

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 32 of 2022
*(Originated from judgment of the Resident Magistrate
Court of Mbeya at Mbeya in Criminal Case No.18 of 2021)*

KELVIN THOBIAS MVENILE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Dated: 27th June & 30th August, 2022

KARAYEMAHA, J

This judgment is in respect of an appeal instituted by the appellant against the decision of the Resident Magistrates' Court of Mbeya at Mbeya, which sentenced the appellant to concurrent prison terms of five (5) years for each count. This followed a conviction on two counts of breaking into a building and committing an offence and stealing.

The appellant was arraigned in Court on 23rd June, 2021, vide Criminal Case No. 18 of 2021 in which two counts of breaking into a building and committing an offence and stealing were read. With respect to breaking into a building and committing an offence, the

allegation was that on 8th May, 2021 at Sae area within the District and Region of Mbeya, the appellant broke and entered into a stationary owned by Ruth Mwakijale and committed an offence therein. With respect to stealing, the prosecution's allegation is that upon entering into the stationary, the appellant stole 6 cylinders of gas, 5 make oryx gas and one make O gas valued at TZS. 346,000/= the properties of Ruth Mwakijale.

The conviction and the sentence imposed by the trial Court have utterly aggrieved the appellant, hence his decision to institute the instant appeal. His petition of appeal has seven grounds as follows:

- 1. That the trial Magistrate grossly misdirect itself by acting on contradictory evidence of the prosecution side.*
- 2. That the trial Court erred in law by acting on certificate of seizure (P2).*
- 3. That the trial Court erred in convicting the appellant by hearsay evidence.*
- 4. That the trial Magistrate erred in law point and fact when convicting (sic) the appellant regards that (sic) the chain of custody was broken so far as it was not established.*
- 5. The trial Magistrate erred when convicted the appellant relying on the caution statement of appellant which was admitted wrong by the Court.*
- 6. That the trial Magistrate erred when convicted (sic) the appellant regarding that PW4 was incompetent.*
- 7. That the prosecution side failed to prove that case beyond reasonable doubt.*

When this matter came before me for hearing on 6th June, 2022, both parties were present. The appellant prayed for the appeal to be argued by way of written submissions. Mr. Davis Msanga, learned State Attorney for the respondent conceded and the court granted the prayer and proceeded to schedule the submissions dates as follows:

1. Appellant's written submission to be filed by 10/06/2022.
2. Respondent's reply submission to be filed by 20/06/2022.
3. Rejoinder (if any) to be filed by 23/07/2022.
4. Mention for orders on 27/06/2022.

The appellant has defaulted the Court order which required him to file his submission on 10th June, 2022. He never filed it as ordered. He instead informed the Court on 27th June, 2022 that he could not file a written submission since he had made one on 6th June, 2022. This was a lie because on that date he simply prayed for the appeal to be argued by way of written submission. However, he filed it on 29th June, 2022. Again, on 1st August, 2022 when the matter came for judgment, the court informed parties that it was not ready but the appellant did not tell the court the reasons for failure to file his submission in conformity to the schedule.

Consequences of failure to file written submissions has farfetched effects, as they are normally equated to an oral hearing, which is tantamount to want of prosecution. The law in Criminal Procedure Code Cap. 20 R.E. 2022 provides under section 366(1) and (2) that;

"366 (1) At the hearing of the appeal, the appellant or his Advocate may address the Court in support of particulars set out in the petition of appeal and the public prosecutor, if he appear, may then address the court and thereafter, the court may invite the appellant or his advocate to reply upon any matter of law or of facts raised by the public prosecutor in his address and the court may then, if it considers there is no sufficient ground for interfering, dismiss the appeal.

(2) an appellant, whether in custody or not, shall be entitled to be present at the hearing of his appeal."

In view of the cited section, it is significant for the Appellant to appear when the appeal is called on for hearing because the word **"shall"** makes it mandatory. Numerous decisions of this court and the Court of Appeal have held in favour of this same stance and to highlight a few, is an unreported Criminal Appeal No. 180 OF 2014- **Republic vs. Novatuce Mtorela** where it was held that:

"Failure to file written submissions on a date scheduled by the Court, suggests absence of a party on hearing without

notice and abuse of Court process which can never be condoned."

In yet another case of **National Insurance Corporation of (T) Ltd & another vs. Shengena Limited**, Civil Application No. 20 of 2007 where the same Court stated;

"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's Case."

On the practice of filing written submissions instead of the in-hearing, the Court Martial in **P 3525 LT Idahya Maganga Gregory vs. The Judge Advocate General**, Court Martial Criminal Appeal No. 2 of 2002 (unreported) the court held that;

"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case maybe..... "

This Court has held time without number that Courts' orders are made in order to be implemented; they must be obeyed. Conversely, if they are disobeyed or ignored the system of justice will grind to halt or it will be chaotic that everyone will decide to do only that which is convenient to them. The requirement to comply with the court's orders to file the written submission in court was emphasized in the case of **Ivan Mankobrad vs. Milroslavan Katik & another**, Civil Case No. 321 of 1997 HC-DSM (unreported) which was quoted in the case of **China Henan Int. Cooperation Group Co. Ltd (CHICO) vs. Morning Glory construction Company**, Civil Appeal No. 4 of 2020 that:

"... they are meant to command parties to act within time frame fixed by the court. If there are total disregard to those orders then the court business will be rendered uncertain; and that will not be good for the efficient administration of justice."

It is obvious that the appellant is a prisoner whose rights and responsibilities are restricted. It was expected from him, therefore, to tell this Court that he faced some problems of this nature in preparing and filing the submission hence seek for extension of time. short of that everything was okay on his side. Deducing from that observation, I

don't think it will be legally proper to infer or assume that what I have just stated happened because after all he was able to file a submission after the expiry of the order. Therefore, his inability to file the written submissions within the time and or his failure to apply for extension of time and insisting that he had made his previously is not a slight lapse or a mere inadvertence. It is a serious lapse and fundamental in nature.

From the above discussion, it is apparent that the appellant's failure to file written submissions on a date scheduled by the Court, and failure to comply with the court's order amounts to his absence on hearing without notice and abuse of Court process which can never be condoned.

In the event, and for the foregoing reasons, I invoke the powers conferred upon this Court by section 383 (1) of the CPA [Cap. 20 R.E. 2022) and accordingly dismiss the Appeal.

It is so ordered.

DATED at MBEYA this 30th day of August, 2022



A handwritten signature in black ink, appearing to be "J.M. Karayemaha", written over a horizontal line.

**J.M. KARAYEMAHA
JUDGE**