

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 26 OF 2021

*(From The original Economic Case No. 01 of 2019 at the District Court of
Ukerewe at Ukerewe)*

DPP.....APPELLANT

VERSUS

JUDITH MFUNDA MGAYA.....RESPONDENT

RULING

Date of last Order: 15.06.2021

Date of Ruling: 16.06.2021

A.Z. MGEYEKWA, J

The appellant lodged this appeal under section 378 (1) and 380 (1) and (2) of the Criminal Procedure Act, Cap. 20 [R.E 2019] together with the notice of appeal made under section 379 (a) of the Criminal Procedure Act, Cap. 20 [R.E 2019]. In order to appreciate the decision I am going to make in this ruling, I find it pertinent to narrate, albeit briefly, material background facts to the appeal. They go thus: in the District Court of

Ukerewe, vide Economic Case No. 01 of 2019, the respondent was charged on three counts; the first count is corruption transaction contrary to section 15 (1) (a) of the Prevention and Combating of Corruption Act No. 11 of 2007.

On the second count; corrupt transaction contrary to section 15 (1) (a) of the Prevention and Combating of Corruption Act No. 11 of 2007. On the first and second counts, the DPP alleged that It was alleged that on 2nd February, 2019 and 7th February, 2019 at Ukerewe District within Mwanza Region, being the employee of the Ministry of Livestock and Fishing as Fisheries Officer cum the Incharge of Fish Resources protection did corruptly solicit the sum of Tshs. 5,100,000/= from one Thobias James Kaswahili as an inducement for herself to return their Boats Engines which were cased.

On the third count; corrupt transaction contrary to section 15 (1) (a) of the Prevention and Combating of Corruption Act No. 11 of 2007. It was alleged that on 2nd February, 2019 and 7th February, 2019 at Ukerewe District within Mwanza Region, being the employee of the Ministry of Livestock and Fishing as Fisheries Officer cum the Incharge of Fish Resources protection did corruptly solicit the sum of Tshs. 6,100,000/= from one Simon Daudi Haule, Myama Mafuru Mgeta, Budutu John Budutu,

and Kaligita Meshack Daudi as an inducement for herself to return their Boats Engines which were cased. The accused denied all the charges thus, to prove their case the prosecution side called nine witnesses and the accused person was a sole defence witness.

The matter was determined to its finality, the trial court found that the prosecution has failed to prove their case beyond reasonable doubt as a result the suit was dismissed. Dissatisfied, the respondent lodged the instant appeal seek to impugn the decision of Ukerewe District Court in doing so he has filed six grounds of appeal. The appeal stumbled upon a preliminary objection. Mr. Mashauri, learned counsel for the respondent pooped up two points of preliminary objections as follows:-

- 1. That the appeal is incompetent for being time barred.*
- 2. That, the petition of appeal is incurably defective for not being properly endorsed.*

The matter was called for hearing of the preliminary objection on 15.06.2021, whereby Mr. Mashauri, represented the respondent Judith Mfunda Mgaya while Mr. Maximilian Kyabon, learned Advocate appeared for the appellant, the Director of the Public Prosecution.

Arguing for the first limb of Preliminary Objection that the appeal is incompetent for being time barred, Mr. Mashauri submitted that, the appeal is out of time. To bolster his submission, Mr. Mashauri referred this court to section 379 (b) of the Criminal procedure Act, Cap. 20 [R.E 2019]. He contended that the applicant was required to file an appeal within 45 days after the deliverance of the judgment. He went on to argue that the District Court delivered its judgment on 15th December, 2020 and the appellant filed the instant appeal on 25th February, 2021. Counting the 45 days, the application was required to be filed on or before 30th January, 2021. He complained that the appellant did not move the court to determine the instant appeal neither did apply for an extension of time to file an appeal out of time.

The learned counsel for the appellant went on to urge this court to consider that, the proceedings and Judgment were issued timely and the applicant has not proved otherwise. Insisting, he contended that the appellant did not file any letter requesting for trial court proceedings to justify his delay. Fortifying his submission he citing the case of **DPP v Mkika Warobi & 4 Others**, Criminal Appeal No. 24 of 2021, HC in Mwanza whereas this court was faced with the same scenario, this court ruled out that an appeal is not an automatic right and when the appellant

is out of time has to apply for an extension of time as required. He urged for this court to dismiss the appeal.

Submitting on the 2nd limb of Preliminary objection, the learned counsel for the respondent contended that, the petition of appeal is incurable defective for want of endorsement. He avers that the petition of appeal is neither signed nor dated. He added that the same means the person who filed the appeal is unknown and it is not known when the appeal was lodged. He insisted that any pleading must contain a date and a signature of the maker, otherwise the appeal is as good as nothing.

On the strength of the above submission, Mr. Mshauri beckoned upon this court to uphold the preliminary objections and dismiss the appeal.

Responding to the first limb of Preliminary Objection, Mr. Maxmilian, learned Advocate submitted that, as per section 379 of the Criminal Procedure Act, Cap. 20 [R.E 2019], the time used to obtain copies is excluded. He insisted that they obtained the lower court copies on 03rd February, 2021, and filed the instant appeal on 24th February, 2021. Therefore, in his view, the appeal was lodged before this court within time. He insisted that the point of preliminary objection is demerit and prays this court to disregard it and proceed with the hearing.

With respect to the second limb of Preliminary Objection, he avers that the learned counsel did not cite any law that supports his argument. He cited the case **of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696. He insisted that the Preliminary Objection must be purely on point of law. He stated that failure to endorse the petition is curable since it does not jeopardize the rights of the respondent. He added that the court can order the appellant to file an amended petition of appeal. He claimed that the omissions were a result of electronic filing but the hard copy was duly endorsed.

On the strength of the above submission, Mr. Maximilian urged this court to dismiss the point of preliminary objection.

In his short rejoinder, Mr. Mashauri, learned counsel for the respondent reiterated his submission in chief and insisted that the appeal is out of time. He kept on insisting that the appellant acknowledged that the petition is defective however, in his view, the defects are incurable, and the same cannot be amended. He landed by praying for this court to dismiss the appeal.

In the determination of the preliminary objection, I have opted to start with the first limb of Preliminary Objection that the instant appeal is incompetent as it is time barred. The issue for determination is *whether*

the appeal is time barred or not. The provision of section 379 of the Criminal Procedure Act, Cap.20 [R.E 2019] provides for a limit time of 45 days to file an appeal from the date of the court decision, in computing the period, the days when parties were waiting for copies of proceedings, judgment or order are excluded. For ease of reference, I reproduce section 379 of the Criminal Procedure Act Cap.20 [R.E 2019] as hereunder:-

"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-

(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."

Going through the court records, it is revealed that the trial court Judgment was delivered on 15th December, 2020 and this instant appeal was filed on 25th February, 2021 which makes a total of 76 days. The statutory day to lodge the instant appeal was on or before 30th January, 2021. The appellant's Advocate claimed that he received the copies on

03rd February, 2021. Unfortunately, there is no document to support his assertion. Thus, it is my finding that this appeal was filed beyond the statutory time limit of 45 days as required by the law.

For the aforesaid finding, I am in accord with Mr. Mashauri, learned counsel for the respondent that the instant petition of appeal is time barred and the appellant did not apply for an extension of time as required by the law. The record reveal that the appellant filed the notice of appeal on 08th January, 2021 and on the same date vide a letter with Ref. number Corruption Case No.01 of 2019 requested to be supplied with a copy of the proceedings. However, the record is silent as when exactly the copies were supplied to the appellant. Consequently, I do not buy Mr. Maximilian claims that they obtained the said copies on 03rd February, 2021 thus, their claims that they filed the appeal within time is unfounded.

Regarding the ground of delay that he delayed to file the instant appeal because he was waiting to be supplied with certified copies cannot stand. In my respectful view, this is a ground for application for extension of time. What is stated by the appellant learned counsel is giving himself powers to apply for the discretion of the court to grant himself an extension of time for reasons known to himself. I am in accord with the respondent's learned counsel that an appeal is not an automatic right and

when the appellant is out of time a party has to apply for an extension of time and it is the court that is vested with powers to grant the same not otherwise. I am in accord with my learned brother Hon. Rumanyika J, in the cited case **of DPP v Mkika Warobi & 4 Others** (supra) that an extension of time can only be granted not at the whims of the parties but at the discretion of the court upon application.

For the aforesaid reasons, this point of preliminary objection suffices to dispose of the appeal. Therefore, I hereby proceed to dismiss the Criminal Appeal No. 26 of 2021 for being time barred. No order as to the costs.

Order accordingly.

DATED at Mwanza this 16th June, 2021.


A.Z MGEYEKWA

JUDGE

16.06.2021

Ruling delivered on this date 16th June, 2021 via audio teleconference whereas both learned counsels were remotely present.




A.Z MGEYEKWA

JUDGE

16.06.2021