

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

PC CRIMINAL APPEAL NO. 15 OF 2020

*(Originating from Karatu District Court in Criminal Appeal No. 22 of
2019, arising from Karatu Primary Court in Criminal Case No. 242 of
2019)*

PAULA DIONIS APPELLANT

Versus

JOHN MATHEO RESPONDENT

JUDGMENT

9th March & 7th May, 2021

Masara, J.

This is a second appeal preferred against the Respondent after his Appeal was allowed by Karatu District Court (the first Appellate Court). In Criminal Case No. 242 of 2019 filed at Karatu Primary Court (the trial Court), the Appellant was the complainant against the Respondent and another person named Domitila Daniel. A charge of Malicious Damage to Property was preferred against the two accused persons in the trial Court. According to the charge, on 5/2/2019, at 11:00hrs, in Marera Village, Karatu District within Arusha Region, the two accused persons were found uprooting trees in the Appellant's farm valued at TZS 232,500/=. The trial Court found the Respondent guilty while Domitila Daniel was acquitted. The Respondent was sentenced to conditional discharge of three months. He was further ordered to pay compensation of TZS 100,000/= to the Appellant as the value of the damaged trees. The Respondent was aggrieved, he appealed to the first Appellate Court vide Criminal Appeal No. 22 of 2019. The first Appellate Court allowed the appeal and acquitted the Respondent.

The Appellant was aggrieved by that decision, he has preferred this appeal praying that this Court nullifies the judgment and proceedings of the first Appellate Court on the following grounds:

- a) That, the Honourable Magistrate of the first Appellate Court erred in law in entertaining an incompetent appeal;*
- b) That, the judgment of the first Appellate Court is bad in law for want of logic, reasoning and supporting authorities;*
- c) That, the judgment of the first Appellate Court is bad in law for being arrived without taking into consideration submission and supporting authorities filed by the present Appellant (Paula Dionis);*
- d) That, the Honourable Magistrate of the first Appellate Court was biased in determining Criminal Appeal No. 22 of 2019 thereby arrived into erroneous decision; and*
- ~~*e) That, the Magistrate of the first Appellate Court misdirected himself in setting aside the trial Court's decision and holding that the advocate for the present Appellant did not oppose the submission filed by the present Respondent (John Matheo).*~~

At the hearing of the appeal, the Appellant was represented by Mr. Felichismi Baraka, learned advocate, while the Respondent appeared in Court in person, unrepresented. Parties requested and the Court agreed that the appeal be argued through filing of written submissions. On 22/10/2020 the schedule for filing submissions by the parties was set as follows: the Appellant was to file submission in chief by 5/11/2020, the Respondent was to file his reply submission by 19/11/2020, a rejoinder submission was to be filed by 26/11/2020 and the appeal was set for mention on the same day. The record shows that the Appellant filed her submissions as per the schedule but the Respondent did not file his reply submissions. On 9/3/2021, when the matter came for fixing a date of judgment, the Respondent was asked why he did not file his submissions as directed. The Respondent simply responded that he asked his lawyer to assist him but he could not trace him.

It is notable that the Respondent depicts unseriousness in prosecuting this appeal. It is trite law that failure to file written submissions as ordered by Court is tantamount to failure to enter appearance in Court on the date fixed for hearing. There is a litany of authorities on this aspect. See for example: ***Masunga Mbegete & 2 others Vs. The Hon. Attorney General & Another***, Civil Application No 68 of 2010, ***Joseph Daud Paul Vs. Registrar of Titles***, Civil Appeal No. 128 of 2004, ***Godfrey Kimbe Vs. Peter Ngonyani***, Civil Appeal No. 41 of 2014, and ***National Insurance Corporation (T) Ltd & Another Vs. Shengena Limited***, Civil Application No. 20 of 2007 (all unreported). In ***Godfrey Kimbe Vs. Peter Ngonyani*** (supra) the Court observed that:

"By not filing any reply submissions contrary to the order of the Court of 16.06.2017, the appellant has therefore failed to defend the preliminary objection and the Court is entitled to proceed with the ruling as if he did not appear at the hearing despite being duly served with the Notice of Hearing."

I subscribe to the above position of the law. Since the Respondent failed to file his reply submission as ordered by the Court, it is obvious that he has failed to defend the appeal. He is taken to have defaulted appearance on the date the case was set for hearing. In the prevailing circumstances, I will determine the appeal basing on the Appellant's submissions only.

Submitting in support of the first ground of appeal, Mr. Baraka contended that the first Appellate Court determined an incompetent appeal for two reasons. First, Criminal Appeal No. 22 of 2019 was filed out of the statutory time. He maintained that the appeal was filed on 10/6/2019 while the judgment in respect of Criminal case No. 242 of 2019 was delivered on 9/10/2019. In that regard, the appeal to the first Appellate

Court was filed 32 days after the judgment of the trial Court was delivered contrary to section 20(3) of the Magistrates Courts' Act, Cap 11 [R.E 2019] (hereinafter the MCA). According to Mr. Baraka, the Respondent ought to have made formal application for extension of time but he opted not to. That extension of time cannot be assumed. To support his argument the learned advocate referred to a myriad of decisions such as: ***Eliminata Masinda & Another Vs. Maswet Masinda & Another***, (PC) Civil Appeal No. 11 of 2018, ***Amina Khalifani Vs. Sara Lifa Lyimo***, Civil Appeal No. 10 of 2018, ***Augustino Elias Mdachi & 2 Others Vs. Ramadhan Omari Ngaieba***, Civil Appeal No. 270 of 2017 and ***Kisioki Emmanuel Vs. Zakaria Emmanuel***, Civil Appeal No. 140 of 2016 (all unreported)

Second, Mr. Baraka submitted that the first appeal was incompetent since in the trial Court the case involved two accused persons but, in the appeal, the second accused's name was omitted. He asserted that regardless of the fact that the second accused was acquitted in the trial Court, her name had to appear so that the record reflects the trial Court's record. The counsel further stated that the first Appellate Magistrate ought to have struck out the appeal for being incompetent. To bolster his argument, Mr. Baraka cited the decision in ***Marwa Mahende Vs. Republic*** [1998] TLR 249.

Elaborating on the 2nd and 3rd grounds of appeal combined, Mr. Baraka fortified that the first Appellate Magistrate did not consider the submissions by the counsel for the Appellant in his decision particularly regarding the issue of time limitation and non-joinder of a necessary party

which was raised thereat. In his view, the first Appellate Magistrate decided the case not basing on the facts and authorities presented by the Appellant's counsel but on his own facts.

Regarding the 4th and 5th grounds of appeal, the learned counsel submitted that the judgment of the first Appellate Court was biased for failure to consider the submissions of both parties. That, the first Appellate Magistrate was wrong to state that the advocate for the Appellant did not reply to the submission made by the Respondent herein, while it was not true. Further, that the first Appellate Magistrate was biased since he decided to proceed with the appeal despite being out of time and in contravention of the law. Moreover, the first Appellate Magistrate was ~~biased for accepting the Respondent's submission which was without a Court order and that even the rejoinder submission was filed contrary to the scheduling order.~~ Mr. Baraka concluded that the first Appellate Magistrate was not impartial in determining the appeal, which signifies that he was prepared to rule the appeal in favour of the Respondent from the very beginning.

Basing on the above submission, Mr. Baraka implored the Court to allow the appeal by setting aside the decision of the first Appellate Court and uphold the decision of the trial Court which had opportunity to assess both the demeanour and credibility of witnesses.

I have considered the lower Courts records, the grounds of appeal and the submissions by the counsel for the Appellant in support of the grounds

of appeal. I will determine the grounds of appeal in the course taken by the Appellant's counsel.

The first ground of appeal hinges on the competency of the appeal in the first Appellate Court. Mr. Baraka's complaint is that the appeal to the District Court was filed out of time. This, in his view, contravened section 20(3) of the MCA. For the purpose of clarity, the relevant provision provides:

*"20(3) Every appeal to a district court shall be by way of petition and shall be filed in the district court **within thirty days after the date of the decision or order against which the appeal is brought.**"*

(4) Notwithstanding the provisions of subsection (3)-

(a) the district court may extend the time for filing an appeal either before or after such period has expired; and

(b) if an application is made to the district court within the said period of thirty days or any extension thereof granted by the district court, the district court may permit an appellant to state the grounds for his appeal orally and shall record them and hear the appeal accordingly."

(emphasis added)

In the light of the above provision of the law, it is apparent that appeals from Primary Courts to the District Courts are to be filed within 30 days from the day the judgment sought to be challenged was delivered. In the instant appeal, it is true, as contended by Mr. Baraka and from the record of the lower Courts, that the trial Court judgment was delivered on 9/5/2019 and Criminal Appeal No. 22 of 2019 was filed on 10/6/2019. I have taken time to look through that year's calendar. Counting from 9/5/2019 when the impugned trial Court judgment was delivered to the time the appeal was filed on 10/6/2019, there are 32 days and not 30 days as was held by the first Appellate Magistrate. Time limit for filing appeals is statutorily provided and must strictly be adhered to. In

Tanzania Diaries Ltd Vs. Chairman Arusha Conciliation Board and Another [1994] TLR 33, the Court stated that:

"Once the law puts a time limit to a cause of action, that limit cannot be waived even if the opposite party desists from raising the issue of limitation"

The above decision underscores the importance of observing time before taking any action. Having noted that the appeal was out of time, all the Respondent needed to do was to apply for extension of time so that he could file his appeal outside the statutory 30 days provided by law. See ***Augustino Elias Mdachi & 2 Others Vs. Ramadhan Omari Ngaleba*** (supra). Appeals which are time barred are rendered incompetent. They cannot be entertained. I am fortified by the Court of Appeal decision in ***Sadallah Ibrahim Sadailah Vs. Nemganga Sadailah and Another***,

Civil Appeal No. 351 of 2019 (unreported), where it was stated:

"Based on the foregoing, this purported appeal is time-barred. We have no other recourse other than to strike it out. We accordingly strike out this incompetent appeal without any order as to costs."

The issue of time limitation was raised in the first Appellate Court but, as contended by Mr. Baraka, the first Appellate Magistrate did not give it considerable weight. He simply concluded that the appeal was within time. Had he taken time to give it a viable scrutiny, this ailment would have been cured in the earliest stages.

Before concluding this ground of appeal, I find it imperative to discuss the second complaint discussed by Mr. Baraka. That is a complaint that parties in the trial Court are not one and the same as parties in the first Appeal, I agree with the holding of the first Appellate Magistrate that the same is misconceived. The second accused in the trial Court, Domitila Daniel, was

acquitted by the trial Court. There was no reason of including her name in the appeal since she was no longer a party to the case. Further, the appeal was preferred by the Respondent alone. It is possible for an appeal to be preferred by a single appellant in a case with more than one party. An appeal is preferred by the aggrieved party. The cited case of ***Marwa Mahende Vs. Republic*** (supra) was misapplied since that case dealt with the procedure of taking a person convicted in absentia before the trial Magistrate/Judge so that he may afford reasons for his absence. I do not find merits in this complaint.

For the above reasons, I find merits in the first ground of appeal on the aspect of the appeal being time barred in the first Appellate Court. It goes without saying that the appeal was in fact filed outside the prescribed time. The first ground of appeal is therefore partly allowed.

It will be pedantic of me if I was to discuss other grounds of appeal considering the conclusion made regarding the first ground of appeal. The first ground of appeal on the aspect of time limitation sufficiently disposes the appeal. Considering the fact that the appeal in the first Appellate Court was time barred, its decision cannot be left to stand since it stemmed from a nullity. In the exercise of revisional powers conferred to me under section 30(1) of the MCA, I hereby quash and set aside the proceedings and judgment of the first Appellate Court for being a nullity.

Consequently, this appeal is allowed on the reasons aforestated. For avoidance of doubts, the decision of the trial Court is restored. If the Respondent is still interested to appeal against the trial Court's findings,

he is advised to apply for extension of time before the first Appellate Court to enable him to pursue the intended appeal.

Order accordingly.



A handwritten signature in black ink, appearing to read "Y. B. Masara".

Y. B. Masara

JUDGE

7th May, 2021


