

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CR-CN-0080-2011 OF 2011

(Arising from Buganda Road Crim. Case No. 571 of 2010)

NILESH SUBASH LODHIA.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: HON. JUSTICE LAMECK N. MUKASA

Representation:

Mr. Nsubuga Mubiru of counsel for the Appellant

Ms Nambasa Caroline Basima PSA for Respondent

Mr. Kutosi Charles, court clerk

RULING:

When this appeal came up for hearing Ms. Nambasa moved court to dismiss the Appeal for:

- (i) Failure to prosecute the appeal contrary to section 44(1)(b) of the Criminal Procedure Act.
- (ii) Failure to state the general grounds of appeal contrary to section 28(2)(b) of the Criminal Procedure Code Act.

Section 44(1)(b) of the said Act provides:

“(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”

Section 28 of the same Act states:-

“(i) 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.

(2) Every notice of appeal shall state shortly the effect of the judgment or order appealed against and shall.....

(b) except where subsection (3) applies, state the general grounds upon which the appeal is preferred.

(3) If the appellant or an advocate or his or her behalf indicates at the time of filing a notice of appeal that he or she wishes to peruse the judgment or order appealed against or before formulating the grounds of appeal he or she shall be provided with a copy of the judgment or order, free of charge and the grounds of appeal shall be lodged with the registrar within fourteen days of the date of the service on him or her of the copy of the judgment or order” (emphasis added).

Counsel Nambasa argued that the Notice of Appeal filed on 14th November, 2011 did not comply with the requirements of subsection (2)(b) of section 28 in that it did not give the general grounds of appeal nor did it comply with

subsection 3 as there was no indication that the Appellant wished to peruse the judgment before formulating the grounds of appeal.

The Notice of Appeal served on the Chief Registrar High Court provided:

“TAKE NOTICE that NILESH SUBASHI LODHIA the appellant named herein above intends to appeal to the HIGH COURT OF UGANDA against the decision of His Worship VICENT MUGABO given at the BUGANDA ROAD CHIEF MAGISTRATE COURT in Criminal case No. 571 of 2010 on the 4th day of November 2011 whereby he was CONVICTED for the offences of

1. MAKING A FALSE STATEMENT contrary to section 66(1)(b) of the Uganda Citizenship and Immigration Control Act.
2. UTTERING A FALSE DOCUMENT contrary to section 351 of the Penal Code Act.
3. GIVING FALSE OR MISLEADING INFORMATION contrary to section 35(1)(b) of the Investment Code Act.

And as a result(ed) was sentenced to a fine.

The APPEAL is against conviction and sentence.

The appellant decision to attend the hearing of the appeal

.....”

Further counsel argued that they would grounds of appeal were filed on 28th June 2012 which she contends was out of time prescribed by the law. On 28th June 2012 the Appellant filed a Memorandum of Appeal wherein four grounds of Appeal are given. She further argued that even if this

Memorandum of Appeal had been file din time still would not have cured the Appellants failure to comply with the provisions of section 28 above as it requires grounds to be filed with the Notice of Appeal.

She further contended that the Memorandum of Appeal was smuggled into the court record without seeking an extension of time contrary to section 31(1) of the Act which stipulates:

“(i) An application to extend the time foe lodging a Notice of Appeal or grounds of appeal under section 28(1) or 93) shall be made in writing to the registrar of the appellate court and shall be supported by an affidavit specifying the grounds for the application”

Counsel submitted that the entire law on filing an appeal was not followed and that to hear the appeal would be entertaining an irregularity. She cited Harman Singh Bhagal vs Jadua Khansan EACA Civil Appeal No. 22 of 1952 where the court of Appeal for Eastern Africa held:

“ It is well settled law that a right of 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”

Counsel argued court to comply with the provisions of section 39(1) of the Judicature Act which provides:

“(1) The jurisdiction vested in the High Court by the Constitution, this Act or by any other enactment shall be exercised in accordance with the practice and procedure provided by this or any other enactment or

such rules and order of the court as may be made or existing under this Act or any other enactment.”

She applied for dismissal of the Appeal for failure to comply with the procedures provided by the Criminal Procedure Code Act.

Mr. Nsubuga Mubiru for the Appellant conceded that appeals are created by statute and that the procedure governing the filling of appeals must conform to the sections 28 of the Criminal Procedure Code Act. He however contended that the notice of Appeal filed on 4th November, 2011 the very date of the judgment appealed against, complied with the provisions of the statute. He argued that it sets out the general ground of appeal that the appeal is against conviction and sentence.

In reply to the above submission Ms Nambasa submitted that the statement in the Notice of Appeal that:

“THE APPEAL is against conviction and sentence”

did not satisfy the requirement for general grounds of appeal envisaged in section 28(2)(b) of the Criminal Procedure Code Act. She submitted that this statement was merely a statement of the effect of the judgment appealed against. She cited A Guide to Criminal Procedure in Uganda by Hon. Justice B.J Odoki, 2nd Ed. Page 183, whereby the procedure for commencement of appeals under section 28 above is explained.”

The above statement only indicated the nature of the orders appealed against as being the conviction and sentence. Then the issue arises as on what grounds is the conviction and sentence being challenged. Section 28(4) CPC Act provides:

“Where the appellant is represented by an advocate or the appeal is preferred by the Director of Public Prosecutions, the grounds of appeal shall include particulars of the matters of law or of fact in regard to which the court appealed from is alleged to have erred’.
(emphasis added).

The requirement is to make clear what parts of the lower court’s judgment the appellant wishes to appeal against and for what reasons. In Uganda vs Bukenya Richard HCT- Crim Appeal No. 21 of 2004 Justice Paul Mugamba held:

“ Needless to say the ground is so general that it is hard to point out where the trial magistrate erred in fact and/or in law. The requirement for particulars under section 28(4) is to make clear what parts of the lower court’s judgment the Appellant wishes to appeal against. A general ground such as the above bears no particulars and is no ground of appeal”

I accordingly find that the statutory requirements provided for under section 28(2)(b) CPC Act were not complied with in the Notice of Appeal.

Mr. Nsubuga Mubiru further argued that the Appellant had before the Trial Court, on receipt of the judgment, indicated to the Trial Chief Magistrate

that he wished to be provided with the judgment and proceedings of the court for the purpose of filing an appeal. Counsel referred to page 17 of the judgment where after delivery of the judgment counsel for the Appellant stated;

“.....we also pray for a typed copy of proceedings to follow up the appeal process’

The record also shows that counsel had informed the trial court that:

“we intend to appeal against 2 counts and fifth and.....’

Counsel contended that this was a process of commencement of the Appeal.

He further argued that the proceedings were certified on 2nd April 2012 and forwarded to the Appellant by the Registrar in her letter dated 21st June 2012. a Memorandum of appeal was filed on 28th June 2012 and served on the DPP’s office the same day. He contended that the Memorandum of Appeal with grounds therein was filed within seven days of delivery of the proceedings to the Appellant.

Section 33(1) CPC Act provides:

“(1) If the appellate court does not dismiss an appeal summarily, it shall cause notice to be given to the appellant and to the respondent or to their advocates if any, of the time and place at which the appeal will be heard and shall furnish the respondent with a copy of the proceedings and the grounds of appeal”

Mr. Nsubuga Mubiru further argued that the practice is that on receipt of the Notice of Appeal the Registrar must have communicated to the lower court for the proceedings and channel the same to the Appellant.

The learned counsel's argument is to the effect that there was an informal indication to the trial magistrate which the Registrar must have got notice of when she received the Record of proceedings which she communicated to the Appellants on 21st June 2012. That following receipt of the proceedings the Appellant filed the grounds within the Memorandum of Appeal filed within the 14 days of receipt of the proceedings as recandled by the provisions of subsection (3) of section 28.

Counsel cited Isanga Lazaro & Anor vs Uganda SCC Appeal No. 19 of 1999. The Supreme Court found in that case that in the Notices of Appeal each appellant indicated that his appeal was against sentence only. In their joint Memorandum of Appeal filed out of time, they appealed against both convictions and sentence. The Honorable court held:

“On a strict application of the rules therefore, it means that the appeal of both appellants against conviction was filed outside the prescribed period, since no notice of Appeal thereof was given, as prescribed under r 56(1) of the Rules of this court either informally at the time the decision was given on 2nd July 1999, or in writing within 14 days thereafter. But this is a matter that could have been rectified by an application for extension of time under r.4 of the said rules. No such application was made to us. However having gone through the record and the proposed grounds of appeal, we are of

the view that this appeal raised such important issues of mixed law and fact that it ought to be considered on merit. Mindful of this court's overall duty to see that justice is done (which duty we consider to be of general application and not restricted to reference to S.6(5) of the Judicature Statute 1996 to third appeals only), we consider that this would be a proper case in which to apply the principle enshrined in Article 126(e) of the Constitution that substantive justice shall be administered without undue regard to technicalities. Having regard to all the aforesaid provisions, we on our own motion would extend the time within which the two appellants had to file the Notice of Appeal against conviction and so we deem it to have been extended to 24th September, 1999 when their joint Memorandum of Appeal was lodged and we order that their appeals against conviction are properly before the court. However, we hasten to add that this action on our part is taken on account of the peculiar circumstances of this case”

Counsel submitted that their Lordships, in the above case, raise two important points:-

- (i) the issue of an application to be raised informally or formally;
- (ii) the provisions of Article 126(e) of the Constitution which addresses the issue of substantive justice.

He further submitted that their Lordships were alive to the rules of procedure.

In her reply Ms. Nambasa argued that there was no formal or informal request made to the Registrar. That the informal request was made at sentencing and not at the time of filing the Notice of Appeal and not made to the Registrar as provided by section 28 CPC Act but to the Chief Magistrate. She further argued that the Isanga case above is distinguishable from the instant case as in that case there were Notices of Appeal already properly filed and both the Notices of Appeal and the Memorandum of Appeal were before the Appellate Court.

I have carefully considered the able submissions of both counsel and the law and authorities cited to me. Section 28 CPC Act provides that:

1. every appeal shall be commenced by notice in writing
2. every appeal shall be lodged with the registrar
(the above requirements are mandatory)
3. every notice of appeal to contain a full and sufficient address at which notices may be served on the appellant or his advocate.
4. contain general grounds of appeal SAVE where at the time of filing a notice of appeal the Appellant requested for the judgment to be supplied to him before formulating the grounds of appeal.
5. where represented by counsel the grounds of appeal shall include particulars of the matter of law or of fact alleged to have erred, SAVE that an unrepresented appellant may be allowed by the Appellant court to raise any proper ground of appeal orally at the hearing of the appeal.

The Appellant in this case is represented before this court and was also represented at the lower court. Whatever was raised before the lower court, following the delivery of judgment, was raised on behalf of the Appellant by his counsel and raised orally in court. What is on record is a recording by court but not a written request for proceedings. Section I of CPC Act does not define a “Chief Magistrate’ to include a Registrar. Section 43 of the Judicature Act provides for offices of the courts of judicature who shall include the Chief Registrar, registrar, Deputy Registrars and assistant registrars. Section 28 CPC Act requires the request for the proceedings to be filed at the time of filing a notice of appeal. In the instant case the Notice of Appeal was rightly lodged with the registrar but lacked either the grounds of appeal or a request for the proceedings to be provided. The request made to the Trial Chief Magistrate was made to an officer who was not a registrar and not a registrar of the Appellate court. The Isanga case is distinguishable from the instant case as rule 56(1) of the Supreme Court Rules provides for an informal Notice of Appeal at the time the decision to be appealed against is given. The High Court rules specifically provide for a written Notice of Appeal. Further in the Isanga case there was an already competently filed Notice of Appeal. In the instant case the Notice of Appeal filed lacked in material particulars. It did not have the ground of appeal neither did it contain nor was it accompanied with the written request for the proceedings. In the Isanga case their Lordships made a caution that their action was taken on account of the peculiar circumstances of that case. This court has not been assisted with any peculiar circumstances to warrant the invocation of Article 126(e) of the Constitution. It must be noted that this Article was not intended to do away with the rules of procedure. In Uganda vs Bukenya Richard (supra), a memorandum of appeal was filed out of time without

leave of court and contained only one general ground which did not provide particulars of either law or fact on which the appeal was founded, Hon Justice Paul Mugamba held:

“The grounds of appeal were filed in the memorandum filed on 14th February 2005. Clearly this was outside the period and as such I agree with the submission of counsel for the respondent that the appeal is incompetent”

In an effort to cure the defect counsel for the Appellant had earlier contended that shortly after filing the Notice of Appeal they had filed a Memorandum of Appeal. That they were surprised to received notification on 21st June 2012 that no Memorandum of Appeal had been filed whereupon they filed what he termed a copy on 28th June 2012. The practice of court, and counsel did concede, is that pleadings are filed in copies, whereby upon lodgment a copy is retained on the court file, a copy is served on the opposite party and a copy is returned to the filing party. There was no such earlier filed copy on the court file and no endorsement of receipt thereof on the court file. There was no evidence that the Respondent had been served with a copy of such an earlier filed copy and counsel for the Appellant failed to produce any copy of such an earlier copy filed in court. I find this an unsuccessful attempt to mislead court.

All in all, I find that the Appeal is incompetent and the same is dismissed.

Lameck N. Mukasa

Judge

17/08/2012

17/08/2012

Mr. Nsubuga Mubiru for Appellant

Ms. Josephine Namatovu SSA for Respondent on brief for Ms. Nambasa

Mr. Kutosi Charles, court

Appellant absent

Court: Ruling delivered.

Lameck N. Mukasa

Judge

17/08/2012