IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CRIMINAL APPLICATION NO. 15 OF 2020

(Arising from Criminal Case No. 354 of 2018 in the Resident Magistrate's Court of Geita at Geita)

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT

VERSUS

MASHAKA S/O THOMAS ..... 1ST RESPONDENT

SOSPETER S/O KANOTI ..... 2ND RESPONDENT

ELIAS S/O KANOTI ..... 3RD RESPONDENT

PAULO S/O THEOGEN @ BUGUMA ..... 4TH RESPONDENT

RULING

29th April, & 4th June, 2020

ISMAIL, J.

This is a ruling on a preliminary objection, taken at the instance of the respondent, to the effect that the Court has no jurisdiction to grant the prayer sought.

The application against which the preliminary objection has been raised seeks to move this Court to grant an extension of time within which

to admit the applicant's appeal out of time. The prospective appeal intends to challenge the decision of the Resident Magistrates' Court of Geita in Geita which acquitted the respondents of the offence of cattle theft. The trial court was convinced that identification of the accused, now respondents, did not conform to the minimum standards set by the law. This decision did not sit well with the applicant who decided to institute an appeal (Criminal Appeal No. 182 of 2019) which was nipped in the bud when the Court dismissed it because the notice of appeal which instituted the appeal was adjudged defective.

The instant application represents the applicant's second attempt but, as intimated earlier, the latest effort has hit yet another snag. The contention by the respondents is that the Court is not seized with jurisdiction to consider the prayer for enlargement of time in the absence of a valid notice of appeal.

When the matter came up for virtual hearing on 29th April, 2020, I guided that the preliminary objection be disposed of through the parties' written submissions. Credit to counsel for the parties, the schedule for filing was duly conformed to. Kicking off the discussion was Mr. Fidelis Mtewele, learned counsel for the respondents, who strenuously held the

view that this Court's jurisdiction cannot be invoked and let the applicant file an appeal where there is no valid notice of appeal. Relying on section 379 (1) (a) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (CPA), the learned counsel contended that an appeal by the applicant can only be instituted where notice of appeal has been given within thirty days from the date of decision sought to be appealed against. To buttress his contention, Mr. Mtewele cited a number of decisions of this Court and the Court of Appeal of Tanzania. These are: ***Venance Kilasi v. Republic***, HC-Criminal Appeal No. 64 of 2017 (unreported); ***DPP v. A.M. Swai*** [1989] TLR 37; ***John Tesha v. Republic***, CAT-Criminal Appeal No. 57 of 2008 (DSM-unreported); and ***Yohana Chibwingu v. Republic***, CAT-Criminal Appeal No. 55 of 2010 (Dodoma-unreported). In all of the cited decisions the consistent message is that the notice of appeal is such a fundamental document the absence of which renders an appeal filed by the DPP is incompetent.

It was Mr. Mtewele's further contention that after dismissal of the notice of appeal in Criminal Appeal No. 182 of 2019 (Hon. Mgeyekwa, J.), there was nothing left on which to base the instant application. It is on the basis thereof that the instant application is deemed to be misplaced. It was

his conclusion that, on that basis, the Court is devoid of any power to handle the application.

The applicant's submission was a complete deviation from what is at stake. Mr. Hezron Mwasimba, learned Senior State Attorney for the applicant chose to impress upon the Court as to why the applicant thinks the application is meritorious and should be granted. Dismissing the objection as baseless and lacking in sufficient reasons to justify it, Mr. Mwasimba discounted the respondent's contention and argued that the notice of appeal was filed save that the same was struck out on account of some technical errors. This, he contended, was in contrast with the contention that no notice was lodged. Expounding on sufficient cause, the learned attorney cited a number of decisions, local and foreign, notable among them being the case of ***Royal Insurance Tanzania Ltd v. Kiwengwa Strand Hotel***, CAT-Criminal Appeal No. 111 of 2009 (unreported) in which factors for consideration were propounded. It was his contention that his application ticks all the boxes as the said factors are quite prevalent in the instant application. On the existence of serious triable issues, the applicant was aided by the reasoning in ***The National***

Housing Corporation v. Etienes Hotel, CAT-Civil Application No. 10 of 2005 (DSM-unreported).

Mr. Mwasimba was emphatic that there is no law that he knows of, that prevents a party from applying for leave to appeal out of time before he applies for an extension of time to file a notice of appeal. In view thereof, he was of the view that the instant application should be looked at based on its merits. He prayed that the same be granted.

The respondents did not relent. Their counsel maintained that no appeal may be admitted if it is not preceded by a notice of intention to appeal. He was of the contention that the consequences of the technical error in the struck out notice of appeal were to invalidate the appeal. With a number of other decisions on his side, the counsel maintained that it is the notice of appeal that founds the appeal and that absence thereof renders the appeal incompetent. He maintained that the provisions of section 379 (1) of the CPA have not been complied with. He maintained that the application ought to be struck out.

These rival submissions bring out a single question, and that is as to whether the Court is properly seized with jurisdiction to deal with the

matter. While the respondent holds the view that the Court hasn't been properly moved, the applicant sees nothing wrong with the application.

As stated earlier on, at stake is the applicant's quest to challenge the trial court's decision that set the respondents free and absolved them against any blemishes. The delay is explained out by the applicant is in the realm of a technical delay that came with the dismissal of the appeal. The contention by the respondents is that such quest can only fall through, in view of the fact that no notice of intention to appeal exists.

Let me begin by stating, from the outset, and without any fear of contradiction, that this application is utterly misconceived and deserving nothing except, as proposed by the respondents, a striking out. Here is why.

The law is settled that no criminal appeal can be considered to have been instituted if no notice of intention to appeal is filed in court. This means that filing of a notice of intention of appeal constitutes a condition precedent for lodging the appeal. In fact, as rightly alluded to by the counsel for the respondents, it is the notice of appeal which institutes an

appeal. This imperative requirement is provided for under section 379 (1) of the CPA which states as hereunder:

> *"Subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions 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."*

This position has been widely discussed in many a decision of the Court and the Court of Appeal and the unanimous view in all of them is that an appeal instituted in non-conformity with this imperative requirement is nothing but stillborn. This is where the respondents have pitched their tent. Discussing the role played by the notice of intention to appeal, the Court of Appeal has underscored the importance of Rule 68 (1) of the Court of Appeal Rules, 2009, which is equivalent to section 379 (1) of the CPA. In **Issa Said v. Republic** CAT-Criminal Appeal No. 10 of 2014 (DSM-unreported), the superior Court held that "it is the notice of appeal envisaged under rule 68 (1) which institutes a criminal appeal in the Court of Appeal. Without proof that the applicant had initiated an appeal by a valid notice of appeal, the Court cannot be considered to have jurisdiction...." This position was fortified by the said superior Bench in

several other decisions. In ***Edwin Thobias v. Republic***, CAT-Criminal Appeal No. 160 of 2016 (Mtwara-unreported), it was held as follows:

> *"In criminal cases it is the notice of appeal which institutes an appeal under rule 68 (1) of the Tanzania Court of Appeal Rules, 2009. The rule is couched in mandatory terms and should be complied with in initiating an appeal."*

Such is the importance of a notice of appeal that this Court, in ***The D.P.P v. A.M. Swai*** [1989] TLR 37, had the application for leave to appeal struck out for failure to give a notice of intention to appeal. The recent decision in ***Hussein Ramadhani Beka v. Republic***, CAT-Criminal Appeal No. 349 of 2016 (Mwanza-unreported) summed up everything about the importance of a notice of appeal to an appeal. It was held:

> *"The law in Tanzania is prettily settled that there can be no competent criminal appeal in the High Court against the decision of a magistrate court where the appellant had not given notice of his intention to appeal within ten (10) days from the decision he wants to overturn."*

See: ***Renatus Muhanje v. Republic***, CAT-Criminal Appeal No. 417 of 2016 [2019] TZCA 103; [10 May 2019, TANZLII]; and ***Francis Petro v.***

Republic, CAT-Criminal Appeal No. 534 of 2016 [2019] TZCA 304; [27 August 2019, TANZLII]

The applicant in the instant matter has not denied the fact that after striking out the defective notice of appeal, thereby collapsing the appeal, no fresh notice of appeal was filed subsequent to the striking out. This means that the applicant's latest effort, however successful it may be, will not succeed in having the appeal instituted since the trigger action *i.e.* the notice of appeal has not been preferred. The applicant's contention is that the notice of appeal would be instituted anytime, even after disposal of this application. With respect, this is a flawed proposition. There is no way an extension of time to file a notice of appeal would be preceded by an application for extension of time to file an appeal. I take that absence of such notice or even an application for extension of time to file it was an omission which would not be remedied at any subsequent stage without applying for an extension.

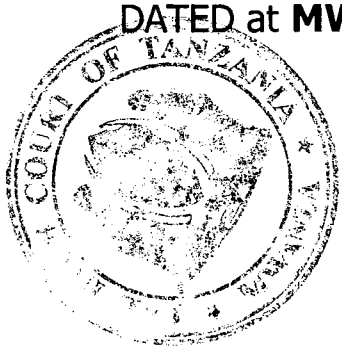
Before I pen off and, aware that what is at stake is a preliminary objection, let me remark on the application in which leave to appeal out of time is sought. In a bid to convince the Court to grant it, the learned counsel for the applicant cited chances of success in the appeal as one of

the factors to be considered when granting or refusing extension of time. The trite position is that delving into the merits of non-existing appeal is a serious error (See: ***Angumbwike Kamwambe v. Republic***, CAT-Criminal Appeal No 10 of 2015 (Mbeya-unreported).

In the upshot, I find that the preliminary objection by the respondents is meritorious and holds a sway. I hold that the application is misconceived. Accordingly, I strike it out.

It is so ordered.

DATED at **MWANZA** this 4th day of June, 2020.



M.K. ISMAIL

JUDGE

Date: 04/06/2020

Coram: Ho. J. M. Karayemaha, DR

Appellant: Mr. Mwasimba, Senior State Attorney

Respondents: 1st, 2nd, 3rd — Mr. Zephania, Advocate

B/C: B. France

Mr. Mwasimba:

The matter is for ruling. I am ready to receive it.

Mr. Zephania:

I am also ready for the ruling.

Court:

1. Ruling has been delivered in the presence of both parties on line and under my hand and Seal of the Court this 04th June, 2020.
2. Right of Appeal dully explained.

J. M. Karayemaha
DEPUTY REGISTRAR

At Mwanza

04th June, 2020