

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CORAM: Mwakasendo, J.A., Makame, J.A. and Kisanga, J.A.

CRIMINAL APPEAL NO. 51 OF 1980

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT
AND

WILBERT MOSHI RESPONDENT

(Appeal from the conviction of the High Court
of Tanzania at Mbeya) Mwakibete, J.) dated
the 23rd day of July, 1980,

in

Criminal Appeal No. 31 of 1980

R U L I N G

MWAKASENDO, J.A.

Mr. Mwipopo, learned Senior State Attorney who appears on behalf of the Republic in these proceedings, has raised a matter of the utmost importance to the administration of criminal justice in the United Republic. Briefly, we are concerned here with the construction of subrule (1) of Rule 73 of the Tanzania Court of Appeal Rules, 1979. The background to the present proceedings may be outlined as follows.

On 29th July, 1980 the Director of Public Prosecutions being aggrieved by the decision of the High Court allowing the respondent's appeal against his conviction and sentence imposed for an offence of corrupt transaction with agent, filed through the Deputy Registrar of the Court of Appeal at Mbeya, a notice of appeal to this court. On 10th October, 1981 the Director of Public Prosecutions filed in this court a memorandum of appeal setting out three grounds of appeal. This Memorandum was, as required by the Rules, served on Mr. Mwakilasa, the advocate for the respondent, WILBERT MOSHI. On 14th November, 1981 Mr. Mwakilasa wrote to the District Registrar, High Court Mbeya, informing him that as Mr. MOSHI had not instructed him to oppose the appeal lodged by the Republic, he was unable to accept service of the notice and record of appeal. Accordingly, on 23rd November, 1981 the Senior Deputy Registrar of this court directed the District Registrar, High Court, Mbeya, to cause the notice and record of appeal to be served directly on the respondent, WILBERT MOSHI. On 29th September, 1982 WILBERT MOSHI was duly served with the notice and record of appeal. However, the following day, that is, the 30th day of September, 1982

him that he had received the notice of hearing of the Republic's appeal in this case but would be unable to attend the hearing of the appeal because he could not afford the fare and other expenses which he would have to bear if he were to attend the hearing of the appeal in Dar es Salaam. The material part of the letter, which is in Kiswahili reads:

"Ndugu Mhusika,

Ninayo heshima kubwa kutuma barua hii katika ofisi yako, kukuarifu kwamba kuitwa shaurini uliyonitumia kupitia kwa Officer in Charge Police Mbeya nimeipata lakini kufuatana na tatizo la uwezo wa kifedha nitashindwa kuhudhuria kikao hicho. Hata hivyo nimejaribu kwenda Mahakama Kuu Mbeya kuomba msaada wa usafiri pamoja na matumizi wakanijibu kwamba hawana fungu la kunisaidia. Ndipo wakanishauri niandike barua katika ofisi yako".

When the appeal by the Republic came up for hearing on 11th October, 1982 Mr. Mwipopo drew our attention to the provisions of subrule (1) of Rule 73 which provides:

"73.-(1) The appellant and the respondent shall be entitled to be present at the hearing of the appeal; save that an appellant or respondent who is in prison, other than an appellant under sentence of death not represented by an advocate, shall, unless in any particular case the court directs otherwise, be so entitled only on terms of paying the expenses of his transport and that of his escort to and from the court".

Mr. Mwipopo then urged the court to proceed to hearing of the appeal in respondent's absence. He stated that subrule (6) of Rule 73 was his authority for urging the court so to do. But as the court had some doubts whether we could properly proceed to hear the appeal in the absence of the respondent having regard to the reason that the respondent had given for not being able to be present at the hearing of the appeal, we invited Mr. Mwipopo to address us on this point. Mr. Mwipopo in a forceful submission argued that the right to be present at the hearing of an appeal which is given to the appellant and the respondent under subrule (1) of Rule 73 is not an absolute one. He said that all ^{that} the subrule says is that an appellant or respondent has a right to be present at the hearing of an appeal, if he so wishes, but there is nothing in the Rule which makes it mandatory for either the appellant or the respondent to do so, if he does not wish to be present or for any reason, he is unable to be present at the hearing of the appeal.

With respect, we think there is a great deal of sense in Mr. Mwipopo's submission. The validity of Mr. Mwipopo's argument is,

in our view, underscored by the very provisions of subrule (1) of Rule 73, which, while giving a right to an appellant or respondent to be present at the hearing of an appeal, goes on to provide that an appellant or respondent who is in prison shall exercise his right to be present at the hearing of an appeal only on terms of paying the expenses of his transport and that of his escort to and from the court. We do not read in this subrule anything that would make the position of an appellant or respondent who is not in prison more favourable than that of his counterpart who is incarcerated. On a proper reading of the subrule we cannot see any reasonable ground why a person - be he an appellant or respondent - who is not in prison should be treated more favourably than another who is incarcerated. Thus, while it is not open to the court to deny a hearing to an appellant or respondent who is present at the hearing of an appeal, it is not the court's duty to facilitate the appellant's or respondent's presence before it. The appellant or the respondent, as the case may be, has a right to be present at the hearing of an appeal but his ability to exercise this right is, in our opinion, a matter which depends on a number of factors over which this court has no control. So long as the court is satisfied that a party to an appeal has been served with a notice of hearing, we think this court need not concern itself with the reason why such a party fails to attend or to be present at the hearing of the appeal. The law, in any case, does not compel him to do so.

We are fortified in this view by the provisions of subrule (1) of Rule 67 which reads:

"67.--(1) An appellant or, where the appellant is the State, a respondent who does not intend to appear in person or by advocate at the hearing of the appeal may lodge with the Registrar or with the Deputy Registrar at the place where the appeal is to be heard a written statement of his arguments in support of or opposition to the appeal, as the case may be".

Upon consideration of the matter we are satisfied that the right of the present respondent to be present at the hearing of the appeal is not an absolute one, for, as it seems to us, were his rights in this regard absolute, we cannot conceive any sensible ground why the learned author of the Rules would have taken the trouble to provide for the alternative right to the appellant who does not wish to attend in person or by advocate at the hearing of the appeal to lodge with the Registrar or his deputy a written statement of his arguments in support of or opposition to the appeal, as the case may be.

In the result we direct that this appeal should proceed to hearing immediately.


DATED at DAR ES SALAAM this 4th day of November, 1982. .

(Y. M. M. Mwakasendo)
JUSTICE OF APPEAL

(L. M. .Makame)
JUSTICE OF APPEAL

(R. H. Kisanga)
JUSTICE OF APPEAL

I certify that this is a true copy of the original


(L. A. A. Kyando)
DEPUTY REGISTRAR