

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

(CORAM: MROSO, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 160 OF 2006

**OMAR SHAABAN SENGE APPELLANT
VERSUS
S.M.Z.RESPONDENT**

**(Appeal from the Judgment of the High Court
of Tanzania at Vuga)**

(Mshibe Ali Bakari, J.)

**dated the 5th day of July, 2005
in
Criminal Case No. 312 of 2004**

RULING OF THE COURT

13 & 17 November 2006

MROSO, J.A.:

At the start of the hearing of the appeal Mr. Mbwezeleni, learned advocate for the appellant, raised the issue whether there was a judgment of the High Court within the meaning of the law. The Court record shows that after the High Court, Mshibe Ali Bakari, J., heard the appeal that was before him, he made an order on 5th July, 2005 dismissing the appeal and reserved reasons by making the following order:-

"The grounds for the dismissal to be given later.

Sgd: Mshibe Ali Bakari,
5/7/2005."

To this day no reasons for the dismissal of the appeal have been forthcoming from the learned judge.

Although reasons for the decision had not been given by the High Court Judge, on 12th July, 2005 the appellant lodged in the Court of Appeal a notice of appeal and on 9th March, 2006 a memorandum of appeal was filed. Later, on 26th October, 2006 after Zanzibar M.M. Law Chambers, Advocates were engaged by the appellant as his advocates, an amended memorandum of appeal was filed by the advocates. The grounds of appeal were 10 in number. The main ground of appeal reads –

1. That the Honourable learned Judge of the High Court erred in law in affirming the lower court decision in his purported judgment in a manner contrary to the procedures pertaining to framing (a)

judgment as provided under the law
hence making the same a nullity.

There followed nine other grounds of appeal but these were in
alternative to the first ground of appeal.

The grounds of appeal were framed on the basis of the decision
of the Judge regarding the appeal that was before him. The decision
reads as follows –

"ORDERS

This is a criminal appeal where by (sic) the
appellant Omar Shaaban Senge appealed
against the decision of the RM's Court of
convicting and sentencing him to 20 years
imprisonment for illegal possession of
dangerous (sic) and the appellant is aggrieved
and haven't (sic) appeal before this court.
Having heard the ground of appeal by the
appellant and the reply by the respondent is
of the considered view that, appellant hasn't
advanced any good ground of appeal which
could make this court to order otherwise. The

appellant was properly convicted and sentenced before the RM's Court.

For that reason therefore the appeal by the appellant is hereby dismissed the conviction and sentence by the RM's Court upheld.

Sgd: Mshibe Ali Bakari, J.

CT. so orders.

The grounds for dismissal to be given later.

Sgd: Mshibe Ali Bakari, J.

5/7/2005"

Mr. Mbwezeleni asked the Court to allow the appeal.

The respondent, Serikali ya Mapinduzi ya Zanzibar (SMZ), was represented at the hearing by Mr. Shaabani Ramadhani Abdalla and Ms Raya Mselem, learned State Attorneys. Mr. Abdalla started by arguing that the notice of appeal was not valid. He advanced three reasons. First that it appears to have been prepared after the period

for lodging notice of appeal had elapsed and after the record of appeal was prepared; that is the reason it is not part of the bound record of appeal. If it had been lodged in time and before the record of appeal was prepared it would no doubt form part of the bound record of appeal and it would have been shown in the index of contents of the record of appeal. Secondly, that the signature of the prison officer on what appears as the original of the notice of appeal is not in original but a carbon copy of the original and there was no official rubber stamp. On second thoughts, the learned state attorney abandoned this second point. Finally, he argued that since a copy of the notice of appeal was missing from all copies of the record of appeal except in the original Court record where the signed copy of the notice was found, then Rule 63 of the Court Rules (The Rules) had not been complied with. The Registrar of the High Court had not sent a copy of the notice of appeal to the respondent. The Rule requires that the Registrar of the High Court would "forthwith" send a copy of such notice to the respondent named in the notice. He asked this Court to strike out the appeal for want of a properly filed notice of appeal.

Mr. Mbwézeleni was of the view that the learned State Attorney was trying to raise a preliminary objection to the appeal improperly. He should have sent a notice of preliminary objection so that the appellant would prepare to confront it. On this point we hasten to say, as was rightly pointed out by Mr. Shaaban Abdalla, the Rules do not provide for a notice of preliminary objection in criminal appeals, the equivalent of Rule 100 in Civil Appeals.

As for the point that the notice of appeal appears to have been lodged beyond the 14 days stipulated in Rule 61 (1) of the Rules, one can only speculate, which is not a judicial approach. On the face of it, the notice of appeal appears to be valid and shows it was lodged within time. The fact that it is not part of the bound record of appeal could be the result of carelessness on the part of Court registry staff just as it may be the result of connivance by untrustworthy staff with the appellant to file it surreptitiously in the original Court record after it was lodged late. Again, the reason the Registrar of the High Court did not comply with Rule 63 (1) of the Rules could be because of inefficiency on the part of the High Court Registrar or because it was

lodged belatedly and put into the original record dishonestly. In all those circumstances it is better to give the benefit of doubt to the appellant because it is not clear who is to blame. We now wish to consider the legal status of the appeal in the light of the order by the High Court Judge that grounds for the dismissal of the appeal were to follow.

Mr. Shaabani Abdalla submitted that the appeal was filed prematurely because the judgment of the High Court was not yet complete to justify the filing of an appeal. This is because Rule 64 (4) of the Rules had not been complied with. It was his argument also that since the reasons for the High Court decision had not been given, the grounds of appeal appear to have been based on presumptions. He suggested that the appellant's advocate could, and had a right to, urge the judge to write the grounds for dismissing the appeal as he had promised to do. The learned State Attorney urged the Court to strike out the appeal and remit the High Court record to the High Court Judge to write and deliver his reasons for the decision he had given.

Mr. Mbwezeleni would not agree with that suggestion because, in his view, that would be tantamount to condoning inefficiency on the part of the judge, at the same time it would result in delayed justice to his client. He demanded that the court hears the appeal and decide on the fate of the appellant. The learned advocate then unnecessarily leveled certain scurrilous remarks against Mr. Shaaban Abdalla suggesting that he was insensitive to the human rights of the appellant. We spoke at some length about the impropriety exhibited by Mr. Mbwezeleni and we need not repeat all that in the judgment. We believe he understood our message and warning quite well.

It is common ground that Bakari, J. had not completed his work on the appeal which was before him. He heard arguments from both sides when hearing the appeal. He pronounced his decision as he was entitled to do and reserved the reasons for the decision, also as he was entitled to do. He had not, therefore, dismissed the appeal summarily or he would not have reserved reasons for his decision. That is to say, he was not yet done with the appeal that was before

him. He was still seized with the appeal when the appellant filed a notice of appeal and then the memorandum of appeal.

The appellant would not be able to comply fully with Rule 64

(4) of the Rules which reads:-

"64 -

(4) for the purposes of appeal from the High Court in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial corresponding as nearly as may be to those set out in sub-rule (2) and shall contain also copies of the following documents relating to the first appellate court -

- (i) the petition of appeal;
- (ii) the record of proceedings;
- (iii) the judgment;
- (iv) the order, if any; and ---

(not relevant)"

Now, sub-rule (2) of the rule reads –

“(2) for purposes of an appeal from the High Court in its original jurisdiction, the record of appeal shall contain copies of the following documents in the following order –

- (a) ---
- (b) ---
- (c) ---
- (d) ---
- (e) ---
- (f) ---
- (g) ---
- (h) the judgment”

It is clear, therefore, that a proper record of appeal to this Court must contain the judgment of the High Court. The reasons for the decision comprise the judgment of the court.

With respect, we agree with the learned State Attorney for the respondent that the appeal to this Court was premature. In saying so we are not by any manner of means condoning the dilatory attitude of the learned judge of the High Court. As it is, it is now the 16th month since he promised to give his reasons for the decision he handed down on 5th July, 2005. The delay is indefensible because the parties to the appeal which was before him, and this Court, do not have the faintest clue to the reasons for the inordinate delay.

After all has been said, we see no option to the order which, regrettably, we have to make. Since the appeal is premature, we strike it out under rule 3 (2) (a) of the Rules. We now order that the record of the High Court should be remitted to Hon. Mshibe A. Bakari, J. with a direction that he writes and delivers the reasons for his decision with dispatch. Thereafter, if the appellant still feels aggrieved, he may wish to initiate and prosecute his appeal according to law.

GIVEN at ZANZIBAR this 17th day of November, 2006.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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



(S.M. RUMANYIKA)
DEPUTY REGISTRAR