

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR
(CORAM: JUMA, C.J., MBAROUK, J.A., And NDIKA, J.A.)
CRIMINAL APPEAL NO. 309 OF 2017

BASHIRU RASHID OMARAPPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(Appeal from the decision of the High Court of Zanzibar at Vuga)

(Mwampashi, J.)

dated the 28th day of September, 2016

in

Criminal Case No. 3 of 2006

.....

RULING OF THE COURT

5th December 2017 & 2nd February 2018

NDIKA, J.A.:

The appellant, Bashiru Rashid Omar, was charged with the offence of murder contrary to section 180 of the Penal Decree, Cap. 13 of the Laws of Zanzibar before the High Court of Zanzibar sitting at Vuga. The prosecution alleged that on 29th August, 2003 at or about 10.00 a.m. the appellant murdered one Shadrack Mziray. The High Court convicted him of the

offence and, as a result, sentenced him to suffer death by hanging in accordance with section 181 of Cap. 13 (supra). Aggrieved, the appellant has appealed to this Court, challenging both conviction and sentence upon a Memorandum of Appeal containing three points of grievance.

Before the appeal could be heard on the merits, Mr. Ramadhan Nassib, learned Principal State Attorney appearing for the respondent/the Director of Public Prosecutions, raised a preliminary objection pursuant to a formal notice that he had filed on 30th November, 2017 under Rule 4 (2) (a) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). It is stated in the said notice as follows:

"That, the purported Notice of Appeal is incurably defective; hence it fails to comply with the Court of Appeal Rules, 2009."

In the alternative, the notice contends:

"That, the purported Memorandum of Appeal is incurably defective; hence it fails to comply with the Court of Appeal Rules, 2009."

Submitting on the first point, Mr. Nassib argued that the notice of appeal that the appellant lodged to institute the appeal, as shown at page

235 of the record of appeal, is incurably defective. He elaborated that the said notice does not comply with the provisions of Rule 75 (1) of the Rules, which require that a notice of appeal lodged by an appellant who is in prison must substantially comply with Form B/1 prescribed in the First Schedule to the Rules. Mr. Nassib relied upon two recent decisions of this Court: **Khamis Abdul-Wahab Mahmoud v Director of Public Prosecutions**, Criminal Appeal No. 569 of 2015 and **Omar Issa Moh'd v Director of Public Prosecutions**, Criminal Appeal No. 128 of 2016 (both unreported) for the proposition that any appellant in prison seeking to institute an appeal must file a notice of appeal that is substantially in Form B/1 and that any notice that does not substantially match that prescribed format is defective.

Mr. Nassib submitted further that when the appellant's notice is compared with the prescribed Form B/1, it is undeniable that it has omitted the following essential particulars: first, the date of the judgment and conviction; secondly, the date of entering prison (educational centre); thirdly, the date of lodging intention to appeal; and finally, the name of the certifying officer in charge of the prison. He thus insisted that the notice

was fatally defective and that the present appeal, purportedly instituted by that notice, is rendered incompetent.

On the alternative point, Mr. Nassib assailed the Memorandum of Appeal, which was lodged by Mr. Uhuru Khalfan, learned Counsel for the appellant, in substitution of a previous memorandum. He contended that the said memorandum was substantially non-compliant with Form C/1 that is prescribed by the provisions of Rules 72 and 75 (1) of the Rules for an appellant who is appealing while in prison. He elaborated that the memorandum lacks the same details missing in the impugned notice of appeal. Although initially Mr. Nassib urged us to strike out the memorandum of appeal on account of the defect he pointed out, he backed off and acknowledged, at the Court's prompting, that the Court is vested with the discretion whether to dismiss an appeal or not in terms of Rule 72 (5) of the Rules in the absence of a proper memorandum of appeal.

Replying, Mr. Khalfan, at first, conceded unreservedly to the respondent's submissions on the defect in the notice of appeal.

As regards the alleged defect in the memorandum of appeal, Mr. Khalfan argued that the said memorandum was properly lodged in substitution of the earlier one lodged by the appellant. He said that the substitution was made pursuant to the provisions of Rule 73 (2) of the Rules. It was his view that a memorandum of appeal lodged in substitution is not required to comply with Form C/1 under Rule 75 (1) of the Rules.

Rejoining, Mr. Nassib maintained that any memorandum of appeal lodged in substitution of a previous one under Rule 73 (2) of the Rules must comply with the format prescribed by Rule 75 of the Rules.

Having summarized the learned rival submissions, we now deal with the first point of contention that the notice of appeal is incurably defective. We begin by remarking that while the requirement to lodge a notice of appeal, by any intending appellant within thirty days of the impugned decision so as to institute the appeal, is primarily stipulated by sub-rule (1) of Rule 68 of the Rules, the contents and format of the notice are specified by sub-rules (2) and (7) of that Rule, which we reproduce, in succession, as follows:

"68 (2) Every notice of appeal shall state briefly the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal, and shall contain a full and sufficient address at which any notices or other documents connected with the appeal may be served on the appellant or his advocate and, subject to Rule 17, shall be signed by the appellant or his advocate."

...

"68 (7) A notice of appeal shall be substantially in the Form B in the First Schedule to these Rules and shall be signed by or on behalf of the appellant."

For ease of reference, we reproduce Form B prescribed by Rule 68 (7) of the Rules as the format for a notice of appeal as follows:

FORM B

(Rule 68)

In the Court of Appeal of Tanzania at Criminal/Civil
Application No of 20..... In the matter of an intended
appeal/Criminal/Civil. Appeal No of 20.....
between..... Appellant
and..... Respondent
(Appeal from the of the High Court of
at..... (Mr. Justice
.....) Dated..... 20..... in
..... Criminal/Civil
Application/Appeal No of 20.....)

NOTICE OF APPEAL

TAKE NOTICE that appeals to the Court of
Appeal of Tanzania against the decision of the Honourable Mr. Justice

.....given at
..... on the day of
..... 20..... whereby the appellant was convicted of
..... and sentenced to
..... The appeal is
against conviction only/conviction and sentence/sentence only. The appellant
intends/does not intend to be present at the hearing of the appeal. The address of
service of the appellant is
.....

..... Dated this day of, 20.....
Signed..... Appellant/Advocate for the Appellant
(Retained only to prepare this notice/ Retained to appear at the hearing of the
appeal/Assigned to appear at the hearing of the appeal.)
To: The Registrar of the High Court at
..... Lodged in the High Court of
Tanzania at on the
day of, 20.....

..... Registrar"

For an intending appellant serving a term in prison, Rule 75 (1) of the
Rules provides a special procedure and format for lodging, among others, a
notice of appeal as follows:

*"75 (1) If the appellant is in prison, **he shall be deemed to have complied with the requirements of Rules 68, 72, 73 and 74 or any of them by filling Form B/1, Form C/1 and handing over to the officer-in-charge of the prison in which he is serving sentence his intention to appeal and the particulars required to be included in the memorandum of appeal or statement, pursuant to the provisions of those Rules.**"*

[Emphasis added]

We have supplied emphasis to the above provisions to stress that an appellant who is in prison is given an additional avenue for preparing and lodging a notice of appeal required under Rule 68 of the Rules by completing Form B/1 and handing it over to the officer-in-charge of the prison in which he is serving his sentence. In this regard, we recall what we observed in **January Makanta v Republic**, Criminal Appeal No. 55 of 2013 (unreported) that:

"For purposes of notice of appeal, Rule 75 gives the appellant another avenue for preparation of Notice of Appeal whilst serving term in prison apart from notices envisaged under Rule 68. This Rule 75 provides that if the appellant is in prison, he shall be deemed to have complied with the requirements of Rule 68 governing notice by filling Form B/1 and handing it over to the officer-in-charge of the prison in which he is serving sentence."

See also **Laurent Kisingo v Republic**, Criminal Appeal No. 123 of 2013 (unreported).

At this point, we wish to observe that Form B/1 is, in essence, analogous to Form B except that it contains an additional part, at the bottom, which the officer-in-charge of prison is required to fill out after the

form is handed over to him by an appellant in prison. The required information concerns the date of judgment and conviction, the date of entering prison, the date of lodging an intention to appeal and the name of the certifying officer-in-charge of prison. For ease of reference, we reproduce that part as follows:

"For Appellant who is in prison:

Date of Judgment and Conviction:

Date of entering the prison:

Date of lodging an intention to appeal:

Name of certifying officer-in-charge of the prison:

Signature:

Date:

Date of transmission:"

We have no doubt that the above additional information is for the purpose of computation of the limitation period for lodging the notice of appeal as can be deciphered from the provisions of sub-rules (2) and (3) of Rule 75:

"(2) In any such case, in computing the time limited for lodging such notice, memorandum or statement, there shall be excluded-

(a) the time between the appellant's conviction and his arrival at the prison to which he was committed; and

(b) the time between the signing of the form, memorandum or statement to the officer-in-charge of the prison and its lodging by him with the Registrar of the High Court or the Registrar or deputy registrar, as the case may be.

(3) An officer-in-charge of a prison receiving the form, memorandum of appeal or statement under this rule, shall forthwith endorse them with the date and time of receipt, and shall forward them to the Registrar of the High Court or the Registrar or deputy registrar, as the case may be."

By way of emphasis, we would, once again, stress that while Rule 68 of the Rules creates the primary requirement for lodging a notice of appeal and then prescribes Form B as the general format for all appellants, Rule 75 (1) provides a special but additional window for an appellant in prison to lodge his notice of appeal in accordance with Form B/1. It is possible to envisage a situation where an appellant lodges a notice of appeal that is sufficient under Rule 68 of the Rules but it is somewhat non-compliant with Form B/1 for the omission of the details that the officer-in-charge of prison ought to have filled in. This could arise especially where the appellant himself draws up or instructs an advocate to draw up for him a notice of

appeal in Form B that would then be presented directly to the Registrar of the High Court for lodgment without being routed through the officer-in-charge of the prison. Recalling this Court's holding in **Salehe Ramadhani Juma & 4 Others v Republic**, Criminal Appeal No. 20 of 2004 (unreported), it is plain that the obvious disadvantage that an appellant in prison suffers by lodging a notice of appeal that is non-compliant with Rule 68 of the Court of Appeal Rules, 1979 (now Rule 75 of the Rules) is that he cannot benefit from the exemption of certain periods of time under that rule. The relevant passage in that decision is as follows:

"It means, therefore, that since the provisions of Rule 68 of the Court Rules [Rule 75 of the existing Rules] were not complied with, the appellant cannot take advantage of that rule and the date of lodging the notice of appeal will have to be the date when it was lodged to the Registrar of the High Court."

In the instant case, the impugned notice of appeal, dated 29th September, 2016, was lodged in time with the Registrar of the High Court of Zanzibar on 4th October, 2016, meaning that no question of limitation would arise. For the ease of determining whether it is compliant with the

provisions we have reviewed herein, we reproduce the impugned notice thus:

IN THE COURT OF APPEAL OF TANZANIA
HELD AT ZANZIBAR
IN THE MATTER OF AN INTENDED APPEAL
CRIMINAL APPEAL NO. OF 2016
BASHIRU RASHID OMAR APPELLANT
and
D.P.P RESPONDENT

Appeal from the decision of the High Court of Zanzibar at Vuga before Honorable Mr. ABRAHAM MWAMPASHI (J), given at Vuga on the 28th day of September 2016 in Criminal Case Number 03 of 2006.

NOTICE OF APPEAL

Take Notice that **BASHIRU RASHI OMAR** appeals to the Court of Appeal of Tanzania against the decision of Honorable Mr. ABRAHAM MWAMPASHI (J) given at Vuga on the 28th day of September 2016 where the appellant was convicted of MURDER and sentenced to be hanged by the neck until he is dead c/ss 180 and 181, the Penal Decree, Cap. 13 of Zanzibar.

The appeal is against conviction and sentence.

The appellant intends to be present at the hearing of the appeal.

The address of service of the appellant is:-

THE COMMISSIONER OF PRISON

ZANZIBAR.

Dated this 29th day of September 2016

Signed (Thumbprint)..... Appellant

To: The Registrar of the High Court at Vuga Zanzibar lodged in the High Court of Tanzania (sic) at Zanzibar on the 4th day of October 2016

Signed..... Registrar

DRAWN AND FILED BY

(Rubber stamp of the Officer-in-Charge of the Kiinua Miguu Educational Centre, Zanzibar)."

It is evident that the above notice contains all the essential components stipulated by Rule 68 (2) of the Rules, which are the nature of conviction and sentence desired to be appealed against, full and sufficient address of the appellant and his signature (thumbprint). In addition, the said notice clearly satisfies the requirement under Rule 68 (7) of the Rules as it substantially meets the format prescribed by Form B. We also note that it was lodged in time as it was presented to the Registrar of the High Court of Zanzibar on 4th October, 2016, about a week after the impugned decision was delivered. Nonetheless, it is evident that the said notice significantly falls short of Form B/1 as it does not include the details of the appellant, as one in prison/educational centre, that ought to have been filled in the Officer-in-Charge of the Kiinua Miguu Educational Centre where the appellant is serving his sentence.

Given the circumstances, it behooves the Court to determine whether, as contended by Mr. Nassib, the appellant's notice, even though it meets the requirements of Rule 68 of the Rules, is defective on account of its being non-compliant with Rule 75 (1) of the Rules as it was lodged by an appellant who was in an educational centre (prison).

As we indicated earlier, Rule 75 (1) of the Rules provides a special but additional window for an appellant in prison to lodge his notice of appeal. We recall that Mr. Nassib cited to us two unreported decisions to support his argument: **Abdul-Wahab Mahmoud** (supra) and **Omar Issa Moh'd Khamis** (supra). Starting with the former decision, we think that it is clearly distinguishable from this matter. In that decision, the Court found the impugned notice of appeal defective on account of being non-compliant with Rule 68 (1), (2) and (7) of the Rules as well as Form B/1 under Rule 75 (1) of the Rules. That is evident from the following passage in the Court's decision:

*"Apart from the discrepancy on the **date of drawing the notice of appeal and that of filing which shows that the notice of appeal was lodged before it was drawn and signed by the appellant**, it lacks particulars of the prison and the prison officer in charge of the prison where the appellant is serving the sentence and the date of the transmission of the notice of appeal for filing before the High Court **The dates are conflicting and it is hard to ascertain when the notice of appeal was drawn.**"*

[Emphasis added]

Nonetheless, we note that the Court held, in **Omar Issa Moh'd Khamis** (supra), that:

*"Since the Appellant's notice of appeal does not contain that **part of Form B/1 which ought to have contained the vital information shown above, there is no gainsaying that the notice does not comply with Rule 68 (7) of the Rules.** On account of the defect which is incurable, the appeal is rendered incompetent.* [Emphasis added]

We move along to acknowledge that the above holding appears to have accepted the contention by the learned Senior State Attorney appearing for the Director of Public Prosecutions that since the appellant lodged his impugned notice of appeal from prison (educational centre), he ought to have complied with Rule 75 (1) of the Rules by drawing up his notice in accordance with Form B/1 by which he would have provided the details required to be filled in by the officer-in-charge of prison in which he was serving his sentence.

All said and done, we ask ourselves whether it would be justifiable to find the appellant's notice of appeal incurably defective and strike it out as prayed for by the learned Principal State Attorney on account of its non-

compliance with Rule 75 of the Rules even though it is plainly sufficient under Rule 68 of the Rules.

We think that this question ought to be determined on the basis of the peculiar circumstances of this appeal. It is on the record that the appellant was arrested by the police on 31st August, 2003 upon his surrender, two days after the deceased was murdered. His initial trial for murder before the High Court of Zanzibar was nullified by this Court. Subsequently, he was retried and that the said fresh trial culminated into his conviction and death sentence meted out on 19th August, 2016, now the subject of this appeal. It is evident, therefore, that this appeal involves a case that has been dragging on for fourteen years since 2003 without having been finalized by this Court as the apex court of the country. Should we find the impugned notice of appeal defective and strike it out along with the appeal, the appellant will be at liberty to refile the appeal subject to the law of limitation. Obviously, that course will result in further delay of the matter considering that the appellant will have to process and institute a new appeal from his educational centre (prison).

What is more, we find it significant that the impugned notice of appeal clearly indicates that it was "drawn and filed by" the Officer-in-Charge of the Kiinua Miguu Educational Centre, Zanzibar whose rubber stamp was embossed thereon. Since the Officer-in-Charge was the one who drew up and filed the notice, we expected him to have ensured that a proper notice was prepared and filed in accordance with Rule 75 of the Rules. This is a clear case of the Officer-in-Charge's failure to fulfil his duty under Rule 75 to fill in the details on the appellant and provide the necessary certification. The omission of the required details was obviously not of the appellant's own making.

Given the above context, we think this Court is enjoined to do justice to the appellant. Rule 2 of the Rules provides:

"In administering these rules the Court shall have regard to the need to achieve substantial justice in the particular case and not only the technical compliance with the rules."

Above and beyond, Rule 4 (2) (b) of the Rules states:

"(2) Where it is necessary to make an order for the purposes of:

(a) [Omitted]

(b) better meeting the ends of justice; or

(c) [Omitted]

the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary."

Applying the above cited provisions of Rules 2 and 4 (2) (b) of the Rules to the circumstances of this appeal, we are convinced that the interests of justice would be better served if the non-compliance with Rule 75 of the Rules is ignored. We are also mindful that the respondent Director of Public Prosecutions will suffer no prejudice or injustice. Nonetheless, we wish to repeat what we said in **Laurent Kisingo** (supra), in which we disregarded an inconsequential defect in a notice of appeal, that:

"In so deciding, we are neither making a general rule of practice nor making a departure from any previous decisions of the Court; but its application is only limited to the particular circumstances of this appeal."

In view of the foregoing analysis, we overrule the respondent's first point of preliminary objection.

The second point of preliminary objection, that the memorandum of appeal on the record is defective, need not detain us as it was fully answered by Mr. Khalfan for the appellant. We agree with him that the disputed memorandum of appeal was properly lodged, in substitution of the earlier one lodged by the appellant, pursuant to the provisions of Rule 73 (2) of the Rules. The aforesaid provisions unreservedly vest such discretion in an appellant's counsel as follows:

*"An advocate who has been assigned by the Chief Justice or the presiding Justice to represent an appellant may, within twenty one days after the date when he is notified of his assignment, and without requiring the leave of the Court, **lodge a memorandum of appeal on behalf of the appellant as supplementary to or in substitution for any memorandum which the appellant may have lodged.**"*[Emphasis added]

We recall that Mr. Nassib was insistent that the impugned memorandum would still be defective, even though lodged in substitution, because it was not drawn up in accordance with Form C/1 prescribed under Rule 75 (1) of the Rules in respect of an appellant who is in prison. With respect, we disagree with him as we find it significant that Rule 73 (2)

of the Rules does not make any specific reference to Form C/1. In other words, the use of the general form – Form C – is not specifically excluded for the purpose of substituting a memorandum of appeal.

In addition, since in terms of Rule 72 (5) of the Rules, the Court is endowed with the discretion whether or not to dismiss an appeal where no memorandum of appeal is filed or even where the one on the record is found defective and, hence, liable to be struck out, we are of the view that the second point of preliminary objection is misconceived as it has been raised in respect of a matter involving the exercise of the Court's discretion. Indeed, in the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd** [1969] EA 696 at 701, it was held that:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."

[Emphasis added]

Consequently, we overrule the second point of preliminary objection.

In the final analysis, we overrule the preliminary objection in its entirety. Accordingly, the appeal is to be set for hearing in the next sessions on a date to be determined by the Registrar. It is so ordered.

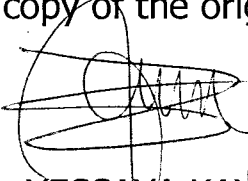
DATED at **ZANZIBAR** this 20th day of December 2017.

I.H. JUMA
CHIEF JUSTICE

M.S. MBAROUK
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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


YESSAYA KAYANGE
DEPUTY REGISTRAR
COURT OF APPEAL

