

IN THE HIGH COURT OF ZANZIBAR
HOLDEN AT TUNGUU
CRIMINAL APPEAL NO. 100 OF 2023
(FROM CRIMINAL CASE NO. 78 OF 2021)
(REGIONAL MAGISTRATE COURT, MWERA)
ABUBAKAR SALEH KHAMIS..... APPELLANT
VERSUS
DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

Date of Ruling: 29 February, 2024
K. SHAMTE J.

This ruling arises out of the preliminary objections (P.O.) on the point of law raised by the Respondent. The Appellant, Abubakar Saleh Khamis was charged with the offence of incest by male contrary to section 143 (1) and (5) of the Penal Act No. 6 of 2018 of the Laws of Zanzibar. The Regional Magistrate Mwera, (Mbarouk N. Mbarouk (RM)) convicted the Appellant and sentenced him to serve twenty years in the Education Centre. The Appellant being aggrieved by the conviction and sentence, appealed to this Court

During hearing the Respondent raised a preliminary legal objection on the point of law that he believed could determine the merit of this appeal. The learned State Attorney has acknowledged the receipt of the judgment and proceedings from the Appellant; however, upon reviewing the documents, he discovered that certain pages from the trial court proceedings were missing, which he believes renders the documents defective.

In the hearing of the preliminary objections, the Respondent was represented by the learned State Attorney Ali Juma, while the Appellant, representing himself, appeared in person.

In the opening of his submission, SA Ali Juma asserted that this Honorable Court cannot be properly moved to entertain this application due to the defective documents submitted by the Applicant. Furthermore, the Respondent has expressed difficulties in responding to the grounds of appeal, as the served proceedings are incomplete and lack crucial pages

(pages 12 to 21) which containing evidence presented by the witness and the defense of the Appellant during the trial.

The Respondent submitted that the Appellant was cognizant of the missing pages, that's why he referred the issue in ground two of his grounds of appeal. The Respondent humbly requests that this appeal be dismissed and stricken, which is the sole remedy at hand.

In supporting his argument, he stated that the discrepancy is in contravention of mandatory provision of the section 350(1) of the Criminal Procedures Act No. 7 of 2018; which reads:

350. (1) If the appellate court doesn't dismiss the appeal summarily, it shall cause notice to be given to the appellant or his or her advocate, and to the Director of Public Prosecutions, of the time and place at which such appeal will be heard and shall furnish the respondent with a copy of the proceedings and of the grounds of appeal;

(2) Notice under subsection (1) of this section, need not to be given to the appellant or his or her advocate if it has been stated in the petition of appeal that the appellant does not wish to be present and does not intend to engage an advocate to represent him or her at the hearing of the appeal.

The State Attorney, in finalizing his submission, referred to the decision in **Director of Public Prosecution V. Mohamed Hamza Mohamed**, Appeal No. 572 of 2015, specifically on page 15, where the Court of Appeal stated that an appeal can be struck out for this reason. On his part, the Appellant who appeared in person had nothing useful to say or respond to on the preliminary point of law raised by the learned State Attorney.

After carefully reviewing the submission provided by SA Juma, the primary matter that this Court shall consider is whether the preliminary objection raised by the Respondent is valid. Additionally, the Court shall determine whether the Appellant's defective documents can be cured or be rectified. Lastly, the Court will determine the appropriate remedy in this case.

On the first issue the Court finds that it is clear that the preliminary objection is not valid and not maintainable, as it does not pertain to any legal issues. In reference of the case of **Mount Meru Flowers Tanzania Limited V. Box Board Tanzania Limited**, Civil Appeal No. 260 of 2018, The concept of a preliminary objection pertains to the legal issues raised by any party in a lawsuit, which necessitates a judicial determination prior to the resolution

of the main case. Such an objection shall be based on a point of law and cannot be otherwise.

Additionally, reference is made to another case, **Mukisa Biscuit Manufactures Ltd. V. West End Distributors Ltd** [1969] E.A. 696, which has been frequently cited with approval by the Court. In this case, the Court provided a detailed explanation of the nature of a preliminary objection.

"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 the 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."

The issue raised by the Respondent in this matter does not qualify to be a point of preliminary objection as it is not based on a pure point of law. In this issue, the Court finds the Applicant's lodged application incompetent.

In the second issue of whether defective documents filed by the Appellant are curable, this Court, before answering the issue, I find it necessary to extract the provision of section 347 (1) and (2) of the Criminal Procedure Act, No. 7 of 2018 provides for the requirement of the petition of appeal:

"Petition of appeal

347. (1) An appeal shall be made in the form of a petition in writing of presented by the appellant or his advocate, and every such petition shall, unless the High Court otherwise directs, be accompanied by a copy of the judgment or order appealed against.

(2) Where the appellant is represented by an advocate the petition shall contain particulars of the matters of law or of fact in regard to which the subordinate court appealed from is alleged to have erred."

Considering the said provision, I find the law does not expressly state that the trial court proceedings is part of key requirements in the petition of appeal, the room rests with the Court to determine.

In this issue, I also determine the observation in **Gasper Peter V. Mtwara Urban Water Supply Authority (MTUWASA)** (Civil Appeal No. 35 of 2017) (at Mtwara) that was heard in Mtwara. In a noteworthy observation, the Court, consisting of Juma, C.J, Mwarija, J.A, and Wambali, J.A, decided to hear the appeal despite the fact that it had been objected to for missing

documents. The Court determined that the missing documents were not essential for resolving the legal issues presented in the appeal and therefore their absence was excusable.

Relying on the case of **Luchalamila Mawanga V. R**, Criminal Appeal No. 319 of 2007 (unreported), the Court finds the notice of appeal incurably defective and strike out the incompetent appeal. In this matter, there is no question that the appeal filed by the Appellant is flawed, and this Court agrees that the trial Court proceeding can be rectified.

The third issue is based on the fitting remedy in this instance. The Court has taken into consideration the case of **Director of Public Prosecutions V. Fidelis Albert Mayombo and 3 Others**, Criminal Appeal No. 340 of 2019, the Court of Appeal of Tanzania at Mtwara (unreported). The Court discussed whether the Court struck out the notice of intention to appeal and observed that:

"Incompetence of proceedings takes many forms. It may arise out of the proceedings being time barred, being wrongly instituted- wrong instituted in the wrong court or forum, a competent court being wrongly moved, citing a wrong number of the case in which the challenged decision emanates, etc. For this reason, in the appeal under scrutiny, before hearing counsels' arguments on the merits or otherwise of the appeal, we had to ascertain first whether or not there was a competent appeal before us."

Referring the principle which was drawn by the Court of Appeal in the case of **Fidelis Mayombo and 3 Others** (supra), it is possible for the trial court proceedings to be amended if a defective notice of appeal is deemed incurable. However, if the Court of Appeal determines that the defect is not curable, it would be inappropriate to order an amendment.

In **Tanzania Revenue Authority V. ARMZ** (Civil Appeal No. 78 of 2018), the Court of Appeal demonstrated its commitment to substantive justice by ordering the party to amend the record of appeal. Despite the absence of a one-page document, the court ruled that the Appellant (TRA) be given the opportunity to amend its record of appeal, and the appeal was not dismissed. This decision reflected the court's consideration of the Tribunal's missing submissions.

In support of the foregoing, this Court in the case of **National Bank of Commerce V. Basic Element Limited**, Civil Appeal No. 70 of 2014 (unreported), finds that where the letter was found missing in the record of appeal, the Court, after it had quoted Rule 96 (1) (k) it went on to say that:

"It is discernible from paragraphs (d) and (k) of the extracted Rule that copies of ancillary Rulings as well as such other documents as may be necessary for the proper determination of the appeal must be contained in the record of appeal."

The analysis of all raised issues concludes that the preliminary objection (P.O) lacks merit and is dismissed.

In conclusion, it is essential to consider the case of **Mondorosi Village Council and 2 Others v. TBL and 4 Others** in Civil Appeal No. 66 of 2017 (at Arusha), where the Appellant sought the Court's blessing to appeal a decision whose record only lacked a letter requesting copies of the proceedings from the subordinate courts. The Court of Appeal refused, saying that such a letter is *"a necessary document to enable the Court to determine whether the appeal is within the prescribed time."* It is for the Court of Appeal to choose the direction it intends to take in dispensing substantive justice.

With the aforementioned points, I do not support the argument presented by Mr. Ali Juma, the learned State Attorney, and therefore, I order the records be revised and a comprehensive record of the proceedings be submitted. Consequently, this Court, therefore, is dismissing the preliminary objections raised by the Respondent for lack of merits.

It is so ordered.



KHADIJA SHAMTE MZEE
JUDGE

Dated at Zanzibar this 29th February, 2024