IN THE HIGH COURT UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 44 OF 2022

(Originating from the Judgement of the Resident Magistrate's Court of Morogoro, at Morogoro in Criminal Case No. 36 of 2021).

MAXSON JOHN @ MACK..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

22nd May, & 31st August, 2023

CHABA, J.

The Appellant, Maxson John @ Mack was arraigned before the Resident Magistrate's Court of Morogoro, at Morogoro (the trial Court) charged with the offence of Armed Robbery contrary to section 287A of the Penal Code [CAP. 16 R. E, 2019], (the Penal Code).

The allegations set out in the particulars of the offence before the trial Court is to the effect that, on 7th February, 2021 at Daraja la Kidogobasi area within Kilosa District in Morogoro Region, the accused person stole one mobile phone make TECHO K7 worth TZS. 250,000/= and cash money TZS. 40,000/=, all valued at TZS. 290,000/=, the properties of one Fadhili Ally and immediately before such stealing, he threatened the said Fadhili Ally with a knife in order to obtain and retain the said properties.

When the charge sheet was read over and fully explained to the appellant, he denied the allegations by entering a plea of not guilty to the charge.

At the height of the trial, the trial Court found that, the prosecution evidence was sufficient to prove the case beyond reasonable doubt. It thus, convicted and sentenced the appellant as afore stated. Aggrieved, the appellant has initiated the instant appeal based on the following grounds, which for better understanding, I reproduce as hereunder:

1. That, the learned trial SRM grossly erred both in law and fact when convicted the appellant while the prosecution side failed to prove that armed robbery was committed.
2. That, the learned trial SRM grossly erred both in law and fact when he convicted the appellant based on evidence of PW.1 without giving opportunity to the appellant to cross-examine which is against the procedure of laws.
3. That, the learned trial SRM grossly erred both in law and fact when he convicted the appellant based on a weak and contradictory prosecution evidence.
4. That, the learned trial SRM grossly erred both in law and fact when he convicted the appellant upon failing to consider the appellant defence that there was conflict between PW.1 (complainant) and appellant.
5. That, the learned trial SRM grossly erred both in law and fact when he convicted the appellant while the prosecution side failed to prove the apprehension of the appellant in connection with the offence he was charged with.
6. That, the learned trial SRM grossly erred both in law and fact to convict the appellant when believing on incredible and unreliable prosecution evidence.

7. That, the learned trial SRM grossly erred both in law and fact to convict the appellant when there is no factual or legal point of determination in accordance with mandatory of Section 312 (1) of Criminal Procedure Act. (Cap. 20 R.E, 2019).
8. That, the learned trial SRM grossly erred both in law and fact to convict the appellant when he failed to realize that this case was not investigated at all by the police investigator (PW.3).
9. That, the learned trial SRM grossly erred both in law and fact when he convicted the appellant where there was inconsistency and material contradiction between evidence of PW.1 and his complainant statement.
10. That, the learned trial SRM grossly erred both in law and fact to convict the appellant when he failed to realize that PW.1 and PW.2 knew each other before the incidence and no independent witness was called to testify while it was alleged that the scene of crime was crowded by people who wanted to kill appellant.
11. That, the learned trial SRM grossly erred in law and fact when considered the evidence of PW.2 which did not prove if he witnessed robbery or what he saw were people fighting.
12. That, the learned trial SRM grossly erred both in law and fact when convicted the appellant by failure to analyse and evaluate evidence tendered by defence side which raised reasonable doubt.
13. That, the learned trial SRM grossly erred both in law and fact when he convicted the appellant by shifting the burden of proof from the prosecution to the appellant.

14. That, the learned trial SRM grossly erred both in law and fact when he convicted the appellant on a case that was not proved to the hilt.

When the appeal was called on for hearing, the appellant appeared in person, and unrepresented whereas the Respondent / Republic was represented by Mr. Shabani Abdallah Kabelwa, Learned State Attorney. The appeal was conducted orally. However, for reasons to be apparent in due course, I shall not reproduce the parties' submissions.

In the course of composing this judgment, I took pain to go through the entire Court records and noticed that, the record of appeal is tainted with irregularity and thus its competence is questionable in law. I say so because, the appellant skipped the requirement of the provision of section 361 (1) (b) of the Criminal Procedure Act [CAP. 20 R. E, 2022] which provides for the time limit to lodge an appeal before this Court against the decision of the District Court or Resident Magistrate's Court. For ease of reference and clarity, I find it apt to reproduce the provision of section 361 (1) of the CPA as hereunder:

> *"Section 361 (1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant:*
>
> *(a) N/A...*
>
> *(b) has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order, save that in computing the period of forty-five days the time required for obtaining a copy*

of the proceedings, judgment or order appealed against shall be excluded.

From the above interpretation of the law, it is trite law that, in computing the period of time limit to appeal, the period the aggrieved party awaited to be supplied with the copy of judgment is to be automatically excluded. This stance of law has also been provided for under section 19 (2) of the Law Limitation Act, [CAP. 89 R. E, 2019] which articulates that: -

> *"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."*

Reverting to the present case, it is uncontested that, the decision sought to be appealed against was delivered on the 10th May, 2022. It is also uncontested that, the appellant lodged his petition of appeal before this Court on 12th July, 2022 almost sixty-four (64) days from the date of the delivery of the impugned judgment. Applying the above principle of law, the time limit ought to have started to run against the appellant from the date he was supplied with the copy of judgment. However, as the facts of the case suggests, the appellant ought to have enjoyed the said automatic exclusion only, if he

would have submitted and exhibited as well the relevant proof that dates of the critical events for the reckoning of the statutory period, which includes the date of the delivery of the impugned decision, the date on which the copy of the decree or judgment was requested and the date of the supply of the requested document would have been annexed in the petition of appeal.

This standpoint was expounded by the CAT in the case of **Alex Senkoro & Others Vs. Eliambuya Lyimo (Criminal Appeal 16 of 2017) [2021] TZCA 104 (13 April 2021)** (Extracted From www.tanzlii.org), where the Court of Appeal of Tanzania observed thus: -

> *".....Furthermore, this Court took a similar standpoint in two recent decisions where the proviso to section 379 (1) (b) of the Criminal Procedure Act, Cap. 20 R.E. 2002 [now R.E. 2019], an analogous exclusion stipulation, was considered: Director of Public Prosecutions v. Mawazo Saliboko @ Shagi & Fifteen Others, Criminal Appeal No. 2017; and Samuel Emmanuel Fulgence v. Republic, Criminal Appeal No. 4 of 2018 (both unreported).To illustrate the point, we wish to extract what we said in Mawazo Saliboko @ Shagi & Fifteen Others {supra) where the learned High Court Judge had decided that the exclusion was not automatic:*
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> *"The learned Judge was of the view that, though the appellant filed the appeal within 45 days after being*

served with the copy of the proceedings, he ought to have applied for extension of time to do so because he was time-barred from the date of the impugned decision. On our part, we are of the decided view that the intention of the legislature under the proviso to section 379 (1) (b) of the CPA was to avoid multiplicity of, and delay to disposal of cases. That is why it provided for automatic exclusion of the time requisite to obtain a copy of proceedings, judgment or order appealed from, this is different where the intending appellant finds himself out of 45 days to file an appeal after receipt of the copy of proceedings. "[Emphasis added]

The CAT went further and expounded that:

"We need to stress what we stated in the above case that ***the exclusion is automatic as long as there is proof on the record of the dates of the critical events for the reckoning of the prescribed limitation period. For the purpose of section 19 (2) and (3) of the LLA, these dates are the date of the impugned decision, the date on which a copy of the decree or judgment was requested and the date of the supply of the requested document."*** *[Emphasis added].*

In this appeal, although the appellant had into his mind that, he was out of the statutory time limits to lodge his petition of appeal, he didn't bother to attach / annex the relevant documents at least to prove that on a particular date he wrote a letter to the trial Court requesting the copies of the judgment and proceedings, and that such document(s) were supplied to him (stating the date) so as to be covered by the law under the umbrella of automatic exclusion.

Going by the appellant's petition of appeal, the same indicates that the appellant was supplied with the copy of judgment on 10th June, 2022. However, in my respective view, this piece of evidence is not sufficient evidence to rely upon in absence of any other document(s) proving that, the appellant was availed with the copy of the impugned judgment on the date shown in the petition of appeal which, in my understanding the same was just inserted by the Officer Incharge of Prisons at the Morogoro Prisons. In absence of such other proof, it is safe to come to an end and decide that, the appellant was supplied with copy of the judgment on 10th May, 2022 when the same was stamped with a Court Seal and signed by the Learned trial SRM.

In the case of **Samuel Emmanuel Fulgence Vs. Republic (Criminal Appeal 4 of 2018) [2019] TZCA 380 (8 November 2019)** (Extracted from www.tanzlii.org), where upon being faced with akin situation, the CAT had the following to state:

> *"...That apart, the petition of appeal was filed on 26th day of February, 2016. In reckoning the forty-five days within*

which to lodge an appeal, the time requisite for obtaining a copy of the proceedings and judgment will be excluded. The record is silent as to when the proceedings were ready for collection. Nonetheless, the judgment of the Resident Magistrate Court was certified and was ready for collection on 28th day of October, 2015. The period from the date of acquittal of the appellant, that is, 21st day of August, 2015 to the date the certified copy of the judgment was ready for collection, that is, 28th day of October, 2015, is excluded in computing the forty-five days. As such the respondent ought to have filed its appeal latest on 13th day of December, 2015. It follows then that the petition of appeal filed on 26th day of February, 2016 was filed out of time. The High Court ought not to have entertained the appeal as it was time-barred".

From the above deliberation supported by binding precedents, I may safely conclude that, the instant appeal is incompetent before this Court for being filed out of time and without obtaining leave of the Court. With regard to the way forward, I have decided to seek guidance from the holding in the case of **Said Shaibu Mwigambo Vs. Republic (Criminal Appeal 420 of 2021) [2023]TZCA 148 (28 March 2023)** (Extracted from www.tanzlii.org), where the CAT underscored that:

"We agree with the learned State Attorney that all being equal, the delayed filing of the petition of appeal had the effect of rendering the appeal incompetent. The court was barred from entertaining an incompetent appeal for, it was as good as none had been instituted in the first place. The court could only make an order striking it out instead of dismissing as it did...".

For the reasons stated above, I am satisfied that this appeal was improperly instituted in this Court, hence incompetent. In the circumstance, I hereby strike it out on the ground of being time barred. It is so ordered.

DATED at **MOROGORO** this 31st day of August, 2023.

M. J. CHABA

JUDGE

31/08/2023

Court:

Judgement delivered under my Hand and the Seal of the Court this 31st day of August, 2023 in the presence of Mr. Shabani A. Kabelwa, Learned State

Attorney who appeared for the Respondent / Republic and in absence of the appellant.

M. J. CHABA

JUDGE

31/08/2023

Court:

Right of Appeal to the parties fully explained.

M. J. CHABA

JUDGE

31/08/2023