IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And SAMATTA, J.A.)

CRIMINAL APPEAL NO. 5 OF 1997

BETWEEN

1. JOHN MGAYA
2. NAPOLIONI MWAKAYANDA
3. TELA KURUBAI
4. YASINI KABELEGE
5. PHILIPO CHINIKO

. . . . . APPELLANTS

AND

1. EDMUND MJENGWA
2. LAURENT MWANG'OMBE
3. RAPHAEL SIKWITA
4. STEPHEN NDWENYA
5. SAIDI KIMITA
6. MHANDO MKATASA
7. GASPAR MLWILO

. . . . . RESPONDENTS

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

(Mwipopo, J.)

dated the 7th day of January, 1997

in

Criminal Appeal No. 127 of 1996

JUDGEMENT OF THE COURT

SAMATTA, J.A.:

This is an appeal from a ruling of the High Court (Mwipopo, J.) dismissing a preliminary objection raised in Criminal Appeal No. 127 of 1996 that the appeal was incompetent in law. In that appeal, the present respondents were appellants, while the present appellants were respondents.

We can state fairly briefly, but we hope adequately, the background to the appeal before us. On June 28, 1996, the appellants filed an application before the Resident Magistrate's Court at Mbeya under S. 99(1) and (3) of the Criminal Procedure Act, 1985 purportedly seeking that Court's leave to "commence

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private prosecution proceedings" against the respondents. The two subsections read as follows:

> 99. - (1) Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the President in this behalf shall be entitled to conduct the prosecution without such permission.
>
> 2. .....
>
> 3. Any person conducting the prosecution may do so personally or by an advocate".

The application was vehemently opposed by the respondents on the ground, among others, that it was misconceived in law in that it was not preceded by institution of criminal proceedings against them by making, under S. 128 of the Act, a complaint before a magistrate. The learned magistrate who heard the application held that the application was competent and he granted the appellants the leave sought. The respondents were aggrieved by that decision; they appealed against it to the High Court. On the date fixed for the hearing of the appeal the appellants raised a point *in limine*. They contended that the appeal was incompetent in law on two grounds: first, because the appellant omitted to serve the respondents with a copy of the proceedings of the case; and, secondly, no appeal lies against an interlocutory order granting leave to an applicant to mount a private prosecution. The learned Judge found no merits in both grounds. On the first ground, he held that the duty to serve the respondents with a copy of the proceedings lay on the Court, not on the appellants. Wi

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regard to the second point, he was of the opinion that the Resident Magistrate's Court's decision was appealable at that stage. Accordingly, the learned Judge held that the appeal was competent and proceeded to order that it be heard and determined on merits. It is this decision which is impugned in the instant appeal. The Petition of Appeal contained the following three grounds of appeal:

1. THAT THE LEARNED APPELLATE JUDGE erred in law in holding that the Ruling granting permission to the appellants was appealable.

2. THAT IN THE ALTERNATIVE AND WITHOUT PREJUDICE TO THE FIRST GROUND, the Learned Appellate Judge erred in law in holding that Criminal Appeal No. 127/96 which is pending before it was properly before the Court and that the said appeal should proceed to hearing and determination on its merits, when the said criminal appeal was not accompanied by the relevant order sought to be appealed against.

3. THAT IN THE ALTERNATIVE AND WITHOUT PREJUDICE to the foregoing, the Learned Appellate Judge erred in law and in fact in attempting to determine Mbeya High Court Criminal Appeal No. 127 of 1996 in the preliminary objections raised by the appellants/ original applicants which objections did not touch on the merits of the said criminal appeal.

At the commencement of the hearing of the appeal, however, Mr. Mwale, counsel for the appellants, abandoned the first and third grounds, thus leaving only the second ground of appeal to be argued.

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Mr. Mwale submitted that when a criminal appeal is lodged against a ruling before the High Court the appellant must extract the order of the Court from the ruling and annex it to the petition of appeal. According to the learned advocate, it is not sufficient in law for the appellant to annex the subordinate court's ruling to the petition of appeal. The sheet anchor of Mr. Mwale's submission is S. 362(1) of the Criminal Procedure Act, 1985 (hereinafter referred to as "the Act"), which reads:

> "362. - (1) Every appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every such petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against", (the underscoring is supplied).

According to Mr. Mwale, the word "order" in this provision does not include a ruling. Taking his argument further, the learned advocate contended that in Criminal Appeal No. 127 of 1996, lodged before the High Court, it was mandatory for the respondents to annex to their petition of appeal a copy of the order extracted from Mwipopo, J.'s ruling. The learned advocate further submitted that the application of S. 362(1) of the Act is similar to the application of Rule 89(1)(h) of the Tanzania Court of Appeal Rules 1979 (the Rules). He reminded us that in many cases - including Fortunatus Lwanyantika Masha v Dr. William Shija, Civil Appeal No. 43/96 (unreported) - this Court has held, while construing the abovenamed Rule, that failure to extract a decree or order is fatal to the appeal. Citing Harnam Singh Bhogal, trading as Harnam Singh & Co. v Jadva Karsam (1953) 20 EACA 17, the learned advocate submitted

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that a party who wishes to exercise his right of appeal must strictly comply with the provisions of the releavnt legislation. In that case, at p.18, the Court of Appeal for Eastern Africa said:

> "It is well settled law that a right to appeal can only be founded on a statute and that any party who seeks to avail himself of the right must strictly comply with the conditions prescribed by the statute".

Mr. Rweyongeza, counsel for the respondents, countered Mr. Mwale's submissions by contending that it was sufficient in law for a copy of the learned Judge's ruling to accompany the Petition of Appeal. Relying on a passage in the ruling of Mapigano, Ag. J.A. (as he then was), in Edward Marealle v 1. Marealle Clan 2. Akilei Marealle, Misc. Civil Application No. 189/91 (unreported), a matter which partly concerned the true interpretation of Rule 46(3) of the Rules, the learned advocate invited us to hold that the word "order" in S. 362(1) of the Act includes a ruling. Mrs. Makuru, Senior State Attorney, who appeared before us as amicus curiae, and to whom we are grateful for her assistance, referred to us the definition of the word "rule" in Osborn's Concise Law Dictionary, at p.285, and to Edward Marealle's case supra, and submitted that the words "order" and "ruling" are used interchangeably. The learned Senior State Attorney invited us to hold that Rule 89(1)(h) of the Rules, relied upon by Mr. Mwale in his attractive submission, is not relevant to the point for determination in the instant appeal as, according to her, that Rule exclusively deals with civil appeals.

The submissions of counsel summarised above clearly indicate that the pivotal point in this appeal is whether Mwipopo, J., was right in holding, as he did, that Criminal Appeal No. 127 of 1996 is correct.

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is competent in law and ought to be heard and determined on its merits. Having listened carefully to the competing contentions so forcibly presented by counsel, we are of the opinion that Mr. Mwale's arguments have no merits. While we appreciate that in Edward Marealle's case supra Mapigano, Ag. J.A., was dealing with competence or otherwise of an application in a civil matter, we respectfully agree with the learned Acting Justice of Appeal that, to use his own words:

> "... in many legal contexts /the/ words "order" and "ruling" carry the same meaning and are mutually interchangeable".

We do not have the slightest doubt that the word "order" in S. 362(1) of the Act also includes ruling and must be so construed. There is nothing in the subsection, in our opinion, which militates against holding that view. We can see no warrant for the opinion that in omitting to specifically use the word "ruling" in the subsection Parliament wanted to introduce the cumbersome practice of extracting orders from rulings into the criminal jurisdiction of the High Court. The learned author of Black's Law Dictionary, 6th ed., defines, at p.756, the word "order" as including "Direction of a court or judge made or entered in writing, and not included in a judgment, which determines some point or directs step in the proceedings". Applying that definition to the present case, we entertain no doubt that Mwipopo, J.'s ruling, which is the subjectmatter of the instant appeal, is for the purposes of S. 362(1) of the Act, an order, in so far as it determined the issue of competence or otherwise of Criminal Appeal No. 127 of 1996 and directed that the appeal be heard on its merits. We agree with Mr. Rweyongeza and Mrs. Makuru that the cases decided by this Court relied upon by Mr. Mwale in his argument are of no relevance

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in construing S. 362(1) of the Act. Those cases specifically concerned the process of appealing to this Court in civil matters.

The novel point raised by Mr. Mwale in this appeal may, we think, be examined from another angle. As far as criminal appeals against rulings are concerned, the established practice in the High Court is for the aggrieved party or his advocate to annex to the petition of appeal the ruling appealed against, not to annex a copy of an order extracted from the ruling. No practice of extracting orders in criminal matters is known in that court. Any settled practice of a court is part of the law of the land, albeit of adjectival rather than substantive law. See Mayes v Mayes /1971/ 1 W.L.R. 679, 681. We know of no statutory provision or rule of common law which renders the established practice of the High Court referred to above illegal. The law recognises, as common sense does, that unnecessary technicalities in the administration of criminal justice may occasion injustice. We are happy to be able to come to the conclusion that the wording of S. 362(1) of the Act does not compel us to fault the decision of Mwipopo, J., impugned in this appeal.

While admiring the ingenuity of Mr. Mwale's submissions, we are unable, for the reasons we have given, to give countenance to them. We accordingly dismiss the appeal.

DATED AT DAR ES SALAAM THIS 16th DAY OF MARCH, 1998.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR