

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

**(CORAM: KILEO, J.A., MASSATI, J.A. And ORIYO, J.A.)**

**CRIMINAL APPEAL NO. 363 OF 2008**

<p><b>1. MBEHO NGWEMBE</b>  <b>2. MATONYA DUKA @ GANGOTA</b>  <b>3. GAITAN ADAM @ MGANGA</b></p>	<p style="font-size: 2em;">}</p>	<p>.....<b>APPELLANTS</b></p>
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**VERSUS**

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

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

**(Masanche, J.)**

**dated 6<sup>th</sup> day of March, 2008  
in  
Criminal Appeal No. 61 of 2003**

**JUDGMENT OF THE COURT**

**17<sup>th</sup> & 23<sup>rd</sup> March, 2010**

**ORIYO, J.A.:**

This is a second appeal. The appellants were convicted as charged by the District Court of Kondoa, of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16, R.E. 2002. Each was sentenced to the statutory minimum sentence of 30 years imprisonment and 12 strokes of the cane.

The appellants' appeals to the High Court against conviction and sentence were unsuccessful. The learned first appellate judge struck out the appeals for being time barred. With regard to the first and second appellants' joint appeal, the learned judge stated as follows:

".....after the right to appeal was explained to them, they did not express their intention to appeal. They did not give notice to appeal either."

Further, the learned judge added:

"But that is not all. The record shows that the appellant **Mbeho Ngwembe alias Chilosa and Matonya Duka @ Hongotu** did plead guilty to the offence they were facing..... After the charges were read to them, the accused persons....said **it is True**"

The learned judge went through the pleas of guilty entered by the other two appellants throughout and the fact that they raised no objection to the admission of exhibits.

It is clear to us here that the learned first appellate judge, after finding that the appeals by the first and second appellants were time barred went ahead to consider what appears to be the merits of the appeal itself.

At the hearing of the appeal before us, Mr. Nchimbi learned State Attorney appeared for the respondent Republic while the appellants appeared in person. The appellants adopted the grounds of appeal in their respective memoranda of appeal.

Regarding the appeal by the third appellant, the learned State Attorney stated that the appeal is not properly before us because he is appealing to this Court against the merits of the appeal. He added that the proper cause of action for the third appellant was to apply for leave of the

Court to appeal in the High Court out of time. Otherwise he asked us to strike out the appeal for being incompetent.

When considering the third appellant's appeal, the learned High Court Judge stated as follows:

"The third appellant, on the date of judgment, did not express intention to appeal against the judgment. Nor did he give notice of appeal. So, as Mr. Nchimbi says, when the petition got filed on 11.08.2004, the appellant Gaitan, was time barred."

Our perusal of the record show that the third appellant's Notice of Intention to Appeal was forwarded to the District Court of Kondoa by a Saving Telegram from Kondoa District Prison with reference number Sav. No. 112/DO/3/VII/119 dated 09.03.2004. A copy of the telegram was also forwarded to the High Court at Dodoma. In the same telegram the third appellant asked the court to supply him with copies of proceedings and

judgment to enable him lodge the appeal. Upon receipt of the said notice of appeal, the court made the following endorsement thereon:

“(ii) R/O Cause it typed and supply to the applicant as requested.

(Signed)

10/3/2004.”

A copy of the Petition of Appeal on record shows that the third appellant received a copy of the judgment on 31/7/2004 and lodged the appeal on 8/8/2004; a period of only one week after receipt of the judgment; in compliance with the provisions of section 361 of the Criminal Procedure Act.

It is obvious from these two documents, that the third appellant’s Notice of Appeal was filed within less than 10 days and the Petition of Appeal within less time than the legal requirement of 45 days. We are certain that had these two documents been brought to the attention of the

learned first appellate judge, he would have come to a different conclusion as the third appellants appeal had been filed within time.

Regarding the joint appeal by the 1<sup>st</sup> and 2<sup>nd</sup> appellants, according to the original record their appeals were timely filed as well. Their Notice of Appeal is dated 20/7/2003 with thumb prints of the appellants; signed and forwarded by the Prison Officer. Their appeals, that is the memorandum of appeal, was presented for filing on 11/8/2004, that is a period of less than 14 days from the date of receiving copy of the judgment on 31/7/2004.

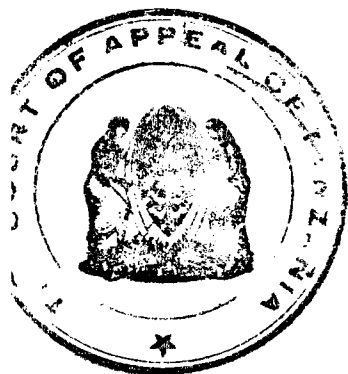
From the foregoing chronological order of events, the first and second appellants' appeal cannot be said to have not been timely filed.

After going through the records of the two lower courts and having satisfied ourselves that the notices of appeal as well as the memoranda of appeal were timely filed the issue now is what happens to the learned judge's erroneous decision. With respect, the learned State Attorney did not take us this far. It is our view that the fact that the learned judge considered and determined the appeals on a misconception that they were

time barred, was sufficient to dispose of the appeals. But the learned judge proceeded to determine the joint appeal on merit.

We have given a serious consideration of the matter and we have decided to exercise the Court's revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 to cure the error committed by the High Court. We therefore revise and quash the proceedings of the High Court in **DC Criminal Appeal No. 61 c/f 62 of 2004** and the order dated 6 March, 2008 is set aside. We order that the records be remitted to the High Court for it to hear the appeals on merit.

DATED at DODOMA this 23<sup>rd</sup> day of March, 2010.



E. A. KILLEO  
**JUSTICE OF APPEAL**

S. A. MASSATI  
**JUSTICE OF APPEAL**

K. K. ORIYO  
**JUSTICE OF APPEAL**

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

A handwritten signature in black ink, appearing to read "E. Y. Mkwizu", written over a horizontal line.

E. Y. MKWIZU  
**DEPUTY REGISTRAR**