IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A. AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 319 OF 2007

LUCHALAMILA MAWANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Tabora)

(Mwita, J.)

Dated the 18th day of December, 2006
in
Misc. Criminal Application No. 120 of 2004

JUDGMENT OF THE COURT

4 & 7 JUNE, 2010

RUTAKANGWA, J.A.:

Article 117(1) of the Constitution of the United Republic of Tanzania, 1977 (henceforth the Constitution) creates the Court of Appeal of the United Republic of Tanzania (the Court, hereafter), and provides that its jurisdiction shall be as "*provided in the Constitution or any other law*". It is further provided in sub-articles (2) and (3) that:

"(2) The functions of the Court of Appeal shall be to hear and determine every appeal brought before it arising from the judgment or other decision of the High Court or of a magistrate with extended jurisdiction.

(3) A law enacted in accordance with the provisions of this Constitution by Parliament or by the House of Representative of Zanzibar ***may make provisions stipulating procedure for lodging appeals in the Court of Appeal, the time and grounds for lodging the appeal and the manner in which such appeals shall be dealt with."*** [Emphasis is ours].

One such law enacted by our Parliament is the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (hereafter, the Act).

The Act was specifically enacted to "provide for Appeals to the Court of Appeal" in all Constitutional, criminal and civil matters, either with or without leave and/or with a certificate on a point law: see, sections 5,6 and 7 of the Act.

Section 12 of the Act empowers the Chief Justice to:-

> *"... make rules of court regulating appeals to the Court of Appeal and other matters incidental to the making, hearing or determination of those appeals".*

In the exercise of this power, the Chief Justice made the Tanzania Court of Appeal Rules, 1979 (hereinafter the Rules) which were revoked by the 2009 Rules published in G.N. No. 368 of 2009 dated 6th November, 2009. These latter Rules came into operation on 1st February, 2010.

The Rules, in Rule 3(1) (now Rule 4(1)) provided that the practice and procedure in connection with appeals and intended appeals from the High Court was to be as provided in the said Rules. However, the Court was given discretion to direct a departure from them in the interests of justice.

Part IV of the Rules dealt with criminal appeals. Rule 61(1) of the Rules (now Rule 68 (1) provided that any person who desired to

appeal to the Court had to give a written notice in writing. Such notice was to be lodged with the Registrar of the High Court where the impugned decision was given within fourteen days. Unlike in civil appeals, it was clearly provided in this sub-rule that such "***notice of appeal shall institute the appeal.***"

Equally important was sub-rule 2 (now R 68(2)), which provided as follows:-

> *"Every notice of appeal* ***shall state briefly the nature of the acquittal, conviction, sentence, order, or finding against which it is desired to appeal,*** *and shall contain sufficient address at which any notices or other documents connected with the appeal may be served on the appellant or his advocate, and subject to Rule 14, shall be signed by the appellant or his advocate".* (Emphasis is ours].

With this exposition of the law governing the jurisdiction of the Court and the mandatory procedure of instituting appeals in the

Court, we can now safely tackle and provide an answer to the intriguing legal issue posed by this purported appeal. We are using the word *"purported"* deliberately for a reason which shall soon become evident.

The appellant was sentenced by the District Court of Nzega District to thirty (30) years imprisonment after it had convicted him of the offence Rape. Aggrieved by the conviction and sentence he resolved to appeal to the High Court against both. Apparently, he failed to institute the intended appeal within the time prescribed under section 361 of the Criminal Procedure Act, Cap 20, Vol. I R.E. 2002. He accordingly applied for extension of time within which to lodge both the notice of intention to appeal and the petition of appeal out of time. The application for extension of time was dismissed by the High Court at Tabora (Mwita, J.). Dissatisfied with the High Court ruling and order, he wanted to appeal to this Court.

As already shown above, criminal appeals against decisions of the High Court in the exercise of its criminal jurisdiction, are

instituted by lodging notices of appeal in the High Court registry within the prescribed time. The appellant took steps to institute such an appeal against the ruling of the High Court, and thereafter lodged his memorandum of appeal.

When the appeal came up for hearing before us, the appellant appeared in person and was unrepresented. For the respondent Republic, Mr. Edgar Luoga, learned Senior State Attorney, appeared. The appellant decided to adopt the three grounds of complaint he had enumerated in the memorandum of appeal. He had nothing to say in elaboration.

On his part, Mr. Luoga resisted the appeal from two fronts. He challenged its competence as well as its merits. We heard him first on the issue of the competence or otherwise of the appeal before us (which was raised by the Court). He was brief but focused.

It was Mr. Luoga's contention that this appeal is patently incompetent. He argued that the appellant is to date yet to lodge an

appeal in the High Court against the conviction for rape entered against him by the trial District Court and the thirty year jail sentence. He pointed out that what was before the High Court (Mwita, J.) was an application for extension of time as already elaborated on earlier. That application, he stressed, was dismissed by the High Court, and if the appellant had any right of appeal to this Court, that right ought to emanate from Misc. Criminal Application No. 120 of 2004 in which he was seeking extension of time. We were then taken through the appellant's notice of appeal found on page 33 of the record of appeal.

In his notice of appeal which is supposed to have instituted this appeal, Mr. Luoga noted, the appellant is not appealing against the decision of the High Court which dismissed his application, but against the conviction for rape. To Mr. Luoga, this notice of appeal, in the light of the clear provisions of Rule 61(2) of the Rules, is incurably defective and renders this purported appeal incompetent. He, therefore, urged us to strike out this incompetent appeal.

The appellant had nothing to say in response. This is understandable, the issue being purely a legal one and he is a lay person.

We have had the chance of perusing the impugned notice of appeal. If the appellant has the intention of challenging the ruling and order of Mwita, J. dismissing his application for extension of time then it bears out completely Mr. Luoga. This notice of appeal does not state the real order the appellant was bent on appealing against. It reads, partly, as follows:-

> "***TAKE NOTICE*** *THAT* ***LUCHAMILA s/o MINANGA*** *appeals to the Court of Appeal of Tanzania against the decision of the Honourable Mr. Justice D.M. Mwita given at Tabora on the 18th day of December, 2008* ***when the Appellant was convicted of RAPE c/s No. 13 & 131 (sic) as Replaced by section 5 & 6 of SOSPA No/ 4/98 and sentenced to THIRTY (30) YEARS IN JAIL".***

From our earlier discussion, it must be obvious that this notice of appeal is incurably defective. This is because the High Court (Mwita, J.) never convicted the appellant of any offence, leave alone Rape, and then sentenced him to thirty years imprisonment, either on 18th December, 2006 or on any other date. There is, therefore, no notice of appeal before us, against the order of the High Court at Tabora dismissing the appellant's application for extension of time.

As we have already sufficiently demonstrated in this judgment, a criminal appeal in this Court against any decision, finding, sentence, order, etc, of the High Court would have been appropriately instituted under the Rules by the intending appellant duly lodging a notice of appeal which fully complied with the mandatory requirements of Rule 61(1) and (2) of the Rules. It was then and only then that the Court would have become seized with jurisdiction conferred upon it by the Constitution and the Act, to entertain the appeal. If there was total or substantial non compliance with these provisions, there was no appeal before the

This is still the case under the new 2009 Rules.

In view of the clear stance of the law, we are constrained to hold, more in sorrow than in fear of offending anybody, that there is no competent appeal by Mr. Luchamila s/o Mawanga against the order of Mwita, J. dated 18th December, 2006 in Misc. Criminal Application No. 120 of 2004. Since there is no appeal before us, we cannot even invoke the provisions of Rule 4 (formally Rule 3), and /or Rule 47 (formerly Rule 44) to salvage the situation. It would have been a different matter, if we had a competent appeal and the problem was with the memorandum of appeal, for instance. We have, therefore, no option in the circumstances, but to strike out this incompetent appeal.

All said and done, we hereby strike out this abortive appeal. The appellant is at liberty to pursue his intended appeal by applying for extension of time to lodge a proper notice of appeal in

accordance with the prevailing law. If he does so, it is our expectation that it will be given the urgency it deserves.

DATED at TABORA this 5th day of June, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL