

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

CRIMINAL APPEAL No. 45 OF 2021

(C/F Criminal Case No. 426 of 2019 of the District Court of Moshi at Moshi)

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

OPOTUNA D/O VERANI NJAU 1ST RESPONDENT

VERANI S/O VALERIAN NJAU 2ND RESPONDENT

RULING

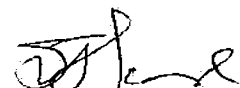
4th April & 25th May, 2022

SIMFUKWE, J.

This appeal originates from the District Court of Moshi at Moshi (trial court) in **Criminal Case No. 426 of 2019** where the Respondents were arraigned with one offence of Assault Causing Bodily Harm contrary to section **241 of the Penal Code, Cap 16 R.E. 2002**, and Now R.E.2019. The trial magistrate acquitted the Respondents after being satisfied that the case against them was not proved at the required standard. Aggrieved with the decision, the Appellant had preferred this appeal on one ground:

- 1. That, the trial magistrate erred in law and fact in faulting the prosecution case while the charge against the respondents had been proven beyond all reasonable doubt. (sic)*

Before the appeal was heard on merit the respondents raised the following points of preliminary objections:

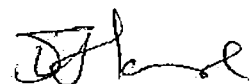


- a) *That, the Appellant's Appeal is defective before this Court for being hopelessly time barred.*
- b) *That, the Appellant's appeal is defective for it contravenes mandatory provision of **section 361 (1) (a) of the Criminal Procedure Act, Cap 20 R.E. 2019 (CPA).***
- c) *That, the Appellant's appeal is improper before this Court for it contravenes mandatory provision of section 362 (1) and (2) of the CPA.*

During the hearing of the preliminary objection, the Appellant was represented by Mr. Rweyemamu, learned State Attorney whereas the Respondents were jointly represented by Mr. Gideon Mushi, and learned counsel.

Supporting the objection Mr. Mushi opted to abandon the 2nd point of objection and submitted on the 1st ground that, this appeal is hopelessly time barred and filed contrary to **section 361 (1) (b) of the CPA** which provides that the same should be filed within 45 days from the date of delivery of judgment. He added that, paragraph (c) of the same section provides of exclusion of days spent in obtaining the copies of Judgment and Proceedings. He asserted that, the Appellant was supplied with a copy of Judgment on 02/03/2021 but this appeal was filed on 02/05/2022 which is 60 days late without leave of the court for extension of time thus time barred.

On the 3rd point of objection, Mr. Mushi argued that this appeal contravenes **section 362 (1) (2) of the CPA** which provides that the same should be lodged as Petition of Appeal and not Memorandum of Appeal. That, since **section 362 (1) of the CPA** is coached in mandatory

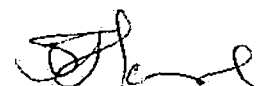


terms by using the word "shall" which according to the Interpretation of the Laws Act means mandatory. The learned counsel finally submitted that, this appeal should be dismissed or the Appellant should prepare themselves and lodge a proper appeal.

In reply, Mr. Rweyemamu submitted that, **section 361 and 362 of the CPA** do not apply to appeals lodged by the Director of Public Prosecution (DPP), thus they are not binding to him/her. He averred that, appeals from the DPP are provided under **section 377 to 386 A of the CPA** hence regarding the 1st objection on time limitation, **section 379 (1) (b) of CPA** provides for 45 days excluding days spent in obtaining copies of the judgment and proceedings for the DPP to file an appeal. He argued that, they were served with the certified copies of judgment and proceedings on 02/03/2021 and 19/03/2021 respectively. In that regard, since this appeal was filed on 02/05/2021 it was not time barred.

Arguing the 2nd point of objection Mr. Rweyemamu submitted that, Memorandum of Appeal and Petition of Appeal is one and the same thing and it does not prejudice the Respondent in any way. He prayed that the points of objections raised be dismissed.

In his brief rejoinder the learned counsel reiterated his earlier submission. He added that when they were served with the Memorandum of Appeal, there was no attachment of proceedings which are alleged to have been supplied on 19/3/2021. What was attached was copy of judgment only. Mr. Gideon was of the view that what enables one to appeal is copy of judgment. He therefore submitted that it was not necessary for the Appellant to wait to be supplied with copy of proceedings in order to



appeal. That, it has been a practice that an appeal is filed within time, then proceedings are ordered to be typed.

Concerning the issue that Petition of Appeal and Memorandum of Appeal are the same, Mr. Gideon submitted that it is absurd for the learned counsel's failure to note the difference between Petition of Appeal and Memorandum of Appeal.

In determining these points of objection first of all I concur with the learned State Attorney that the Appellant/the DPP's right to appeal and the whole procedure involved thereof are governed by **sections 377 to 386A of the CPA** and not 361 and 362 of the same Act which provides for appeals in general. Regarding the 1st point of objection, section 379 provides for time limitation in lodging appeal by the DPP, it provides:

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-

(a) has given notice of his intention to appeal to the subordinate court within thirty days of the acquittal, finding, sentence or order against which he wishes to appeal and the notice of appeal shall institute the appeal; and

(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



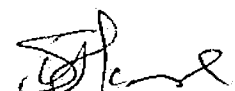
record of proceedings in the case shall be excluded.
(Emphasis mine)

Looking at the records, it is undisputed that the Notice mentioned in the above subsection (a) was filed timely at the trial court to wit; on 03/03/2021. Likewise, subsection (b) clearly stipulates for time limitation of 45 days save for days spent in obtaining necessary copies. In his submission the learned counsel for the respondents argued that the appellant was served with the copy of judgment on 02/03/2021 thus filing an appeal on 02/05/2021 makes it time barred. However, he failed to note that the copies of proceedings were issued on 19/03/2021 hence making the appeal within 45 days as prescribed by the law. **section 380 (1) of CPA** provides that:

"380. -(1) Every appeal under section 378 shall be made in the form of a petition in writing presented by the Director of Public Prosecutions and shall, unless the High Court otherwise directs, be accompanied by a copy of the proceedings, judgment or order appealed against."

This section explicitly states that the copies of judgment and proceedings appealed against have to be attached in the petition of appeal. In that regard since the Appellant was served with copies of proceedings on 19/03/2021 and this appeal was lodged on 02/05/2021, forty-three (43) days later makes it within time.

Apart from that, **section 19 of the Law of Limitation Act Cap 89 R.E. 2019** provides that:



"19. -(1) In computing the period of limitation for any proceeding, the day from which such period is to be computed shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall be excluded."

In light of the above, contrary to what was argued by Mr. Mushi, the current position in excluding days spent in obtaining requisite copies of appeal is automatically excluded as long as there is proof in respect of the events prescribed in limitation period. This position was laid down by the Court of Appeal in the case of **Alex Senkoro and 3 others Vs. Eliambuya Lyimo (As administrator of the Estate of Frederick Lyimo, Deceased), Civil Appeal No. 16 of 2017, CAT at Dar es Salaam** (unreported) where it stated that:

*"We entertain no doubt that the above sub-sections expressly allow automatic exclusion of the period of time requisite for obtaining a copy of the decree or judgment appealed from the computation of the prescribed limitation period. **Such an exclusion need not be made upon an order of the court in a formal application for extension of time.** Indeed, that stance was taken recently in **Mohamed***

Sallmini v. Jumanne Omary Mapesa, Civil Appeal No. 345 of 2018 (unreported) where the Court affirmed that section 19 (2) of the LLA obliges courts to exclude the period of time requisite for obtaining a copy of the decree appealed from.”
(Emphasis mine)

Applying the above authority in the appeal at hand, it is safe to say that the statutory limitation period of 45 days started to run from the date when the Appellant was served the said copies of proceedings on 19/03/2021. Therefore, the appellant was not required to apply for extension of time as argued by Mr. Mushi as only 43 days had lapsed. Thus, 1st point of objection is overruled.

As to the 2nd point of objection, counsel for the respondent had argued that this appeal was lodged as Memorandum of Appeal instead of Petition of Appeal. Although section 380 as quoted above impliedly state that what is lodged is a Petition of Appeal, I am of considered opinion that the title 'Memorandum of Appeal' neither prejudice any party to this appeal nor caused injustice to the respondents. I am aware that, the intention of any litigant to file appeal is clearly to challenge the decision of the lower court, a mere titling of the grounds of appeal in my view does not prejudice neither the appellant nor the respondents in getting their rights. The couching of the word "shall" have been defined in a number of cases not to necessarily mean mandatory. In the spirit of overriding objective principle, that mere irregularity is curable as observed in the case of **Basil Masare Vs. Petro Michael [1996] TLR 226** where Mroso, J, held *inter alia* that:

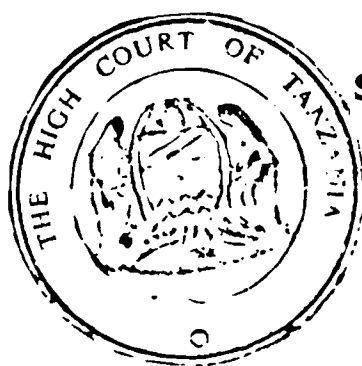
"The Tanzania Court of Appeal Rules uses the words 'Memorandum of Appeal' regarding the grounds of appeal in

*both criminal and civil appeals to the Court of Appeal of Tanzania. What substantive distinction can one make from the use of the words 'petition' or 'memorandum' when referring to grounds of appeal to a higher court? I must confess, I can see no such distinction although I would say that it would be preferable if an intending appellant uses the word adopted by the legislature for the relevant type of appeal. **In my view, if an appellant uses the word 'memorandum' instead of the word 'petition' in connection with his grounds of appeal in a case originating in the primary court, that alone cannot render the appeal incompetent. That would be making a mountain out of a mouse mound unnecessarily.**" Emphasis added*

In that regard, this objection also must fail. However, the Word Memorandum has to be crossed with a pen and alternatively a word Petition has to be inserted to read Petition of Appeal in all the records of Appeal and should appear as such from this day forward. Having ruled out that all points of objection are overruled, the appeal will proceed to be heard on merit.

It is so ordered.

Dated and delivered at Moshi this 25th day of May, 2022




S. SIMFUKWE
JUDGE
25/05/2022