**IN THE HIGH COURT OF TANZANIA**
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO.110 OF 2004**

**REPUBLIC ..... APPELLANT**

**VERSUS**

**HASSAN S/O MKOMWA..... RESPONDENT**

## JUDGMENT

**MANENTO, JK:**

This is an appeal by the Republic. The appeal is against the decision of Resident Magistrate's court. Before the subordinate court, the respondent Hassan Mkomwa was charged of two counts. The first count was for erecting a dwelling house on plot No.597 Block E Mbezi area without obtaining a consent from Dar es Salaam City Council contrary to Rule 35 and 71 of the Town Planning Ordinance Cap.378 as amended by act No.13/1991. Second count was failure to comply with the requirement of the demolition Notice c/s 12(2) and 64 of the township Rules Cap. 101.

The particulars of the charge were briefly that the respondent on 5/3/1996 was found at plot No.597 block E Mbezi area within Kinondoni district and Dar es Salaam Region, erecting a Dwelling house without

obtaining a consent and that having been served with a demolition Notice dated he 15/3/96 refused to demolish it within seven days order.

The prosecution called several witnesses mainly from the lands office and one Zelda Oswald who had initiated the proceedings by complaining to the land office that the respondent was erecting a house in a plot belonging to one Byarugaba. Zelda Oswald PW1 was having powers of attorney of the said Byarugaba, so she was taking care of the interests of Byarugaba, who was at Bukoba. After hearing both the prosecution witnesses and the defence, the trial Principal Resident Magistrate was of the considered opinion that the whole case centred on ownership of the plot in dispute and not on the charge which the respondent faced. The respondent was found not guilty and acquitted. The court ordered for the institution of a civil suit in order to determine as to who was the lawful owner of plot No.597 Block 'E' at Mbezi area. The judgment of the court was delivered on 9/7/2004. The Republic was aggrieved by that decision. They lodged a petition of appeal, filed on 6/9/2004.

The DPP had one only ground of appeal and prayers. That is to say:

> THAT the trial Magistrate erred in law and in fact by ordering the case to be referred to a civil court while all the ingredients of the offence had been properly proved.

The prayers were as follows:

(a) That the order to file a civil case to determine ownership issue be quashed and set aside.

(b) That the respondent be convicted for having violated the provisions of s.35 and 71 of the Town Planning Ordinance Cap. 378 as amended by Act No.13/1991 which forbids one to erect a building without obtaining a permit (consent).

The DPP was represented by one M/S Saiga, learned state attorney while the respondent/accused was represented by one Nyange, learned counsel. M/S Saiga, learned state attorney made submissions in support of the petition of appeal and on his part, Mr. Nyange, learned counsel stated in reply by raising to preliminary points of law, which, if upheld, will determine the appeal, hence no need to deal with the substance of the appeal. Therefore, I shall deal with the preliminary objections on points of law. If then the objections will not dispose of the appeal, I shall proceed with the appeal on merits.

1. That the DPP did not give a 30 days notice of his intention to appeal.

2. The propriety of the proceedings before the Court of the Resident magistrate.

In the first ground of objection, Mr. Nyange, learned counsel briefly submitted that the DPP had not given notice of his intention to appeal, hence violated section 379(1) of the Criminal Procedure Act, 1985. Neither were the respondent given a copy of the notice of appeal. Thus, the appeal should not be entertained. On the second point, the learned counsel submitted that after the close of the prosecution case, as seen at page 31 of the typed proceedings of the subordinate court, the prosecution closed their case on 6/4/2001. But thereafter, the prosecution re-opened their case, by sending documents to a handwriting expert and after three years period, the prosecution called on there other witnesses. Besides that, this appeal was time barred and that there was no application for extention of time to file the appeal out of time. Hence, there are a lot of irregularities in this appeal. The learned state attorney conceded to all the three preliminary objections.

Starting from the first ground of objection, the DPP is duty bound to give a 30 days notice of his intention to appeal. Section 379(1) of the Criminal Procedure Act, 1985 is self explanatory. It provides as follows:

S.379(1) No appeal under section 370 shall be entertained unless the Director of Public Prosecutions:-

a) Shall have given a notice of his intention to appeal to the subordinate court within thirty days of the acquittal finding, sentence or order against which he wishes to appeal;

b) Shall have lodged his petition of appeal within forty five days from the date of such acquittal, finding, sentence or order; save that

(i) .....

(ii) The High Court may for good cause admit an appeal notwithstanding that the periods of limitation prescribed in this section have elapsed.

In the first place, giving of notice of intention to appeal by the DPP is mandatory. Failure to do so precludes this Court from entertaining the appeal. This notice is to be given to the subordinate court whose judgment, order or sentence is appealed against. This has been the stand of the then East African Court of Appeal and in the courts in this country. In Daphne Parry V. Murray Alexander Garson (1963) EA 546 even an extension of

time of giving notice was refused, though the applicant was late for only five days.

This Court in the unreported Criminal Application No.8/2002 the DPP V. Abdallah Ndege, following the East African Court of Appeal decision (supra) refused to admit an appeal where notice of the intention to appeal was not given by the DPP. Mr. Nyange, learned counsel, without citing any authority to fortify his submissions submitted that if the DPP had given notice, he ought to have given the respondent the copy of the notice of appeal. He is very right. In the case of Inspector Sadiki V. Jerald Nkya (1979) TLR 290, where the Attorney General had given a notice of appeal but failed or neglected to give a copy of it to the respondent, the Court of Appeal held that:

> "The cause of the delay in the present case was the error of the applicants. The circumstances did not constitute sufficient reason for purpose of Rule 8."

If no notice of appeal had been given then there could neither be an application for leave to appeal out of time or to entertain an appeal itself like in this case. See the decision in **DPP v. A. M. Swai (1989) TLR 37,**

The second preliminary objection by Mr. Nyange t,he learned counsel have made me peruse the proceedings, so that I can satisfy myself of the

propriety of the proceedings. On perusing the records, I found it true that after the prosecution had closed their case, the accused was called up to give his defence, (even though the procedure was not followed as I shall show below). The respondent testified and closed his evidence after calling a witness on his behalf. Then Mr. Nyange, learned counsel was recorded to have formerly informed the court that the defence case is closed. Surprisingly, this is what happened:

**Pros:** We pray to make one application – since there are documents which are alleged to have been forged we pray the documents to be sent to expert for confirmation, we pray for 3 weeks times. Building permit and offer.

**Court:** Prayer granted.

**Order:** Mention 31/5/2000.

**Sgd. Rm**

**6/4/200**

Then on 14/2/3003, the trial magistrate had been promoted to the rank of a Senior Resident Magistrate. She allowed the prosecution to call one more witness. Thereafter, judgment was delivered on 9/7/2004.

It is very interesting to note that the said Senior Resident Magistrate does not know the procedure of recording evidence in a criminal trial.

After the close of the defence case, the magistrate was required to allow the prosecutor and the accused's advocate to address the court if they so wished. If they did not want to address the court, as provided under section 233, then she should adjourn the proceeding in order that she could write the judgment and deliver it on a date she ordered. There is no known procedure of allowing the prosecution to further conduct their investigation basing on the defence evidence. The procedure is unknown. If I were to deal with the merits of the appeal, then I would have gone further to explain what I would have done with he proceedings and judgment.

The unprocedural conduct of the court made me look back to the proceedings Allas, the learned Senior Resident Magistrate did not know either the procedure to follow at the close of the prosecution case. Let again the relevant part of the proceedings support what I say:

On 7/12/98 the Public Prosecutor is recorded to have said:

**PP:** We have closed our defence case.

**Court:** Since the prosecution has closed its case. Accused is required to prepare himself for defence.

**Order:** Defence hearing on 22/12/98.

Sgd. RM

22/12/98

As the record speaks by itself, it shows clearly that the learned trial Resident Magistrate did not know of what she was wanted to do. The Criminal Procedure Act, 1985 required her to make a ruling at the close of the evidence in support of the charge, and if it appeared to the court that a case is made against the accused person sufficiently to require him to make a defence in relation to the offence with which he is charged he is liable to be convicted, then he should be called to give evidence on his behalf and call witnesses if he so wished. In short, the court makes a finding of a prima-facie case established by the prosecution, and informs the accused that he has a case to answer. Then the procedure of making the defence follows. The trial Resident Magistrate, who is now a Principal Resident Magistrate is advised not to take things for granted. She should follow the procedure laid down by the law. Sections 228 to 236 of the Criminal Procedure Act, 1985 are relevant.

The learned state attorney conceded to the preliminary objections raised. Then what are the effects of those objections. The answer is easy and simple. If there was no notice of the intention to appeal filed by the DPP in the trial curt, then there should not be an appeal filed by the same person, the DPP. You cannot go to step No.2 before step No.(1). Thus, there is no appeal in the eyes of the law worth of being determined by this

court. Secondly, the propriety of the proceedings could also vitiate the whole proceedings. Therefore, both the DPP and the trial Resident Magistrate flouted on the procedure. The DPP could either on negligent or acted under pressure which led him to forget the legal duty required of him, while the trial Resident Magistrate acted on ignorance.

Just for the preliminary objections, the appeal is dismissed.

**A.R. Manento**

**JAJI KIONGOZI**

**2.11.2005**

Coram: E.G. Mbise, DR-HC

For Republic – Mr. Vincent Haule, State Attorney assisted by Mr. Denis

For Respondent – Present in person.

Cc: Edward.

**COURT:**

Judgment read on 2/11/2005 in the presence of Mr. Vincent Haule, the State Attorney assisted by Mr. Denis and in the presence of the Respondent in person.

E.G. Mbise, DR-HC

2/11/2005

R/A explained.

E.G. Mbise, DR-HC

2/11/2005