



IN THE HIGH COURT OF TANZANIA
AT BUKOBA

(CORAM: MJEMMAS J, LYIMO J, AND MZUNA J.)

MISC CIVIL CAUSE NO. 8/2009

SHABANI SHEYI @ MAMI.....PETITIONER

VERSUS

1. PRINCIPAL RESIDENT MAGISTRATE
2. THE ATTORNEY GENERAL } RESPONDENT

RULING OF THE COURT

Hearing: 23/08/2010

Lyimo J,

The petitioner Shabani Sheyi @ Mami filed his application Under Section 4 of the Basic Rights and Duties Enforcement Act, Cap 3 of the Revised Laws praying inter alia for the following orders:-

- i. To declare the administrative omission by the 1st Respondent unconstitutional.

- ii. To immediately supply the petitioner with the copy of judgment and proceedings.
- iii. Costs to follow the Event, and
- iv. Any other order Relief (s) that would suit circumstances of the case and ensure equality adherence in future administration of justice at the discretion of this honourable court.

Mr. E. Luoga, learned senior State Attorney for both the 1st and 2nd Respondents filed two preliminary points of law duly served, resisting the Petition of the following grounds:-

- i. THAT, the affidavit that supports the application contravenes order XIX Rule 3 (1) of the Civil Procedure Code.
- ii. THAT, the Application is unmentionable in law as the Petitioner assigned no single ground in his affidavit. He prayed for the Petition to be dismissed with costs.

Upon perusal of the records, it was shown that the Petitioner was charged and convicted for the offence of robbery with violence and sentenced to thirty years (sic) imprisonment, vide Bukoba District Court Crim Case No. 143 of 2000. That was on 30/05/2001.

There was no evidence adduced by the Petitioner that upon his conviction he had issued the requisite notice of appeal. And during the hearing of this Petition, he had no copy of such notice. After a considerable period of time had lapsed in 2008 the Petitioner attempted to file his memorandum of appeal without the requisite notice of appeal. As late as September 2008, the office of the District Registrar, Bukoba, indicated to the Petitioner through his letter BK/DR/CP/Vol /IV/26 of 24/09/2008 that the Petitioner's intended appeal can not be processed in the absence of the basic documents as per Section 362 of the Criminal Procedure Act Cap 20. Notwithstanding the advice from the District Registrar the Petitioner filed this Petition praying for the above orders. And in an effort to show that his rights were being violated, he gave the particulars of facts in Paragraph 6 of his statement of facts. In Paragraph 6:2 and 6:3 he has asserted:-

"6:2: That, the said convict verdict aggrieved a petitioner hence a Notice of Appeal was signed and filed in time vide Bukoba Prison

Authority a copy of the Notice of Appeal to that Respect is attached to form Annexure "SM 2".

6:3: Petitioner's Application for copy of judgment and proceedings have been sidelined while the same court has been issuing copies of judgment and proceedings to other prisoners convicted later than the petitioner, which depicts discrimination."

(emphasis supplied)

As the notice of P.Os had been duly served and acknowledged, the court before delving into the merits of the objections and Replies thereto and taking into account the nature of the Petition before us, deemed it necessary to consider whether this constitutional court was clothed with the powers which the Petitioner has sought. The respective parties were granted chance to address the court.

Mr. Luoga, learned Senior State Attorney was of the view that the petition was brought rather prematurely. He submitted that before this court embarks on addressing the issues raised by the

Petition, there ought to be on record that the applicant petitioner had exhausted all the remedies provided for under the Criminal Procedure Act Cap 20. In other words, the petitioner should show to the court that he had exhausted the available remedies in prosecuting his appeal.

He pointed out that while the record shows that the Petitioner was convicted to serve 30years, there was no evidence showing that he had taken the appropriate steps of instituting his appeal, which is predicated upon issuing the requisite notice of Intention to appeal. One thing clearly emerges from this Petition. While it is admitted that the Petitioner was convicted on 30/05/2001, it was not until May 2005 when some efforts appear to be made in the follow up of the intended appeal. And in September 2008 the Petitioner appears to be making frantic efforts to institute his appeal without complying to the standard procedures. The petitioner alleges to have issued the relevant notice and by virtue of his Para 6 of the Petition he also alleges to have attached a copy of the said Notice. Quite unfortunately the annexure "SM 2"

is not a copy of notice of appeal. Needless to say, without filing notice of appeal as required by section 361 of the CPA, one may not be able to institute an appeal before the court.

Further even assuming he did file a notice upon his conviction and that it was misplaced, as soon as he was prompted that his appeal can not be processed in the absence of judgment and copy of proceeding he still had the opportunity to process for an appeal out of time. The prisons officials are well versed with said procedures and his insistence to have the appeal heard when he had not filed one is but a serious misconception. Simply stated the Petitioner did not file notice of appeal as alleged.

The learned Senior State Attorney submitted that looking at the prayers being sought, these are in the form of mandamus and certiorari. However, the Basic Duties and Enforcement Act Cap 3, Section 8(2) thereof specifically state that this court should not deal with any application where alternative remedies have not been exhausted. Now that there is evidence

that the Petitioner has not fully exercised his rights to appeal, he should not be allowed to resort to the use of the Basic Rights and Duties Enforcement Act.

In reply, the petitioner being a lay person and unrepresented, insisted that he had served/issued the relevant notice of appeal and that he had been denied his right to appeal.

This court has seriously considered the competing arguments by the respective parties.

From the record, the petitioner was convicted in Bukoba D/Court Crim Case No. 143 of 2000. The procedure regulating the institution of appeals by persons convicted by the D/Court or a court of a Resident Magistrate is to be found under the Criminal Procedure Act Cap 20, RE 2002 and the Magistrates Courts Act Cap 11 RE 2002, relating to appeals, appeals out of time, and Revision. The petitioner was convicted on 30/05/2001 and there is no evidence that following his conviction he had filed the requisite notice of intention to appeal. There is no evidence showing the steps taken by the petitioner in an effort

to institute the appeal. What is on record, is a combination of letters between the office of the District Registrar and various prison officials whereby the District Registrar clearly indicated to the officials that there was no appeal filed by the Petitioner. What it all amounts to is that the petitioner had not exhausted the remedies for an appeal or for Revision as stipulated. And by virtue of Section 8(2) of the Basic Right and Duties Enforcement Act, Cap 3 it is provided:-

8(2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for contravention of the alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexations.

We are therefore satisfied that the petition has been brought pre – maturely as the petitioner had hardly made use of the available remedies under the Criminal Procedure Act as amplified above.

There is yet another point for consideration. This is in respect to the prayers which he has sought. He has complained that the 1st Respondent has prevented his appeal. We must point out that the prayers/orders he has raised are basically declaratory and can not be upheld. They are not constitutional. If we may point out, the petitioner did not exercise his rights of appeal. But that is far from saying that the doors are closed. As can be discerned from Chapters 20 & 11 RE 2002 respectively, the High Court has wide supervisory, and Reversionary Powers over criminal cases originating from the District Courts and Courts of Resident Magistrates.

Throughout these proceedings this court has not been moved to believe that the Remedies available to the Petitioner have been exhausted. At the risk of repeating what I have stated, we have not been informed why the Petitioner opted not to pursue his appeal as provided for and opted to adopt the current approach. The application is misconceived and it is dismissed. No order as to costs.
Order accordingly.

Delivered at Bukoba this 23/08/2010.

G.J.K. Mjemmas,
JUDGE

V.K.D. Lyimo
JUDGE

M.G. Mzuna
JUDGE

I certify that this is a true copy of the original.
CERTIFIED TRUE COPY OF THE
ORIGINAL

Pett
(P.J. Matete)

Ag - DISTRICT REGISTRAR

