

**IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR**

(CORAM: OTHMAN, C.J., KIMARO, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO 148 OF 2014

DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT

VERSUS

**1. FARID HADI AHMED
2. MSELEM ALI MSELEM
3. MUSSA JUMA ISSA
4. AZZAN KHALID HAMDAN
5. SULEIMAN JUMA SULEIMAN
6. KHAMIS ALI SULEIMAN
7. HASSAN BAKARI SULEIMAN
8. GHALIB AHMADA OMAR
9. ABDALLA SAID ALI
10. FIKIRINI MAJALIWA FIKIRINI**

.....RESPONDENTS

**(Appeal Against the Orders of the High Court of Zanzibar
at Vuga)**

(Mahmoud, J.)

dated 15th & 31st day of January, 2014

in

Criminal Case No. 09 of 2012

RULING OF THE COURT

10TH & 14TH December, 2015

OTHMAN, C.J.:

The main and only challenge mounted in this preliminary objection raised on 5/12/2014 by Mr. Abdallah Juma Mohamed, assisted by Mr. Rajab Abdalla Rajab and Mr. Suleiman Salim Abdalla, learned Advocates for the 1st, 2nd, 5th, 6th, 7th, 8th, 9th and 10th respondents is that the appeal by the appellant Director of Public Prosecutions (D.P.P.) is time barred,

by Ms. Raya Issa Mselem, Mr. Suleiman Haji Hassan and Mr. Mohamed Ali Juma, learned Senior State Attorneys resist the preliminary objection.

With cogency and conviction, Mr. Mohamed submitted that the Registrar of the High Court had furnished the appellant D.P.P. with a copy of the record of appeal, under Rule 72(1) of the Court of Appeal Rules, 2009 by his letter Ref. No. MMK/344/2014 dated 21/07/2014. He construed the expression "*mwenendo mzima wa kesi*" employed by the Registrar therein as meaning a record of appeal. The appellant D.P.P., he urged, was required under Rule 72(1) to have filed its memorandum of appeal within twenty one days of service on it of that record of appeal. That by the time it did so, on 11/08/2014, the memorandum of appeal was time barred, as it was beyond the twenty one days prescribed by Rule 72 (1). This rendered the appeal incompetent. He invited the Court to uphold the point of objection and to strike out of the appeal.

On her part, Ms. Mselem, disagreed. She forcefully submitted that the expression "*mwenendo mzima wa kesi,*" communicated in the Registrar's letter Ref. No. MMK/344/2014 dated 21/07/2014, referred to a copy of the proceedings and not a copy of the record of appeal. From the bar, she strenuously attempted to invite the Court to examine the Registrar's Dispatch Book on the date the appellant D.P.P. actually

acknowledged receipt of the copy of the proceedings referred to in his letter. She admitted that the Dispatch Book was not a part of the record of appeal, but that the Court could examine it under Rule 4(2)(b) to better meet the ends of justice and in order to arrive at substantive justice under Article 107A(2)(a) of the Constitution of the United Republic of Tanzania, 1977. That as Rule 72(1) is triggered "after service" on the appellant D.P.P. of the record of appeal, its memorandum of appeal cannot be filed until it is in receipt of a copy of the record of appeal. She relied on **D. T. Dobie (T) Co. Ltd v. N. B. Mwatebele** [1992] T.L.R. 152. Counting from the date the appellant D.P.P. received the copy of the record of appeal, which was recorded in the Dispatch Book on 23/07/2014, it was her contention that when the memorandum of appeal was filed by the appellant D.P.P. on 22/8/2014, it was within the twenty one days prescribed under Rule 72(1) and the appeal was not time-barred.

In a short and lucid rejoinder, Mr. Rajab invited us to reject the Dispatch Book as it was outside the reach of the record of appeal. That the preliminary objection was based on the record of appeal, not on an extraneous matter such as that purported document. He correctly pointed out that a record of proceedings, under Rule 71(2) (c) was a part of the record of appeal under Rule 72(1).

Having closely considered the point of objection and issues raised, we are of the decided view that the preliminary objection stands or falls essentially on Rule 72(1) and its application.

Rule 72(1) provides:

"Rule 72(1). The appellant shall, within twenty one days after service on him of the record of appeal, lodge eight copies of the memorandum of appeal, with the Registrar or with the deputy registrar at the place where the appeal is to be heard".

First, on a plain reading of the Registrar's letter Ref. No. MMK/344/2014 dated 21/07/2014, and its intended purpose we are not persuaded by Mr. Mohamed's attractive argument that the words "*mwenendo mzima wa kesi*," used therein referred to a copy of the record and not a copy of the proceedings. Additional support for this view can be found in the certificate of the record of appeal, which the Registrar certificated under Rule 71(6), only on 19/9/2014, as a true copy of the original proceedings. Both Mr. Rajab and Ms. Msalem were at one that this certification beared that date. The record of appeal was therefore not available and duly certified by 21/07/2014.

Second, with respect, we do not think that we need to labour much on the Dispatch Book, not only because Ms. Mselem agreed that it was not a part of the record of appeal, but for a more fundamental reason. To locate and examine it would be to task the Court to fish for the ascertainment of facts and evidence, which is beyond the remit of a point of law, which a preliminary objection is all about. (See, **Citibank Tanzania Ltd V. Tanzania Telecommunications Co. Ltd and 4 others**, Civil Application No. 64 of 2003 (CAT, unreported)).

Third, in the attending circumstances as revealed earlier, the Registrar's letter Ref. No. MMK/344/2014 dated 21/07/2014 which went to the supply to the appellant D.P.P. of a copy of proceedings and not a record of appeal under Rule 72(1), cannot be invoked in calculating the date when the twenty one days limitation period prescribed thereunder started to run. In our decided view, that period started to run when the Registrar supplied a copy of the record of appeal to the appellant D.P.P. by his letter titled "YAH: KUWASILSIHA RECORD ZA KESI" Ref. No. MMK/492/2014, dated 20/10/2014, which both Ms. Mselem and Mr. Mohamed confirmed to the Court they had possession of. That letter is also contained in the original record.

Fourth, the strength and consequence of this is that when the appellant D.P.P. filed the memorandum of appeal on 12/8/2014, it did so prematurely. In fact, even before the Registrar had duly certified as true, a copy of the record of appeal as he was required to do under Rule 71(6). This he positively did only on 19/9/2014. This renders the purported memorandum of appeal a baseless piece of paper, in so far as Rule 72(1) is concerned. It is accordingly struck out.

Fifth, to do substantive justice between the parties and considering that they may have been misled by the Registrar's good intentions to supply them with both the requisite proceedings and the proper record of appeal, we think this is a fit case for the Court to invoke Rule 4(2)(a) read together with Rule 72(5) to order, which we hereby do, the appellant D.P.P. to file its memorandum of appeal within two weeks of the date of the delivery of this Ruling and the appeal to be set down for hearing on a date to be fixed and communicated to the parties. We note that all the remaining points of preliminary objection have been gracefully withdrawn by Mr. Mohamed.

In the result and for the aforesaid reasons, we dismiss the preliminary objection. Ordered accordingly.

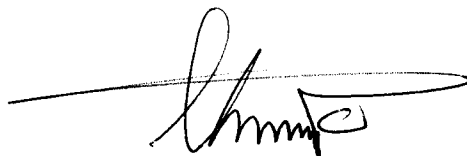
DATED at **ZANZIBAR** this day of 11th December, 2015.

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', with a long horizontal flourish extending to the left.

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL