

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 104 OF 1995

(ORIGINAL CRIMINAL CASE NO. 874 OF 1990)
(Before: IFUNYA ESQ., DISTRICT MAGISTRATE)

KHAMIS ABDALLAH.....APPELLANT
VERSUS
THE UNITED REPUBLICRESPONDENT

R U L I N G

KALEGEYA, PRM

Khamis Abdallah was charged for Robbery with violence c/s 285 and 286 of the Penal Code and sentenced to 30 years imprisonment on 17/9/91. Dissatisfied with the conviction and sentence he appealed to the High Court. When the Appeal came for hearing, Miss Munisi for Respondent\Republic raised a preliminary objection that it was incompetent as it had been filed out of time. This ruling has to decide on this.

Miss Munisi for Respondent vigorously contended that the appeal is incompetent as it is hopelessly out of time; that although Khamis was convicted on 17/9/91 he kept silent till 1995 when he applied for a copy of judgement, and finally that he did all this notwithstanding the fact that he was explained by the Court of his rights to appeal as indicated on the certified copy of judgement. In response Mr. Khamis Abdallah simply said that he appealed within time as he did express his intention to appeal upon conviction and to prison officials but that he got a copy of judgement in 1995.

Indeed this is an unfortunate incident on the side of Khamis Abdallah. The record shows that his rights of Appeal were explained to him upon conviction and sentence but does not show that he expressed his intention to appeal then. Of course a mere writing of "Rights of Appeal explained" by the Court is far away from proving that the mandatory requirements of S. 359 CPA (which require the Court to mandatorily explain to the convict the time within which to lodge notice and petition of Appeal) were complied with and seems to be commonly a matter of routine, but in the absence of any evidence to the contrary we have to take it that those rights were duly explained.

Under S. 361 of the CPA, for an appeal to be competent a notice should have been filed within 10 days of delivery of judgement and the petition of Appeal within 45 days provided days taken to procure copy of judgement are excluded in the computation of the period and also provided the court for good cause can permit the same to be filed out of time.

In the present case the Petition of Appeal shows that though the conviction was entered on 17.9.91, a copy of judgement was received on 26.5.95 while the petition was filed on 6/6/95. It is silent on when the Notice was given nor when a copy of judgment was applied for. The usual practice is for prison officers to indicate also the date when Notice of Appeal was given; copy of Judgement was applied for, and it is surprising that it was not indicated in this case. Anyone in Miss Munisi's shoes could not have submitted differently. In the premises it is as clear as day light that no Notice was given though the Petition was filed in time if we tread by what is indicated on the memo of Appeal (between date of receipt of copy of Judgement and filing of Petition). However, even though, as held in the case of JAMAL MANJI AND COMPANY VS. REPUBLIC (1970) HCD 338, when dealing with a section in the old CPC which was in pari materia with the present S. 361 CPA

"The compliance required is total. A partial compliance as by giving notice of Appeal in time but lodging the Petition out of time or vice versa is not enough. A partial compliance creates, at most, an imperfect appeal which cannot be entertained".

That said I have to say that as rightly pointed out by Miss Munisi for Respondent\Republic this appeal is incompetent. But on the other hand can we say that the Appellant has assigned good cause for non-compliance so as to prompt this Court to act under the proviso to S. 361 CPA?

As earlier indicated this is an unfortunate situation for the Appellant. I concede that he is a layman but at no given stage in his arguments did he assign any reason at all for not complying with s. 361 apart from saying that he did give notice of Appeal upon conviction and to prison officials which I have rejected as not being true. In view of the fact that he has assigned no cause at all for the delay I have no ground on which to consider using the Courts' discretion under the proviso to S. 361 CPA. Again seeking assistance of Jamal's case cited above, this is the legal stand on such matter,

"The proviso..... however provides that the High Court may, for good cause, admit an appeal notwithstanding that the periods of limitation have elapsed, that is to say, restore the right of Appeal and treat an imperfect Appeal as valid and proper appeal or allow a notice of Appeal to be given and Petition of Appeal to be lodged out of time, where no steps have been taken by the

prospective appellant. When the Court has exercised this power in favour of an Appellant or prospective Appellant it would then proceed to entertain it (consider or deal with it).... This power to admit an appeal cannot be exercised unless good cause is shown. The good cause has invariably to be shown by the Appellant or prospective Appellant. He initiates the proceeding by moving or applying to the Court to exercise its powers under the proviso.....". (emphasis mine).

In this case the Appellant is yet to apply to the Court to use its discretion. Of course regard being had to the gravity of the offence with which he is charged and sentence passed against him, (but without speaking for the Court which may be called upon to decide) an application properly filed may possibly find basis for consideration, but till that is done this incompetent appeal can't remain in the registry and it is struck out accordingly.

Preliminary objection upheld.

SGD; (L. B. Kalegeya)
PRM WITH EXTENDED JURISDICTION

Delivered in the presence of Mr. Khamis Abdallah and Mr. Chiwiwo, State Attorney for Respondent today the 15th May, 1996.



(L. B. Kalegeya)
PRM WITH EXTENDED JURISDICTION

15th May, 1996