

The problem arose when the appellant who is a resident of Dar es Salaam later during the afternoon claimed that he has failed to acquire sureties as per the initial order of this court, hence through his Advocate they orally moved the court to review the initial order issued by this court. This court then ordered the learned state attorney who represented the respondent in this appeal to be called for the urgency of hearing of the oral application for review of the initial order.

At the time when both the parties were before me, Mr. Mnkonje, Advocate for the Appellant prayed for a review of the order for the security for appearance of the appellant at the Respondents intended appeal at the Court of Appeal.

Mr. Mnkonje prayed for a review on the following grounds, that the order is somehow contradicting the constitution which needs the appellant to be released unless there is a lawful order/cause. He said that the constitution provides that a person's freedom should not be curtailed unless there is a law which allow his freedom to be curtailed. He then went on further by saying that section 358 does not provide an alternative if the appellant who has been released fails to furnish such a security required. Also that section does not state whether failure to furnish security will lead to the appellant (the would be respondent in the intended appeal) to be sent to remand prison or not.

Mr. Mnkonje then pointed out that there has been an error apparent on the ruling of the security issued earlier by this court which stated that Part XII of Act No. 7 of 2005 is for both High Court and Courts subordinate to it.

In pointing out the error, he cited section 351 which shows that the definition of the term "Appellate Court" in that Act has been interpreted to mean those courts subordinate to the High Court having appeals to the High Court only are to be dealt with this Part XII.

He gave the example of section 359 (i) which says that the Notice of Appeal to be filed within 15 days and the appeal to be lodged within 45 days, whereas for appeals to the Court of Appeal requires Notice of Appeal to be filed within 14 days and not 15 days and an appeal to the Court of Appeal is required to be lodged within 60 days and not 45 days.

Furthermore, Mr. Mnkonje submitted that according to section 360 every appeal is to be made by way of petition whereas at the

Court of Appeal, the Rules directs that appeals are to be made by way of Memorandum and not petition.

He also have pointed out that section 361 (2) of Part XII says that the petitions of Appeal to be lodged to the office of the High Court Registrar who shall forward the said petition to the Chief Justice.

Basically Mr. Mnkonje said that the whole of Part XII deals with the issue of appeal which are to be brought to the High Court from subordinate court and those appeals from within the subordinate courts themselves.

Finally he humbly submitted that section 358 is not applicable and this court to review its orders and give such terms for the appellant to enjoy his constitutional right of freedom.

On the other hand the learned state attorney Mwanamkaa responded by saying that the appellant is not held as a convict but he is required to furnish security according to law and failure of which he is to be held as a remandee until he files such a security that he will appear in the intended appeal.

Furthermore, the learned state attorney for the respondent argued that the object of section 358 (2) is to make sure that the appellant will appear at the intended appeal and it is not to hinder his freedom but just to furnish security that he will appear at the time of appeal. Mrs. Mwanamkaa then pointed out that the section is silent on the conditions which means that the court is free to give any conditions which are reasonable which will ensures that the objectives of this section is fulfilled and that is the appellant should not run away during the time awaiting the appeal.

As to the issue that the said order of remanding the appellant if he fails to furnish the ordered security, the learned state attorney disagreed with that point and maintained that the remand order will be according to law as far as the case has not finished yet unless he is to be released by the Court of Appeal which is the Highest Court where of that point someone may say that the case is over. She then added that if the appellant fails to furnish security and he is ordered to remain in remand custody that order will be lawful.

As to the point that there is no alternative to section 358 (a) as to what will follow if the appellant fails to furnish security, the learned state attorney Mwanamkaa responded by pointing out that logically the only remedy is to remand him even though there is no authority to that effects. This is because she added, if the appellant

will not be remanded after his failure to furnish security and he is set free, hence this section 358 (2) will become useless and powerless. The learned state attorney also disagreed with her learned brother that the appellant to be given his own recognizance as that will not amount to security to appear at the Court of Appeal. She also disagreed that the appellant to be given other conditions apart from local sureties and security of having local property amongst his sureties, because the purpose of it is to make sure that the sureties be available and answerable if the appellant do not appear at the time of appeal. Also if sureties are not local that will be difficult to trace them and the appellant will not be traced. As concerning the security of local property that will be difficult to know the genuineness of the title deed if it comes from outside Zanzibar.

As to the point that the appellant is not a Resident of Zanzibar, hence she responded by saying that, that leads to have an importance of having such a security for him to appear at the time of appeal otherwise he will be at large.

She then reacted by pointing out that section 358 (2) refers to the High Court as well and as far as the matter is still at the High Court and not at the stage of the Court of Appeal yet, this is because the judgment was given by this court and it is in this court where the oral Notice has been given. Therefore this court is bound by that section to provide security even though there would be an appeal to the Court of Appeal.

However she conceded with Mr. Mnkonje, Advocate for the appellant that those other sections in Part XII does not include the High Court but section 358 has not meant that it cannot be referred at the level of appeal at the High Court.

Finally, the learned state attorney Mwanamkaa prayed that the ruling given by this court earlier be stayed and the review should not be allowed.

Then Mr. Mnkonje, Advocate for the appellant responded to what have been argued by the learned state attorney who represented the Respondent by saying that they argued that section 358 provide for an alternative because if you compare that section with the provisions regarding bail which are sections 150 and 151 of Act No. 7 of 2004 you will find out that when an accused person is given bail those sections provide for an alternative if he fails to meet the conditions of bail, but section 358 (2) is silent and it does not provide for alternative.

Mr. Mnkonje pointed out further that for a remandee the law directs that an accused is to be brought to court for every 14 days, hence how about the person who is not a remandee but has been kept in custody for his failure to meet security under section 358 (2). The section itself is silent on what follows if the appellant fails to furnish security.

As on the issue of logic or mischief of section 358, he pointed out that, that is in relation to matters before the Court Subordinate to the High Court but not at the level where there is an intended appeal to the Court of Appeal. This is because once, a Notice of Appeal has been filed it is regarded that the matter is not in the hands of the High Court anymore.

Mr. Mnkonje also argued that, as clearly conceded by his learned friend, hence she cannot then say that section 358 is not part and parcel of part XII and that it does not refer to the matters confined to the High Court and subordinate courts.

He then submitted that it is his humble submission that the intended appeal goes beyond the High Court, hence section 358 (2) cannot be applied in this situation.

Finally, Mr. Mnkonje prayed for the ruling to be reviewed.

After examining arguments from both sides in this oral review application I remain convinced that section 358 (2) is contradicting the constitution for the reason that it curtails the freedom of a person who has been released from prison as it has appeared in this case.

After all as it has been correctly argued by Mr. Mnkonje, Advocate for the Appellant, section 358 (2) is silent on what will follow if the appellant fails to furnish the security. This gap of what will follow if the appellant fails to furnish security cannot be filled in by implication that the appellant will be remanded. The said section should have been clear on what will follow.

However even if that section had mentioned what will follow if the appellant has failed to furnish security, but there would appear difficulties in its implementation, because on one hand the appellant has been ordered to be set free, whereas on the other hand the court will make an order to remand the appellant/accused. Hence will that be a "just order" to send such a person to remand custody at the time when the same court has already set him free. I am of the considered opinion that courts should not go to the extent of putting a person who has been released by itself to remand. This is

because by so doing it will be contrary to Article 14 (1) of the Zanzibar Constitution, 1984 which requires that every person has a right to freedom, where it says that:-

“Kila mtu anayo haki ya kuwa huru na kuishi kama mtu huru”

Whereas Article 14 (2) says that:-

“Kwa madhumuni ya kuhifadhi haki ya mtu kuwa huru na kuishi kwa uhuru, itakuwa ni marufuku kwa mtu ye yote kukamatwa, kufungwa; kufungiwa, kuwekwa kizuizini, kuhamishwa kwa nguvu au kunyang’anywa uhuru wake vinginevyo isipokuwa tu”

- (a). Katika hali na kwa kufuata utaratibu uliowekwa na sheria; au
- (b). Katika kutekeleza hukumu, amri au adhabu iliyotolewa na mahkama kutokana na shauri au kosa la jinai ambalo mtu amekuwa na hatia ya kulitenda”.

The situation in this case as we have already seen is that the judgment on appeal has set the appellant free, hence according to the Constitution the said appellant is required to enjoy his freedom.

Apart from that as correctly pointed out by Mr. Mnkonje, there has been an error apparent to the ruling delivered by this court on the issue of security based on Part XII of Act No. 7 of 2004 to which according to section 351 the situation which has appeared at the appeal in this court does not include the High Court decisions awaiting the hearing at the Court of Appeal. This is because section 359 (i) which is also under Part XII talks about Notice of Appeal to be filed within 15 days and appeals to be lodged within 45 days whereas this intended appeal which is to be sent to the Court of Appeal of Tanzania requires the Notice of Appeal to be filed within 14 days and not 15 days and appeal to be lodged within 60 days and not 45 days. This already shows section 358 (2) of Act No. 7 of 2004 cannot be applied to appeals heard by the High Court to which its decision await the

hearing of the intended appeal at the Court of Appeal after Notice of Appeal has been filed.

Apart from that according to section 360 of Act No. 7 of 2004 every appeal is to be made by way of petition whereas the Court of Appeal Rules directs that appeal to the Court of Appeal as the one which is to be filed by the Respondent in this appeal are to be made by way of Memorandum and not petition.

Also under section 361 (2) says that the petitions of Appeal are to be lodged to the office of the Registrar High Court who shall then forward them to the Zanzibar Chief Justice. However the intended appeal in this case is not to be forwarded to the Zanzibar Chief Justice but to the Registrar Court of Appeal and then to the Union of Tanzania Chief Justice.

This shows clearly that section 358 (2) has no intension of including appeals to be sent to the Court of Appeal of Tanzania but only appeals which ends at the High Court of Zanzibar.

For those reasons this court is convinced that section 358 is not applicable and that gives rise to the entertainment of this urgent oral review application.

In the upshot, because of the aforementioned reasons that is why this court was led to order the appellant to be released from the educational Centre as per this court's judgment dated 12.5.2005 without any security attached to the appellant.

Sgd: Mbarouk S. Mbarouk
Judge
17.5.2005.

Reasons for the ruling have been read this 19th day of May, 2005 in the presence of Ms. Mwanamkaa (S.A) for the D.P.P. and Mr. Mnkonge (Advocate for the appellant).

Sgd: Abraham Mwampashi
R.H.C.

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

(ABRAHAM MWAMPASHI)
REGISTRAR
HIGH COURT
Z A N Z I B A R .