IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISCELLANEOUS CRIMINAL APPLICATION NO. 50 OF 2002

From Criminal Appeal No. 48 of 2002 of the High Court of Tanzania Mbeya and Original Criminal Case No. 74 of 2000 of the District Court of Mbeya)

THE REPUBLIC ..... APPLICANT

VERSUS

CHARLES GAKWAYA ..... RESPONDENT

R U L I N G

MACKANJA, J.

This is an application for extention of time within which to appeal. It is supported by the affidavit of Mr. Ayubu Mwenda, learned State Attorney. I have observed that the supporting affidavit gives no ground upon which the application is founded, save that the appeal was dismissed for being incompetent; that the said incompetence was stated to be due to failure to give notice of intention to appeal; and that the notice of intention to appeal was given by the Public Prosecutor on 28th May, 2002. The Public Prosecutor was ASP Ndaki who swore his own affidavit on the matter. He states that the judgment was delivered on 14th May, 2002 and that he filed notice of the D.P.P.'s intention to appeal on 28th May, 2002.

Mr. Mwenda has submitted that they be granted leave to appeal because the notice of intention to appeal was given within the prescribed time.

Mr. Materu, learned defence counsel, has submitted that the application is defective because the applicant has not cited the enabling provisions under wnich it is brought. He cited the decision of this Court in Harold Maleko v. Harry Mwasanjala (DC) Civil Appeal No. 16 of 2000 as authority for his argument.

Mr. Materu, learned counsel, gave yet another ground why the application should be dismissed. He contends that whereas the judgment against which it is intended to appeal was delivered on 14th May, 2002, the document

..../2

on which the notice is recorded is stamped 28th May, 2002. It means that 14 days had elapsed from the date of the judgment to the date the notice was issued. According to Mr. Materu notice ought to have been given within nine days from the date of the judgment. He did say which procedural law supports that view. He wound up saying that the appeal be dismissed as it was time-barred.

All along the Republic has maintained that their appeal was lodged in time because the notice of their intention to appeal was given within the prescribed period, in that the said notice was given within fourteen days from the date of the decision which they seek to challenge on appeal. The Republic does not say exactly within which time they were entitled to give notice. I am sure they rely on what section 379 (a) of the Criminal Procedure Act, 1985 under which the Director of Public Prosecution may appeal. I will reproduce the relevant part of it for ease of reference. It provides thus:-

> "379. No appeal under section 370 shall be entertained unless the Director of Public Prosecutions —
> (a) shall have given notice of his intention to appeal to the subordinate court within thirty days within which he wishes to appeal."

This means, then, that the Director of Public Prosecutions was entitled to appeal, if indeed they gave notice of their intention within thirty days from the date of the decision the Director of Public Prosecutions intends to challenge on appeal. So the issue is whether, indeed, the Director of Public Prosecutions gave notice.

The Court observed in its earlier decision which it delivered on 2nd September, 2002, that —

> "It is possible the Republic gave notice of their intention to appeal as indicated in their copy of the alleged notice. The District Court record, however, does not have any document that shows that indeed notice was given. In my view, documents which are in possession of the appellant do not form part of the court record. In the circumstances I hold

.../3

that no notice was given in terms of s. 397 (a) of the CPA".

So, what the applicant was required to do when applying for extention of time within which to appeal was to give reasons why the omission was made. If indeed, as the applicant says in the affidavital evidence that the notice was given, then the only avenue that was open to them was to appeal. I am satisfied, therefore, that the applicant has not made out a case to justify granting him his prayer for extention of time.

Mr. Materu, learned defence counsel, has argued that the application is fatally defective as it does not cite the law under which it is brought. This point will not delay me because case law on it is now settled. This court, citing the decision of the Court of Appeal of Tanzania in Almasi Iddi Mwinyi v. N.B.C., (CA) Civil Application No. 88 of 1998, held that the omission to cite enabling provisions in the chamber summons inflicts a fatal blow on the entire application. In particular, the Court of Appeal observed thus:-

> "... the practice of the Court has always been that provision of law relied upon to move the Court be cited. Referring to Sadrudin Meghji (Civil Application No. 20 of 1997—CAT)... if a wrong citation of law renders an application incompetent, 'I have no flicker of doubt in my mind that non-citation of law is worse and equally renders an application incompetent.'"

This exposition of the law was made in relation to a civil proceeding. The principal that was enunciated therein equally applies to a proceeding of a criminal nature.

It follows, then, that upon the foregoing observations I hold that the application does not have any merit. It is accordingly dismissed.

Sgd. J. M. MACKANJA

JUDGE

27/10/2003

.../4

Date: 31st October, 2003

Coram: J. Kahyoza, D.R.

Applicant: Miss Kileo State Attorney - Present

Mr. Mayeye/Mr. Muruambo

Respondent: Present

C/C: Mbasha.

Court: Ruling delivered.

Sgd. J. KAHYOZA, D.R.

31/10/2003

Certified true copy of the original Ruling.

DISTRICT REGISTRAR

MBEYA

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