IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: KISANGA, J.A.:

CRIMINAL APPLICATION NO. MYA 1 OF 1985

BETWEEN

SELEMANI KIPINDULA. . . . . APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS. . .RESPONDENT

(Application from the Judgments of the High Court of Tanzania, Mbeya, in its Appellate Jurisdiction in Criminal Appeal No. 61 of 1983 (Original case No. 9 of 1983 of the District Court Sumbawanga) and Criminal Appeal No. 102 of 1983 (Original Criminal case No. 240 of 1983 of Sumbawanga District Court.

R U L I N G

KISANGA, J.A.:

The applicant had been convicted by the District Court of Sumbawanga on two separate occasions for the offence of stealing by servant, and was on each occasion sentenced to six years' imprisonment. His appeals to the High Court at Mbeya were heard separately by two different judges, each upholding the conviction and sentence. In his applicaton to this Court, therefore, the applicant is seeking for an order that the two prison terms be made to run concurrently. The main contention as urged by Mr. P. R. Bateyunga on behalf of the applicant was that both offences involved stealing from the same employer, and were committed within a very short interval of only about four days; so that had they been preferred in one information the District Court would have ordered the prison terms to run concurrently. Mr. A. A. M. Teemba, learned Senior State Attorney who appeared for the Republic stated at first that he did not oppose the application.

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I asked counsel under which provision of the law this application was brought. Mr. Bateyunga seemed to take the view that this Court has inherent powers to grant such an order. Alternatively he relied on the provisions of section 36 of the Penal Code and section 133 of the Criminal Procedure Act as conferring such powers. He further referred me to a number of decided cases in support of that submission. Among the cases cited were: Burton Mwakipesile v. R (1965) E.A. 407, Chilemba v. R. (1969) E.A. 479 and Lemmi Aron v. R. (1977) L.R.T. No. 40. With due respect to the learned counsel, however, all the references are completely irrelevant and of no avail. Section 36 of the Penal Code relates to the powers of a trial court to order conourrent prison sentences, and section 133 of the Criminal Procedure Act deals with joinder of counts in a charge or information while the cases cited dealt with the powers of the High Court on appeal to make an order for concurrent prison sentences. In the instant case, however, we are concerned with the powers of the Court of Appeal to make an order for concurrent prison sentences.

The Court of Appeal is a creature of Statute. It was established by the Appellate Jurisdiction Act, and its powers and jurisdiction are as conferred upon it by that Act. It cannot derive its power or authority from anywhere. Under the Act, the jurisdiction of the Court is conferred by section 3 which provides,

> "3.-(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction.
>
> (2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power, authority and jurisdiction vested in the court from which the appeal is brought".

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That section makes it very clear that the Court of Appeal has powers to hear and determine appeals and to make any orders incidental thereto. In other words, the Court has powers to hear applications and make orders thereon only in the course of dealing with an appeal which is before it. There is no other provision in the Act which empowers the Court to make orders otherwise than in the course of handling an appeal.

The same is true of the Court of Appeal Rules which are made under section 11 of the Act. Rule 36 of the Rules provides that:

> "36. The Court may, in dealing with any appeal, so far as its jurisdiction permits, confirm, reverse or vary the decision of the High Court, or remit the proceedings to the High Court with such directions as may be appropriate, or to order a new trial, and to make any necessary, incidental or consequential orders, including orders as to costs."

Once again the operative words here are: "....<u>in dealing with any appeal</u>, " and it is plain that that rule empowers the Court to make orders upon applications in the course of an appeal before it. I have not been able to see any other rule which empowers the Court to make orders in circumstances other than in the course of dealing with an appeal which is before it.

In the instant case, there is no appeal by the applicant before the Court of Appeal. That being so, there is no peg, as it were, upon which to hang the purported application. That is to say, the Court has no jurisdiction to entertain the application. As intimated earlier, Mr. Teemba, learned Senior State Attorney, stated at first that he had no objection to the application, but on second thoughts he conceded that this Court has no power to grant such application.

Thus, although I am clear in my mind that there is merit in the application, it is a matter for regret that this Court has no power to redress the position. In the circumstances the application

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is refused, and the applicant is advised to seek his redress in the appropriate forum.

DATED at MBEYA this 28th day of April, 1986.

R. H. KISANGA
JUSTICE OF APPEAL

Applicant's right of a reference to the Court explained.

R. H. KISANGA
JUSTICE OF APPEAL

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

(J. H. MSOFFE)
DEPUTY REGISTRAR