

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 384 OF 2017

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

1. MAWAZO SALIBOKO @ SHAGI
2. JUMANNE NSHIMBA @ LUBIBI NINDILO
3. MASALI CHILO
4. EDWARD BUNELA @ NURU
5. SHABAN MOHAMED AMOUR
6. JOHN PASCHAL CHARLES NDAKI
7. PIUS WILLIAM MABULA @ KULWA
8. KULWA MAKOLE MABULA
9. ALOYCE PETER ZINDOLO
10. DAVID CHARLES NDAKI
11. TEDDY GABRIEL KIMARIO
12. FRANK SELEMANI KABUCHE
13. AGNESS NSHIMBA
14. MAKONO MAGANYALA KANIKI
15. MARCO NDOSELA MWANAGANDILA
16. GEOFFREY IGNATUS KAPALATA

.....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania
at Tabora)

(Mallaba, J.)

dated the 11th day of August, 2017

in

(DC) Criminal Appeal No. 190 Cf 6, Cf 7, Cf 8, Cf 9, Cf 10, Cf 11, Cf 12
and Cf 13 of 2016

JUDGMENT OF THE COURT

28th April & 6th May, 2020

KWARIKO, J.A.:

The appellant preferred this appeal against the ruling of the High Court of Tanzania at Tabora in (DC) Criminal Appeal No. 190 Cf 6, Cf 8 and Cf 9-13 of 2016 (Mallaba, J). In that ruling the High Court

sustained a preliminary objection to the effect that the appellant's appeal was time barred.

A brief background in respect of this matter can be stated as follows. The respondents were jointly and together charged in the District Court of Nzega in Criminal Case No. 83 of 2009 with 18 different offences namely: One count of conspiracy to commit an offence contrary to section 384, one count of armed robbery contrary to section 287A and three counts of receiving stolen property or unlawfully obtained contrary to section 311 all preferred under the Penal Code [CAP. 16 R.E. 2002] (now R.E. 2019). They were also charged with 13 counts of money laundering contrary to sections 3(j), 12 (d) and 13(a) of the Anti-Money Laundering Act No. 13 of 2006.

At the end of the trial, the 1st, 4th, 5th, 6th, 7th, 9th, 10th and 12th respondents were convicted of the offence of conspiracy and armed robbery and were sentenced to imprisonment of two and thirty years respectively. The other respondents, except the 11th respondent who was found to have no case to answer, were found not guilty and were thus acquitted.

Upon being aggrieved by the acquittal of the 2nd, 3rd, 8th, 13th, 14th, 15th and 16th respondents and the 11th respondent who was earlier

found with a no case to answer, the appellant filed an appeal to the High Court. On the other hand, the 1st, 4th, 5th, 6th, 7th, 9th, 10th and 12th respondents appealed to the High Court against conviction and sentence. The appeals were consolidated to be heard together.

Before the hearing of the said appeals, the 4th, 6th and 10th respondents raised a preliminary objection to the effect that the appeal by the appellant herein was time barred. Likewise, the appellant raised a preliminary objection that the respondents' appeal was incompetent for want of proper notice of intention to appeal. In the end the High Court sustained both preliminary objections and struck out the two consolidated appeals.

It is against that decision that the appellant is before this Court on appeal. He has raised the following two grounds of appeal:

- "1. That, the learned Honourable Judge erred in law to strike out the appellant's appeal on reason that it was filed out of time.*
- 2. That, the learned Honourable Judge erred in law and fact in holding that the exclusion of the time requisite for obtaining certified copies of proceedings and judgment for appeal purposes has to be done by a court*

of law through making an application to the Court.”

When the appeal was called on for hearing, Mr. Oswald Tibabyekomya, learned Principal State Attorney who was being assisted by Messrs. Juma Masanja and Pius Hilla, learned Senior State Attorneys appeared for the appellant. On the other hand, Mr. Deya Paul Outa, learned counsel represented the 13th, 14th and 15th respondents while the 1st, 3rd, 4th, 5th, 6th, 7th, 9th, 10th and 12th respondents appeared in person, without legal representation. The 2nd, 8th, 11th and 16th respondents did not appear. However, since their whereabouts was not known, on 25/11/2019 the Court ordered service upon them to be made through publication. Indeed, they were served in the “Mwananchi” and Daily News Newspapers on 23/4/2020 and 3/4/2020 respectively. Therefore, the appeal was heard in their absence.

In their submissions in respect of the appeal, Mr. Hilla argued the first ground of appeal. He argued that the High Court erred to hold that their appeal was time barred. He submitted that on 4/8/2014 the 11th respondent was acquitted on a no case to answer and the 13th, 14th and 15th respondents were acquitted of the offence of money laundering. Following that decision, they lodged a notice of intention to appeal, applied for a copy of the ruling and prayed for stay of the proceedings

pending determination of the intended appeal. He went on to submit that, the trial court refused to stay the proceedings until the same was concluded on 27/11/2015. On being dissatisfied by that decision, they also lodged a notice of intention to appeal and applied for a copy of the proceedings. The learned counsel accounted further that; they were not supplied with any copy of the proceedings until on 15/6/2016 when they received the summons of the respondents' appeal. This was done after the 1st, 4th, 5th, 6th, 7th, 9th, 10th, 11th and 12th respondents had filed their appeal against the trial court's decision; hence they were supplied as a respondent to that appeal. That, they filed an appeal on 29/7/2016, which was within 45 days after being supplied with a copy of the proceedings as provided under section 379(1) (b) of the Criminal Procedure Act [CAP 20 R.E. 2002] (now R.E. 2019) (the CPA). In fact, he argued, they filed their appeal on the 44th day after they had received the copy of the proceedings hence the High Court erred to hold that their appeal was time barred.

The second ground of appeal was argued by Mr. Tibabyekomya. He submitted that the proviso to section 379(1)(b) of the CPA provides for exclusion of the time requisite to obtain a copy of the proceedings in the lower court. He argued that since the law excludes the time required to obtain the copy of the proceedings, the High Court judge

was not correct to hold that the appellant was supposed to make an application for the court to exclude that time. In support of his position, the learned counsel referred us to the decision in the case of **Aidan Chale v. R** [2005] T.L.R 76 at page 78.

The learned counsel argued further that the judge mixed the requirements under section 379(1) (b) and 379 (2) of the CPA, in that the latter provision is applicable where the appellant is out of time to file appeal after being supplied with a copy of the proceedings. Mr. Tibabyekomya relied on the case of **Mateo Paulo & Another v. R**, Criminal Appeal No. 398 & 400 of 2016 (unreported). In that case, the Court interpreted section 361(2) of the CPA which is similar to section 379(2) of the CPA. He thus urged us to hold that the High Court erred in its decision and implored us to allow the appeal.

In his response, Mr. Outa's stance was that the High Court judge's conclusion was correct though he differed on his reasoning. He argued in respect of the first ground of appeal that, the appellant's appeal was time barred. This he said, is because the appellant did not prove when he received the copy of the proceedings. He contended that the allegation that the appellant was supplied with a copy of proceedings on 15/6/2016 is not backed-up with evidence but was a statement from the

bar. He argued further that although the learned judge acknowledged 15/6/2016 to be the date of receipt of the copy of the proceedings by the appellant, there ought to be a proof to that effect which in this case is lacking.

As regards the second ground of appeal, Mr. Outa concurred with the appellant that it was not necessary for them to have applied for extension of time to file an appeal. He argued that, what was necessary is proof of the date of the receipt of the copy of proceedings.

On their part, the 1st, 3rd, 4th, 5th, 6th, 7th, 9th, 10th and 12th respondents being lay persons, only concurred with the submission made by Mr. Outa.

In rejoinder, Mr. Tibabekomya argued that there was no dispute regarding the date of receipt of the copy of proceedings by the appellant. According to him, this issue ought to have been raised in the High Court for consideration. He was of the contention that this is an afterthought which cannot be determined at this stage, the same being a factual issue. He went further to say that they did not tender evidence to prove that issue because there was no dispute to that effect. He added that the said date of receipt of a copy of the proceedings is in the court record as it is based on the summons with

which they were served, acknowledged and returned to court. He finally welcomed Mr. Outa's concession in respect of the second ground of appeal.

We have considered the submissions by both parties. The germane issue for decision is whether the appeal has merit. Starting with the first ground of appeal, the question is whether the appellant's appeal before the High Court was time barred. Section 379 (1) (b) of the CPA which is relevant here provides thus;

*"(1) Subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions—
(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."*

The appellant's case in this respect is that his appeal was filed on 27/7/2016 which was within 45 days after he was supplied with the copy of proceedings of the trial court on 15/6/2016. The respondents

contended that in order for the 45 days to be reckoned from 15/6/2016, the appellant ought to have presented evidence to prove that he was supplied with the copy of proceedings on that date. According to them, such evidence is lacking. Mr Outa argued that in fact that date was only stated from the bar and was not backed-up by any evidence.

It is our considered view that there was no dispute at the High Court as to the date on which the appellant was supplied with the copy of the proceedings. That date was settled to be 15/6/2016. Had there been reservation about that date, the respondents ought to have raised it at the High Court for consideration by the learned Judge. This being a factual issue, cannot be decided at this stage as it requires evidence to prove. Therefore, it is settled that the appellant was supplied with the copy of the proceedings on 15/6/2016. That being the case then, when the appellant lodged his appeal on 27/7/2016 it was within forty-five days required in law; it was the 44th day. The appeal was therefore within the time limit. This ground of appeal has merit.

On the second ground of appeal, we are in agreement with both parties that the learned Judge erred to hold that the appellant ought to have applied for extension of time to file appeal so that the time requisite for obtaining a copy of the proceedings could be excluded by

the court. We are saying this because the law has already excluded that time. The proviso to section 379 (1) (b) quoted above is self-explanatory, it does not need any interpretation, it is clear and not ambiguous. It says that in computing the 45 days, the time requisite for obtaining a copy of the proceedings, judgment or order appealed from shall be excluded. It follows therefore that an intended appellant is required to lodge his petition of appeal within forty-five days reckoned from the date of the receipt of the requisite copies. There are several authorities by this Court which interpreted this provision of the law, some of them are **Sospeter Lulenga v. R**, Criminal Appeal No. 108 of 2006 (unreported) and **Matheo Paulo & Another** (supra) cited by Mr. Tibabyekomya. For instance, in the former case, faced with similar situation, the Court interpreted section 361 (1) (b) of the CPA which is similar to section 379 (1) (b) of the CPA and stated that: -

"As far as the ground for delaying to file the petition of appeal in time is concerned, there is ample evidence by the officer In charge of Isanga Central Prison at the bottom of the petition of appeal in the High Court (pages 24-25 of the record of appeal) indicating that the date of conviction was on 27/12/2004. On the following day, that is, on 28/12/2004, the copy of

judgment was applied for. It was never supplied till more than a year later, that is, on 30/3/2005. 11 days later, that is, on 31/3/2005, the appellant lodged his petition of appeal. Thus, although judgment was delivered on 27/12/2004, the 45 days required within which to file the petition of appeal accrued from the date when the copy of judgment was received, that is, on 20/3/2005. Thus, when the appellant lodged his petition of appeal on 31/3/2005, it was still within time in terms of the proviso to section 361 (1) (b) of the Criminal Procedure Act, 1985.....”

Likewise, in the latter case the Court interpreted section 361 (1) (a) (b) of the CPA and had the following to say: -

“..... It can be inferred from those provisions, on the one hand, that it is the filing of an appeal (petition of appeal) which should be preceded by the intending appellant being served with a copy of the proceedings and judgment.”

Thus, from these decisions what is important is proof of the date of the decision, the date when the copy of the proceedings was applied for and the date when the same was supplied to the intending appellant. In the present appeal those dates are not in dispute. More specifically the date

when the copy of the proceedings was received, that is 15/6/2016, which the respondents have tried to question now. That date was not disputed and the petition of appeal was thus filed within 45 days therefrom, that is on 27/7/2016.

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 dispose of cases. That is why it provided for automatic exclusion of the time requisite to obtain a copy of the 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 the proceedings. In that case, he may apply for extension of time to file petition of appeal in terms of section 379 (2) of the CPA which provides thus: -

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

This provision was discussed in the case of **Aidan Chale** (supra) cited by the learned Principal State Attorney. In that case, the appellant was late to file his appeal within 45 days after being supplied with the copy of judgment. When the High Court found that the appeal was time barred it took upon itself and decided that there was "good cause" and extended the time *suo motu* to the appellant to file an appeal. The Court stated as follows at page 82: -

"In the case before us no application was made to the High Court by the DPP for extension of the time limit to appeal. We are constrained to agree with Mr. Mbogoro, therefore, that it was not proper for the High Court, in the absence of any application to it, to imagine the existence of an application, to create reasons for the application and then agree that those reasons amounted to "good cause" within the meaning of section 379 (b) (ii) of the Criminal Procedure Act 1985 for admitting the DPP's appeal out of time."

Section 379 (b) (ii) referred above is similar to section 379 (2) of the CPA.

We are therefore settled that the time requisite for obtaining a copy of the proceedings and judgment for appeal purposes has been

excluded by the law in terms of the proviso to section 379 (1) (b) of the CPA. The appellant was therefore entitled to file his appeal within 45 days after receipt of the copy of the proceedings and judgment. He need not apply for extension of time to do so. The second ground too has merit.

Finally, we find the appeal with merit and hereby allow it.

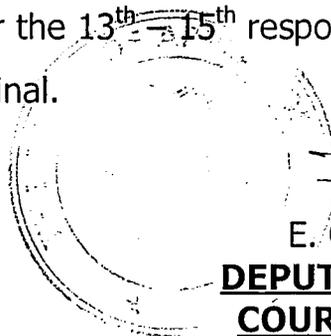
DATED at **TABORA** this 5th day of May, 2020.

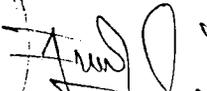
A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This Judgment delivered on 6th day of May, 2020 in the presence of Miss Mercy Ngowi, Senior State Attorney for the appellant/Republic and in the presence of the 1st- 4th, 5th, 6th, 7th, 9th, 10th and 12th respondents via video conference and in absence of the 2nd, 3rd, 8th, 11th & 16th respondents duly served and in presence of Mr. Deya Paul Outa counsel for the 13th - 15th respondents, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL