

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 67 OF 2008
NALUKENGE MILDREDAPPELLANT
VERSUS
UGANDA.....RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

*[An appeal from the decision and order of His Lordship The Hon
Mr. Justice E.S. Lugayizi J. in High Court Criminal Appeal No. 54 of
2007 at Kampala dated 18th July 2008.]*

JUDGEMENT OF THE COURT

In a Judgment dated 19th July 2007 of the then Buganda Road Court Chief Magistrate Her Worship Margaret Tibulya (as she then was) she convicted the appellant on charges of embezzlement, forgery and making documents without authority. She sentenced the appellant to 2 years imprisonment for the offences of embezzlement and forgery and 2 years for the offence of making a document without authority. The sentences were to run

concurrently. The appellant was also ordered to refund Shs. 46, 500,000/- to the complainant.

Being dissatisfied with the said Judgment the appellant lodged a notice of appeal in the High Court of Uganda at Kampala on 15th August 2007. It was registered as High Court Criminal Appeal No.54 of 2007.

When that appeal came up for hearing before the High Court on 18th July 2008, the appellant was not in Court. However, her counsel Mr. Mac Dusman Kabega of Tumusiime Kabega and Company Advocates was present. He sought an adjournment on account that he had not been served with a certified copy of the court proceedings and Judgment of the trial Magistrate's Court. That as result he had not been able to file a memorandum of appeal.

He also informed Court that he had not been in touch with the appellant since the filing of the notice of appeal. Apparently the adjournment sought would also enable him to get in touch with the appellant and also to file a memorandum of appeal.

The learned State Attorney opposed the adjournment and contended that in fact M/s. Tumusiime Kabega and Company Advocates had been served with both the certified copies of the Judgment and proceedings of the Magistrate's Court on 1st April 2008. The learned State Attorney had proof of service which had been duly acknowledged by the appellant's Advocates. He

contended that the appellant was not interested in the appeal and sought to have it struck out. The learned Judge, The Hon. Mr. Justice E.S. Lugayizi J declined to grant the adjournment sought by counsel for the appellant and struck out the appeal.

The appellant then took two simultaneous actions. Through her said Advocates Tumusiime Kabega and Company Advocates, she filed a notice of appeal in this Court. Then at the same time she filed Criminal Miscellaneous Application No. 165 of 2008 at the High Court in Kampala seeking to extend time within which to file a fresh notice of appeal. This application was eventually heard by Hon. Justice Eldald Mwangusya J (as he then was) and dismissed on 5th September 2008.

Having lodged a notice of appeal on 18th July 2008, the appellant whose earlier bail pending appeal to the High Court had been cancelled by the order of Justice Lugayizi, then filed an application for bail pending appeal in this Court on 23rd September 2008. On 10th December 2008, the appellant was granted bail by this Court pending the disposal of this appeal.

When this appeal first came up for hearing at this court on 17th December 2013, the appellant was not in court. Mr. Mac Dusman Kabega who appeared for her informed court that he had lost touch with the appellant. The appeal was then adjourned for mention to 20th December 2013, at which date the appellant appeared in court.

When the appeal again came for hearing on 12th May 2014, Mr. Mac Dusman Kabega appeared for the appellant. The appellant was present in court although she came late. Mrs. Betty Khisa, Assistant Director of Public Prosecutions appeared for the respondent.

The appellant's memorandum of appeal sets out only two grounds as follows;-

- 1. "The learned Judge erred in law and fact when he summarily dismissed the appellant's appeal as a "ghost" appeal under Section 28 (3) of the Criminal Procedure Code Act.**
- 2. The learned Judge erred in law and fact when he refused to grant an adjournment to the appellant and dismissed the appeal summarily thereby penalizing the appellant based on a mistake of her counsel which amounted to a miscarriage of justice."**

Mr. Kabega argued both grounds together. He submitted that counsel who appeared before Justice Lugayizi had not been served with a copy of the Judgment and the lower court record and as such he had not been able to file a memorandum of appeal. He could not proceed without the memorandum of appeal. He conceded that the record of proceedings and the Judgment had been duly served upon his law firm.

However he argued, the counsel in personal conduct of the matter was unaware of the service. He submitted that clearly that was a mistake of counsel that ought not to have been visited on the appellant. He submitted that the Judge had therefore erred when he struck out the appeal on that account in disregard of the law as set out in the authorities of ***Yowasi Kabiguruka versus Samuel Byarufu; Court of Appeal Civil Appeal no 18 of 2008*** and ***Julius Rwabinumi versus Hope Bahimbisomwe Supreme Court Civil Application No. 14 of 2009*** which authorities are to the effect that a mistake of counsel should not be visited on the client of that counsel.

He went on to submit that the learned trial Judge had dismissed the appeal under a wrong provision of the law. That Section 28(3) of the Criminal Procedure Code Act (Cap 166) (C.P.C) under which the Judge had struck out the appeal was not applicable in the circumstances of that appeal. He submitted that the applicable law was Section 46 1(b) of the Criminal Procedure Code. (C.P.C).

He prayed that this appeal be allowed and the orders of the learned Judge be set aside and the appeal at the High Court be reinstated.

He also prayed that the order of Justice Mwangusya in High Court Criminal Miscellaneous Application No. 165 of 2008 also be set aside.

Mrs. Betty Khisa, the learned Assistant Director of Public Prosecutions (Assistant DPP) opposed the appeal. She submitted that the appellant had not shown court under what law this appeal had been lodged and is being pursued. She submitted that a right of appeal is a creation of statute and that the law does not provide to the appellant a right of appeal in a scenario such as this.

She submitted that instances in which a person may appeal to this court from the High Court are provided for in the Trial On Indictments Act (T.I.A) and that an appeal of this nature is not provided for under that law.

She also submitted that the Judgment of the Chief Magistrate having been delivered on 19th July 2007 the notice of appeal ought to have been lodged within 14 days from that date. In this case she submitted that, the notice of appeal was lodged at the High Court on 14th August 2007 well out of time. The learned Assistant DPP submitted further that the appellant is not and was not interested in prosecuting the appeal. She was using the same only because she wanted to get bail. She had abused court process when she filed this appeal in this court and at the same time filed in the High Court at Kampala an application for extension of time within which to lodge a fresh notice of appeal which application was dismissed by Hon. Justice Mwangusya J. (as he then was).

She submitted further that the appellant was not in court when this appeal first came for hearing on 17th December 2013, at which hearing Mr. Kabega, her counsel, offered no explanation for her absence, even after the court had stood over the appeal for half an hour.

The above conduct of the appellant confirms that she had no interest in the appeal and was only interested in seeking bail. She submitted that this appeal was wrongly before this court and ought to be dismissed.

We have listened carefully to the submissions of both counsel and we have also carefully perused the court record.

We have also perused the record in respect of Court of Appeal Miscellaneous Criminal Application No. 56 of 2008 in respect of the appellant's application for bail pending appeal in this court.

Before we determine the issues raised in the two grounds of appeal, there are other issues of law and fact which have been raised by both counsel which require to be settled first.

The first issue is whether the notice of appeal filed by the appellant arising from the Judgment of the Chief Magistrate was filed within the time prescribed by the law.

It is not in dispute that the appellant lodged a notice of appeal at the High Court on 15th August 2007. The notice of appeal is dated 14th August 2007. It is in respect of the Judgment of the

Chief Magistrate Buganda Road dated 19th July 2007. The Section 28 (1) of the Criminal Procedure Code Act (CAP 116) stipulates that a notice of appeal is to be lodged within 14 days of the date of Judgment. In this case therefore the notice of appeal having been lodged on 15th August 2007 from a Judgment dated 19th July 2007 would have been well out of time.

However, a close look at the record of the Magistrates' Court indicate that although the Judgment is dated 19th July 2007, it was in fact not delivered on that date.

The Judgment, it appears from the record was delivered on 14th August 2007. This was an error. The learned Chief Magistrate (as she then was) ought not to have signed the Judgment before delivering it. Apparently she did. The law requires that a Judgment be signed and dated on the day it is delivered.

We accordingly find that the notice of appeal to the High Court was lodged within time.

The second issue was whether or not the appellant had a right to bring this appeal to this court.

It was contended by Ms. Betty Khisa that the appellant had no right of appeal. Mr. Kabega on his part contended that she had a right of appeal under Section 28 (1) of the Criminal Procedure Code Act.

Section 28(1) of Criminal Procedure Code Act is as follows:-

“2 Notice of appeal.

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(1) Every appeal shall be commenced by a notice in writing which shall be signed by the appellant or an advocate on his or her behalf, and shall be lodged with the registrar within fourteen days of the date of judgment or order from which the appeal is preferred.”

The reading of this section, with all due respect to learned counsel Mr. Kabega, does not appear to give a right of appeal. It simply sets out the procedure of appeal. Ms. Betty Khisa submitted that the right of appeal to this court is set out under the Trial On Indictments Act.

The relevant section of the Trial On Indictments Act is Section 132. It stipulates as follows:-

“132 Appeals to the court of appeal from the High court

(1) Subject to this section-

(a) an accused person may appeal to the Court of Appeal from a conviction and sentence by the High Court in the exercise of its original jurisdiction, as of right on a matter of law, fact or mixed law and fact;

(b) an accused person may, with leave of the Court of Appeal, appeal to the Court of Appeal against the sentence alone imposed by the High Court, other than a sentence fixed by law;

(c) where the High Court has, in the exercise of its original jurisdiction, acquitted an accused person, the Director of Public Prosecutions may appeal to the Court of Appeal as of right on a matter of law, fact or mixed law and fact,

and the Court of Appeal may

(d) confirm, vary or reverse the conviction and sentence;

(e) in the case of an appeal against the sentence alone, confirm or vary the sentence;

or

(f) confirm or reverse the acquittal of the accused person.

(2) Where the Court of Appeal reverses an acquittal under subsection (1), it shall order the accused person to be convicted and sentenced according to law.

(3) No appeal shall be allowed in the case of any person who has pleaded guilty in his or her trial by the chief magistrate or magistrate grade I or on appeal to the High Court and has been convicted on the plea, except as to the legality of

the plea or to the extent or legality of the sentence.

- (4) Except in a case where the appellant has been sentenced to death, a judge of the High Court or the Court of Appeal may, in his or her or its discretion, in any case in which an appeal to the Court of Appeal is lodged under this section, grant bail, pending the hearing and determination of the appeal.***
- (5) Section 40 of the Criminal Procedure Code Act other than subsection (2) of that section shall apply to a convicted appellant appealing under this section.***

The above provisions of the law clearly set out the right of appeal from the High court to this Court.

It appears however, that the right of appeal under Trial On Indictments Act (T.I.A) is restricted to appeal against conviction, sentence and acquittal. This appeal does not arise from a conviction, sentence or acquittal. Learned counsel for the appellant was not helpful in pointing out under what law the appeal was brought. As we have already noted above the section he cited, that is Section 28 (1) of the Criminal Procedure Code is inapplicable.

The law which would otherwise be applicable in respect for appeal to this court from the High Court exercising its appellate jurisdiction is Section 45 (1) of the Criminal Procedure Code Act.

That section provides as follows:-

45 (1) Second appeals.

Either party to an appeal from a Magistrate's court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a

matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law. (Emphasis added).

A close look at the memorandum of appeal clearly indicates that the two grounds of appeal set out earlier in this Judgment are in respect of matters of mixed law and fact.

The above provision of law specifically prohibits an appeal such as this one based on matters of mixed fact and law.

We agree with counsel for the respondent that it is a long established rule of law that an appeal is a creature of statute. In ***Attorney General vs Shah No. 4 of [1971] EA P.50-*** SPRY Ag. President stated that:-

“Appellate jurisdiction springs only from statute. There is no such a thing as inherent appellate jurisdiction.”

Jurisdiction cannot be prescribed by mere inference – see the Judgment of Tsekooko JSC in ***Baku Raphael Obudra and Obiga Kania versus The Attorney General (Supreme Court Constitution Appeal No.1 of 2005.***

In that same case B.J Odoki, CJ, also noted as follows;-

“It is trite law that there is no such a thing as an inherent appellate jurisdiction. Appellate jurisdiction must be specifically created by law. It cannot be inferred or implied.”

We entirely agree with the above position of the law.

We agree that the appellant had no right of appeal against the order of Justice Lugayizi, striking out the notice of appeal. Similarly we also find that this court has no jurisdiction to entertain this appeal. We would accordingly strike it out.

Be that as it may, we feel inclined to dispose of the grounds of appeal as set out herein, if for nothing else but to set the whole record straight.

Mr. Kabega learned counsel for the appellant submitted on ground one that the learned Judge erred when he summarily dismissed the appeal as a “*Ghost*” appeal under Section 28 (3) of the Criminal Procedure Code Act.

The reason given by the Judge in his Ruling dated 18th July 2008 is that the appellant had failed to prosecute her appeal. The appellant had been duly served with a copy of the Judgment and proceedings of the trial Magistrate's court on 1st April 2008.

Apparently Mr. Kabega learned counsel for the appellant was oblivious of this fact. The appellant herself who was regularly re-newing her bail at the same High Court was completely unaware that her lawyer had been served with the Judgment and proceedings. Indeed the appellant had never bothered to check with her lawyers the status of her appeal. She also never bothered to check with the court. Her lawyer on 18th July 2008 stated in court that he had lost contact with his client, the appellant. Apparently the client did not bother to pursue her appeal after having been granted bail. In her own affidavit filed in support of bail pending this appeal she states that she came to know that the appeal had been struck out and her bail had been cancelled when she appeared at court to extend her bail.

The appellant and her Advocates having failed to file the memorandum of appeal in time, having been duly served, left the Judge with no other option but to dismiss the appeal.

We agree with learned counsel Mr. Kabega that the learned trial Judge erred when he struck out the appeal.

We find that the right procedure would have been to strike out the notice of appeal. There was no appeal pending in court as no

memorandum of appeal had been filed at the time although the appeal had actually been fixed. It may as well have been the reason why the learned Judge referred to it as a “Ghost appeal” as in fact no appeal existed. Since no appeal existed, an order could not have been made to strike it out.

Counsel for the appellant ought to have made an application, oral or otherwise, before the Judge for extension of time within which to file the memorandum of appeal, having been shown evidence that his law firm had been served with the lower court record and Judgment. He did not.

We therefore find that the learned Judge was justified when he struck out the notice appeal. This ground has no merit and it therefore fails.

Mr. Kabega submitted on ground two that the learned Judge erred when he penalized the appellant based on a mistake of counsel.

From the facts giving rise to this appeal the appellant had never been keen at all in prosecuting the appeal before the High Court.

Judgment of the Chief Magistrate was delivered on 19th July 2007. On the same day she filed a notice of appeal. A few days later she applied for and was granted bail pending appeal to the High Court. She then did nothing else. She did not even bother to visit her advocates’ office. She never bothered to check with court the progress of her appeal. She only learnt of the appeal on 1st

September 2008 more than a year after she had filed the notice of appeal.

Clearly this is not just a mistake of counsel. It is complete lack of interest in the appeal by the appellant herself. A party to an appeal has a duty to prosecute the appeal with or without a lawyer. She cannot sit back and pass on blame to the lawyer.

The authorities cited by Mr. Kabega are therefore distinguishable from the facts of this case. In this particular case the appellant herself must accept the large share of the blame.

The duty to prosecute an appeal lies squarely on the appellant's shoulders and not on that of his or her advocates.

Section 44 of the Criminal Procedure Code states as follows:-

“ 44 (1) The appellate court may dismiss an appeal for want of prosecution.

(b) If the appellant fails to take any necessary step in prosecuting his or her appeal within the time allowed and has not made an application for extension of time.

We find that the appellant herself failed to take necessary steps in prosecuting the appeal before the High Court and the learned Judge was right to so find.

This ground also fails as it has no merit.

We also note that when the appellant's appeal was struck out by Justice Lugayizi on 18th July 2008 the appellant then filed an application for extension of time within which to lodge a notice of appeal. This application was certainly misconceived. It was heard and determined by Justice Mwangusya J (as he then was). We agree with the decision of Justice Mwangusya that, the appellant failed to show sufficient cause to warrant extension of time she had prayed for, and as such her application had to be dismissed. We accordingly uphold that decision.

This appeal therefore fails as it has no merit whatsoever. It is accordingly dismissed.

The appellant's bail pending appeal granted by this court on 10th day of October 2008 is hereby cancelled.

The appellant must proceed to serve her remaining sentence in prison. She must also comply with the order requiring her to refund shs. 46,500,000/- to the complainant.

Dated at Kampala this 22nd day of May 2014.

HON. MR. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

**HON. MR. JUSTICE RICHARD BUTEERA
JUSTICE OF APPEAL**

**HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL**