

TANZANIA / JUDGMENT

director of public prosecutions vs amina talib mselem others 2020 tzca 1765 28 august 2020

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IN THE COURT OF APPEAL OF TANZANIA AT SHINYANGA (CORAM: MWARIJA, J.A.,
MWAMBEGELE, J.A., And KEREFU, J J U CRIMINAL APPEAL NO. 561 OF 2016 DIRECTOR OF
PUBLIC PROSECUTIONS.....APPELLANT VERSUS

1. AMIN TALIB MSELEM
2. KARIM HAJI SHABANI
3. ELIYA JOHN MRAHAGWA
4. ISMAIL BAKARI HAMIS RESPONDENTS
5. MOHAMED JUMA BALOZI
6. JUSTUS TRAZIUS MTECHURA (Appeal from the Ruling of the High Court of Tanzania at Shinyanga) (MakanLJJ.) dated the 28th day of October, 2016 in DC. Criminal Appeal No. 35 of 2015 JUDGMENT OF THE COURT 14th & 28th August, 2020 MWARIJA, J.A.: This appeal arises from the ruling of the High Court of Tanzania sitting at Shinyanga (Makani, J.) dated 28/10/2016. The facts giving rise to that ruling can be briefly stated as follows: The respondents; Amin Talib Mselem, Kharim Haji Shabani, Eliya John Mrahagwa, Ismail Bakari Hamis, Mohamed Juma Balozi, Justus Trazius Mtechura together with i another person who is not a party to this appeal, Aloysius Fundikila Shija (to be referred by his first name of Aloysius) were jointly charged in the Resident Magistrate's Court of Shinyanga with three counts under the Penal Code [Cap. 16 R.E. 2002] (the Penal Code). In the first count, they were charged with the offence of conspiracy to commit an offence contrary to section 384 and in the second and third counts, they were charged with the offence of stealing by public servant contrary to sections 271 and 265, all of Penal Code. It was alleged that on various dated stated in the three counts, between 1/10/2011 and 19/2/2012, being employees of Bulyanhulu Gold Mine, the respondents and Aloysius conspired and later stole 3.20 kilograms of gold bearing materials worth TZS 210,000,000.00 and 11,956.1 grams of gold bearing materials containing 10,141.7 grams of pure gold valued at TZS 875,053,562.84, all

being the properties of Bulyanhulu Gold Mine. They denied all counts but at the end of the trial, except for the first respondent who was convicted of the third count and sentenced to three years imprisonment, the other respondents were found not guilty and were thus acquitted. The appellant DPP was dissatisfied with the decision of the trial court and therefore, on 28/7/2015 lodged a notice of intention to appeal in which, he also applied for certified copies of the proceedings and judgment (certified copies). The notice, which is at page 264 of the record of appeal, shows that it was received by the High Court Registry on 28/7/2015. Later on 19/11/2015 the appellant filed his petition of appeal. The competence of the appeal was however, challenged by the counsel for the first respondent through a notice of preliminary objection filed in the High Court on 2/3/2016. The objection consisted of two grounds as follows; "(1) That the appeal is time barred.

- (2) That the drawer of the petition of appeal did not endorse his signature on the 'drawn and filed clause.' The preliminary objection was supplemented by another ground through another notice filed on 17/5/2016. The counsel for the first respondent added another ground (the third ground) contending as follows; 3 "That, the petition of appeal is defective for want of prayers." Having heard the preliminary objection, Makani, J, in her ruling dated 28/10/2016, upheld all the grounds raised by the first respondent's counsel. The appellant was aggrieved and therefore, preferred this appeal raising three grounds:

1. That, the appellate court misdirected itself when it allowed the appeal and acquitted the Respondents on the ground that the petition of Appeal was defective for lack of prayers.
2. That, the appellate judge misdirected himself (sic) when she upheld a preliminary objection on a matter of fact that the petition of Appeal by the DPP was signed by an officer who did not prepare and that it was an irregularity.
3. That, appellate judge erred in law when she held that the appeal by the DPP was time barred without considering the time the DPP was waiting for obtaining judgment and proceedings of the lower court." At the hearing of the appeal, the appellant was represented by Mr. Tumaini Kweka, learned Principal State Attorney assisted by Ms. Margareth Ndaweka, learned Senior State Attorney and Ms. Caroline Mushi, learned State Attorney. The respondents did not enter appearance. Despite the fact that they could not be served with notices of hearing because their whereabouts was unknown, they were served through substituted service by publication in Habari Leo Newspaper of 3/8/2020. The hearing thus proceeded in their absence under Rule 80(6) of the Tanzania Court of Appeal Rules, 2009. The three grounds of appeal were argued by Mr. Kweka who submitted on the first and third grounds and Ms. Ndaweka submitted on the second ground. In her submission, Ms. Ndaweka argued that the second ground of the preliminary objection which was upheld by learned High Court Judge did not raise a pure point of law and therefore, the learned Judge erred in entertaining it. According to the learned Senior State Attorney, the issue concerning the status of the person who signed the petition of appeal raised a matter of fact, the determination of which could not be made in the preliminary objection. In any case, Ms. Ndaweka submitted, since the document was signed by a State Attorney, the objection was

not tenable. On his part, submitting in support of the first ground of appeal, Mr. Kweka argued that the contention that the petition of appeal was defective for failure to contain prayers is without merit. Relying on the provisions of section 380(2) of the Criminal Procedure Act [Cap. 20 R.E 2002] (the CPA), the learned Principal State Attorney argued that, it is not a requirement of the law for a petition of appeal to contain the appellant's prayers. On the third ground, Mr. Kweka argued that the learned Judge erred in finding that the appeal was filed out of time. Relying on the provisions of section 379(1)(a) and (b) of the CPA, the learned Principal State Attorney submitted that, since it was not disputed that the appellant was supplied with certified copies on 21/10/2015, by filing the appeal on 19/11/2015, the appeal was not time barred. He added that, the reason which was relied upon by the High Court that, had the appellant made a follow-up, he would have found that the certified copies were ready for collection on 2/9/2015 is not valid. He argued that the time starts to run after the notification that the applied copies are ready for collection. Based on their submissions, Mr. Kweka urged the 6 Court to find that the preliminary objection did not have merit. He thus prayed that the appeal be allowed. Having considered the submissions made by Mr. Kweka and Ms. Ndaweka, we now turn to determine the grounds of appeal. We intend to do so in the order in which they were argued by the appellant. Starting with the second ground, the argument made during the hearing of the preliminary objection centers on the competence of Ms. Makondo, learned Principal State Attorney in signing the petition of appeal which was prepared by Mr. Pius Hilla, learned Senior State Attorney. The learned Judge considered section 10 of the Office of the Attorney General (Discharge of Duties) Act No. 2005 and concluded that Mr. Hilla who signed the petition of appeal was delegated the powers of performing the duties of the Attorney General and that therefore, under the Principle of *delegatus non potes delegare* he should not have delegated such powers to Ms. Makondo. We think the issue of delegation of powers between Mr. Hilla and Ms. Makondo or whether the powers of signing the documents were also delegated to her by the Attorney General are matters which required evidence to be established. In the circumstances, we agree with Ms. Ndaweka that since the matter at issue in the second ground of the preliminary objection required evidence to ascertain, it did not constitute a pure point of law which could be argued and determined in the preliminary objection. It is instructive here to restate the principle which was enunciated in the often cited case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distribution Co. Ltd* [1969] EA

696. It is that: "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..." We find therefore that the High Court erred in entertaining that ground of the preliminary objection. As for the first ground of appeal, the same need not detain us. S. 380 (1) and (2) of the CPA provides for the requirements which a petition of appeal to the High Court should contain. It states as follows:- "380 - (1) 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

- (2) The petition shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred." It is clear from the provision which has been reproduced above that, as submitted by Mr. Kweka, it is not a requirement of the law that a petition of appeal has to contain prayers. We agree further with Mr. Kweka that in practice, prayers are made at the conclusion of the appellant's submission. Next for consideration is the third ground which challenges the finding of the High Court to the effect that the appeal was time barred. The governing section of the CPA as regards the limitation for lodgment of an appeal by the DPP to the High Court from a subordinate court is section 379 (1) (b) which states that:- 9 "379 - (1) Subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions-
- (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
- (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 proceedings of the High Court at pages 282 to 283 of the record I of appeal, the parties were not in dispute that the appellant was supplied with the certified copies on 21/10/2015. There is no dispute further that the certified copies were ready for collection on 2/9/2015. It was on the basis of the fact that the certified copies were ready for collection on that date that High the Court was of the view that by filing the appeal on 19/11/2015, the appellant lodged it out of time. The learned Judge was of the view that the appellant ought to have made a follow-up so that he could file the appeal within the prescribed period from the date when the certified copies were ready for collection. She was of the view that, since the prescribed period of 45 days had elapsed from the date when the copies were certified, the appellant should have applied for extension of time to institute his appeal out of time. She cited this Court's decision in the case of Aidan Chale v. Republic, [2005] T.L.R.76 as authority that, where an appellant delays to file an appeal he should first apply for extension of time to file it out of time. As pointed out above, the basis of the High Court's finding to the effect that the appeal was filed out of time is the appellant's failure to make a follow-up so that he could collect the certified copies as soon as they were certified by the Registrar of the High Court. With due respect to the learned Judge, although it is logical for a person who has applied from the court, certified copies of proceedings and judgment, it is not a liability which is imposed on him by the law. Conversely, it is the duty of the court to notify the applicant of their readiness for collection. In the case of Mwananchi Communication Ltd v. New Habari (2006) Limited, Civil Application No. 61/16 of 2017 (unreported), for example, we observed as follows:- "It is logical that the respondent could not be blamed for not collecting the copies on the absence of proof of any notification by the Registrar that copies of the documents are ready for collection. "[Emphasis added]. See also the case of Christopher Ole Memanyoki v. Trade and

Sellers (T) Ltd, Civil Application No. 319/02 of 2017 (unreported). The decisions in these cases emphasized the duty of the court to notify a party who has applied for certified copies of proceedings and judgment that the same are ready for collection. It is after the party has been duly notified that when the limitation starts to run. Although the two decisions were made in civil cases, in our considered view, the principle applies to criminal matters where the time limit is subject to obtaining certified copies of proceedings and judgment as provided for 12 under section 37 9(1) (b) of the CPA. That said, we are settled in our mind that the learned High Court Judge erred also in upholding the third ground of the preliminary objection. In the event, we allow the appeal. The impugned ruling of the High Court is thus hereby quashed. We order that the appeal which was filed in the High Court by the DPP be reinstated. DATED at SHINYANGA this 28th day of August, 2020. A.G. MWARIJA JUSTICE OF APPEAL J. C. M. MWAMBEGELE JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL The judgment delivered this 28th day of August, 2020 in presence of Mr. Jukael Reuben Jairo, learned State Attorney for the Appellant and absence of the Respondents, is hereby certified as a true copy of the 13

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