

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 506 OF 2021

SAID ATHUMANI AMINANI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mtwara)

(Dyansobera, J)

dated the 11th day of August, 2021

in

Criminal Appeal No. 91 of 2020

.....

RULING OF THE COURT

20th & 31st March, 2023

MKUYE, J.A.:

The appellant, Said Athumani Aminani, was charged and convicted of two counts, namely; rape contrary to section 130 (2) (e) and 131(1) of the Penal Code and impregnating a school girl contrary to section 60 A (3) of the Education Act as amended by the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016. Upon a full trial, the appellant was convicted of the 1st count of rape and was sentenced to thirty years imprisonment. He was acquitted on the 2nd count of impregnating a school girl.

Aggrieved by the decision of the District Court of Nanyumbu, the appellant sought to appeal to High Court. He lodged a notice of appeal and petition of appeal. However, at the hearing of the said appeal, the respondent Republic through Mr. Paul Kimweri, learned Senior State Attorney raised the so called legal point which touched on the court's jurisdiction to the effect that the appeal was time barred.

It was argued by the learned Senior State Attorney that, the decision to be challenged was delivered on 28th May, 2020 and was certified on 29th May, 2020 meaning that it was ready for collection. It was contended that, the appellant lodged the notice of appeal on 9th June, 2020, which was beyond the prescribed time limit under section 361 (1) (a) of the Criminal Procedure Act, (the CPA). Mr. Kimweri argued further that, the petition of appeal was equally time barred. It was his argument that the same was filed out of time since the decision of the trial court was certified and ready for collection on 29th May, 2020. He was of the view that by filing his petition of appeal on September, 2020 the appellant was late by three months. He concluded with a prayer for dismissal of the appeal for being time barred.

In reply, the record of appeal shows that the appellant stated that "I have understood all that;" whatever that meant.

The High Court agreed with the learned counsel's submission and dismissed the appeal because the notice of appeal and petition of appeal were filed out of the prescribed time.

Disgruntled with the High Court's decision, the appellant has now appealed to this Court on two grounds of appeal which can be extracted as follows:

- (1) The first appellate court erred in dismissing the appeal without considering that the appellant is a prisoner who has limited movements and depends on prisons authority and therefore collection of the trial court's proceedings and judgment could not be possible.*
- (2) The first appellate court erred in law and fact for (sic) dismissing the appeal without considering that the appellant is in prison and he filed the notice of appeal on 1st June 2020 immediately after judgment and hence the delay in filing the notice of appeal to the Court was caused by the prison authority who were responsible to do that.*

When the appeal was called on for hearing, the appellant appeared in person without any representation whereas the respondent Republic had the services of Ms. Jacqueline Werema, learned State Attorney.

On being given the floor to amplify his grounds of appeal, the appellant adopted them and opted to let the learned State Attorney respond first while reserving his right to rejoin later, if need would rise.

On her part, Ms. Werema prefaced by submitting that she was supporting the appeal. She contended that, it was wrong for the first appellate judge to dismiss the appeal for a reason that it was time barred. She elaborated that, although the notice of appeal shows that it was lodged in court on 9th June, 2020, it was endorsed by the appellant on 1st June, 2020 after the decision sought to be challenged was certified on 29th May, 2020. Likewise, the learned State Attorney contended that, although the petition of appeal was lodged in the High Court on September, 2020 the same was signed on 24th August, 2020 which was within time reckoning from 18th August, 2020 when he received a copy of proceedings and judgment.

Ms. Werema also assailed the first appellate judge for dismissing the appeal instead of striking it out while it was not heard on its merits. She made reliance on the case of **Juma Nhandi v. Republic**, Criminal Appeal No. 289 of 2012 (unreported) to support her arguments that "a dismissal" connotes that the appeal was heard and determined; whereas "striking out the appeal" connotes that the appeal was incompetent and the

appellant may have a chance to come back and refile the appeal subject to time limitation.

She, therefore, prayed to Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act (the AJA) and nullify the proceedings, quash and set aside the judgment and order thereof and direct that the appeal before the first appellate court be heard and determined on its merits expeditiously before another judge.

On his part, the appellant welcomed the concession by the learned State Attorney. He then left the matter for the Court's determination.

Section 361 (1) (a) and (b) governs the lodgement of the notice of appeal and petition of appeal and the time within which they are to be lodged. It states:

"Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant-

(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of sentence of corporal punishment only, within three days of the date of such sentence; and

(b) has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order,

save that in computing the period of forty-five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded. [Emphasis added].

It is clear from the above that appeals to the High Court from the subordinate court begin with the filing of the notice of intention to appeal within ten days of the decision sought to be challenged. A petition of appeal is required to be lodged within forty-five days of the said decision. It is important to emphasize that, if those conditions are not met, such appeal cannot be entertained by the appellate court, in this case the, High Court. However, the proviso to that section provides for exclusion of time required for obtaining a copy of proceedings, judgment or order appealed against when computing the period of forty-five days.

The first appellate Judge found that the appeal was out of time since the notice of intention of appeal was lodged on 9th June, 2020 and the petition of appeal on September, 2020. In so finding, the first appellate Judge observed that the petition of appeal was filed late since a copy of judgment and proceedings were certified on 29th May, 2020 meaning that,

they were ready for collection or rather were readily available for appeal purposes. Then the appeal was dismissed.

It would appear that the first appellate Judge looked at the dates when the notice of appeal and petition of appeal were presented for filing at the court. He did not look at the dates when the appellant expressed his intention to appeal to the prison officers which was made immediately after being committed for prison in the specified prison facility and, in the case of the petition of appeal, when the appellant was supplied with the copies of proceedings and judgment.

Regarding the notice of appeal, although the appellant did not have much to amplify his ground of appeal, we agree with him that being a prisoner, his movements were limited in the sense that he depended much on the prison authority to transmit it to the court. It is our view that, pegging the time when the documents were certified to be ready for collection for appeal purposes, was not realistic because it is not clear as to how he could have known about that.

We also note that the notice of intention of appeal at page 53 of the record of appeal was endorsed by the appellant on 1st June, 2020 which was only 3 days after the judgment. It was forwarded for filing on 9th June, 2020 which was reckoned by the court and thus making it to be

late by two days. It is important to emphasize here that after the appellant had indicated his intention to appeal through his notice of appeal he had completed his obligation. From there, it was the duty of the prison's authority to ensure that the same reaches to the court. If anything, the prison's authority is to be blamed for presenting it to court late. And, this being the case, we are satisfied that the provisions of section 361 (1) (a) of the CPA were complied with.

In relation to the issue that the petition of appeal was filed out of time, section 361 (1) (b) of the CPA what we have reproduced above is pertinent. The issue here was that the same was filed beyond the period of forty-five days stipulated under the law. Much as section 361 (1)(a) and (b) of the CPA is couched in the manner that it pegs the days from the date of judgment, it has a proviso which excludes the number of days required for obtaining a copy of proceedings and judgment. Luckily, section 363 of the CPA imposes a duty to the officer in-charge of prison in which the appellant is imprisoned to ensure compliance with section 361 (1) (b) of the CPA. It provides:

"363 If the appellant is in prison, he may present his petition of appeal and the copies accompanying the same to the officer in-charge of the prison, who shall thereupon forward the petition and

copies to the Registrar of the High Court.”

[Emphasis added]

In the case of **Nzeyimana Zeno v. Republic**, Criminal Appeal No. 458 of 2008 (unreported), the Court was confronted with a similar scenario to the case at hand. It stated as follows:

“For purpose of section 363, all communications between a serving prisoner and the appellate court in respect of the intended appeal is routed through the officer in charge of the prison where he is being held ... We also take note of section 361 (b) of the Criminal Procedure Act which requires an appeal to be lodged within forty-five days from the date of finding. We also take note that this limitation period has a saving provision which excludes the time required for obtaining proceedings, judgment or order appealed against. Since under section 363 the prison authorities are responsible for all commutations involving appellants serving prison sentenced, any delay should be explained by prison officials and not prisoners in case the prisoner is shown to have complied with section 361 (1) (a) by giving his notice of intention to appeal as has happened in the present case.” [Emphasis added]

In the case of **Andrea Mtinda v. Republic**, Criminal Appeal No. 67 of 2008 (unreported), it was also emphasized that although the provisions of section 363 do not state in so many words, the law recognizes the appellant in prison as having fulfilled the requirements of section 361 of CPA once he has presented his papers to the prison officer of the prison. The Court added that:

"It is our understanding that the time between the presentation of papers to the prison officer to the time the latter lodges them with the Registrar of the High Court, is to be excluded in computing time available for lodging under section 361."

In this case, the appeal was dismissed for being time barred since it was believed to have been lodged in September, 2020 after the impugned judgment was certified on 29th May, 2020 which was in violation of the provisions of section 361 (1) (b) of CPA. However, having perused record of appeal at page 56, we have noted that the appellant received a copy of the judgment on 18th August 2020. So, by filing the petition of appeal on 25th August, 2020 after receiving the documents on 18th August, 2020, the petition of appeal was definitely lodged within time. In this regard, we agree with both appellant and Ms. Werema that the appeal

was not time barred as was found by the first appellate Judge. It was lodged within time.

The next issue is whether it was proper for the first appellate Judge to dismiss the appeal for being time barred.

The learned State Attorney took the view that the first appellate Judge ought to have not dismissed the appeal as it was not heard on merit. Instead, it ought to have been struck out.

We agree with the State Attorney. In essence, "striking out" and "dismissal" of the appeal are different and their effects are not the same. In the case of **Juma Nhandi** (supra) cited to us by Ms. Werema, the Court gave a clear distinction between the two in the following terms:

"Dismissal and striking out of an appeal are as distinct as they have different connotations and consequences in law.

By the learned Judge dismissing the appellant's appeal implied that there was a competent appeal that he heard and disposed of. But the appellant had filed his appeal before the High Court outside the prescribed period. This implies that there was no proper appeal capable of being heard and dismissed on merit.

By dismissing an appeal which was not in the first place competently before him, the learned Judge erred in law. The difference between dismissal and striking

*out has been discussed by the Court through several decisions ...” See also **Ngoni Matengo Cooperative Marketing Union Ltd v. Alimohamed Osman** (1959) EA 577.”*

Likewise, in this case, the first appellate Judge dismissed the appeal believing that it was time barred. If that was the case, it meant that there was no appeal capable of being heard and determined due to its incompetence. By dismissing it connotes that the same was heard on its merit which was not the case. We, therefore agree, with Ms. Werema that as assuming the appeal was incompetent, it was not proper for the first appellate Judge to dismiss it. The best option was for the same to be struck out which would have enabled the appellant to come back to the court subject to the time limitation.

In the event, in view of what we have endeavoured to discuss, we agree with the learned State Attorney that the appellant’s appeal was wrongly dismissed as it was not time barred as was found by the first appellate court. Instead, we are settled in our mind that the same was filed in compliance with section 361 (1) (a) and (b) of the CPA as we have demonstrated above.

Hence, with the foregoing, we allow the appeal, quash the ruling and set aside the order of the first appellate court and in terms of section

4 (2) of the AJA Act, we order that the matter be remitted to the High Court with a direction that it should be heard by another judge on its merit. This should be done expeditiously.

Order accordingly.

DATED at **MTWARA** this 30th day of March, 2023.

R.K. MKUYE
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

S.M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 31st day of March, 2023 in the presence of Appellant in person and Mr. Enoshi Gabriel Kigoryo, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F.A. Mtaranja
F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL