

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI SUB REGISTRY**

**AT MOSHI**

**CRIMINAL APPEAL NO. 55 OF 2023**

(Originating from Criminal Case No. 53 of 2023 of Moshi District Court)

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT**

VERSUS

**BEATA HILLARY BIDUGA ..... RESPONDENT**

**RULING**

12/03/2024 & 22/03/2024

**SIMFUKWE, J.**

The respondent, Beata Hilary Binuga was arraigned before the District Court of Moshi (the trial court) facing a charge of obtaining money by false pretence contrary to **section 302 of the Penal Code [Cap 16 R.E 2019]**. However, after hearing three prosecution witnesses, the trial court dismissed the charge under **section 226(1) of the Criminal Procedure Act [Cap**

20 R.E 2019] and acquitted the respondent on the reason that the prosecution failed to call witnesses. The DPP was aggrieved, he preferred the instant appeal. The respondent through her advocate raised the preliminary objection on the following grounds:

*1. That the present criminal appeal has been lodged out of time contrary to **section 361(b) of the Criminal Procedure Act Cap 20 R.E 2022***

*2. That the present criminal appeal has been lodged in a non-existing registry contrary to High Court Registries Amendment Rules 2021 GN NO 638 thus this court do not have requisite jurisdiction to determine the application.*

At the hearing of the preliminary objection, the appellant was represented by Ms. Bora Mfinanga, learned State Attorney and the respondent was represented by Mr. Stephen Mushi, learned advocate.

Submitting in respect of the first limb of preliminary objection, Mr. Stephen for the respondent submitted that this appeal is filed out of time. He elaborated that since the impugned ruling was delivered on 17<sup>th</sup> of May, 2023 the appeal was supposed to be filed within 45 days after delivery of the ruling. The learned counsel continued to submit that; 45 days elapsed on 1<sup>st</sup>

of July 2023 which was Saturday, so he expected the appeal to have been filed on 3<sup>rd</sup> of July, 2023. However, the appeal was filed on 28<sup>th</sup> day August, 2023 which was more than 52 days and the appellant failed to account for those days.

Elaborating more, Mr. Stephen submitted that he is aware that under section **361 of the Criminal Procedure Act** (supra), the days for obtaining judgment and proceedings should be excluded. That, for the Republic to benefit the exclusion of those days, they must show the date when the proceeding was ready for collection and when the appellant was supplied with the same. He continued to lament that the record does not show when the proceeding was ready for collection and when the Republic collected the same. Thus, the appellant cannot benefit the exclusion of the days of delay. He buttressed his contention with the case of **Said Hashim vs. Republic, Criminal Appeal No. 47 of 2023**, (HC) **Hon. Barthy, J**, at page 3. In that regard, the counsel insisted that this appeal was filed out of time.

Mr. Stephen continued to aver that even if it is assumed that the appellant has not shown when they were supplied with the record, the proceedings of the trial court were certified on 15<sup>th</sup> day of July 2023. He assumed that the proceedings were ready for collection from that date. To cement his

assertion the learned counsel cited the case of **Samwel Emmanuel Fulgence vs. Republic**, Criminal Appeal No. 4 of 2018, CAT at page 10 of the judgment where the Court of Appel held that if the record is silence on the date when the proceedings were ready for collection, they should refer to the date of certification of the proceedings. It was further explained that in this appeal the date of certification of proceedings was on 10<sup>th</sup> day of July, 2023. Thus, assuming that the proceedings were collected on 10/07/2023, the days to appeal elapsed on 24/8/2023; while this appeal was filed on 28<sup>th</sup> day of August 2023, four days ahead. The learned counsel faulted the appellant for filing this appeal without seeking extension of time so that they could account for the days of delay. He prayed that this appeal be dismissed.

Concerning the second limb of preliminary objection, the learned counsel contended that, this appeal has been filed in non- existing registry. Mr. Stephen explained that, the appellant wrote that this appeal was filed at Moshi District Registry at Moshi, instead of Moshi sub- registry at Moshi contrary to **High Court Registries Amendment Rules, 2021**, G.N No. 638 in which the word "District Registry" has been substituted with the words "Sub-Registry". In that regard the learned counsel believed that this court

has not been moved properly and cannot have jurisdiction to determine this matter.

Opposing the preliminary point of objections raised by the respondent, Ms. Bora Mfinanga for the Republic vehemently opposed the first preliminary objection by submitting that this appeal was filed within time. Ms. Bora agreed with the counsel for the respondent that, **section 361 of Criminal Procedure Act** (supra) automatically excludes days of obtaining copy of judgment and proceedings. To cement her argument, she referred to the case of **Dar-Express Ltd vs. Mathew Paulo Mbaruku**, Civil Appeal No.132 of 2021, CAT, at page 7 where the case of **Alex Senkoro and 3 Others** was quoted, thus:

*"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 are the dates on which a copy of the decree or judgment was requested and the date of the supply of the requested documents."*

In our case, Ms. Bora submitted that, there is proof of critical events. After delivery of ruling on 23/5/2023, the appellant filed notice of appeal. Thereafter, the appellant was served with proceedings on 11/8/2021. On 28<sup>th</sup> day of August the appellant lodged this appeal. On that basis, the learned State Attorney commented that time started to run on 11<sup>th</sup> day of August 2023 after they had been supplied with copy of proceedings. That, from 11<sup>th</sup> day of August 2023 to 28<sup>th</sup> day of August 2023, it is not more than 20 days which the appellant used to file this appeal. Thus, the allegation that the appellant delayed for 52 days are unfounded.

Responding to the allegation that the proceedings were certified on 10<sup>th</sup> day of July, 2023, Ms. Bora explained that there is a difference between certifying and serving the proceedings. That, certification of the proceeding on 10<sup>th</sup> of July 2023 does not mean that automatically the appellant was served on that date as they were served on 11/08/2024. In that regard, Ms. Bora was of the view that the allegation that the appellant has not shown the date of being served with proceedings has no merit.

Distinguishing the cited cases of **Said Hashimu** and **Samwel Emmanuel Fulgence** (Supra), Ms. Bora for the appellant submitted that the record is not silent as averred by Mr. Stephen. That, they have attached documents

which have court seal showing when the said documents were filed. Thus, the cited cases cannot be applied to our case. She referred to the case of **Dar-express Co. Ltd** (Supra) at page 10 2nd where the court held that: *the mere fact that the letter was not in the court record does not mean it was not written and presented.*

Based on the above authorities the learned State Attorney implored this court to dismiss the first preliminary objection for lack of merit.

Replying on the second point of preliminary objection, Ms. Bora submitted that various amendments have been made between 2021 to January 2024 in respect of citation of High Court Registries. Therefore, the learned State Attorney opposed the raised objection as wrong citation of court registry is not fatal.

She stated further that they cited the right court that is the High Court which has jurisdiction to entertain this matter. She added that the learned counsel for the respondent has not said how wrong citation of sub-registry has prejudiced his client. She said that wrong citation of court registry is curable under **section 388 of the Criminal Procedure Act** (Supra) and **Miscellaneous Amendments Act, No.11 of the 2023 of the Civil**

**Procedure Act** [Cap 33 R.E 2019] which set the principle of overriding objective. Supporting the principle of overriding objectives, Ms. Bora referred the case of **Dar-Express Co. Ltd**, (supra) at page 11 first paragraph.

Ms Bora concluded by urging this court to dismiss the second preliminary objection for lack of merit, and proceed to determine the appeal on merit.

In rejoinder, Mr. Stephen for the respondent distinguished proof of service in respect of filing an appeal and proof of service of summons. He was of the view that court seal on the document is not proof of service. Instead, the court has to notify parties that proceedings are ready for collection. That, if the same was available, they could count the exclusion from that date. He insisted that the seal on National Prosecution Services cannot be considered as proof of service. The logic behind is that you may be supplied with the document while you are out of time. Thus, there should be proof from court when the said documents were ready for collection. Otherwise, the learned counsel believed that this appeal is time barred as the proceedings were certified on 10<sup>th</sup> day of July 2023.

Concerning the cited case of **Dar-Express Co. Ltd** (Supra) which was referred by the learned State Attorney, Mr. Stephen contended that in the



said case the letter was written but it was missing in the court records. Thus, its principle is inapplicable in this matter as the appellant did not write a letter requesting to be supplied with the proceedings and the court did not notify them that the proceedings were ready for collection. He suggested that the court should have notified the parties that the proceedings were ready for collection.

Rejoining on the second ground of objection, Mr. Stephen reiterated his submission in chief and opined that the oxygen principle cannot be applied. He prayed the preliminary objections to be upheld.

Having heard the rival submissions, the issue for determination before this court is ***whether the raised preliminary objections have merit.***

Starting with the 1<sup>st</sup> limb of preliminary objection, the respondent's counsel alleged that this appeal was lodged out of time. That, the appeal was filed 52 days after the date prescribed by the law. On the other hand, Ms. Bora for the appellant submitted that the appeal was filed within the prescribed time.

**Section 378 of the Criminal Procedure Act** (supra) provides that:

*"378. -(1) Where the Director of Public Prosecutions is dissatisfied with an acquittal, finding, sentence or order made or passed by a subordinate court, other than a subordinate court exercising its extended powers by virtue of an order made under section 173 of this Act, he may appeal to the High Court.*

*(2) An appeal to the High Court under this section may be on a matter of fact as well as on a matter of law.*

*(3) Notwithstanding the provisions of subsection (1) and (2), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of a subordinate court unless such decision or order has the effect of finally determining the criminal charge."*

**Section 379 (1) (a) and (b) of the Criminal Procedure Act** (Supra) prescribes time limitation to file appeal by the DPP. As a matter of reference, the provision reads:

*"379-(1) Subject to the subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions or any other 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 that acquittal, finding, sentence or order; **save that in computing the said period of forty- five days the time requisite for obtaining a copy of proceedings, judgment or order appealed against or of the record of proceedings in the case shall be excluded.** Emphasis added*

*(2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed."*

According to the above provision, if the DPP is aggrieved with the decision, they should lodge an appeal to the High Court within fourth five days (45) from the date of the impugned decision or order. The provision further excludes time requisite for obtaining a copy of proceedings, judgment or order appealed against or of the record of proceedings.

In the present appeal there is no dispute that the ruling of Moshi District court was delivered on 17<sup>th</sup> day of May 2023 in the presence of both parties. The learned State Attorney does not dispute the fact that the appeal was filed beyond the prescribed 45 days. Her argument is that they were supplied with copy of proceedings on 11/8/2023, thus, the period from 17/5/2023 to 11/8/2023 should be excluded as they were waiting to be supplied with copy of proceedings. Mr. Stephen learned counsel for the respondent argued among other things that the appellant did not write a letter requesting to be supplied with copy of proceedings and the court did not notify the parties that the proceedings were ready for collection. With due respect to the learned counsel for the respondent, in my perusal of the trial court records I discovered that the appellant filed the notice of appeal together with a letter titled: "RE: REQUEST FOR CERTIFIED COPY OF PROCEEDINGS AND JUDGMENT

IN THE DISTRICT COURT OF MOSHI AT MOSHI CRIMINAL CASE NO.

53/2022.

REPUBLIC

VERSUS

BEATA HILARY BIDUGA”

The above noted letter was dated 19/05/2023 and it was filed in court on 23/05/2023. Thus, it is not true that the appellant did not request for the copy of proceedings. Moreover, the copy of trial court proceedings supplied to the appellant has a seal which reveals that it was received on 11/08/2023.

**Section 19 (2) of the Law of Limitation Act**, Cap 89 (R.E 2019) provides that the time spent to be supplied with certified copies of the proceedings will be excluded in computing time for lodging an appeal. However, for any party to enjoy such exclusion, there must be a written request to be supplied with documents necessary for appeal purpose. I find my strength in the case of **Valerian Mcgovern v. Salim Farkrudin Balal**, Civil Application No. 386 of 2019 (2021) TZCA 235 (7 June 2021) (Tanzlii) which held that:

*"....it must be understood that section 19 (1) of LLA can only apply if the intended appellant made a written request for the supply of the requisite copies for the purpose of an appeal.*

That being the case, I am of settled opinion that the appellant deserves the exclusion prescribed under **section 379 (1) (b) of the CPA** (supra). The case of **Dar Express** (supra) cited by Ms Bora learned State Attorney is

relevant. Therefore, the instant appeal was filed within the prescribed time of 45 days.

Concerning the second point of preliminary objection in respect of lodging an appeal in a non-existing registry; on the outset, I concur with the learned State Attorney that wrong citation of the court registry is curable under **section 388 of the CPA** and the overriding objective principle.

In the upshot, the two raised preliminary objections are hereby overruled. The matter should proceed for determination on merit.

It is so ordered.

Dated and delivered at Moshi this 22<sup>th</sup> day of March, 2024.



X

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S. H. SIMFUKWE  
JUDGE  
Signed by: S. H. SIMFUKWE

**22/03/2024**