IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 472 OF 2019

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

BARICK ENOS MWASAGA ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mbeya)
(Mambi, J.)

dated the 15th day of July, 2019
in
Criminal Appeal No. 175 of 2018

.....

JUDGMENT OF THE COURT

26th November & 1st December, 2021

MWAMBEGELE, J.A.:

The genesis of this appeal is the decision of the District Court of Chunya sitting at Chunya which acquitted the respondent, Barick Enos Mwasaga of seven counts of offences under the National Parks Act, Cap. 282 of the Revised Edition, 2002 and the Forest Act, 2002 together with its Regulations. The acquittal irritated the Director of Public Prosecutions. His appeal to the High Court was proved futile by a preliminary objection to the effect that it was lodged out of time. Undeterred, he lodged this appeal.

The appeal to this Court is premised on only one ground; that the first appellate court erred in law in holding that, in computing the forty-five days under section 379 (1) (b) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA) for the DPP to file his appeal, time started to run from the date of the delivery of the judgment.

At the hearing of the appeal before us, the appellant appeared through Mr. Saraji Iboru, learned Principal State Attorney and Mr. Baraka Mgaya, learned State Attorney. The respondent was represented by Mr. Ladislaus Rwekaza, learned advocate. Mr. Mgaya and Mr. Rwekaza also represented their respective parties in the two courts below.

Both parties were very brief and focused in their respective submissions. It was Mr. Mgaya who argued the appeal in the submissions-in-chief. He submitted that the appeal before the High Court was timely filed in that even though the judgment was pronounced on 30.04.2018, the appellant received the documents for appeal purposes on 07.09.2018 and filed the appeal on 16.10.2018. In terms of section 379 (1) (b) of the CPA, he submitted, time started to run against the appellant on the date on which they received the documents for appeal purposes; that is, on the said 07.09.2018 and not on 30.04.2018 on which the judgment was

rendered. The learned State Attorney took us to p. 148 of the record of appeal where the appellant prayed in the High Court to adjourn the hearing of the appeal so that they could collect a document tendered in other proceedings in the High Court before Ndunguru, J. which would verify that the appellant received the documents for appeal purposes on 07.09.2018. He submitted that after that prayer was refused, the appellant implored upon the court to invoke section 59 (1) (d) of the Evidence Act, Cap. 6 of the Revised Edition, 2002 to take judicial notice of the document tendered in other proceedings of the court and the court allegedly agreed.

The learned State Attorney submitted that the petition of appeal was not filed out of time and that the first appellate court erred in holding that it was not filed timeously. He thus implored upon us to allow the appeal.

Mr. Rwekaza, on the other hand, submitted in rebuttal that the document showing that the appeal was filed in time was not in the record of appeal before us. The learned counsel referred to p. 141 of the record where it is shown that the judgment of the District Court was pronounced on 30.04.2018. He added that both parties collected the impugned judgment on the same date it was pronounced. He contended that the

record of appeal shows that the proceedings and judgment were ready for collection on 09.05.2018. Mr. Rwekaza submitted further that the appellant did not prove before the High Court the date on which they received the documents for appeal purposes failure of which time started to run from the date on which the judgment was delivered. The learned counsel cited to us **Aidan Chale v. Republic** [2005] T.L.R 76 to buttress the point. He also referred us to our unreported decision in **Mawazo Saliboko @ Shagi & 15 others v. Republic**, Criminal Appeal No. 384 of 2017 in which we underscored the importance of an applicant proving the date on which copies of proceedings and judgment are supplied to an intending appellant.

Having stated as above, Mr. Rwekaza implored us to uphold the decision of the High Court and dismiss the appeal in its entirety.

In a short rejoinder, Mr. Iboru reiterated what Mr. Mgaya submitted in his submissions-chief and added that **Aidan Chale** (supra) was distinguishable from the appeal before us because there, unlike here, the appeal was filed out of time. Upon being prompted by the Court why they could not furnish proof that the appeal was timely filed while the record of appeal showed that on 03.06.2019 they prayed for an adjournment so that

they could bring that proof and the hearing was adjourned to 04.06.2019, he responded that they could not get that document because it was too short a time to get it from their Chunya Offices. That is the reason why they urged the court to take judicial notice of the proceedings in another case, he argued.

Having stated as above, Mr. Iboru reiterated the prayer by the appellant to have this appeal allowed.

Having summarised the submissions of both parties, we should now be in a position to confront the sole issue in the appeal before us which, we think, calls upon us to decide whether the appeal was filed out of time as argued by the respondent and held by the first appellate court. Apparently, the trained minds for the parties in this appeal are at one on the import and purport of section 379 (1) (b) of the CPA. Despite that, we find it apposite to reproduce the provision for clarity. It reads:

> *"(1) Subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions–*
>
> *(a) ...*
>
> *(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 court has had occasions to discuss the import of the above provisions in a number of its decisions some of which have been cited by the parties. Those cases are: **Aidan Chale** (supra) **Mawazo Saliboko** (supra) and **Samwel Emmanuel Fulgence v. Republic**, Criminal Appeal No. 4 of 2018 (unreported).

As already stated, the parties are agreed that a petition of appeal must be filed within forty-five days of the date of delivery of the impugned judgment; that is, the date of acquittal, finding, sentence or order. They are also at one that in computing the forty-five days of limitation, time used for obtaining the proceedings, judgment or order sought to be appealed against, shall be excluded. The only question on which they have locked jaws is whether, in view of the provisions of section 379 (1) (b) of the CPA, the appeal was lodged timely.

The first appellate court found the appeal before it incompetent and, for that reason, struck it out on the ground that the record before it

showed that the impugned judgment was delivered on 30.04.2018 and the petition of appeal lodged on 16.10.2018; about six months after the delivery. That was the argument of the respondent and the High Court upheld it. The appellant submitted that there was documentary proof to show that the documents were received by the appellant on 07.09.2018 and therefore the appeal was timely filed on 16.10.2018. That assertion was objected by the respondent under the pretext that the appellant was not supposed to bring documentary proof and cited **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd** [1969] 1 EA 696, the decision of our predecessor; the Court of Appeal for East Africa.

We have subjected the arguments of the parties before the High Court and before us to a proper sieve they deserve. Having so done, we think the High Court had no material upon which to perfectly determine whether the appeal was time barred. As the question whether the appeal was time barred was to be answered with certainty by production of the document which showed the date on which the appellant received the documents for appeal purposes, the respondent's purported preliminary objection ceased to be a preliminary objection. This is the tenor and import of the decision in **Mukisa Biscuit Manufacturing**, the decision referred to by Mr. Rwekaza in the High Court.

Flowing from the above, it is our considered view that the proviso to section 379 (1) (b) which reads "***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***" brings in the question of factual proof to ascertain the days which shall be excluded in the computation. In the premises, we do not think the first appellate court was in the right track to entertain the preliminary objection which needed documentary proof to determine. To make matters worse, the first appellate court relied on assumption to hold that the petition of appeal was lodged out of time. At p. 158 of the record of appeal the High Court observed:

> *"... it appears the judgment was ready for collection on 30th April 2018 but the petition of appeal was filed on 16.10.2018."*

That was too wide a statement to the detriment of the appellant and, in our view, it had two flaws. First, the statement was made from the bar by counsel for the respondent, it ought not to have been relied upon by the first appellate court. Secondly, even if it was true that the impugned judgment was ready for collection on the date it was delivered, we are of

the view that the appellant could not have filed a meaningful petition of appeal relying on only the judgment. He might as well have needed a copy of proceedings for that purpose. The course taken by the first appellate court to rely on this statement from the bar, we respectfully think, offended the ends of justice. As already stated above, the first appellate court did not have enough material before it to justifiably hold that the petition of appeal was filed out of time. It was therefore an error to strike out the appeal before it.

For the avoidance of doubt, we do not think the document complained of fell under the scope of section 59 (1) (d) of the Evidence Act. The paragraph calls upon courts to take judicial notice of "all seals of all the courts of the United Republic duly established and of notaries public, and all seals which any person is authorised to use by any written law". It will be appreciated that this was not the case in the appeal before the High Court and is not the case in the appeal before us. The High Court did not take judicial notice of the document filed in another case and to our mind that course was properly taken.

In the final analysis, we find merit in this appeal and allow it. As a result, we set aside the order of the High Court striking out Criminal Appeal

No. 175 of 2019 before it. We order that the record be remitted to the High Court for hearing of the appeal before another Judge.

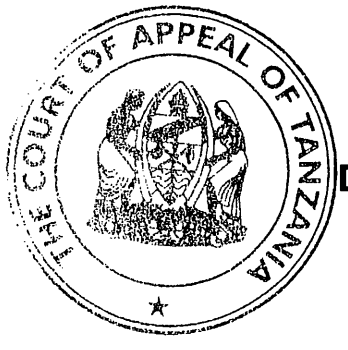
DATED at **MBEYA** this 30th day of November, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 1st day of December, 2021 in the presence of Mr. Baraka Mgaya, learned State Attorney for the Appellant/Republic and Ms. Juliana Marunda Counsel for the Respondent is hereby certified as a true copy of the original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL