

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 4 OF 2018

SAMUEL EMMANUEL FULGENCE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Mlacha, J.)

dated the 29th day of November, 2017

in

Criminal Appeal No. 21 of 2016

.....

JUDGMENT OF THE COURT

5th & 8th November, 2019.

SEHEL, J.A.:

In the Resident Magistrates Court of Mtwara (the trial court), the appellant, Samuel Emmanuel Fulgence was charged with two counts under the Prevention and Combating of Corruption Act No. 11 of 2007 (the PCCA), namely; sexual favour contrary to sections 5 of the PCCA, and abuse of position contrary to section 31 of the PCCA.

The appellant was an Assistant Lecturer at the Tanzania Instituted of Accountancy (TIA). His indictment arose from an event which occurred on 20th April, 2013 in room number 104 at MT lodge within Mtwara Mikindani

Municipal in Mtwara Region. It was alleged by the prosecution that on that date the appellant being employed by TIA as an Assistant Lecturer used his authority as Field Report Supervisor to demand sexual favour from one Dorina d/o Boma (PW2), a student of TIA Mtwara Campus, as a condition to assist her to collect and complete her field report a fact which was in relation to his principal affairs. It was further alleged by the prosecution that the appellant abused his position in the discharge of his duties by demanding to obtain undue advantage of sexual favour from the said Dorina Boma.

PW2 was a diploma student majoring in accounts at TIA. As part of her diploma course she was supposed to do a field work research. The appellant was her supervisor of that field work. PW2 recounted that on 17th day of April, 2013 the appellant told her that her report was sub-standard. He instructed her to re-write it all over again and she should also change the research title. She obliged. On 18th day of April, 2013 she went to hand over the redrafted report only to be told that he was too tired on that day and should bring it on the next day. She obliged.

On the next day, that is, on 19th day of April, 2013, she went again but to her surprise, she was told to change the title. The appellant also warned her that the deadline was due hence she had limited time to prepare the

report. He instructed her that after finishing the corrections she should meet him in his lodge, failure of which she would lose every-thing.

PW2 was very much troubled by the appellant's actions towards her. She wondered why the appellant was complicating the situation. The only possible reason she could suspect was that the appellant was soliciting for sexual favour. She thus reported the matter to the Prevention and Combating of Corruption Bureau (PCCB) and proceeded to prepare the report, as directed. She sent it to the appellant at around 18:00 hours but she was told to see him later. At around 21:00 hours, he called her and gave her a direction of the place to meet. Immediately after his call, PW2 informed Gideon Magala (PW1), a PPCB officer that the appellant wanted to meet her.

PW1 put a trap and sought an assistance of arrest from Maisha Magessa (PW4), a police officer. PW2 went and met the appellant at the Free Park, and then they moved to the MT Lodge. They took room number 104.

While in the room, the appellant demanded to have sex in order for her to get good marks for her research work or otherwise she would not make it. He directed her to take bath and get ready for sex. PW2 went in the bathroom with her mobile phone and while there, she called PW1.

PW1, Yohane Emmanuel Mkapa (PW3), and Hafidhi Salumu Bakari (PW5) arrived at the scene and arrested the appellant who was with PW2 in the room. He was taken to court for trial.

On 21st day of August, 2015 the trial court acquitted the appellant on both counts. The respondent was aggrieved and successfully appealed to the High Court (the first appellate court). The first appellate court reversed the decision of the trial court and found the appellant guilty. He was convicted in absentia and sentenced him to serve a jail term of 3 years. Aggrieved, the appellant, through the services of Ali Kassian Mkali, learned advocate from Felicity Attorneys appealed to this court challenging both the conviction and sentence.

In his memorandum of appeal, the appellant advanced a total of seven grounds of appeal as follows:-

1. That the learned judge erred in law and fact by sentencing the appellant without proper conviction as required by law.
2. That, the trial court and appellate court erred in law and fact by failure to observe the requirement of section 192 (3) of the Criminal Procedure Act, Cap 20 RE: 2002(the CPA).

3. That, the trial and appellate court erred in law and fact by failure to observe the requirements of section 231 (1) (a) and (b) of the CPA.
4. That, exhibit P1 and P2 were wrongly tendered and exhibit P3 and P4 were wrongly relied upon after admission and were relied upon without being read after their admission.
5. That, the first appellate court erred in law for entertaining the appeal which was hopelessly time barred.
6. That, the case against the appellant was not proved beyond reasonable doubt to warrant conviction.
7. That, the learned appellate judge erred in law and fact in imposing custodial sentence while there was an option of paying fines.

At the hearing of the appeal, Mr. Ali Kassian Mkali, learned advocate appeared to represent the appellant while Mr. Abdulrahman Msham, learned Senior State Attorney appeared for the respondent/Republic.

After studying the entire evidence on record and the grounds of appeal, we requested the learned counsels to address us on the fifth ground of appeal because we were of the view that it goes to the jurisdiction of the first appellate court.

Mr. Mkali began his submission by informing the Court that he was abandoning grounds number two and six of appeal. Arguing ground number five that the appeal by the respondent at the High Court was time barred, he submitted that section 379 (1) (a) and (b) of the CPA prescribes time limit within which an appeal preferred by the Director of Public Prosecution shall be lodged at the High Court. He said that sub-section (1) (b) of the CPA requires that a petition of appeal has to be lodged within 45 days from the date of the findings of the lower court and that in computing the 45 days, the time requisite for obtaining copies of proceedings, judgment or order shall be excluded.

He pointed out that the judgment of the trial court that acquitted the appellant was delivered on 21st day of August, 2018. On 15th day of September, 2015 the respondent lodged its notice of appeal. However, that notice was lodged at the District Court of Masasi at Mtwara while the trial was conducted and the judgment was issued by the Resident Magistrate Court of Mtwara at Mtwara. It was his submission thus that there was no notice of appeal.

Elaborating further, Mr. Mkali submitted that thereafter the respondent filed its petition of appeal on 26th day of February, 2016. He said a copy of

the judgment was certified and ready for collection on 28th day of October, 2015. Therefore, counting from 28th day of October, 2015 to 26th day of February, 2016, almost four months had passed and there is nothing in the record to justify that inordinate delay. He, therefore, urged us to find that the appeal by the respondent at the High Court was time barred and for that reason the appeal should be allowed.

Responding in support of the appeal, Mr. Msham forthrightly conceded to Mr. Mkali's submission and added further that the notice of appeal appearing at pages 106 shows that it was corrected by an ink pen. The correction was to effect of striking out the word "*Masasi*" and substituted it with "*Mtwara*" in order for the court to read "*In the District Court of Mtwara at Mtwara*". He contended that unfortunately that correction is not initialled. He argued that the only conclusion to make then is that the notice of appeal was lodged to a non-existent court because in the whole region of Mtwara there is no such court known as "*the District Court of Masasi at Mtwara*". At the end, he supported the prayer made by Mr. Mkali.

From the submission made by Mr. Mkali and Mr. Msham, the only issue we are invited to determine in this appeal is whether or not the appeal lodged by the respondent at the High Court was filed within the prescribed

time. As rightly submitted by the learned counsel, section 379 (1) (a) and (b) of the CPA prescribes limitation of time on appeals by the Director of Public Prosecution against an acquittal, finding, sentence or order passed by a subordinate court. It reads:

"379-(1) Subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions or any person acting under his instructions in terms of sections 22 and 23 of the National Prosecutions Service Act–

(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 such acquittal, finding, sentence or order; save that in computing the said period of forty-five days the time requisite for obtaining a copy of the proceedings, judgment or order appealed against or of the record of proceedings in the case shall be excluded".

From the wording of the above provision of the law, in order for the appeal by the Director of the Public Prosecution against the acquittal, finding,

sentence or order made by the subordinate court to be entertained by the High Court, the notice of appeal must be lodged with thirty days from the date of the acquittal, finding, sentence or order and a petition of appeal be filed within the period of forty-five days from the date of the acquittal, finding, sentence or order. The law provides for exclusion of time spent in securing copies of proceedings, judgment, or order appealed against, in computing the forty five days.

The record in this appeal shows that the judgement was delivered on 21st day of August, 2015. On 15th day of September, 2015, the respondent lodged its notice of intention of appeal wherein it also requested to be supplied with the copies of the proceedings and judgment for appeal purposes. Although the notice was filed within the prescribed period of thirty days, but as rightly observed by Mr. Msham, that notice was filed to an unknown court of "*the District Court of Masasi at Mtwara*". In essence, there was no notice of appeal against the decision of the Resident Magistrate Court of Mtwara which could have been formed the basis of the appeal before the High Court.

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.

An akin situation arose in the case of **Aidan Chale v. Republic**, Criminal Appeal No.130 of 2003 (unreported) where the appellant complained to the Court that the High Court erred in entertaining a time-barred appeal filed by the Director of Public Prosecution for which the petition of appeal was filed out of the prescribed period of forty five days. The Court allowed the appeal after being satisfied that the petition of appeal was filed outside the prescribed period of forty five days. In this appeal we re-assert the same position.

Accordingly, we allow the appeal by quashing the proceedings of the High Court, judgment, and conviction and we set aside the three years sentence meted out to the appellant.

Order accordingly.

DATED at **MTWARA** this 8th day of November, 2019.

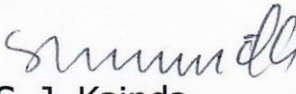
B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 8th day of November, 2019 in the presence of Mr. Ali Kassian Mkali, learned advocate for the appellant and Mr. Meshack Lyabonga learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL