

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

PC. CRIMINAL APPEAL NO. 1 OF 2021

*(Arising from Criminal Appeal No. 22 of 2020 Kilosa District Court;
Origin Criminal Case No. 12 of 2019 Masanze Primary Court)*

RASHID SAID MATEMBO.....APPELLANT

VERSUS

FADHILI JUMA KONDO.....RESPONDENT

JUDGMENT

Date of Last Order; 15/07/2021

Date of Judgment; 16/03/2022

S.M. KULITA, J.

The Appellant one **RASHID SAID MATEMBO** was convicted and sentenced to pay a fine of Tsh. 300,000/= or to serve the imprisonment of 6 (six) months in alternative, for Obtaining Money by False Pretence, contrary to section 302 of the Penal Code by Masanze Primary Court in Criminal Case No. 12 of 2019. Aggrieved with that decision the Appellant lodged an appeal at Kilosa District Court through Criminal Appeal No. 22 of 2020. The said appeal was dismissed regarding the appellant's failure to file the written

submission in support of his appeal. He was further aggrieved, hence this appeal.

In his petition of appeal lodged at High Court the Appellant relied on the following grounds;

1. That, the trial Magistrate erred in law and fact to dismiss the appeal without considering that the Advocate for the Appellant is the one who defaulted to file written submission without the knowledge of the Appellant.
2. That, the trial Magistrate erred in law and fact to proceed dismissing the appeal while on the date fixed for mention, 10/11/2020 the trial Magistrate did not inform the appellant on the failure to file the written submission.
3. That, generally the trial Magistrate erred in law for dismissing the appeal on 18/11/2020 surprisingly without giving the Appellant an opportunity to express or adduce the reason for failure to file the written submission.

The matter was disposed of by way of written submissions. The Respondent (**FADHILI JUMA KONDO**) is represented by Mr. Justine Kaleb, Advocate from Moriah House while the Appellant is unrepresented.

In his written submission the Appellant submitted that he actually never filed the written submission to support his appeal at the District Court for the Criminal Appeal No. 22 of 2020 but it was the fault of the Advocate whom he had engaged to represent him. He further alleged that after the case being scheduled to be disposed of by way of written submissions, and the same being not complied with, on the 10/11/2020 the Magistrate fixed the matter for judgment without giving the Appellant an opportunity to express or adduce the reason for failure to file the written submission.

The appellant contended that his right to be heard was infringed, contrary to Article 107A(2)(e) of the Constitution of the United Republic of Tanzania of 1977. He further stated that in dismissing the appeal the Magistrate had not considered the principle of overriding objective under the Written Laws (Miscellaneous Amendments) (Act No. 8 of 2018) at section 3 which provides for the courts to deal with cases justly by regarding substantive justice, instead of technicalities.

He concluded by praying this court to restore the Criminal Appeal No. 22 of 2020 at Kilosa District Court.

In reply thereto the Respondent's Counsel, Mr. Justine Kaleb, Advocate submitted that the appellate District Court was proper

and correct to dismiss the appeal as the Appellate Magistrate fixed the dates for filing the written submissions in the presence of the Appellant and his Advocate but negligently and maliciously they did not file submission in support of their appeal. He said that, both parties had consented the proposed dates for filing the written submissions. The Counsel further stated that the Appellant or his Advocate were duly bound to inform the court on their failure to file the written submission pursuant to the court's order. Mr. Kaleb said that the appellant did not take any initiative to seek for leave to file the written submission out of time. He averred that it is a trite of law and practice that failure to file the written submission amounts to non-appearance. He cited the case of SETI TETE V. MWANJELWA SACCOS, Misc. Civil Application No. 22 of 2018, HC at Mbeya (unreported) to cement his argument.

The Respondent's Counsel concluded by praying this court to dismiss the Appeal.

In the rejoinder the Appellant reiterated what he had submitted in his submission in chief.

From the above submissions I find the issue to be determined is whether the District Court was wrong to dismiss the appeal for the Appellant's failure to file the written submission. As rightly

submitted by the Respondent's counsel that failure to file the written submission amounts to non-appearance as it was so held in **SETI TETE V. MWANJELWA SACCOS, Misc. Civil Application No. 22 of 2018, HC at Mbeya (unreported)**. However, the said case of SETI TETE V. MWANJELWA SACCOS is distinguishable to the matter at hand as the records transpire that upon failure of the appellant to comply with the scheduling orders made by the District Court on 10/11/2020, the Magistrate fixed the matter for decision without giving the Appellant an opportunity to express or adduce the reason for failure to file the said submission, that was wrong.

Article 107A(2)(e) of the Constitution of the United Republic of Tanzania of 1977 discourages the courts to rely on technicalities in deciding matters tabled before them. That is also a position of the law in *Overriding Objective (Oxygen Principle)* under **Section 3(A) and (B) of the Appellate Jurisdiction Act [Cap 141 RE 2019]** which requires the courts to rely on substantive justice in making decisions instead of dwelling on technicalities.

As the appellant's right to be heard was infringed in the appeal by the District Court, a way forward is for the matter to be remitted back at that said court for the parties to be heard (***Trial de Novo***)

and I so order. In that sense, save for the pleadings which were already filed, I hereby quash the whole proceedings and ruling for the Criminal Appeal No. 22 of 2020 of Kilosa District Court. I further order that the said court should conduct hearing of the appeal on merit, be it orally or through written submissions, whichever it finds convenient. This should be done immediately **by another Magistrate with competent jurisdiction.**

In upshot, the appeal is allowed to that extent.



S.M. KULITA
JUDGE
16/03/2022

