

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 05 OF 2021

(Arising from Criminal Appeal No.24/2021 of Kigoma District Court; Originating from
Criminal Case No. 122/2021 of Ujiji Primary Court)

KIPUTO S/O AHMAD.....APPELLANT

VERSUS

MARIKI S/O MPENDA.....1ST RESPONDENT

MGENI D/O MOSHI..... 2ND RESPONDENT

CHUKI D/O SAID.....3RD RESPONDENT

ASHURA D/O MNYONGE.....4TH RESPONDENT

RULING

10th & 25th March, 2022

F. K. MANYANDA, J

This is a ruling on a preliminary objection raised by the Respondents to the hearing of the appeal on one point of law that in terms of Rule 18(1) of the Judicature and Application of Laws (Criminal Appeals and Revisions in



Proceedings Originating from Primary Courts) Rules, 2021 GN 390 of 14/05/2021 the appeal is incompetent since the Appellant was supposed to file an application to set aside the dismissal order.

In this matter, the appellant Kiputo Ahmad unsuccessfully sued the respondents Mariki Mpenda, Mgeni Moshi, Chuki Said and Ashura Mnyonge at Ujiji Primary Court, hereafter referred to as "the trial court" for the offence of common assault contrary to section 240 of the Penal Code [Cap 16 R.E 2019].

After a full trial, the trial court decided in favour of the respondents, then, the appellant was aggrieved by the trial court's decision hence, appealed to the District Court of Kigoma vide Criminal Appeal case No. 24 of 2021. In the District Court hearing was ordered to be disposed by way of written submission but the appellant avoided compliance of the order. His disobedience of the lawful order led to the dismissal of his appeal for want of prosecution.

Dissatisfied by the said ruling and order, the Appellant is now before this Court appealing against the decision and order of the District Court. He has raised six grounds of appeal, which I need not to list them at this preliminary stage, not being dealing with the appeal itself.

At the hearing of the appeal, the appellant was present unrepresented while the respondents were present and represented by Mr. Moses Rwegoshora, learned Advocate.

As stated above, before hearing of the appeal on merit was held out, the Counsel for the Respondents, Mr. Rwegoshora, raised a Preliminary Objection stating that the rules *supra* direct that where an appeal is dismissed for want of prosecution, it is a requirement for the appellant to apply for setting aside the dismissal order.

Mr. Rwegoshora went on further explaining that, the appellant's appeal was dismissed on 15/09/2021 and he appealed on 11/10/2021 to this court. He said, this is against the rules cited above. He further submitted that, the right of appeal to this court is for parties who were heard on merit. In the instant matter the appeal wasn't heard on merit.

The counsel stated that this appeal is premature and incompetent because the appellant wants the District Court to be blamed but it didn't hear him. The Appellant lacks automatic right of appeal, let him go back to the District Court, said the counsel. He thus called this court to dismiss the appeal.



The appellant on the other hand been a layman didn't object the Respondents' Counsel submission but further stated that, the District Court was not correct to reject his appeal. He thus left the matter for the court to decide.

Without much ado, I agree with the preliminary objection raised by the respondents' counsel that this appeal has been brought prematurely since the appellant was not heard in the District Court, his immediate remedy is not to appeal to this court but to apply to set aside dismissal order into the court that entered the same so that he could be heard on merit.

The law under Rule 18(1) of the Judicature and Application of Laws (Criminal Appeals and Revisions in Proceedings Originating from Primary Courts) Rules, 2021 GN 390 of 14/05/2021 provides that;

"The appellant or his agent may, where an appeal has been dismissed under rule 17(2) in default of his appearance, apply to the appellate court concerned for the re-admission of the appeal."

From the wording of the law, the Appellant in the instant matter after been aggrieved with the decision of the District Court, was supposed to go back in the same court and file an application to set aside the dismissal order.

His contention that the District Court wrongly rejected his appeal might be one of the grounds in that application.

It is not disputed by both parties that Criminal Appeal No. 24 of 2021 was not determined on its merit but it was dismissed for want of prosecution as it is written on page 1 of the ruling

"On account of the Appellant default transgression of the lawful order the appeal is hereby dismissed for want of prosecution as it is contemporary legal position that failure to file written submission in time as per court orders is amount to not appearance".

It is trite law that failure to file written submission on the dates scheduled by the court without any justifiable reason is as good as non- appearance on the hearing date. In this case, it is in the evidence that the appellant was present in court on 30/08/2021 when the court scheduled the mode of filing submission. It was ordered that, the appellant to file his written submission on 06/09/2021 but he failed and decided to file the same on 07/09/2021.

In the case of **Godfrey Kimbe v. Peter Ngonyani**, Civil Appeal no 41 of 2014 the Court of Appeal of Tanzania Held that;

"Failure to file written submission is tantamount to failure to appear and defend ones' case."

Similarly in the case of **Haleko Vs. Harry Mwasaijala**, DC Civil Appeal No.16 of 2000, (unreported), the court held:-

"I hold, therefore that the failure to file written submission inside the time prescribed by the court order was inexcusable and amount to failure to prosecute the appeal. Accordingly, the appeal is dismissed with costs."

Similar position was emphasized in the case of **P 3525 LT Idahya Maganga Gregory Vs. The Judge Advocate General**, Court Martial Criminal Appeal No. 2 of 2002 (unreported) the court held

"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 nonappearance at a hearing or want of prosecution. The consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be"

I fully subscribe to this guidance that indeed in any civilized society, there must be respect to law and order. Court orders must be respected, obeyed and complied with religiously. Likewise, court proceedings are controlled by the presiding judge or magistrate, parties cannot decide to do contrary to the court's order. Tolerating them will amount to voluntary invitation to judicial chaos, disrespect and injustice.

Basing on the ruling of the first appellate court and case laws, the Appellant next step to take was to file an application to the first court for the same to set aside the dismissal order and re-admit his appeal not to appeal to this court.

In the case of **St. Mary's International School v. Geoffrey M. Rwekaza**, Rev. No. 734/2019 TZHC at Dar es salaam, at page 6 it was held that;

"It is an established principle of law that when a matter is dismissed in any court or body for non-appearance of a party, the remedy available to the aggrieved party is to file an application for restoration before the same Court."

The law further under subsection 2 of the rules supra provides that;

"The court may, upon being satisfied that the appellant was prevented by good cause from appearing either personally or by an agent when the appeal was called for hearing, re-admit the appeal".

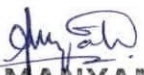
Literally meaning of the provision herein above, the only way to fight or challenge a dismissal of the appeal for want of prosecution is **to apply to the court which passed that order for it to set aside and re-admit the appeal.**

In the circumstances of this case and the guided by the principles of the law above, I therefore sustain the preliminary objection raised and I find that this appeal has been brought prematurely.



Consequently, I do hereby accordingly strike it out. It is so ordered.




F. K. MANYANDA

Judge

25/03/2022