

IN THE HIGH COURT OF TANZANIA

AT MWANZA

APPELLATE JURISDICTION

(Mwanza Registry)

HIGH COURT CRIMINAL APPEAL NO. 84 OF 1998

(Original Criminal Case No. 189 of 1998 of the District Court of Geita
District at Geita Before:- L.N.B. NGUVONGO, Esq., DISTRICT MAGISTRATE)

MTEBI s/o LUKANYA LUCHAGULA APPELLANT

(Original Accused)

Versus

THE UNITED REPUBLIC RESPONDENT

(Original Prosecutor)

JUDGMENT

NSEKELA J.

This is an appeal by one Mtebi s/o Lukanya Luchagula who was convicted on 11.8.98 on his own plea of guilty with the offence of cattle theft c/s 268 and 265 of the Penal Code. He was sentenced to eight years imprisonment subject to confirmation by the High Court. At the hearing of the appeal Mr. Rutaisire learned advocate, represented the appellant and Mr. Cuta, learned State Attorney represented the respondent Republic. Before I proceed to consider the merits or otherwise of this appeal, there is one matter which has caused me considerable anxiety and ~~this~~ is whether or not this appeal is properly before this Court. Sections 359 and 361 of the Criminal Procedure Act, 1985 (CPA) provide as follows --

"359 (1) Save as hereafter 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 such subordinate court shall at the time when such finding, sentence or order is made or passed, inform such 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. (emphasis supplied)

A prospective appellant has to do two things if he wants to set the appellate process in motion. He has to give his notice of intention to appeal AND to lodge his petition to appeal. The first thing to do is to give notice of intention to appeal soon after the finding sentence or order is made. In the instant appeal, the appellant through his learned advocates, Messrs Lake Law Chambers, on the 28.8.98 filed a memorandum of appeal accompanied by a copy of the judgment, no doubt in compliance with section 362(1) of the CPA. But where is the notice of intention to appeal? Section 361 of the CPA reads —

"361. No appeal from any such findings sentence or order as aforesaid shall be entertained unless the appellant —
(a) shall have given notice of his intention to appeal within ten days from the date of the findings, sentence or order, or in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and
(b) shall have lodged his petition of appeal within forty-five days from the date of the finding, sentence or order!
(emphasis supplied)

It is common knowledge that the sentence was delivered on 11.8.98 and when the memorandum of appeal was lodged on 28.8.98 the notice of intention to appeal had not been given according to the court records.

In the case of Jamal Manji and Company v R [1970] HCD 338 this Court had occasion to construe the then section 314(a) of the Criminal Procedure Code (now section 361 (a) CPA). Briefly, the appellant filed his notice of intention to appeal against sentence 19 days after the 10 days prescribed by section 314(a) for filing such notice. This was due to the fact that the notice was mistakenly sent to Mwanza instead of Musoma. The petition of appeal was however filed in time. On an application to file the notice of appeal out of time, this Court (Onyike J.) held, *inter alia*, that —

- "1. The compliance required by section 314 is total. A partial compliance, as by giving the notice of appeal in time but lodging the petition out of time or vice-versa is not enough. A partial compliance, creates at most, an imperfect appeal which by section 314 cannot be entertained.
2. The right of appeal conferred by section 312 of the Criminal Procedure Code (now section 359 of the CPA) would be lost if the periods of limitation prescribed in section 314(a)(b) (now section 361(a) and (b) were not complied with."

Needless to say, I am in entire agreement with the views expressed above. There is no doubt in my mind that section 361(a) of the Criminal Procedure Act was not complied with. I cannot entertain the appeal. In the event the memorandum of appeal is hereby struck out as *incomptent*. It is accordingly ordered.

H. R. NSEKELA

JUDGE

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9/11/98 Judgment delivered in the presence of Mr. Rugaisire learned
advocate for the appellant and Ms H. Ally learned State Attorney.

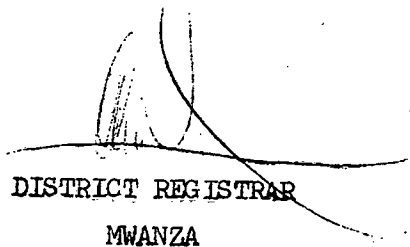
AT MWANZA

H. R. NSEKELA

9/11/98

JUDGE

I hereby certify that this is a true copy of the Original.


DISTRICT REGISTRAR
MWANZA