IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO 94 OF 2018

(Arising from Criminal Case No. 81 of 2018 of the District Court of Maswa at Maswa)

JUMA S/O MASUNGA .....1ST APPELLANT
JILALAS/O DAUDI @ MASELE.....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

RULING

Date of the last Order: 16th January, 2020
Date of the Judgment: 23rdJanuary, 2020

E.Y. MKWIZU, J.

The appellants **JUMA MASUNGA** and **JILALA DAUDI @ MASELE** were convicted by the District Court of Maswa at Maswa in Criminal Case No. 81 of the two offences Burglary and Stealing contrary to **sections 294 (2) (1) (b) and 258 (1)of the Penal Code, Cap. 16 R.E. 2002** as amended by Act No. 4 of 2004. As a result, they were sentenced to imprisonment for a term of 20 years on the first count of burglary and 7 years jail term on the second count of stealing.The above sentences were to run concurrently.

Dissatisfied with the conviction and sentence, appellant appealed to this court, each filling a separate petition of appeal challenging the decision of the trial court all lodged on 1st October, 2018. It significant in my view, to note here that, the record contain no notice of appeal.However in their petition of appeal,appellant indicated at the bottom of each petition that the notice of appeal be found in the record of criminal appeal No 60/2017.

As if that is not enough, the records of appeal were accompanied with a decision of this court (Hon. Makani J) in DC Criminal Appeal No 60 of 2017, dated 29th November, 2017 relating to the present appellants. In that decision the court had found that appeal No 60/2017 originated from two different case files that is Criminal Case No 81 of 2016 and Criminal Case No 82 of 2016 which were consolidated at the judgement level by the trial court on 29th November 2016. After the court had looked at and considered circumstances and stages on which consolidation should be done, it arrived at the conclusion that the trial court misdirected itself in consolidating the cases after it conducted a separate trial. The court said: -

> *"...Consolidating the cases at the judgement lever,and giving an omnibus conviction was an irregularity.Having conducted*

separate trials, the trial court was supposed to arrive at separate conviction on each of the counts in the respective cases.It is apparent from the record that the court acted upon the cases separately including taking the pleas,calling witnesses and presentation of evidence.In other words,there was no common trial in respect of the cases as the pleas and evidence were taken independently and therefore the trial magistrate giving an omnibus conviction was misdirection on his part...It is also difficult at this stage to construe and give a fair decision in respect of the appeal... all in all the irregularity by the trial court goes to the root of the matter and the judgement is accordingly acquiescent to revision...."

The court, therefrom invoked its revisionary powers, and went on to say at page 3 and 4 of the typed decision:

"...I...order that the record be returned to the trial court for the sole purpose that the trial magistrate composes separate judgements in respect of criminal case No 81 of 2016 and criminal case No.82 of 2016"

On the fate of the appellants, the court ordered them to remain in custody pending the composition of the separate judgements and that they are at liberty to file fresh appeals thereafter. This order was dated 29th November,2017

When this appeal came before me for hearing on 16th January,2020, the court wanted to satisfy itself as to the competence or otherwise of the appeal by the appellants. This was due to the fact that, the present appeal is said to have originated from a decision in Criminal case No 81 of 2016 but which is dated 29thNovember, 2016 the same date on which the original consolidated decision was delivered.

In addition, the records are silent on whether the trial court complied with the order by Hon. Makani J dated 29th November, 2017. What is on the record is a certified decision in Criminal Case No.81 of 2016 certified on 8th June,2018.

Yet again as stated above, the appellant did not file a fresh notice of appeal. They just made reference on their petition of appeal to the notices of appeal they had filed in respect to the struck out appeal No 60 of 2017.I think it is appropriate to reproduce the wording of the petition:-

"Notice of appeal given on 03/12/2016

(he notice may be found in records of the H/C App.No.60/2017)"

At the hearing of the appeal, the appellants appeared in person, unrepresented, while Ms. Immaculate Mapunda learned State Attorney appeared for the respondent, Republic. This court made the facts above known to the parties and required parties to explain on whether the appeal before itis competent.

The appellants readily admitted that according to the record of appeal, their appeal came before Hon Makani J who directed them to go back and have the judgement separated at the trial court and come back afresh. They said, they have now come again in this court after being supplied with a separated decision.They however, blamed the court for delaying the matter and prayed for directives by this court on the way forward.

In response to the issues raised, Ms. Mapunda, learned State Attorney, for the respondent, Republic was quick to submit that, the appeal before this court is time barred and therefore it should be struck out with leave to refile.

Upon a close scrutiny of the issues raised, the party's submissions and upon perusing the courts records, I am of the respectful opinion that, this appeal is not properly before me. As hinted above,the record is silent as to when the judgement in respect of the criminal appeal No 81 of 2016 subject of the present appeal was delivered to the parties after the directives of this court on 29th November,2017(Hon. Makani J). As stated earlier. The trial court was directed to split the decision which had combined two cases that is, Criminal case Nos 81 and 82 all of 2016.

What does compliancy to this order entails? It is my considered view that, the trial magistrate was required to prepare a separate judgments in respect of Criminal case No 81 of 2016 and 82 of 2016 and deliver them to the parties according to the provisions of sections311 and 312 (1) of the Criminal Procedure Act, Cap 20.I quote for easy of reference:

> *"311.- (1)* ***The decision of every trial of any criminal case or matter shall be delivered in an open court*** *immediately or as soon as possible after termination of trial, but in any case not exceeding ninety days, of which notice shall be given to the parties or their advocates, if any, but where the decision is in writing at the time*

of pronouncement, the Judge or Magistrate may, unless objection to that course is taken by either the prosecution or the defence, explain the substance of the decision in an open court in lieu of reading such decision in full.

*2) The accused person **shall,** if in custody, be brought up or, if not in custody, be required by the court to attend to hear judgment delivered except where his personal attendance during the trial has been dispersed with and the sentence is one of fine only or he is acquitted*

*312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and **shall** be **dated and signed by the presiding officer as of the date on which it is pronounced in open court."***

I wish to observe here that the above sections are couched in a mandatory terms. In this context, section 53(20) of the **Interpretation of Laws Act** (CAP 1 R.E.2002) is of importance. Itprovides: -

> *"Where in any written law the word "shall" is used in conferring a function,such word shall be interpreted to mean that the function so conferred must be performed"*

It follows therefore that,after the judgement is prepared,it should be;**One,**pronounced in an open court.**Second,**pronounced in the presence of the parties unless their attendance is dispensed with at the hearing andthe sentence is one of fine only or he is acquitted. **And lastly,** that,it must be signed and dated by the trial court on the date when the said decision is pronounced in open court.

Coming to the appeal at hand, by the directive of this court in the decision of Hon. Makani J, the trial magistrate was expected to do what the law under the above cited sections required. First and foremost, he was required to prepared a judgement,summon parties including the appellants who were still incarcerated,pronounce a fresh judgement in an open court and have it signed and dated on the date when it was pronounced. This was not done.

There records are silent as to whether the trial court summoned the parties after the order of Honourable Makani J. It is not clear as to whether the split judgement was delivered to the parties and when.The records are also silent on when the parties got hold of the new judgement.The judgement attached by the appellants in their petition of appeal is dated 29th November 2016 and at page 12 of the said judgement, it is said to have been delivered to the parties on 29th November, 2016. The paragraph says:-

> *"Delivered: this 29th November, 2016 in an open court in the presence of the public prosecutor and three accused person Right of appeal is fully explained.*
>
> ***Sgn: T.J. Marwa, RM***
>
> ***29/11/2016"***

By any standard,this judgement is not the decision anticipated by the Hon.Makani J's order.It is something else which lacks explanation so to speak. I say so because, Hon. Makani's decision was given on 29th November, 2017, thus, the decision by the trial magistrate resulting from that directives would be expected to be dated after the decision giving the

directives. The trial courts failure to comply with the court's order had led to a total confusion to the appellant as well as to the court and has contributed to a multiplicity of appeals in this court.

From the foregoing, therefore, there is no dispute that the appeal before me is incompetent.Even if it is taken that the judgement purported to be delivered on 29/11/2016 in criminal case No 81 of 2016 above is a correct version of the trial court's decision,still,the appeal before me would not beproper.As I have tried to show, the appeal was filed without a valid notice of appeal.Appellant were in this appeal, required to file their notices of appeal within ten (10) days after the decision of the trial court in Criminal case No 81 of 2016 as per section 361 (1) (a) of the Criminal procedure Act.

It must be noted that the appellants notice of appeal referred to in their petition of appeal were in respect of Criminal appeal No 60 of 2017.The said notices functionality ended with the opening of the said criminal appeal and which was struck out for reasons I have indicated in this ruling. For that reason the same Notices could not be used to open and file the present appeal.This takes me to a conclusion that, there is no notice before me to initiate a valid appeal. This appeal therefore is incompetent.

All said and done, I am satisfied that trial magistrate did not comply with the court order.I am therefore inclined to declare the purported appeal beforethis court incompetent and strike it out. I remit the record to the trial court for it to comply with the order of Hon.Makani J dated 29th November, 2017, deliver the judgment to parties as required by **sections 311 and 312 of the CPA**. This being a delayed exercise, it should be done with an immediate effect. The appellants therefrom can process afresh appeal subject to the law.

It is so ordered.

DATED at **SHINYANGA** this 23rd February, 2020

E.Y. MKWIZU
JUDGE
23/1/2020