

**IN THE COURT OF APPEAL OF TANZANIA
AT Mtwara**

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

CRIMINAL APPEAL NO. 622 OF 2021

**BASHIRU HASSAN MPOYO APPELLANT
VERSUS**

THE REPUBLICRESPONDENT

(Appeal from the ruling of the High Court of Tanzania, at Mtwara)

(Dyansobera, J.)

dated the 5th day of October, 2021

in

Criminal Appeal No. 123 of 2020

JUDGMENT OF THE COURT

17th & 31st March, 2023

RUMANYIKA, J.A.:

Bashiru Hassan Mpoyo, the appellant, together with another who was acquitted by the District Court of Nachingwea (the trial court), were charged with an offence of being found in possession of a motorcycle with Registration No. MC 249 BNQ make SUNLG suspected to have been stolen or unlawfully acquired contrary to section 312 (1) (b) of the Penal Code. Upon conclusion of the trial, he was sentenced to five years' imprisonment and the co-accused acquitted as stated earlier. Aggrieved by that decision,

he unsuccessfully appealed before the High Court at Mtwara. His appeal was dismissed for being time barred. Being aggrieved by the dismissal, he has preferred the present appeal challenging it.

Briefly, when the appeal was placed for hearing before the High Court on 13/10/2021, representing the respondent Republic, Mr. Paul Kimweri, learned Senior State Attorney, questioned it contending that, it was time barred. He premised his argument on the provisions of section 361 (1) (b) of the Criminal Procedure Act (the C.P.A). He submitted that, upon the judgment being pronounced, the certified copy of the proceedings of the trial court was ready for collection on 10th December, 2019 whereas the appellant filed the petition of appeal on 21st April, 2020. In the premises, Mr. Kimweri contended that, counting from 17th February, 2020 when the copies of proceedings and judgment were certified and thus at the appellant's disposal and 21st April, 2020 when he lodged the petition of appeal, the period of limitation of forty-five days had already lapsed. The first appellate court agreed with the learned attorney's submission and dismissed the appeal for being time barred. The appellant was aggrieved and preferred an appeal

before the Court on five grounds which are challenging the decision of the trial court convicting him rather than the order dismissing his appeal subject of the notice of appeal lodged on 03/11/2021, which institutes an appeal. With respect, the said five grounds of appeal contained in his petition of appeal therefore, are irrelevant to the appeal.

At the hearing of the appeal on 22/03/2023, the appellant appeared in person unrepresented whereas Ms. Jacqueline Werema, learned State Attorney, represented the respondent Republic.

At the outset, the appellant opted to let Ms. Werema submit first while him reserving his right to rejoin.

Ms. Werema supported the appeal on a ground other than those preferred by the appellant. She was candid that the appellant's appeal before the High Court was wrongly dismissed because neither was time barred nor was it proper to dismiss it if at all it was time barred. She argued that, the record of appeal showed that the appellant received the requisite copy of the proceedings on 12/12/2019 and lodged the petition of appeal thirty-one days later on 13/01/2020 which was 14 days before the lapse of the period

of 45 days prescribed under section 360(1) (b) of the C.P.A. Further, she contended that, even if the appeal was time barred, which is not the case, the first appellate court should have struck it out and not dismissing it. With regard to the way forward, she urged us to invoke the Court's revisional powers under section 4(2) of the Appellate Jurisdiction Act (the AJA) to nullify the proceedings, quash the impugned decision and set aside the resultant orders with an order remitting the record to the High Court for determination of the appellant's appeal on merits.

Rejoining, the appellant joined hands with Ms. Werema urging the Court to set aside the impugned dismissal order and direct a hearing of his appeal on merits.

We have heard Ms. Werema submit in support of the appeal albeit on a ground other than those wrongly preferred by the appellant. We also have examined the record of the appeal.

In criminal appeals before the High Court, the filing of a petition of appeal is governed by section 361 (1) (b) of the C.P.A. It has to be filed within forty-five days of the impugned finding, sentence or order, all things

being equal. However, it is common knowledge that, prisoners' movements, as is the appellant are controlled by prison officers. With regard to the timing therefore, the said forty-five days available for a prisoner to file appeal ought to have been reckoned from 7th October, 2022 when the appellant received the copies of proceedings and judgment and not 10th December, 2019 when purportedly, such copies were ready for collection. It means that, the moment he thumb printed and presented his petition of appeal to the Prison officers at Lilungu prison for transmission to court on 24th October, 2022 he was "home and dry," however long the period of delay caused by the officers may have been. This, with respect, is the gist of section 363 of the C.P.A which reads:

"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."

On his side, the series of events appearing at the bottom of his petition of appeal which were certified and presented in court by B.7540 SGT NOEL

of Lilungu Prison on 24/10/2022 will exhibit that the appellant had fulfilled the requirement of the above cited law.

The trial court's record may have indicated that at such time the copies of proceedings and judgment earlier requested by the appellant were ready for collection. However, there was nothing before the first appellate court to show when exactly that information reached him in prison where he appealed from. It is common knowledge that, because of the bureaucracy and extreme restrictions that are there, prisoners' movements including observing appeal processes they are controlled and facilitated by the prison officers. Had the learned State Attorney assisted the High Court properly, it would not have held the appellant's appeal to be time barred time.

Next, is on the propriety of the dismissal order. Dismissing and striking out of a matter in court are two different verdicts with different legal consequences. On a number of occasions this Court has pronounced itself on them. Generally, dismissal of an appeal implies that it was competently determined on merits whereas striking out implies that there was no proper appeal capable of being disposed of. See our unreported decisions in **Juma**

Nhandi v. R., Criminal Appeal No. 289 of 2012 (unreported) and **Hashim Madongo and 2 Others v. Minister for Industries and Trade and 2 Others**, Civil Appeal No. 27 of 2003 in which reference was made to **Ngoni Matengo Co-operative Marketing Union Ltd v. Alimahomed Osman** [1959] EA 577.

The above legal principle is applicable also to the present case. With respect, the course taken by the first appellate judge was not correct. It was tantamount to causing the appellant to shut up his mouth which had the effect of a total denial of a hearing on his part. Even if the appeal was time barred, which is not the case, the first appellate judge could only strike it out because that appeal had not been heard on merits.

As we are concluding, we wish to express our sentiments that, in this time-round sessions at Mtwara we had a number of appeals identical to this, one of them is **Ramadhani Rajabu @ Kules v, R.**, Criminal Appeal No. 553 of 2021 on which we pronounced our decision on 28/03/2023 in all cases faulting the first appellate judges for dismissing appeals prematurely on account of time bar.

In the upshot, in terms of section 4(2) of the AJA, we nullify the proceedings of the first appellate court dated 13/10/2021 resulting into the impugned decision which is hereby quashed. We remit the record with immediate dispatch to the High Court which is directed to determine the appeal on merits before another judge.

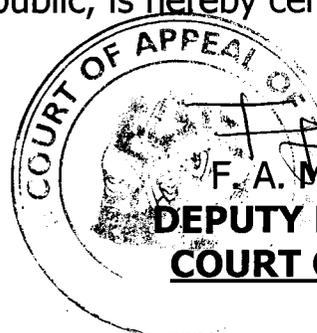
DATED at **MTWARA** this 30th day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

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

The seal of the Court of Appeal of Kenya is circular, featuring a central emblem with a scale of justice and a book, surrounded by the text "COURT OF APPEAL OF KENYA".
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL