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IN THE HIGH COURT OF TANZANIA
AT BUKOBA

HC CRIMINAL APPEAL NO. 29 OF 2014

(Arising from Ngara District Court Cr. Case No. 51/2014)

1. MWESIGE GEOFREY
2. TITO BUSHABU } **.....APPELLANTS**

VERSUS

THE REPUBLIC .....RESPONDENT

09.09.2014 AND 31.10.2014

RULING

MJEMMAS, J.

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This ruling is in respect of a preliminary objection on a point of law raised by Mr. Matuma, learned State Attorney for the respondent - Republic. The preliminary objection is couched in the following words.

"The appeals No.....are bad in law for want of proper notice of an intention to appeal."

The background of this matter is as follows. In criminal case no. 51 of 2014 of Ngara District Court the two appellants and five other persons who are not the subject of this ruling/appeal were charged and convicted

of two counts, namely, (i) unlawful grazing livestock in a Game Reserve contrary to section 18(2) and (4) read together with section 111(1)(a) and (3) of the Wildlife Conservation Act, No. 5 of 2009 and (ii) unlawful entry into a game reserve contrary to Section 15(1) and (2) of the Wildlife Conservation Act, No. 5 of 2009. The appellants were aggrieved by the conviction and sentence hence appealed to the High Court. The appellants issued notices of intention to appeal. The first appellant, that is, Mwesige s/o Geofrey issued and filed his notice of intention to appeal at the District Court of Ngara while the second appellant Titto Bushahu through his advocate Mathias Rweyemamu issued and filed his notice of intention to appeal at the High Court of Tanzania, in Bukoba. It was the notice of intention to appeal which was filed at the High Court Registry which led Mr. Matuma, learned State Attorney to raise the preliminary objection that the appeal is bad in law for want of proper notice of an intention to appeal. In other words the learned State Attorney contended that the notice if intention to appeal which was filed at the High Court Registry was filed in the wrong registry so it is as good as if no notice at all which was given under the mandatory provisions of section 361(1)(a) of the Criminal Procedure Act, Cap 20 R.E. 2002.

The parties were ordered to argue the preliminary objection by way of written submissions and a schedule was set out for filing the submissions. Both parties have complied with the timeframe provided.

Arguing in support of the preliminary objection Mr. Matuma contended that the notice of intention to appeal must and should be filed in the subordinate court which passed the decision of which is sought to be challenged and not elsewhere. The learned State Attorney conceded in his written submission that section 361(1)(a) of the Criminal Procedure Act, Cap 20 R.E. 2002 requires a notice to be given within a prescribed time limit but it does not specify where the same (notice) is to be filed. He however argued that the construction of section 361(1)(a) of the Criminal Procedure Act, Cap 20 R.E. 2002 should be read to mean that the notice be filed in the subordinate court in the spirit of the counterpart provision of section 379(1)(a) of the Criminal Procedure Act, Cap 20 R.E. 2002 where the Director of Public Prosecutions is required to file his notice of intention to appeal to the subordinate court. To fortify his argument the learned State Attorney submitted that it was not the intention of the Parliament to limit the Director of Public Prosecutions as to the place of filing his notice while on the other hand giving the counter party in the same proceedings unlimited discretion as to where the notice be filed. He further submitted that to hold that section 361(1)(a) of the Criminal Procedure Act, Cap 20 R.E. 2002 means that an appellant can file his notice of an intention to appeal anywhere would lead to absurdity because the appellant may wish to file his notice to the Registrar of the High Court or to the Regional Commissioner's Office or to the District Commissioner's Office or to the District and Regional Security Offices or to the District Land and Housing Tribunal etc. The learned State Attorney stressed that the Parliament

(i) Section 361(1)(a) referred a person to give notice to be the appellant and not the accused person, as he was referred in the subordinate court.

(ii) The appellant is a party who appeals to the higher court and not a party in the subordinate court.

(iii) The appellant has to give notice of intention to appeal to the High Court within 10 days from the date of finding, sentence or order.

(iv) The appellant on the party of the Director of Public Prosecution is also maintained as a party in the subordinate court and has to give the notice of appeal within 30 days and in the subordinate court appealed from alleged to have erred. (sic!)

The learned advocate concluded his submission by stating that the notices of appeal were properly given in the High Court and not to subordinate court.

Sections 361(1)(a) and 379(1)(a) of the Criminal Procedure Act, Cap 20 R.E. 2002 provide –

S. 361(1)(a) "*Subject to subsection (2) no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant –*

(a) *has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence;*

And Section 379(1) "*Subject to subsection (3), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions –*

(a) *has given 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;*

It was Mr. Matuma's contention that section 361(1)(a) (supra) should be construed in the light or spirit of section 379(1)(a) (supra) to mean that the notice of intention to appeal should be filed in the subordinate court. His main reason for that argument is that the Parliament did not intend to limit the Director of Public Prosecutions as to the place of filing his notice while on the otherhand giving the counterparty in the same proceedings unlimited discretion as to where the notice be filed. Mr. Mathias, learned counsel for the appellants has countered that argument by saying that the two provisions cannot be harmonized to create the same meaning.

Perhaps the question which we have to ask ourselves is whether the omission to state clearly the place where notice under section 361(1)(a) (supra) is to be filed was deliberate on the part of legislature? With respect to Mr. Matuma, learned State Attorney, in my humble opinion, the omission was deliberate. If the legislature wanted to specify the place where notice under section 361(1)(a) (supra) was to be filed it could have stated so expressly as it did in section 379(1)(a) (supra).

Besides, the two parties i.e. The Director of Public Prosecutions and a convicted person or prisoner for that matter cannot be said to be equal. One of them, and to be specific, a prisoner is in a disadvantaged position. His liberty has been curtailed and he can only act under or through the control of prison officials (see for instance section 363 of the Criminal Procedure Act, Cap 20 R.E. 2002). Moreover, to show that the legislature intended to treat the two parties differently, the Director of Public Prosecutions is given thirty (30) days to file his notice of intention to appeal but a prisoner is only given ten (10) days or three (3) days in case of corporal punishment.

The rest of Mr. Matuma's arguments are highly persuasive, particularly the one on the purpose of enacting provisions demanding notice of intention to appeal. In other words, the learned State Attorney was urging this court to adopt a "purposive approach" in interpretating section 361(1)(a) (supra) and to give effect to the true purpose (intentions) of the legislature. With respect, I entirely agree with the

reasons or purposes which Mr. Matuma has explained. For instance, there is no doubt that the purpose of issuing a notice is to inform the trial court that the prisoner (convicted person) intends to appeal against its decision, finding or order so copies of the proceedings and the decision are prepared for the collection of the party who wishes to appeal; refer to **MTANI ALFRED V REPUBLIC, Criminal Appeal No. 262 of 2009, CA, Mwanza,** [unreported]. I am, however, convinced that the legislature intended that notice of intention to appeal under section 361(1)(a) be filed either at the subordinate court or for whatever reasons at the High Court. After all, if a notice of intention to appeal is filed at the High Court within the prescribed time what injustice is caused to the Director of Public Prosecutions?

It is from the foregoing reasons that I find that the notice of intention to appeal by Tito Bushahu was properly filed at the High Court. The preliminary objection is hereby dismissed.

G.J.K. Mjemmas
JUDGE

31/10/204
Coram: P.B. Khaday, J.
1st Appellant:
2nd Appellant:
3rd Appellant:
Respondent: Kadushi
B/C: Agnes

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Ruling delivered in the presence of both parties.

P.B. Khaday
JUDGE
31.10.2014

Mr. Rweyemamu, Adv.

We pray for a mention date in view of fixing a hearing date.

Order: Mention on 24/11/2014.

P.B. Khaday
JUDGE
31.10.2014

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