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

**(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MJASIRI, J.A.)**

**CRIMINAL APPEAL NO. 225 OF 2008**

**MARTIN SWAI.....APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Songea)**

**(Kaganda, J.)**

**Dated 1st day of December, 2005**
**in**
**Criminal Appeal No. 53 of 2000**

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# RULING OF THE COURT

**29th & 31st July, 2013**

## RUTAKANGWA, J.A.:

The appellant was convicted by the District Court of Songea District of the offence of rape. He was jailed for thirty years. In addition, he was given 12 strokes of the cane. Aggrieved by the conviction and sentences, he unsuccessfully appealed to the High Court. The High Court, (Manento, J.), sitting at Songea, dismissed the appeal on 13th November, 2002, but in the absence of the appellant. The appellant was aggrieved and resolved to

institute an appeal to this Court, when he became aware of the outcome of his appeal.

In terms of Rule 61 (1) of the then Tanzania Court of Appeal Rules, 1979 (the Rules), the appellant was required to lodge the notice of appeal within fourteen (14) days of the date of the High Court decision. He failed to do so. He accordingly applied to the High Court for extension of time to lodge the notice of appeal out of time. This was on 4th July, 2003.

The High Court (Kaganda, J.), sitting at Songea, rejected the application on 1st December, 2005. Dissatisfied with the rejection order, which was again, given in his absence, the appellant sought to appeal against it in this Court. He accordingly instituted IR. Criminal Application No. 1 of 2008 in this Court, seeking extension of time within which to lodge his notice of appeal out of time. This was on 21st July, 2008. The application was granted on 23rd July, 2008. The appellant was granted forty-five days within which to lodge the notice of appeal. He did so on 29th July, 2008, hence this "appeal".

When the appeal was called on for hearing, the appellant appeared before us in person and was unrepresented. The respondent Republic was

represented by Mr. Maurice Mwamwenda, learned Senior State Attorney. To be fair to the appellant, we have to point out that he immediately sought leave to amend his notice of appeal, and substitute the name of "A.R. Manento, J." for " S. S. Kaganda, J."

Before we attempted to hear the appeal on merit, therefore, we sought the views of Mr. Mwamwenda on whether or not there was a competent appeal before the Court worth our determination. We were forced to take this course of action due to the following reasons, one of which was apparently given by the appellant.

**One,** as indicated above, the appellant was initially aggrieved by the decision of Manento, J. As he had defaulted in lodging the notice of appeal in time, he had properly although unsuccessfully sought extension of time to do so in the High Court. Aggrieved by the High Court's (Kaganda, J.) refusal order, he intended to prefer an appeal against it, as we have already shown.

Regardless of the merits or otherwise of the intended appeal, one would have expected the notice to appeal to show that he was aggrieved by the decision of the High Court rejecting his application for extension of

time. This would have been in accord with the mandatory requirements of Rule 61 (2) of the Rules. Instead, the notice of appeal found at page 23 of the record of appeal, shows that the appellant is appealing against the decision of Kaganda, J. dated 1st December, 2005 in Criminal Appeal No. 53 of 2000. The said notice of appeal further states that, the appellant is appealing against the conviction for rape and a sentence of thirty (30) years imprisonment. This explains his unacceptable last minute attempts to "amend" the notice of appeal.

**Two,** notwithstanding the clear contents of the notice of appeal, the memorandum of appeal lodged in this Court, on an unknown date, contains eight substantive grounds of appeal, all attacking the decision of the trial court and not the decision of either Manento, J. and/or Kaganda, J. This means there is no memorandum of appeal on record in support of the notice of appeal.

**Three,** the High Court in the application for extension of time was wrongly moved. The chamber summons cited "section 45 and 46 of the court rule Act, 1979."

**Four,** and more important, all the above deficiencies in the notice of appeal and Chamber summons notwithstanding, we were a shade unsure as to whether the appellant has any right of appeal against the order of the High Court refusing his application to lodge the notice of appeal out of time.

Addressing himself to these crucial legal issues, Mr. Mwamwenda pressed us to strike out this purported appeal. His reasons were that the appellant could not appeal against the judgment of Manento, J. as he is yet to lodge any notice of appeal in respect to it. Two, the High Court, having been wrongly moved ought to have struck out the application for extension of time. Three, the memorandum of appeal is misconceived.

The appellant urged for wisdom to prevail so that he may have his day in Court and vindicate himself.

After giving the submissions of Mr. Mwamwenda and the appellant the benefit of an objective consideration and addressing ourselves to the clear provisions of the law, we have found ourselves in full agreement with the position taken by the learned Senior State Attorney. Guided by settled law, assuming that the appellant had a right of appeal to this Court against

the decision of Kaganda, J., we are settled in our minds that this appeal would have been held incompetent on account of being instituted by an incurably defective notice of appeal. As we have attempted to demonstrate above, there is no valid notice of appeal instituting an appeal, in terms of Rule 61 (1) and (2), against the decision of Kaganda, J. Decisions of the Court supporting this stance are now innumerable. However, we can quickly refer to a few, namely, **Majid Goa Vedastus v. R.,** Criminal Appeal No. 268 of 2006, **Emmanuel Andrew Kanengo v. R.,** Criminal Appeal No. 432 of 2007, **Daud Mwampamba v. R.,** Criminal Appeal No. 204 of 2009, **John Petro. V. R.,** Criminal Appeal No. 130 of 2010, **Elia Masena Kachala and Two Others v. R.,** Criminal Appeal No. 156 of 2012, **Hussein Ramadhani v. R.,** Criminal Appeal No. 52 of 2013 (all unreported).

In **John Petro v. R.,** (*supra*), the Court succinctly stressed that:-

> *"It is now stressed law that under Rule 61 (2), it was a mandatory requirement for the notice of appeal to state the nature of the conviction, sentence, order, or finding of the High Court against which it is desired to appeal. Failure to do*

*so rendered, and still renders under the 2009 Court Rules, the purported appeal incompetent."*

In view of this, had the appellant a right of appeal against the rejection order of Kaganda, J., we would have forthwith struck out this appeal on this ground. However, we shall go further and express ourselves on the fourth reason given earlier on.

As it is now obvious, the appellant's intention for intents and purposes, was to appeal against the order of Kaganda, J. and not against the judgment of Manento, J. as he is yet to lodge a notice of appeal against that decision. As such, he cannot so far institute any competent appeal against that decision. The critical question here is whether the appellant has a right of appeal against the decision of Kaganda, J. The answer to this question lies in the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the Act).

There is no gainsaying that there is no inherent right of appeal. This is common knowledge. A right of appeal is either constitutional or statutory. For this reason, we entertain no doubt on the fact that subject to

prescribed conditions, the appellant had an undeniable right of appeal, under section 6 (7) (a) of the Act, against the decision of Manento, J. However, that right was circumscribed by Rule 61 (1) of the Rules (and now Rule 68 (1) of the Tanzania Court of Appeal Rules, 2009 (the new Rules)). That right could only be enjoyed if the intended appellant lodged his notice of appeal within fourteen days of the impugned decision. The law is, all the same, not that draconian. In section 11 (1) of the Act, the High Court is given powers to "extend the time for giving notice of intention to appeal from a judgment of the High Court." This Court enjoyed concurrently with the High Court this power under Rule 8 of the Rules. However, effective from 1st February, 2010, this power is derived from Rule 10 of the new Rules.

Since this power was, and still is, shared concurrently, it was provided as follows in Rule 44 of the Rules:-

> *"Whenever application may be made either to the Court or to the High Court,* ***it shall in the first instance be made to the High Court,*** *but in any criminal matter the Court may in its discretion, on application or* ***of its own motion,***

***give leave to appeal or extend the time for the doing of any act,*** *notwithstanding the fact that no application has been made to the High Court."*

*[Emphasis is ours.]*

The provisions of Rule 44 have been retained in the new Rules in Rule 47.

In the light of the above, we are increasingly of the view that after the High Court had refused to grant the appellant an extension order, he had a right, to what has now become popularly known as a second bite to this Court under Rule 44 of the Rules. Strictly speaking, he had no right of appeal and this has been made clear in a number of this Court's decisions on the issue. We have clearly pronounced ourselves on this that an intending appellant who fails to secure an extension order under section 11 (1) of the Act, "cannot access the Court for such an order through the appellate process", but by way of a second bite under the Court Rules. See, for instance:-

a) **Dickson s/o Mhagachi, v. R.,** Criminal Application No. 1 of 2004,

b) **M/S Serengeti Road Services v. CRDB Ltd,** Civil Application No. 12 "A" of 2011,

c) **Josephine Kalalu v. Isaac Michael Malya,** Civil Reference No. 1 of 2010, and

d) **Braighton Sospeter @ Mzee & Two Others v. R.,** Criminal Appeal Nos. 358-60 of 2009 (all unreported).

e) **N.B.C. v. Star Transport Company Ltd.** [1997] T.L.R. 293.

In **Josephine Kalalu** (*supra*), the Court said:-

> *"Established law is that if a party failed to get an order of such extension of time from the High Court, a second bite in this Court was permissible under Rule 8 of the Rules..."*

Such right still persists under Rule 10 of the new Rules, but not a right of appeal. For this reason, we further hold without any demur that as the appellant has no right of appeal against the decision of Kaganda, J. this purported appeal is incompetent and ought to be struck out. We shall not strike it out for the purposes of retaining the records in order to remedy the irregularities committed in the High Court. We have sought inspiration, in so acting, from the Court's decisions in **Tanzania Heart Institute v. The Board of Trustees of N.S.S.F.,** Civil Application No. 109 of 2008 and

**Chama Cha Walimu Tanzania v. The Attorney General,** Civil Application No. 151 of 2008 (both unreported).

For the purpose of completing the record, we are enjoined from failing to rule on the competence of the application for extension of time to lodge the notice of appeal out of time in the High Court. As alluded to earlier on in this ruling, the appellant had moved the High Court under what he labelled "sec. 44 and 45 of the court rule, Act 1979. "The learned State Attorney, who represented the respondent Republic and resisted the application, had drawn the attention of the learned judge to this irregularity. It was his strong contention that the court had been wrongly moved. To him the proper enabling provisions were rule 44 and "section 8 (1) (a) of the Appellate Jurisdiction Act, 1979." He went further and said:-

> *"These laws provide for concurrent jurisdiction for extension of time. The same was observed in the case of* ***N.B.C. v. Star Transport Company Ltd.*** *[1997] TLR 29."*

He was partly correct and partly wrong.

In our respectful opinion, the proper section of the Act is section 11 (1). This is the provision which gives the High Court power to extend time within which to lodge a notice of appeal out of time. As far as this Court is concerned, the proper rule was Rule 8 under the Rules, and it is Rule 10, under the new Rules. It goes without saying, therefore, that the appellant/applicant had wrongly moved the High Court. The High Court, therefore, was supposed to strike out the incompetent appeal instead of determining it on merit. In the exercise of our revisional powers under s. 4 (2) of the Act, we hereby nullify those proceedings in the High Court, quash them as well as the order rejecting the application for extension of time and set them aside. The effect of this order is to place the appellant in a position of one who has never made any application under s. 11 (1) of the Act. This situation compels us, then, to consider the prayer of the appellant urging us to use wisdom and enable him have his day in Court. We are convinced that this is not a misplaced prayer. It can be accommodated under Rule 47 of the Rules, so as to do substantive justice in this long standing case.

criminal matter, has absolute discretion, on application or of its own motion, to "extend the time for the doing of any act, notwithstanding the fact that no application has been made to the fact." We have very often exercised this discretion in favour of such hapless appellants: See, for instance, **Braiton Sospeter @ Mzee & Two Others** (*supra*). Acting under Rule 47 of the Rules, because the appellant has been in prison for over thirteen (13) years, we grant him thirty (30) days from the date of this ruling within which to lodge his notice of appeal against the judgment of Manento, J., without sending him back to the High Court.

We order accordingly.

**DATED** at **IRINGA** this 29th day of July, 2013.

E. M. K. RUTAKANGWA
**JUSTICE OF APPEAL**

B. M. LUANDA
**JUSTICE OF APPEAL**

S. MJASIRI
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

M.A. MALEWO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**