

UGANDA / JUDGMENT

Kazahura Robinah Achieng v Uganda (Criminal Appeal 20 of 2020) [2024] UGHC 32 (17 January 2024) [2024] UGHC 32

COURT

High Court of Uganda

BEFORE

Bukirwa, J

CASE / FILE NUMBER

Criminal Appeal 20 of 2020

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT JINJA CRIMINAL
APPEAL NO. 20 OF 2020 ARISING FROM CRIMINAL CASE NO.21 OF 2017

KAZAHURA ROBINAH ACHIENG::

VERSUS

UGANDA::

RULING

Background

The appellant filed a notice of appeal in this honorable Court on the 13th day of October 2020 seeking to challenge the decision of Her Worship Agnes Nambafu Magistrate Grade 1, dated 7th October 2020 in Criminal Case No. 21 of 2017 delivered at Jinja Chief Magistrates Court. The Deputy Registrar of this court in a letter dated 30th October 2020 wrote requesting for the lower court record for purposes of hearing the appeal. This letter was received by the Chief Magistrate's Court on 7th December 2020. In a letter dated 11th February 2021 the Chief Magistrate sent the record of proceedings and certified judgment plus the lower court file to handle the appeal. The Appellant filed a Memorandum of appeal in this Court dated 6th November 2023. When the matter came up for hearing on 7th November 2023, the learned State Attorney informed this court that the State had only been served the Memorandum of Appeal on the 6th of November 2023 (the previous day) and that she needed time to study the same and file a reply in the matter. Counsel for the Appellant in response informed Court that he filed a Notice of Appeal on the 13th

sup> October 2020, however it had taken a long time to get the record of proceedings and certified judgment from the lower court which were only obtained on 22nd February 2021. Court inquired from Counsel for the Appellant what happened between the period between 22nd February 2021 and 6th November 2023 when he served the Memorandum of Appeal on the State. Counsel for the Appellant in response stated that it was an oversight on his part to have filed the Memorandum of Appeal belatedly. He stated that having filed the Notice of Appeal on 13th October 2020 and having served the State with the same on 29th October 2010, the appeal had been instituted. Appellant's counsel argued that by serving the State with the Memorandum of Appeal 3 (three) years later was not fatal to the appeal and that in the circumstances and in order to save time. Court should proceed to give the parties a schedule to file written submissions. He orally prayed to Court for leave to validate the Memorandum of Appeal which had been served out of time.

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Court directed the parties to file written submissions to address the issue as to whether the Appellant's Memorandum of Appeal filed on 6th November, 2023 can be validated by this Honorable Court.

Both the Appellant and the Respondent filed written submissions which Court has considered in this ruling.

Legal representation:

The Appellant was represented by Counsel Esarait Robert of Esarait. Adikin & Co. Advocates while the Respondent was represented by Ms. Shallote Kamusiime, a Senior State Attorney in the Directorate of Public Prosecutions.

Court's Consideration

The issue that was raised by the parties for determination by this Court is: -Whether the Appellant's Memorandum of Appeal filed on the 6th day of November can be validated by this Honorable Court?

Section 28 of the Criminal Procedure Code (CPC) Act Cap 116 provides that: -(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.

(2)

(3) If the appellant or an advocate on 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 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.

(4)

(5) Where an appellant who is not represented has not availed himself or herself

of the provisions of subsection (3), nothing in this section shall be read as preventing the appellate court from permitting the appellant from raising any proper ground of appeal orally at the hearing of the appeal.

(6) The appellate court may, for good cause shown, extend the periods mentioned in subsection \$(1)\$ or \$(3)\$. (*Emphasis added*)

Citing Section 28 of the CPC, Lady Justice Margret Mutonyi in the case of Mbaine Eliphazi & Anor Vs Uganda HCT-00-CR-CN-0141-2016 (Originally Criminal Appeal No. 59/2015 laid down the ideal procedure which should followed in Criminal Appeals process as the wording is mandatory. The laid down procedure is as follows: -

1. The appellant shall provide a full and sufficient address for service of court process.

2

- 2. That the Notice of Appeal shall contain briefly the grounds of appeal (as the rest maybe formulated after getting the record and judgment of the trial court.
- 3. The Appellant court shall send the Notice of Appeal to the trial court and avail the original typed and certified proceedings and judgment, orders and any other material that is relevant to the appeal.
- 4. The trial court shall send with practicable dispatch the original file, typed and certified proceedings and Judgment with all material /exhibits that are relevant to the Appeal.
- 5. In case the trial court does not comply with the call made by the Registrar, the Registrar has a legal duty to send a reminder and warning to the trial court because the appellant court and the appellant cannot proceed further with the appeal without procuring the lower record from the trial court.
- 6. The Registrar of the Appellant Court shall cause the Appellant to be served with the certified copies of the record of proceedings, judgement, orders and any other relevant materials /exhibits of the trial court.
- 7. The process server of the Appellant Court shall file an affidavit of service indicating how and when the Appellant or his or her advocate were served.

- 8. That the Registrar of the Appellate Court shall indicate on the file when the 14 days after the service of appellant or his advocate shall expire.
- 9. The appellant or advocate shall then file the grounds of appeal within 14 days after service of the certified record of proceedings, judgement and any other relevant material for the appellant court.
- 10. The Registrar of court shall allocate the file to the appellate court judge for further management.

In the instant case the appellant filed a notice of appeal in this Honorable Court on the 13th day of October 2020 indicating his address of service address as Esarait, Adikin & Co, Advocates, Plot 16, Noor Building, 2nd Floor, Oboja Road, P. O. Box 724 Jinja. The Deputy Registrar of this court in a letter dated 30th October, 2020, which was received by the Chief Magistrates Court on 7th December 2020, wrote requesting for the lower record for purposes of this court to hear the appeal. In a letter dated 11th February 2021 which was received by the High Court on the 22nd February 2021, the Chief Magistrate sent the record of proceedings and certified judgment plus the lower court file to handle the appeal. Having perused the court record, all these documents are on file.

I observed that there is no record to show that the Appellant was served with the typed record of proceedings or judgement of the lower court. However, Counsel for the appellant duly informed this court on 7th November, 2023 when the matter came up for hearing that he was only able to get the record and a certified copy of the judgment on 22nd February 2021, the same day the lower court record was

sent to the High Court. This implies that the lower court served the proceeding and judgement on the appellant. That the appellant then went ahead and filed a Memorandum of appeal in this court dated 6th November 2023 and as submitted by the Respondent they were also served on the same day.

In the instant case, under Section 28(3) of the CPC, the appellant is required to have filed the memorandum of appeal 14 days after receiving the lower court typed proceedings and certified judgment on the 22nd February 2021 which would have been by 8th March 2021. However, 8th March is a recognized public holiday in Uganda since it is International Women's Day and therefore the said memorandum of appeal would have been filed by 9th March 2021. However, the appellant filed the memorandum of appeal on 7th November 2023 which is two years, eight months and fifteen days from 9th March, 2021 when the memorandum of appeal should have been filed.

In the case of *Wanyaka Samuel Huxley Vs Uganda (IGG) SC Misc. Application No. 18 of 2020*, ^{*}the Supreme Court held that there is a specific time^{*} period to lodge a memorandum of appeal with the Registrar. This calls for ^{*}vigilance and diligence on the part of the appellant.^{*}

In the instant case the appellant did not comply with the specific time of filing the memorandum of appeal within 14 days after receiving the certified judgement and typed record of proceedings from the lower court on 22nd February 2021.

Counsel for the appellant submitted to this court that failure to file the memorandum of appeal was an oversight on his part and that as long as the Notice of Appeal had been filed on the 13th of October 2020 and served on the State on the 29th October 2020, failure to serve the State with the memorandum of appeal was not fatal to the appeal. I vehemently disagree with the submissions of Appellant's Counsel in this regard. In the case of *Wanyaka Samuel Huxley Vs Uganda (IGG)(supra)* the Supreme Court stated that: -

"I have emphasized the word "commenced by a notice". It means that the notice is the start of the appeal process. In the Supreme Court Criminal Application No. 8 of 2019 *Uganda Vs Ntambi Vincent, Mwagusya JSC* stated inter alia that filing a Notice of Appeal is the first step and the intending appellant must do in the process of appealing. We agree on the above."

Further in the same case *Wanyaka* (supra), the Supreme Court held that;

"... the notice of appeal cannot be substituted for a Memorandum of appeal, again rule 62(2) provide for the contents of the memorandum of appeal which are different from the contents of Notice of Appeal".

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Relying on the above cited case, after filing a Notice of Appeal on the 13th October 2020, the appellant who was duly represented by an advocate had to file the memorandum of appeal after receiving the lower record as clearly explained above. That the Notice of Appeal cannot substitute a memorandum of appeal as the law is clear that a memorandum of appeal is filed after receiving the lower court record by the appellant and its contents are different from those in the Notice of Appeal.

Appellant's counsel in his submissions argued that mistake or negligence of counsel should not be visited on the litigant and also cited Article 126(2)(e) of the Constitution of the Republic of Uganda which in effect provides for the administration of substantive justice without undue regard to technicalities. In the case of *Nalukenge v Uganda* (Criminal Appeal No. 67 of 2008) [2014] UGCA 27 (22 May 2014) the Justice of Court of Appeal observed that: -

"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."

On the justification of Article 126(2)(e) of Constitution of Republic of Uganda in the case of *Mulindwa v Kisubika* (Civil Appeal No. 12 of 2014) [2018] UGSC 38 (2 August 2018), it was stated that;

"As pointed out earlier in this judgment, in the instant appeal, it is clear that the appellant does not complain that the Justices of the Court of Appeal exercised their discretion wrongly or as a result of any misdirection. He does not even dispute the finding of fact by the two courts that the reason he gave for the delay was insufficient to justify the grant of the order sought. His contention is that the Rules of procedure that the courts applied to dismiss his case are mere technicalities that Article 126 has done away with.

This contention is, in our opinion, erroneous and unsupported by the pronouncements of the Supreme Court in several cases involving the application of Article 126 of the Constitution by the courts. According to these authorities, the settled position is that Article 126 (2) (e) has not done away with the requirement that litigants must comply with the Rules of procedure in litigation. The Article merely gives Constitutional force to the well settled common law principle that rules of procedure act as handmaidens of justice. The

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framers of the Constitution were alive to this fact. That is why they provided that the principles in Article 126 including administering substantive justice without undue regard to technicalities, must be applied "SUBJECT TO THE LAW." Such laws *include the Rules of procedure.*

A host of cases such as *Utex Industries Ltd vs. Attorney General*, SCCA No. 52 of 1997; *Kasirye & Byaruhanga and Co. Advocates vs. Uganda Development Bank*, SCCA No.2 of 1997 and *Horizon Coaches vs. Edward Rurangaranga*, SCCA No. 18 of 2009 drove this point home." Emphasis added.

In my view and relying on with the decision in decision *Mulindwa George William Vs Kisubika* (supra), Article 126 (2) (e) of the Constitution does not oust the requirements that litigants must comply with in respect of the rules of procedure in litigation.

In the instant case the Appellant did not make any attempt to file an application for extension of time to file a Memorandum of appeal as provided by the law. Section 31(1) of the Criminal Procedure Code Act provides that: -

"An application to extend the time for lodging a notice of appeal or grounds of appeal under section 28(1) or (3) 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.*"

In the case of *Nalukenge v Uganda* (Criminal Appeal No. 67 of 2008) [2014] UGCA 27 (22 May 2014) the Justice of Court of Appeal observed that: -

"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." (Emphasis added)

In the instant case, the appellant having failed to file an application for extension of time to file the memorandum of appeal and yet the memorandum of appeal was filed out of time on 6th November 2023, I hereby strike out the Memorandum of appeal. This appeal fails and is hereby dismissed.

Dated, signed and delivered today 17th January, 2024.

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\$\cdots\$ FARIDAH SHAMILAH BUKIRWA NTAMBI JUDGE

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