

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 13 OF 2020

(Originating from the District Court of Simanjiro at Orkesumet, Criminal Case No. 143 of 2017)

EMMANUEL MARK NYAMBO APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

8th & 18th December, 2020

Masara, J.

In the District Court of Simanjiro (hereinafter the 'trial Court'), the Appellant and one **Evance Masuet Mbogo** (hereinafter 'the second accused'), stood charged with three counts; to wit, the Appellant was charged with the first two counts; namely, Abuse of Position and Corrupt Transactions in Employment, contrary to sections 31 and 20(2) of the Prevention and Combating of Corruption Act, No. 11 of 2007 respectively. The second accused stood charged of the offence of Corrupt Transactions in Employment contrary to section 20(1) of the Prevention and Combating of Corruption Act, No. 11 of 2007. At the end of trial, the second accused was acquitted while the Appellant was acquitted of the second count but was convicted of the first count. The Appellant was sentenced to pay a fine of Tshs. 2,000,000/= or serve two years imprisonment in default. The Appellant was not pleased by the decision of the trial Court, he has preferred this appeal challenging both the conviction and sentence met on him on the following grounds:

- a) That, the trial Magistrate erred both in law and fact when found that the seized phone from the Appellant sent interview questions to the second accused without an authentic and accurate proof of electronic conversation among the two;*
- b) That, the trial Magistrate erred in law and fact when ruled that the Appellant through his phone disseminated interview questions without collaborating such conversation with the tendered and approved interview sheet (exhibit P4);*
- c) That, the trial Magistrate erred in law and fact when convicted and consequently sentenced the Appellant basing on assumption evidence which was not proved beyond reasonable doubt; and*
- d) That, the trial Magistrate erred both in law and fact when convicted and consequently sentenced the Appellant basing on contradictory evidence.*

Before dealing with the grounds of appeal, it is pertinent that an upshot of the facts leading to the conviction of the Appellant is given, albeit briefly.

Generally, it was the Prosecution evidence that the Appellant was employed as a Human Resource Officer in Simanjiro District Council. Between 6-10/4/2015 the Appellant and his fellow Human Resource Officers were assigned to prepare job interview questions for the post of Village Executive Officer III. The interview was to take place on 13/4/2015. It was alleged that the Appellant sent the interview questions to one of the interview candidates, Mr. Evance Masuet Mbogo on 9/4/2015 in exchange for a bribery of Tshs 150,000/= . The money was allegedly sent to the Appellant from the second accused's phone number 0767609194 on 2/4/2015 via his phone numbers 0757780375.

desirable to determine that issue so as to assure myself whether there is a competent appeal before me.

Submitting on the matter, Ms Tusaje contended that the Appellant's Notice of Intention to appeal was not attached to the record. She added that they were never served with such Notice. She maintained that under section 361(1)(a) of the Criminal Procedure Act, Cap 20 [R.E 2019] Notice of Intention to appeal has to be lodged within ten days from the day of the finding, sentence or order sought to be appealed against. She averred that it is the Notice of Intention to Appeal which institutes an appeal in the High Court; therefore, its absence in this appeal makes the appeal incompetent. The learned State Attorney implored the Court to strike out the appeal for being improperly instituted.

Mr. Ilyarugo refuted the argument put forth by the learned State Attorney in his rejoinder submission stating that the Notice of Intention to Appeal was filed on 3/4/2019, four days after the judgment was delivered. He attached the Notice of Intention to Appeal in his rejoinder submission sought leave of the Court to dispense with the legal requirements as submissions do not contain annexures. The learned advocate added that the copies of judgment and proceedings were delayed to be availed to them, therefore they were late to file the appeal. They filed an application for extension of time through Misc. Criminal Application No. 25 of 2019 which was granted on 27/2/2020. Mr. Ilyarugo thinks perhaps the Notice was mixed up in Misc. Criminal Application No. 25 of 2019 file.

Having seized the Appellant's phone, PW2, PW4 and PW5 saw the interview questions which were sent to the second accused. The two were arrested and arraigned before the Trial Court where the charges stated above were levelled against them. In their defence, they both denied commission of the offence. On his part, the Appellant denied to have participated in the exercise of preparing interview questions as the same was not assigned to him in writing. He also denied the phone number that was alleged to have sent the questions and receive the money stating that his phone number is 0743165745. The second accused stated that he does not remember if he has ever sent money to a phone number 0757780375.

At the hearing of this appeal, the Appellant was represented by Mr. Justus Josephat Ilyarugo, learned advocate, while the Respondent was represented by Ms. Tusaje Samwel, learned State Attorney. The appeal was argued through filing of written submissions.

In the course of composing this judgment I had an opportunity to venture into the written submissions filed by the learned counsel for the parties. From those submissions, I discovered that the learned State Attorney did not file a reply submission on the substance of the appeal. To the contrary, she brought to the attention of the Court a legal issue touching on the competence of the appeal before this Court. She alleged that she was not served with the Appellant's Notice of Intention to Appeal and her perusal of the Court file proved that no such Notice is in the Court records. Considering that it is the Notice of Appeal which initiates appeals in this Court, I found it

I have dispassionately considered the rival claims between the learned counsel for the parties. I have carefully revisited the trial Court record, I could not find the Notice of Intention to Appeal on the Court record before me. The record shows that the learned State Attorney for the purpose of satisfying herself made an application for file perusal on 17/9/2020. In that perusal she made a conclusion that the Notice was missing in the Court record.

Section 361(1)(a) of the Criminal Procedure Act puts it mandatorily that no appeal shall lie to this Court unless Notice of intention to Appeal is filed. In the absence of the Notice, there is no appeal before the Court. The relevant provision provides:

- “361- (1) Subject to subsection (2), **no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant–***
- (a) **has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and***
 - (b) **has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order.** (Emphasis added)*

The Court of Appeal in numerous decisions has held that it is the Notice of Intention to Appeal that institutes appeal in this Court. In ***Wankuru Mwita Vs. Republic***, Criminal Appeal No 32 of 2006 (unreported) it was held:

“In fine, the preliminary objection is sustained. As the Notice of Appeal institutes an appeal, the appeal is incompetent.”

In a corresponding case of ***John Tesha Vs. Republic***, Criminal Appeal No. 57 of 2008 (unreported), the Court of Appeal substantiated:

"In the absence of a valid Notice of Appeal, was there appeal filed by the DPP in the High Court? The law is very clear, no appeal shall be presented without notice. Therefore, there was no appeal before the High Court. The orders made by the High Court were a nullity."

See also: ***Juma Mohamed vs. Republic***, Criminal Appeal No. 60 of 2008, ***Iko Sigaje Vs. Republic***, Criminal Appeal No. 21 of 2012 and ***Salehe Ramadhan Juma and 4 Others Vs. Republic***, Criminal Appeal No. 20 of 2004 (all unreported).

The Appellant's advocate contends that he filed the Notice of Intention to Appeal on 3/4/2019. He has in fact attached a copy thereof, which I have no reasons to doubt, without evidence to the contrary. Mr. Ilyarugo, however, did not substantiate whether he served the said notice to the Respondent. Service on the other party, although not a legal requirement under the CPA, informs the other party that there is an intended appeal. Further, Mr. Ilyarugo contends in his rejoinder submissions that he filed Criminal Application No. 25 of 2019 in this Court seeking extension of time to lodge his appeal out of time and the same was granted on 27/2/2020. However, the order or ruling granting that application was not made available in this appeal. Other than his mere words, there is no any other proof that the Appellant applied for and was granted extension of time to file this appeal. Notably, the instant appeal was filed on 9/3/2020, while the impugned decision was delivered on 29/3/2019. The Petition of Appeal was therefore lodged almost one year after the date the judgment was delivered.

Time to lodge appeal is provided under section 361(1) (b) of the CPA as cited earlier. The prescribed time is forty-five days from the date of the finding, sentence or order. Without an extension being granted to the Appellant, the instant appeal would not be entertained as it was filed out of time. Unfortunately, the Appellant's counsel has raised the extension issue in his rejoinder submissions. The Respondent could not submit on the same and the Court could not be availed with the alleged records for scrutiny and ultimate decision. Therefore, the concern raised by the learned State Attorney on the competence of the appeal before this Court remain valid unless the contrary is proved. In the absence of Notice which initiates the appeal, there is no competent appeal before this Court. It is deplorable to note that the learned advocate for the Appellant lodged the appeal without disclosing that the appeal had been preceded with an application for extension of time, which was granted. A copy of the ruling extending the time would have been of great help in the processing and ultimate decision in this appeal.

For the above stated grounds, it is the finding of this Court that this appeal is incompetent for two reasons. First, it was not initiated by Notice of Intention to Appeal, and second, the Petition of Appeal was filed outside the prescribed time to file appeals. However, for interest of justice, and for affording the Appellant a benefit of doubts that there may be existing in this Court record of Application No. 25 of 2019 which invariably could not be determined without a Notice being presented before it.

Consequently, I hereby strike out the Appeal for being incompetent. The Appellant is given liberty to refile a fresh appeal preceded with a fresh Notice of Appeal. The Appellant is at liberty to do so within 10 days, for the notice, and 30 days for the appeal.

Order accordingly.



Y. B. Masara

JUDGE

18th December, 2020.

