out as being incompetent. The Court gave a negative answer to the question. The decision was followed in *DP Valambhia v. Transport Equipment Ltd.* (2). In similar vein is the decision in *Alhaj Talib v. Kiweni Mushi* (3). We agree with Mr Lyimo that under rule 92(3) an appellant may at any time lodge a Supplimentary Record but we construe the expression "at any time" to mean at any time before objection is taken. Upon objection being taken, time is up, so to speak, and a Supplimentary Record cannot then be lodged as of right but with leave of the Court. Any other interpretation would lead to chaos and absurdity. We were satisfied that the Supplimentary Record was lodged to pre-empt and defeat the preliminary objections already served on Mr Lyimo, and so we rejected it. For the avoidance of doubts, however, it should go on record that the Supplimentary Record, even if it were properly lodged, would not have assisted the appellants. It did not contain any decision extending the time to lodge the Notice of Appeal.

In short, there was no valid Notice of Appeal, it having been lodged out of time without extension. It follows that the appeal was also out of time; indeed it is more correct to say the appeal was vitiated as there can be no appeal without a valid notice in the first place. We uphold the preliminary objection and strike out the appeal with costs. The appellants, if they so wish, may go back to the High Court and start all over, beginning with an application for Extension of Time to file Notice of Appeal.

ILUMINATUS MKOKA v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Kisanga, Ramadhani and Lugakingira, JJ.A.)

CRIMINAL APPEAL No. 67 OF 1999

(From the decision of the High Court of Tanzania at Dar es Salaam, Bubeshi, J. dated 2 July 1999, in Economic Crime Case No. 3 of 1997)

Criminal Practice and Procedure – Exhibits – Custody of Exhibits – Need to know in whose custody Exhibits were kept.

Evidence – Proof – Proof of person who made microfilms and person who kept custody or control of the same – Section 78 of the Evidence Act 1967.

Evidence – Proof – Failure to examine copy with the original – Effect of such failure – Section 79 of the Evidence Act 1967.

The appellant had been convicted of occasioning loss to a specified authority and sentenced to ten years' imprisonment and was also ordered to compensate the specified authority for the loss. He had been a branch manager of the defunct National Bank of Commerce, Mlimani Branch. Acting in that Capacity he authorized cash payments on various cheques drawn by one Abdallah Mohamed Dalidali, a fellow branch manager of the same bank at Mlandizi. Dalidali operated two accounts under two different names at his own branch. A total of TZS. 127 million was thus paid out in cash within a period of seven months. By the time it was discovered that the two accounts had no funds at the time of the encashment of the cheques Dalidali had disappeared as had the cheques against which the payments totalling TZS. 127 million had been made. In his defence the appellant said he only authorized the cheques after seeing an endorsement on the reverse side of the cheques of either "Good Customer" or "Good for Funds." At the trial the prosecution produced copies of cheques printed from microfilms after the Court had so ordered. The copies so produced did not have the endorsement as alleged by the appellant. However, there was no evidence of the person or persons who had photographed the original cheques for keeping in the microfilms or who had custody of the microfilms before the cheques were printed. Further, there was no evidence of who had printed the cheques produced in Court or where the microfilms had been kept between the photographing of the original cheques and the printing of the copies produced in Court.

Held: (i) There was no cogent evidence to prove the authenticity of the microfilmed copies of the missing cheques printed upon the order of the Court;

(ii) The microfilm copies relating to the reverse side of the missing cheques were wrongly admitted in evidence especially as there was no evidence that the copies were at any stage examined with the reverse side of the original cheques;

(iii) The finding of the Trial Court that the appellant, in authorising payment of the cheques, acted recklessly and in total disregard of normal banking practice was not supported by evidence on record.

Appeal allowed

Statutory provisions referred:

(1) Economic and Organized Crime Control Act 1984, section 59

(2) Evidence Act sections 78 and 79

Mr Lugua for the Appellant

Miss Mkwizu for the Respondent

JUDGMENT

(Dated 30 July 2001)

Kisanga, J.A.: The appellant was convicted by the High Court (Bubeshi, J.) of occasioning loss to a specified authority contrary to paragraph 11(1) of the first schedule to and section 59 of, the Economic and Organized Crime Control Act 1984, and was sentenced to 10 years' imprisonment with an order to compensate the specified authority for the loss. He appealed to this Court against both conviction and sentence. At the hearing of the appeal he was advocated for by Mr Lugua, Advocate, while the respondent Republic was represented

by Miss Mkwizu, Senior State Attorney. Counsel for both sides did not seek to support the conviction and as we were inclined to the same view, we allowed the appeal after hearing counsel submissions, quashed the conviction and set aside the sentence, reserving our reasons for doing so. We now give our reasons.

The appellant was a branch manager of the defunct National Bank of Commerce at Mlimani Branch in the City of Dar es Salaam. Acting in that Capacity he authorized cash payments, on various cheques, to one Abdallah Mohamed Dalidali, a fellow branch manager of the said defunct Bank at Mlandizi, Kibaha in the Coast Region, who operated two accounts at his own branch under the names of Abdallah Mohamed Dalidali and Madaila Abdallah Mohamed respectively. While the two accounts were maintained at the Mlandizi branch, the appellant authorized payment of the cheques in question at his Mlimani branch. The proceeds of the cheques for which payment was so authorized totaled TZS. 127 million paid out frequently at short intervals and extending only between January and July 1995. It turned out that the accounts of this customer lacked funds to meet such payment, but at the time of discovering this, the said Mohamed Abdallah Dalidali *alias* Madaila Abdallah Mohamed had absconded and has not been traced to date, and the cheques against which the payments totaling TZS. 127 million were made had also disappeared. The prosecution therefore charged the appellant for recklessly authorizing payments without ascertaining that the payee's accounts at the Mlandizi branch had funds to meet the payments.

In his defence the appellant asserted that he did ascertain the availability of funds after seeking the endorsement by the Mlandizi branch manager of such words as "Good Customer" or "Good Funds" on the reverse side of the cheques in question. However, the trial judge rejected the defence and proceeded to convict and sentence the appellant as above stated, hence this appeal.

The crucial question both at the trial and in this appeal was whether it was proved that the appellant did not ascertain on the availability of funds before authorizing the payments in question. The burden was on the prosecution to prove this but the task was obviously made difficult by the disappearance of the cheques in question. In an attempt to discharge that burden the prosecution led secondary evidence consisting of copies of the said cheques. However, that attempt hit a snag when it turned out that the copies so tendered did not show the back side of the cheques; only the front side was shown. Whereupon the prosecution sought leave of the Court to tender in evidence microfilms of the missing cheques in order to reproduce or print therefrom copies showing the back side of the cheques, and thereby to demonstrate that there was no endorsement at the back of the cheques confirming the availability of funds, as asserted by the appellant.

Microfilm was described as a technique for the purposes of keeping and retaining bank documents or records in a more permanent form less susceptible to destruction or loss. A document or a cheque in this case, is passed though a microfilm machine which automatically photographs it both sides. The document is then developed and retained in cartridge form until when it is required in which case copies may then be printed or reproduced from it.

The defence objected to the admissibility of the microfilms in evidence saying that the copies which it was intended to print from them belatedly showing the back side of the missing cheques should have been put in evidence at the time the copies showing only the front side of the cheques were tendered in evidence. To admit such evidence at this stage amounted to re-opening investigation and making out a new case against the appellant. In any case, it was further contended, such evidence was suspect and of no probative value. However, the objection was overruled, the microfilms were received in evidence and copies showing the back side of the missing cheques were reproduced or printed out of them by order of the Court. The copies so reproduced bore no endorsement on the back side of the cheques as to availability of funds as was asserted by the appellant. That was the basis for the trial judge rejecting the appellant's defence.

The issue in this appeal turned largely on the authenticity and reliability of the microfilm evidence which, as pointed out, was the

basis for the Trial Court rejecting the appellant's defence. The appellant contended that before authorizing payment he saw on the back of the missing cheques endorsement by the Mlandazi branch manager to the effect that the cheques were good for payment. But the copies reproduced or printed from the microfilms of the cheques show no such endorsement on the back side, a number of serious questions have been raised concerning the microfilms and the copies printed from them only belatedly, upon Court order, showing no endorsement on the reverse side. The identity of the person or persons who photographed the missing cheques for the purpose of preserving them in the microfilms was not established. The prosecution put forward PW9, Christine Malamba, as the person who photographed the missing cheques and processed the microfilms or as the person who supervised the clerks to do so. But the witness was photographing the cheques and processing the microfils all the time. She did that job only when the clerks were not there, otherwise she used to supervise the clerks to do it. The said clerks, however, did not give evidence, nor were they identified. Furthermore PW9 could not recognize any of the microfilm copies as being those of the missing cheques which she photographed and processed or supervised the clerks to do so. She said she could not identify or recognize any of the cheques because she used to deal with so many cheques. To make matters worse, she said that when processing the cheques she used to look at the front side only. And lastly, the microfilms were not produced from PW9's custody. They were retrieved from what was described as Dar es Salaam Zonal Office – Metro Office but no one from that office was called to testify on how the microfilms were received and preserved there.

There is therefore, no cogent evidence to prove whether or not the back side of the cheques was microfilmed and if so whether the microfilms thereof were kept intact and not tampered with. In the circumstances, therefore, the authenticity of the microfilmed copies of the missing cheques printed out only belatedly upon the order of the Court was, to say the least, questionable. Counsel for both sides submitted that the microfilm copies relating to the back side of the missing cheques were wrongly admitted in evidence in non-compliance with provisions of sections 78 and 79 of the Evidence Act especially as the copies were not at any stage examined with the back side of the original cheques. That criticism is quite justified, and that part of the evidence ought to have been held inadmissible.

The other piece of evidence relied on by the Trial Court to convict the appellant was that the appellant, in authorizing payment of the cheques, acted recklessly and in total disregard of the normal banking practice or procedure. This finding was allegedly based on the evidence of PW2, Fatuma Mkangaa, who, it is alleged said that the normal banking procedure required the appellant, before authorizing the payment, to send a tested message to the responding Mlandizi branch for confirmation as to the existence of the customer's account there and the availability of funds, and that when the witness asked the appellant if he had taken such precaution the appellant replied that he knew what he was doing and that the cheques would not be dishonoured. But even assuming that this pointed to the appellant's guilt, the point is that this statement is nowhere to be found in PW2's evidence in Court. It is to be found in the final submission by the prosecuting attorney who attributed it to PW2 but, as already said, there is nothing like it in PW2's evidence in Court. With due respect to the learned trial judge, she wrongly acted on the statement to the appellant's detriment without being satisfied that the statement did, in fact, form part of the recorded evidence of PW2.

Once the evidence of microfilms and the said statement wrongly attributed to PW2 are discounted, there is nothing to support the appellant's conviction. The trial judge in her judgment lamented that the investigation and the prosecution of this case in certain aspects left a lot to be desired. Indeed she should have gone further and found that the evidence as adduced, although it cast a lot of suspicion on the appellant, fell far short of the requisite standard of proof of a criminal charge. As already intimated, Miss Mkwizu, learned Senior State Attorney for the respondent Republic, did not seek to support the appellant's conviction, and for the reasons briefly set out herein

above, we are satisfied that she took the right decision. It is for these reasons that we allowed the appeal and set aside the conviction and sentence with an order for the appellant's immediate release from prison unless he was otherwise lawfully detained there.

MBEYA-RUKWA AUTOPARTS AND TRANSPORT LTD v. JESTINA GEORGE MWAKYOMA

COURT OF APPEAL OF TANZANIA
AT MBEYA

(Ramadhani, Lubuva and Lugakingira, JJ.A.)

CIVIL APPEAL No. 101 OF 1998

(Appeal from the Judgement of the High Court of Tanzania at Mbeya, Mwipopo J. dated 16 December 1999, in Miscellaneous Civil Application No. 3 of 1999)

Civil Practice and Procedure – Affidavits – Pleading by affidavits – Whether a rejoinder to a Reply to a Counter Affidavit is permissible

Appeal – Locus standi in appeals – Whether a person who was not involved in original proceedings has capacity to bring appeal – Rule 76(1) of the Court of Appeal Rules 1979.

Court of Appeal – Court of Appeal Rules 1979 – Notice of preliminary objection –Whether omission to cite provision under which the objection is brought is fatal.

Natural Justice – Right to be heard – Right to land revoked without a hearing – Decision reached without regard to natural justice.

Constitutional Law – Basic Rights – Basic rights guaranteed protection by the Constitution – Right to be fully heard enshrined in the Constitution – Article 13(6)(a) of the Constitution of Tanzania.