

TANZANIA / JUDGMENT

dpp vs lengai ole sabaya and 5 others

2022 tzhc 15351 14 december 2022

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE DISTRICT REGISTRY OF ARUSHA) AT ARUSHA CRIMINAL APPEAL NO. 155 OF 2022 (C/F Resident Magistrate's Court of Arusha at Arusha, Economic Case Number 27 of 2021) THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT VERSUS LENGAI OLE SABAYA..... 1st RESPONDENT ENOCK TOGOLANI MNKENI..... 2ndRESPONDENT JOHN ODEMBA AWEYO..... 3rdRESPONDENT SYLVESTER WENCENSLAUS NYEGU..... 4thRESPONDENT JACKSON RAMWELI MACHA..... 5thRESPONDENT NATHAN JOHN MSUYA..... 6thRESPONDENT

RULING.

S.M, MAGHIMBI, J: The appellant herein who is also the Director of Public Prosecutions, was dissatisfied with the judgment of the Arusha Resident Magistrate's court which acquitted the six respondents herein and another party who is not a party to this appeal. They have lodged this appeal raising two grounds which fault the Resident Magistrate in her analysis of the whole evidence and the verdict reached. On the 12/12/2022, the 1st respondent, duly represented by Mr. Moses Mahuna, learned Counsel, filed in this court a i notice of preliminary objection on point of law that the appeal contravenes the provisions of Section 379(l)(b) of the Criminal Procedure Act, Cap. 20 R.E 2022 C'the CPA"). When the appeal came for hearing on the 13/12/2022, the appellant was represented by Mr. Patrick Mwita, Mr. Abdallah Chavula, Mr. Kevin Kihaka, Mr. Felix Kwetukia and Mr. Timothy Mmari, all Senior State Attorneys. On his part the first respondent who was present in person, was also represented by Mr. Moses Mahuna, Ms. Fauzia Abdallah and Mr. Fridoline Gwemelo, learned Counsels, while Mr. Sylvester Kahinduka, learned Counsel, represented the 4th respondent who was also present in person. Hearing of the preliminary objection commenced first, hence this ruling. In addressing the preliminary points of objection, Mr. Mahuna made the submissions on behalf of the first respondent. In his detailed submissions he advanced his arguments in two limbs; the first limb is that this appeal is out of time and the second limb is that the appeal is not supported by the notice of appeal or the petition of appeal. Having appreciated the parties submissions on the issue; submissions which shall be taken on

board in due course of determination of the points 2 of objection; and the relevant provisions of the law as well as the case laws cited, my findings are as elaborated hereunder. In determination of the arguments advanced in addressing the objection, I find it prudent that I first address the argument advanced by Mr. Chavula while making his reply submissions. This is because he is challenging the validity of the point of objection raised on the ground that it is not a point fit to be determined as a preliminary point of law as it requires evidence to show when the disputed documents were filed for the purpose of computation of time. He relied on the cited case of DPP Vs. Barick Enock Mwasaga, criminal Appeal No. 472 of 2022 (unreported). His argument is that this point needs evidence and that the court has to go through some documents to be supplied by the party that raises the objection, since it is coming from the bar to the bench. He submitted that a preliminary objections must be directed to points of law, citing the case of Mukisa Biscuits Manufacturing Company Limited Vs. West End Distributors Limited, 1969 Vol I E.A 696, whereby the Court of Appeal of East Africa made that principle. As to why the objection raised is not a point of law, he cited the decision of the Court of Appeal in the case of DPP Vs. Barick Enock Mwasaga whereby at 3 page 7-9 the court emphasized that in ascertaining the time, it brings in the question of factual proof to ascertain the days which shall be excluded in the computation. He concluded that the objection is not a preliminary point of law. In reply, Mr. Mahuna submitted that the issue of time limitation has attributes of jurisdiction of the court hence if the matter is filed out of time, the court cease to have jurisdiction to determine it. He argued that saying that the objection raised is not a pure point of law is misleading. On the cited the case of DPP Vs. Barick Enock, he argued that the statement contradicted the submission of his Colleague Mr. Mwita who submitted that the essence of the decision is to show that the DPP lodges an appeal after receiving requisite documents. He concluded that the matter at hand fits to be determined as a preliminary point of objection. Having heard the parties, at the onset, I must put it clear that although the issue of time limitation is an issue of law touching the jurisdiction of the court, in some situations, it may not be a fit issue to be determined as a preliminary point of objection. This is because sometimes, in order to prove that a matter was filed within time, evidence must be adduced to prove when the right of action arose in cases of civil nature or in all cases, when 4 a certain matter was initiated in court. Under such circumstances, it will not be entertained as a preliminary point of law. Without prejudice to the above, the situation in our case, with respect to Mr. Chavula, is not the same. In the cited case of Mukisa Biscuits (Supra), the court emphasized that for a preliminary point of objection to qualify as it is, it must consist of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary point of law, it may dispose of the suit. The court also emphasized that a preliminary point of objection must raise a pure point of law which is to be argued on the assumption that all the facts pleaded by the other side are correct. Therefore the restriction on determination of issues as a preliminary point of law applies only when the point has to be argued with facts which need to be ascertained. At this point, the question is whether the basis of Mr. Mahuna's objection needs any ascertainment of

facts.

The above question is answered in the negative; the facts which formed a basis of the objection were not denied by the other party (the appellant). They were all undisputed facts clear on the face of records and that is why even in his submissions, Mr. Mwita opened his submissions by making 5 admission that several facts were not disputed. The undisputed facts included that the judgment was delivered on 10/06/2022, notice of appeal was lodged on the 24/06/2022 and further that the DPP received a copy of judgment and proceedings on 14/09/2022. There was also no dispute that the appellant lodged the petition of appeal on 28/10/2022, 44 days after receipt of the requisite documents. The only issue to be determined was the interpretation of Section 379(l)(b) on how the time should be computed for the purpose of limitation. I therefore find the argument advanced by Mr. Chavula not to befit the situation in our case, the point raised is a point of law based on undisputed facts which are apparent on the records. I shall therefore proceed to determine the objection raised. On the substance of the objection, Mr. Mahuna argued the point of objection in two limbs, the first limb is that this appeal is out of time and the second limb is that the appeal is not supported by the notice of appeal or the petition of appeal. For a convenient disposal of the objections, I will start with the second limb challenging the competence of the notice of appeal and petition of appeal. Mr. Mahuna submitted that after they received the petition of appeal and the notice of appeal filed on 24/06/2022, they noted that the notice which gives information of an intended appeal to the High Court was against seven respondents. That when they received the petition of appeal it contained six respondents in exclusion of one of the respondents in the notice of appeal, the third respondent in the notice of appeal, one Watson Stanley Mwahomange. He argued that Section 379(l)(a) provides that when the DPP intends to appeal, he must issue a notice within 30 days and it is the notice of appeal that shall institute the appeal. That Section 386(1) of the CPA gives powers to the DPP, at any time before hearing, to withdraw an appeal by giving a written notice to the Registrar, a notice which shall be communicated to the subordinate court and the respondents. He pointed out that until when this appeal came for hearing, they have not seen any notice of withdrawal which excludes the said Watson Stanley Mwahomange and neither does the court record show it. He then argued that the two documents are not co-related, is like having a Chamber Summons which differs from the affidavit. Emphasizing on the reason why the word "and" was used in Section 379(l)(a)&(b) is because the two provisions are to be read conjunctively and not disjunctively or in isolation. He concluded that if this court expunges the petition of appeal which offends the notice which instituted an appeal, there will be no 7 compliance with Section 379(1)(b) because the notice institutes an appeal and the petition supports the notice of appeal hence no appeal in this court. In reply, Mr. Mwita argued that while lodging a notice of appeal, you cannot know the reasons or grounds of appeal until when you get a copy of judgment and proceedings, this is when you can go through the documents and see the strength of your evidence and that which you are not satisfied with. He argued that on their part, after procuring a copy of proceedings and judgment they found that they had no intention to proceed with the appeal against the said Stanley Watson Mwahomange and that is why in the petition of appeal which is now the appeal, they did not include him as one of the respondents. He argued that Section 386 cited by Mr. Mahuna can only

be used when the appeal is before the court and the name of the person is in the petition of appeal which is the appeal itself. Mr. Mwita also questioned how, with all the documents properly before this court, the absence of the said Mwachomange in this appeal or the petition of appeal, affects or prejudices the respondents. Defending his position as the appellant, he argued that the appellant is the one who decides whether to appeal or not and against whom and that one cannot choose who they appeal against. In rejoinder, Mr. Mahuna insisted that the parties in the two documents are totally different in the sense that from the 3rd respondent to the last one in the petition of appeal and 3rd respondent in the notice of appeal they are totally different. He concluded that justice is possible if one observes the procedures in law and that the procedure are clear under Section 386 and it was not followed. This limb of objection should not detain me much. Under Section 379(1)(a) of the CPA, the DPP is required to lodge a notice of intention to appeal and the subsequent appeal by way of the petition comes after the notice was lodged. The argument by Mr. Mwita makes a lot of sense in that at the time of lodging of a notice of appeal, you are just dissatisfied with the verdict, you cannot know the reasons or grounds of appeal until when you get a copy of the judgment and proceedings. Hence by going through the documents is when one may decide who they desire to appeal against according to that evidence and findings of the court. Therefore by having a party in the notice who will not feature in the petition of appeal, it will not prejudice the competence of the appeal for a reason that I shall elaborate. 9 The notice of appeal under Section 378(1)(a) shows an intention that the DPP intends to appeal and not the appeal itself. It just initiates the appeal and the appeal is only said to have been lodged by filing a petition of appeal. Therefore dropping the parties before lodging an appeal is not fatal as what Mr. Mahuna would desire the court to hold. The situation would have been different if the DPP dragged a party who was not a party during trial and appeal against that party. In conclusion, the omission or discrepancy can well be cured by the overriding objective principle since, as argued by Mr. Mwita, Mr. Mahuna has not shown how the respondents were prejudiced by the said omission. This line of objection is therefore overruled. Now moving to the first limb, that the appeal is out of time. In principle Mr. Mahuna is moving the court to interpret the meaning of the wording in the provision of Section 379(1)(b) of the CPA; whether the computation of time for the purpose of appeal should include the number of days before which the appellant had applied before the lower court, for a copy of the requisite documents to lodge an appeal. His argument is that according to the Section 379(1)(b) of the CPA, the 45 days will be counted from the date of the acquittal, finding, sentence or order of the court. Reproducing the 10 provisions of the Section 379(1)(b) of the CPA, Mr. Mahuna's submission was that after a comma, the Section further provides that in computing the 45 days, the time that was used in procuring a copy of the judgment or order appealed against or proceedings of the matter, shall not be included. Pointing back to the records, he elaborated that the decision of the Arusha RM's Court which is a subject of this appeal was pronounced on the 10/06/2022, while this appeal was lodged on the 28th October, 2022 which is after four months. He admitted that both conditions of appeal under the sub-section (a) and (b) of the Section 379(1) have been fulfilled by the DPP while lodging an appeal, by issuing a notice on 24/06/2022 and filing the subsequent petition of appeal on 28/10/2022. However, Mr. Mahuna's argument was that sub-section (b) requires an appeal to be lodged 45 days from the date of pronouncing the decision hence the time started running

immediately from the date of the decision which was on 10/06/2022. Therefore by the time the notice of appeal was lodged on 24/06/2022, the DPP had already consumed 14 days of filing the petition of appeal and this is where the gist of the objection lies; Mr. Mahuna urges this court to include the 14 days between the date of judgment to the date of requesting for the documents of appeal in computing the time limitation. The days should be summed up with the 44 other days when the DPP received copy of the judgment and proceedings, on the 14/09/2022 to the date the appeal was lodged on the 28/10/2022. Adding up the days, his conclusion was that if the 45 days are to be considered from the date of the decision to the date they requested for a copy of the proceedings and judgment, then this appeal was lodged 59 days from the date of the decision which is way of out of the prescribed time under Section 379(l)(b). He supported his argument by citing the case of Kilimanjaro Timber Utilization Company Limited Vs. Francis A. Mbuya, Civil Appeal No. 07/1999, HC Arusha, Mrosso J (as he then was). He submitted that the essence of the cited decision was the interpretation of requisite time when the law says from the date you requested for those documents. He then argued that the appeal is out of time and that saying that the computation of time starts from the date when you are supplied with the documents will be reading the statute upside down. He submitted further that if the law required the time to run from the date of supply of documents then it would specifically say so. That the position of the law is that the time of 45 days will be computed from the date of the 12 decision hence what matters is the promptness of the person who applied for the records and that one cannot wait that long and the question will be who will account for all those days. He argued that neither does the law create any vacuum. His conclusion on this point was that this appeal is out of time praying that the court dismiss the appeal as it contravenes the provisions of Section 379(l)(b) of the CPA. In reply, Mr. Mwita was brief; he submitted that Mr. Mahuna seriously misdirected himself in computing the time of limitation under Section 379(1) of the CPA. His argument is that the provisions of Section 379(l)(b) cannot be read in isolation of Section 379(l)(a) because you cannot lodge an appeal without first lodging a notice of appeal. Further that the conditions under Section 379(l)(b) are very clear, they require the appellant who is the DPP to lodge the petition of appeal within 45 days from the date of receipt of the copy of judgment and proceedings. He concluded that the condition that the computation starts on the date of supply of the requisite documents is very clear. My work here is but a complex one, to interpret the meaning of Section 379(l)(b) of the CPA with regard to the time for lodging an appeal in the context of how the computation of the period of limitation shall be done. 13 Mr. Mahuna's argument is that the time that lapsed between the date of the acquittal, finding, sentence or order of the court, to the date of application for requisite documents should be included in computation of time, to stop only within the period that the applicant is waiting to be supplied with the copies of the proceedings. Further that the time resumes accrual after the documents are supplied to the DPP. Mr. Mwita on the other hand argues that the words of the statute are clear and that time should be computed after the appellant has received the required documents. On my part; I will first reproduce the provisions of the Section 379(l)(b) of the CPA which reads: "379. -(1) Subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions or a person acting under his instructions: 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.z/ 14 The catching words in this Section are 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 issue is whether, from the wording of the statute, there is any meaning that can be extracted to imply that the period of time before which the applicant has applied for the copies of the requisite documents for appeal should be included in computation of limitation period. My take is that the wording in the statute is clear and unambiguous and they do not need multiple interpretations. I must make it clear at that when the words of a statute are clear and unambiguous, they should be given the same meaning as in the statute and not otherwise. In the case of Pan African Tanzania Limited Vs. Commissioner General, Tanzania Revenue Authority (Civil Appeal 172 of 2020)

[2021] TZCA 287 (09 July 2021); the Court of Appeal was called to interpret several provisions of the Tanzania Revenue Authority Act and the Tax Administration Act. Madame Justice S.E. Mugasha (JA) had this to say on how the statutes should be interpreted: "As we have been called upon to construe several provisions in the TRAA and TAA relating to what is in dispute, we begin with the four rules of Statutory Interpretation to wit: the literal rule; the golden rule; the mischief rule and the purposive approach. Which rule is the best? The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of a statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning irrespective of the consequences" Is for the case at hand, the issue is to see which Rule of interpretation would befit what is before us. As in the cited case, I will capitalize on the Golden Rule that the words of a statute must prima facie be given their ordinary meaning and Rule of Construction that, when the words of a statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning irrespective of the consequences. In interpreting a statute, it is of paramount importance to seek the intention of the legislature in enacting a provision and then apply the intention to the facts of the case at hand. The courts should avoid the interpretation which defeats the intention and purpose for which the statute was enacted. 16 At this point, the question would be what was the intention of the legislature to enact the proviso in Section 379(1)(b), that the time requisite to obtain the relevant documents should be excluded. It is my strong view that the intention of the legislature in enacting this provision was to accord the appellant the exemption of the hands of time from those things which are not under his/her control. The time taken for the court to supply a party with copies of proceedings, judgment or order cannot in any way be influenced by a party. The party only prompts the court by showing his desire to obtain those documents through a notice/letter requesting the documents. What happens thereafter that until when a party is served with those documents is strictly under the control of the court and not a party. It is on this basis that the legislature found it just that this time is to be reckoned in computation. As for the cited case of Kilimanjaro Timber Utilization Company Limited, I find the case not to be

applicable in our case as the same was dealing with an undated decree and the facts there are distinguishable. After all it is a persuasive decision for me and there are decisions of a Superior Court, the Court of Appeal which are binding to me and they are which I have relied on in determining the objection. The next issue is whether the wording of the Section is to the effect that the time before the party requests the documents should be included. At this point I am in agreement with Mr. Mwita that the words of the statutes are plain and clear. Under the golden rule of interpretation, where the words of a statute are clear and unambiguous, we cannot add words or interpret a statute in any other manner that is clearly stated. This same position was held by the Court of Appeal in the case of The Director of Public Prosecutions (DPP) Vs. Mawazo Saliboko @Shagi and Others, Criminal Appeal No.384 of 2017, Cour of Appeal sitting at Tabora (unreported) where it was held: "The proviso to section 379 (1) (b) quoted above is self-explanatory, it does not need any interpretation, it is dear 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. " In addition to the above, in interpretation of the provisions of Section 379(1)(b), we should consider the requirements of other relevant 18 provisions relating to the process of appeal. For instance, one must also take into consideration whether a petition of appeal can be filed without the requisite documents. This is answered under the provisions of Section 380(1) of the CPA which reads: "Every appeal under section 378 shall be made in the form of a petition in writing presented by the Director of Public Prosecutions and shall, unless the High Court otherwise directs, be accompanied by a copy of the proceedings, judgment or order appealed against." (Emphasis is mine) Under the cited Section, an appeal could not be lodged without the requisite documents. However looking at the wording concerning the filing of the notice of intention to appeal under Section 379(1)(a) of the CPA, there is no proviso regarding computation of time because lodging a notice of appeal is something which is completely under the mandate and control of the appellants and does not require any accompanying documents. However, when it comes to the petition of appeal, since it has to be accompanied by a copy of judgment/order and the proceedings, that is why the wisdom of the legislature found it necessary that the time requisite to procure the documents should be excluded, since the same is not within the control of a party. I must also emphasize that in assessing whether the appeal was lodged on time including the time requisite to procure the required documents, as correctly by Mr. Mahuna, the promptness of the appellant is of paramount importance. The court should also assess whether the said documents were requested on time because the interpretation of the law is that within 45 days of the date of the decision, the appellant should have made an application for the documents showing his intention to appeal. Now the records are clear that the appellant showed the intention to appeal within the prescribed time by lodging a notice under Section 379(1)(a) of the CPA and further requested for the said documents. It was just within 14 days of the date of the impugned judgment hence the time will only start to run after the said documents were

availed to him and it is this period that falls under the provisions of Section 379(1)(b) of the CPA. In conclusion therefore, if we are to take Mr. Mahuna's argument that the time between the judgment date and the date which the appellant requested for the documents was to be included, then we would be misinterpreting the statute because, had the intention of the legislature 20 been so, then the language of the statute would have been clear and unambiguous. Instead, the language is clear that the computation should reckon the days when the appellant was procuring the requisite documents. Indeed we cannot have the computation of time in bits and pieces by adding up and subtracting time, stop the time and start over again. That was not the intention of the legislature in enacting the provisions of Section 379(1)(b) of the CPA. On the above findings, it is obvious that the appeal was lodged within the time prescribed by the law hence competent before this Court. The preliminary objection raised is lacking merits out of context. The same is hereby overruled. Hearing of the appeal shall proceed henceforth. Dated at Arusha this 14th day of December, 2022 S.M HAGHIMBI JUDGE 21

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