IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: RUTAKANGWA, J.A., KIMARO,J.A., And LUANDA, J.A.)

CRIMINAL APPEAL NO. 355 OF 2014

THE REPUBLIC .....APPELLANT

VERSUS

MWESIGE GEOFREY
TITO BUSHAHU **.....RESPONDENTS**

(Appeal from the Ruling of the High Court of Tanzania at Bukoba)

(Mjemmas, J.)

dated the 31st day of October, 2014
in
Criminal Appeal No. 29 of 2014
.....

JUDGEMENT OF THE COURT

13th & 19th February, 2015

RUTAKANGWA, J.A.:

The respondents were dissatisfied with the decision of the District Court of Ngara District. Through Mr. Mathias Rweyemamu, learned advocate, they preferred an appeal to the High Court at Bukoba *vide* Criminal Appeal No. 29 of 2014 (the appeal). Before the appeal was called

on for hearing, the respondent Republic lodged a notice of preliminary objection challenging its competence on the ground of "want of proper notice of intention to appeal," on the part of the respondent Tito Bushahu.

The notice of preliminary objection was premised on section 361(1)(a) of the Criminal Procedure Act, Cap. 20 (the CPA). The said provision provides as follows;-

> *"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;"*

In his argument before the learned High Court judge in support of his point of objection, Mr. Athumani Matuma, learned State Attorney, on behalf of the Republic, placed reliance on section 379 (1) (a) of the CPA. The latter provision reads thus:-

> *"Subject to subsection (3), no appeal under section 378 shall be entertained unless the Director of Public Prosecutons-*
>
> *(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."*

In his written submissions, Mr. Matuma conceded that s. 361(1) (a) does not specify where the notice of intention to appeal is to be filed. All the same, placing much faith in s. 379(1)(a), he argued that the construction of s. 361(1)(a) should be read to mean that the said notice ought to be filed in the subordinate court "in the spirit of the counterpart provision", i.e. s. 379 (1)(a). It was his argument that Parliament could

not have intended to limit the D.P.P as to the place of filing the notice of intention to appeal while giving the accused person virtually a *carte blanche* in choosing where to lodge such notice. He further argued that to hold so "would lead to absurdity" because an accused 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 or Regional Security Officer or to the District Land and Housing Tribunal" etc. Mr. Matuma, pressed the learned High Court judge to adopt a purposive approach as this Court did in the cases of **JOSEPH SINDE WARIOBA V. STEPHEN WASSIRA & ANOTHER** [1997] T.L.R 272 and **GOODLUCK KYANDO v. R.** [2006] T.L.R. 363.

Mr. Rweyemamu resisted the preliminary objection arguing that s. 361 (1)(a) is very clear and needed no interpolations. To him, the manifest intention of Parliament was to impose a duty on an appellant under this section to give his intention to appeal within the prescribed periods without in anyway restricting his or her choice of venue where to do so. He stressed that s.361(1)(a) and s. 379(1)(a) cover different persons and cannot be harmonized.

The learned High Court judge found the arguments of Mr. Matuma interesting and "highly persuasive particularly the one on the purpose of enacting provisions demanding notice of intention to appeal." He further reasoned thus:-

> *"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, C.A., Mwanza (unreported.)."*

The above observations notwithstanding, he concluded thus:

> *"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 D.P.P.?"

He accordingly ruled that the 2nd respondent's notice of intention to appeal had been "properly filed at the High Court." The preliminary objection was overruled, hence this appeal against the ruling.

The appellant D.P.P. through Mr. Matuma had two grounds of complaint against the High Court decision. They are as follows:-

"1. THAT, the Hon. Judge erred in law and facts in holding that a notice of an intention to appeal under section 361 (1)(a) of the Criminal Procedure Act, [Cap. 20 RE. 2002] at the option of the party can be filed either at the subordinate court or for whatever reasons at the high (sic) Court.

2. *THAT, the Hon. Judge erred in law and facts by making a decision by sympathy basis (sic) instead of adhering to the law and correct interpretation of the law."*

When the appeal was called on for hearing, Mr. Rweyemamu rose to argue a point of preliminary objection, notice of which had been lodged earlier on. The gist of the point of objection was that the appeal being against an interlocutory ruling, "is incompetent for being prematurely filed."

In his brief submission, Mr. Rweyemamu contended that the impugned High Court ruling is non-appealable in terms of s. 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 (the Act). In response, Mr. Matuma countered that the appeal is maintainable under s. 6 (2) of the Act, as section 5 deals only with civil appeals to this Court. Having heard both counsel on the point of preliminary objection we reserved our ruling thereon and heard their submissions on the merits or otherwise of the

substantive appeal. This judgment on appeal incorporates our ruling on the point of preliminary objection which we shall dispose of first.

We are of the decided view that the point of objection raised touching on the competence of the appeal, should not detain us at all. The legal position covering this controversy was made clear by this Court on an identical objection, in the case of the **D.P.P. (Zanzibar)** v. **FARID HADI AHMED & 9 OTHERS**, Criminal Appeal No. 96 of 2013 (unreported). So we need here do no more than reiterate what we stated therein. The Court succinctly held as follows:-

> *"It must be obvious to all now that in the entire section 6 which clothes this Court with jurisdiction to hear and determine criminal appeals from the High Court and subordinate courts with extended powers, there is no provision similar to, leave alone one identical with s. 5 (2) (d) reproduced above. For this very obvious reason, we have found ourselves*

*constrained to accept without any demur, Ms. Fatma's irresistible contention that the right of the D.P.P. to appeal against "**any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers**", was left unfettered by the total prohibition against appeals or revision applications to this Court in relation to any preliminary or interlocutory decision or order. This conclusion finds strong support from the observation of this Court in the case of **Yohana Nyakibiri** (supra), in respect of the reasons behind the passing of Act No. 25 of 2002.*

*In **Yohana Nyakibari's** decision dated 15/8/2007 the Court made this apt observation:*

> *"At this juncture it may be observed briefly that the intention of the legislature in enacting the law under the Act, was to*

ensure speedy expedition of trials particularly with regard to civil suits. Hence the amendments effected under the Act of section 5(2) (d) of the Appellate Jurisdiction Act, 1979, section 74 of the Civil Procedure Code 1966 and section 43 of the Magistrates' Courts Act, 1984."

To this list, we may as well justifiably add sections 78 and 79 of the same Civil Procedure Code. This list of amended sections has led us to the conclusion that s. 6(2) of the Act was by design left untouched by Parliament.

In the face of these unambiguous provisions of s. 6 of the Act, we respectfully hold that the first point of preliminary objection premised on a statutory provision not related to appeals in criminal cases, as is the appeal under scrutiny, is totally misconceived. It

is accordingly overruled. All other things being equal, the appeal ought to be held competent."

We subscribe wholly to the above holding. On that basis we hold that the raised point of preliminary objection is totally misconceived and it is hereby overruled. We only wish to observe in passing that since there was no intention to bar appeals of this nature to this Court, then the words "criminal charge" appearing in s. 5 (2) (d) of Act should be deleted.

Regarding the appeal, we should state at once that both counsel's submissions before us where a repetition of what they had submitted in the High Court, particularly regarding the first ground of appeal. We shall not have to repeat them.

Borrowing a leaf from the U.S. Supreme Court in **CONSUMER PRODUCTS SAFETY COMMISSION et al.** v. **GTE SYLVANIA**, Inc. et al. 227 U.S. 102 (1980), in disposing of the first ground of appeal, we have

chosen to begin our discussion "with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absenting a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." The same Court went further and held that if a statute's language is plain and clear:-

> *"the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."*

A few decades earlier, the said Court had succinctly ruled that:

> *"It is elementary that the meaning of a statute must in the first instance, be sought in the language in which the act is framed, and if it is plain ... the sole function of the courts is to enforce it according to its terms..."* in **CAMINETTI v. UNITED STATES**, 242 U.S. 470 (1917).

We fully subscribe to the above holdings. We shall happily apply them in our resolution of the legal issues raised in this appeal. While doing so we shall remain alive to the dictum of A.V. Dicey that:

> "*Statutes themselves though manifestly the work of Parliament, often receive more than half their meaning from judicial decisions*", **Lectures on the Relation Between Law and Public Opinion in England**, 3rd ed. 1924, P. 486.

In a fitting case, therefore, we shall not shirk from doing so.

Indeed it is axiomatic that when the words of a statute are unambiguous, "judicial inquiry is complete." There is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation. This is all because:-

> "*courts must presume that a legislature says in a statute what it means and means in a statute what it says there*": **CONNECTCUT NAT'L BANK v. GERMAIN**, 112 S. Ct. 1146, 1149 (1992).

But this only holds true in the clearest of cases. Where there is an obvious lacuna or omission and/or ambiguity the courts have a duty to fill in the gaps or clear the ambiguity. In doing so they are not embarking on "a naked usurpation of the legislative function under the their disguise of interpretation" as feared by Lord Simonds in **MAGOR AND St. MELLONS RURAL DISTRICT COUNCIL v. NEWPORT CORP**. [1952] A.C. 189, 191. It is because often, Parliament enacts provisions with general or vague wording with a view to courts filling the gaps. This may occur deliberately or inadvertently.

As can be clearly discerned from the arguments of both counsel before us and in the High Court the pith of the controversy here lies not in the ambiguity of the provisions of s. 361 (1)(a) of the CPA as such, but on the apparent omission on where or to whom the envisioned notice of intention to appeal ought to be given. While it is the contention of the appellant that the said notice must be filed in the trial subordinate court, Mr. Rweyemamu is adamant that it can be lodged even in the High Court, a position shared by the learned High Court judge. Was this omission in s.

361 (1) (a) deliberate or accidental? Again both counsel are in disagreement. It behoves us then to resolve the controversy.

S. 361(1) (a) of the CPA provides as follows:-

> *"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;"*

The provisions of s. 361 (1) (a) differ slightly with the provisions of s. 379 (1) (a) of the CPA, which says:-

"Subject to subsection (2), 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;"

As conceded by Mr. Rweyemamu the words "to the subordinate court" found in s. 379(1) (a) are missing in s. 361(1) (a). Admittedly, both sections fall under Part X of the CPA which deals with appeals, from District courts and Courts of Resident Magistrate to the High Court. It is evident from these two provisions that the persons subjected to the conditions prescribed therein, derive their right of appeal from sections 359 (1) and 378 (1) respectively.

Section 359 (1), for instance, provides as follows:

"Save as hereinafter provided, any person aggrieved by any finding, sentence or order made or passed by a subordinate court other than a subordinate court exercising its extended powers by virtue of an order made under section 173 of this Act, may appeal to the High Court and the subordinate court shall at the time when such finding, sentence or order is made or passed, inform that person of the period of time within which, if he wishes to appeal, he is required to give notice of his intention to appeal and to lodge his petition of appeal."

It is plain from the above provision, that the duty to inform an aggrieved person "the period of time within which... to give notice of his intention to appeal and to lodge his petition of appeal "lies on the trial subordinate court and not on the High Court. Furthermore, it is provided in the proviso to section 361(1) that" in computing the period of forty five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded." It has occurred to us that

the fact that the said copies of proceedings, judgment and/or order would always be obtainable from the trial subordinate court and not the High Court, is not disputed here. These two facts compel us, therefore, to accept the forceful argument of Mr. Matuma. We have found it to be based on logic and not expediency. That is why in its enduring wisdom Parliament, in s. 379 (1) (a) directed that the notices of intention to appeal by the D.P.P be given to the trial subordinate court. In the absence of a clearly expressed intention by Parliament to the contrary, reason dictates and logic affirms that notices of intention to appeal under section 361 (1) (a) ought to be given to the trial subordinate court as convincingly argued by Mr. Matuma. If the current situation is left to continue, the scenario alluded to by Mr. Matuma, would turn into a reality. A person, in good faith and innocently, may find himself giving his notice of intention to appeal at best to the primary court or at worst to the "Kitongoji"/Village office without in any way offending the seemingly mandatory provisions of 361 (1) (a) of the CPA, as the respondent in this case did file a notice of appeal in the High Court. This state of affairs, though not strictly prohibited by the law is unsatisfactory.

To bring certainty in the law, we find a purposive approach should be resorted to remove the omission inadvertently, and not deliberately, left by Parliament in this section. We find this to be a fit case for the Court to read the missing words into s. 361 (1) (a) of the CPA in order to remove this patent confusing anomaly. This Court has done so before [**J.S. WARIOBA v. S.M. WASSIRA and GOODLUCK KYANDO** (supra)] and in appropriate cases will do so in future. That Parliament is imbued with enduring wisdom does not mean that it cannot forget. So to attain this noble goal we direct that the words "to the trial subordinate court" be inserted in s.361(1) (a) of the CPA. The section should now read as follows:-

> *"361(1) 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 to the* ***trial subordinate court*** *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;"

After so ordering, we should hasten to point out that the respondent Tito Bushahu, like many others who have been doing so, did not violate at all, the law in filing his notice of intention to appeal in the High Court. His appeal is accordingly competent before the High Court and must proceed to hearing, as well as the appeals of those who found themselves in a similar predicament. Being aware of the realities on the ground, this amendment to s. 361(1) (a) of the CPA should become operative six (6) months from the date of this judgment. We accordingly reject the first ground of appeal subject to what we have stated in this judgment, as the judge was right in dismissing the preliminary objection given the current stance of the law.

Lastly, and briefly, we have found the second ground of appeal wanting in merit. We have dispassionately studied the High Court ruling. We were unable to trace therein a single line from which it could be fairly inferred that the learned High Court judge jettisoned objectivity to the

winds and resorted to sentimentalities. His approach to the issue before him was judicial. Even if we had overruled him in *toto*, the reproach directed at him in this ground of complaint, in our respectful opinion, was not justified at all. We dismiss the second ground of appeal in its totality.

DATED at BUKOBA this 19th day of February, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL