, the respondents have raised two points of preliminary objection that:

(i) The intended appeal is hopelessly time bared.

(ii)The appeal is in abuse of Court process.

In their submissions, the respondents started with the first point of objection, that t***he intended appeal is hopelessly time bared. Their submission was that th***at the intended appeal by the Appellant is time bared since it has been filed out of the prescribed statutory period of filling appeals originating from the subordinate court (i.e District Court) without the Appellant seeking extension of time to file his appeal out of time. That the provisions of section **379 (1) (b) of the Criminal Procedure Act, Cap R.E 2002 (The CPA),** dictates that the Appellant has to lodge the appeal within Forty Five (45) days from the date of the appealed judgment. That the intriguing question that arises is whether the Appellant complied with the said provision of the law.

In answering the issue of time limitation, the respondents referred this court to the record of the lower court in Criminal case No. 1258 of 2015. They submitted that as per the said record, it is evident that the judgment which is subject of the purported appeal was delivered on the **3rd November 2017** and a certified copy of said judgment was signed on the **30/11/2017** and Court proceedings was certified on the **4th January 2018,** that means as of the 4th January 2018, the record for filling appeal was ready for collection and the statutory Forty Five days' time limit to file the appeal stated to run. They submitted that the Forty Five days were to be counted from the 5th January 2018 expired on the **18th day of February, 2018. They hence argued that** the appellant's appeal is time bared because it was lodged in Court on the **16th April 2018** i.e after

lapse of **One hundred and one (101) days** as from 4th January, 2018 or Forty Nine (45) days out of time as from 18th February, 2018 when appeal was supposed to be filed considering that the records were ready for collection since 4th January 2018. That there is neither any application for extension of time to lodge the appeal out of time nor any plausible explanation as to why this appeal has been lodged out of time.

The respondents then pointed out that perhaps the Appellants will seek to travel with a sinking ship by relying on a weak reason that, the Court delayed to supply them with the record. Their submission to this was that this would be a baseless reasoning to have ever been relied upon since the founding of the legal profession. That it is a practice that the Court has no duty in law to serve the record to the parties but it is a duty of the party that wish to lodge an appeal to obtain a copy of the records from the court and not otherwise, and even the law itself is very clear in that regards. They cited **Section 378 (1) (b) of the Criminal procedure code;**

> . *"(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."* (Emphasis is ours)

The respondents submitted further that the meaning of the word "**Obtain**"

as used in the above cited provision of the law; may be related to the definition given in the **Black Laws dictionary 9th Edition at page *1183*** *"obtain; come into possession of".* They argued that as per the said definition the Appellant had a duty to collect the said record from the Court, but if they decided to seat on their rights while waiting for the court to serve them with the said records then they only have themselves to blame for negligence and this Court cannot condone such an act.

The respondents submitted further that save for the 2nd and 5th Respondents, the Respondents herein, on the **18th day of January 2018** managed to procure the said records and as a result they lodged in this Court Criminal Appeal No. 8 of 2018 on the 25th day of January 2018. That on the 26th day of January 2018, Appellant was served by the Court with a copy of the Memorandum of Appeal in Criminal Appeal No. 8 of 2018 to wit records of the District Court i.e Judgment and Proceedings were appended to it and were served to the Appellant with the said memorandum of appeal. They argued that on the **26 day of January 2018** when the Appellant was served with the Memorandum of appeal annexed with the records thereof; this is when the Appellant came to obtain copies of the records; therefore he had Forty Five days to lodge a meaningful appeal within time or a cross appeal to that effect. Further that for reasons best known to the Appellant, he slept over his rights for more than 50 days from the time when he was served with the memorandum of Appeal in Criminal Appeal No. 8 of 2018 to the time when he lodged this appeal on the 16th day of April, 2018.

The respondents then implored this Court to ask itself if the Respondents managed to get hold of the record since 18 January 2018, what really prevented the Appellant from collecting the same even after had been

served with records (on 26 day of January 2018) which were annexed in the Memorandum of appeal in Criminal Appeal No. 8 of 2018. They argued that the obvious answer to this is negligence of the Appellant which has occasioned inordinate delay in filing this appeal in time.

In an alternative submission, the respondents admitted that S**ection 379 (2) of the CPA vests this c**ourt with powers to admit appeals out of time, once the Appellant has demonstrated a good cause for delay. Their argument was that the good cause was to be manifested during the application for extension of time by the Appellant and prior to the filling of our preliminary points of objections; but for reasons known to the Appellant they opted not to seek for extension of time. To support this argument, the respondents cited the decision of the Court of Appeal, sitting in Mbeya in the case of **Aidan Chale Vs. Republic Criminal Appeal No 130 of 2003,** where it was held that:

> *"We think that there is nothing inherently wrong in a court to which an application has been made to consider all or any of those matters as "good cause" for admitting an appeal out of time. But we have to come back to the same point, that a court should not act* ***suo motu*** *in favour of a party by assuming the existence of a request to it to extend the period limited by statute for bringing an appeal to it. To do so could lead to a subversion of the very purpose for which limitation period to appeal was statutorily fixed for both the private individual and the Director of public prosecution.*
>
> *We hold that the learned High Court Judge erred in assuming the role of an Applicant and in finding that "good cause" existed for admitting the appeal out of time"*

The respondents then submitted that regarding the scenario at hand, this

Court cannot admit this appeal under **section 379 (2) of the criminal procedure code** *suo motu.* The concluded their submission on the first point of objection by praying that the objection is sustained and as consequence the appeal be dismissed with contempt it deserves.

In reply, the appellant submitted that this contention has no legal foundation for this court to rely on. That when a copy of judgment and proceedings is sent by the court and delivered to the parties, time shall start running from the date of such receipt of a copy of judgment and proceedings and that is when it shall be termed as delivered by the respective party. They argued that in their intended appeal, the judgment and proceedings were delivered and received on 12th April 2018 and Petition of Appeal was filed on 13th April 2018 hence the petition was lodged within time as per the law.

On the respondents' argument that appellant ought to have relied on the records served by them, the appellant's reply was that the reason of the appellant filing notice of intention to appeal was for them to be served with the records of appeal by the court as per the law. That the 26th day of January 2018 that the respondents argued that is when the records of appeal was ready is the date Respondents served Appellants with their memorandum of appeal annexed with the records and not the day court served Appellant with copy of judgments and proceedings as requested vide their notice of appeal. That the same cannot be relied on by the Appellant as the Respondents forced it to be so and termed it as the day appellant came to obtain the copies. The appellant submitted further that Section 379 (1) (b) of the CPA requires the DPP to file his petition of appeal within 45 days from the date of acquittal, finding, sentence or order

against which the appeal is intended. That in reckoning the 45 days within which to lodge an appeal, the time requisite for obtaining a copy of the judgment and proceedings is excluded. The appellant submitted further that on the facts, the period between 16th November 2017 when Appellant filed its notice of intention to appeal and 12th April 2018 when they legally obtain copy of judgment and proceedings would be excluded and hence argued that the DPP appeal is within time as the certified copies that were delivered to DPP by court are of 12th April 2018. That the DPP lodged his appeal on 13th day of April 2018, just one day when he was properly served with the court proceedings and judgment as per the law. That going through the entire respondent's submissions, there is no anywhere, the respondents have cited any provision of the law or case law that obliges court to delegate its powers of serving documents properly requested by the party from court to the counter party. They hence argued that there is no any negligence on the part of the appellant as the petition was lodged within time and that the case cited by the Respondents in their submission does not fall within the walls of this case, as in the cited case DPP was indeed out of time.

On the respondents' contention that the appellant did not make any efforts to procure the records of appeal, their reply was that in their entire submissions, the respondents did not show any evidence that appellant did neglect or sit back without doing any efforts to obtain the records. Further that it was the respondent who obtained the certified copies from court on 4th January 2018 and not the appellant who obtained it on 12th April 2018. They argued that this is a factual issue, which ought to be established by way of evidence before the Court can act upon and that the only fact which stands uncontroverted is the fact the Appellant

was served with the said copies on 12th April 2018, as evidenced by a Court stamp.

On the respondents' argument that the appellant ought to have filed cross appeal, the appellant replied that the respondents should know that this appeal is not prompted by the their appeal, rather its from their notice of intention to appeal which was properly filed before the District court. That going through the entire CPA, there is no provision that when party wants to appeal but is forestalled because the opposite party or parties has/have filed a notice of appeal first, then DPP should file notice of cross appeal or cross appeal. They cited the wording of section 378(1) of the Criminal Procedure Act [Cap 20 R.E 2002] provides categorically that;

> "*Where the DPP is dissatisfied with an* ***acquittal, finding, sentence*** *or order made or passed by a subordinate court other than a subordinate court exercising its extended powers by virtue of an order made under section 173 of this Act, he may appeal to the high court*"

They hence argued that for this reason, the notice of intention to appeal which was filed on 16th day of September, 2017 which is thirteen days from the date of the judgment which was on 03rd November, 2017 intended to appeal against sentence and acquittal. They also pointed out what the respondents also admitted, that there is also an appeal against acquittal of 2nd and 5th respondents, which is all a new matter that cannot be consolidated with respondents appeal. That it is one of the reasons why the appellant had initiated separate appeal because for a very reasonable man there would be no meaning of having an appeal against acquittal and at the same time file cross appeal against sentence for the same parties, which would amount to the appellant filing two notices of appeal. That the

respondent's line of argument that appellant ought to have file separate appeal is irrational and prejudicial to the appellant, provided there is no jurisprudence in our country that prohibits having two appeals from the proceedings that emanates from a single decision/judgments. The fact that allowing this appeal would lead to conflicting decisions, these are speculations by the respondents which has no any legal stand.

The appellants also pointed their concerns on the way the respondents have been citing the CPA as the **Criminal Procedure Code** [Cap 20 R.E. 2002], which is non-existent in the Laws of Tanzania. They concluded by praying that the objection is dismissed for failure by the respondents to indicate the proper law that was violated by the Appellant, and citing wrong/non-existent provision of law, and without citing enabling provision of the law which give the power to the court to do what they requested, we therefore. They also argued that the objection has no legs to stand and should be dismissed.

In their rejoinder, the respondents reiterated their submission that the intended appeal is hopelessly time bared because the same was filled in Court after lapse of **One hundred and one (101) days** as from 4th January, 2018 or Forty-Nine (45) days out of time as from 18th February, 2018 when appeal was supposed to be filed considering that the records were ready for collection since 4th January 2018. They argued that the institution of criminal appeals from subordinate Courts to this Court is governed by S**ection 379 (1) (a) and (b) of the CPA which** does not impose the duty to the Court to serve the parties with the judgment and proceeding, but the same imposes the duty to the parties to obtain the same from the Court. Further that the appellants admitted to have been served with the copy by the respondent which was ready for collection on

the ***26th day of January 2018 which was*** **just a span of twenty two (22) days form the 4th January 2018 when the said documents were ready for collection**, but they are wrongly trying to put it that it was not the Court that served the said record but it was the appellant who did so. They cited the provisiond of S**ection 365 (1) of the CPA which provides:**

> *"If the High Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his advocate, and* ***to the Director of Public Prosecutions, of the time and place at which the appeal will be heard and shall furnish the Director of Public Prosecutions with a copy of the proceedings and of the grounds of appeal****; save that notice need not be given to the appellant or his advocate if it has been stated in the petition of appeal that the appellant does not wish to be present and does not intend to engage an advocate to represent him at the hearing of the appeal." (*Emphasis is ours)

They argued that the plain meaning of the cited authority is that the Court is the one, which served appellant with the Judgment and proceedings on the 26th January 2018, so now it is clear that the appellant had copies and a knowledge of the existence of the judgment and proceedings since that day. Further that the appellant failed to elaborate what transpired on their part not either to go to Court and procure the Copies directly from the Court or if they verified with the registry if the judgment and proceedings served to them on the 26th January 2018 are genuine. Further that for the Court to be in a position to Count time limitation to file the appeal, it has to see the records of the court to satisfy itself on when the records were

ready for collection and that the records are clear that the judgment and proceedings which is subject for the intended appeal was ready for collection since 4th January 2018 and the respondents managed to obtain the same from the Court since 18th January 2018. On the argument raised by the appellant that the respondents cited the wrong provisions of the law, the respondents reply was that there is no any application which has been proffered by the respondents, hence the mistake in citing the law to support the non-contentious fact (Forty Five days limitation to file appeal) does not make the preliminary objection incompetent.

On my part, I have considered the objection raised and the parties' submission for and against the raised objection. I have also gone through the records of both this appeal and the Criminal Appeal No. 08/2018 which is pending before this court. The issue in contention in the first point of objection that the appeal is time barred; is mainly on the interpretation as to when the appellant, the Director of Public Prosecutions is deemed to have been served with the copies of the records of the lower court for the purpose of this appeal. It is the background of this appeal has developed the current issue. As I have stated earlier in this ruling, there is already an appeal lodged by the respondents (save for the 2nd and 5th respondents) against their conviction and sentence, Criminal Appeal No. 08/2018 lodged in this court on the [redacted] The respondents' argument is on the fact that at the time the appeal was lodged, the appellant herein (then respondent) was served with the copies of the records of the same Criminal Case No. 1258/2015 a subject of this appeal and also a subject of the Criminal Appeal No. 08/2018. They hence contend that the same records should have been used to lodge the current appeal and that the computation of

time for this appeal commenced on the 18/01/2018 when the documents were ready for collection. On the other hand, the appellant's argument is that he lodged his own notice of appeal on the 16/11/2017 requesting, along with the notice, copies of proceedings and judgment for the purpose of this appeal and that he only lodged this appeal after being served with the response of the court by supply of the requested copies, hence the computation of time for this appeal commenced on the 12/04/2018 when he was supplied with those copies.

Having gone through the records of the trial court, the judgment that is subject to both appeal was delivered on the 3rd November 2017 and the certified copy of said judgment was signed on the 30/11/2017. Subsequently the Court proceedings were initially certified on the 4th January 2018 which is the day that the records of the court are deemed to have been ready for collection. Indeed as correctly argued by the respondents, the computation of time for the purpose of any appeal commenced on the 05th day of January, 2018 the next day after which the records were certified. It is hence obvious that had the appellant been keen in making the follow up of his request, he would have found that the records were ready on 04/01/2018. That notwithstanding, the appellant was served with the said records when the respondents (save for 2nd and 5th respondents) lodged their appeal and the court notified them of the appeal. Correctly so argued by the respondents the statutory Forty Five days' time limit to file the appeal stated to run from the 5th January 2018 expired on the 18th day of February, 2018.

I must admit, there is a confusion on the part of the court records We have a copy of proceedings certified on the 04/01/2018 and yet again we have another copy of proceedings certified on the 12/04/2018. The question

here is that, can the proceedings of the same court be certified twice on different dates? The answer is definitely no. what is to be counted as the true records of the court is the intial records that were certified on the 04/012018. It is not even clear as to why the appellant was given his own set of proceedings certified on a different date to match their convenience in lodging the appeal. As far as this court is concerned, since the appellant admits to have received the records of the appeal when the Criminal Appeal No. 08/2018 was lodged, it is conclusive that he was seized with the court records and hence subject of the time limitation from the 04/01/2018 when the said copies were ready for collection. Whether he was waiting for his own golden plate of his share of the certified copies is defiantly not the concern of this court. As far as the records go, it is undisputed that the records/certified copies of Criminal Case No. 1258/2015 were ready for collection as from the 04/01/2018. Computing from the 05/01/2018 when the computation begun, the present appeal was to be lodged in this court by latest the 18/02/2018. Since no extension of time was obtained by the appellant, I sustain the first preliminary point of objection raised by the respondents that this appeal is hopelessly time barred. Having so sustained the first point of objection, I see no reason to dwell on the second point of objection. The appeal before me being time barred, it is hereby dismissed.

Preliminary Objection Sustained.

Dated at Arusha this 29th day of August, 2018

HIGH COURT OF TANZANIA

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S. M. MAGHIMBI

JUDGE