IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., MASSATI J. A. AND ORIYO, J. A.)

CRIMINAL APPEAL NO 162 OF 2008

BETWEEN

INYASI GABRIEL..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

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

[Kwariko, J.]

dated 25th July 2007
in
DC Criminal Appl No. 15 of 2007

RULING OF THE COURT

11th & 18th March, 2010

KILEO, J. A.

The appellant Inyasi Gabriel was convicted of the offence of rape contrary to section 130 and 131 of the Penal Code by the District Court of Singida and was sentenced to the mandatory term of life imprisonment as the victim was a child below the age of 10 years. His appeal to the High Court was struck out (Lila, J) for the reason that it was time barred. His attempt to have time within which to appeal

enlarged was unsuccessful. The learned judge who heard the application (Kwariko, J.) found that there was not sufficient cause advanced for the delay in filing the memorandum of appeal. Furthermore, after what appears to be a consideration of the evidence, the learned judge found that the appellant's appeal had very slim chances of success, anyway. His appeal to this Court met with a preliminary point of objection raised by Ms Neema Mwanda learned Senior State Attorney appearing for the Respondent Republic. Notice of the preliminary objection had been lodged earlier and served upon the appellant. The objection is the subject of this ruling.

At the hearing before us the appellant appeared in person. The Notice of preliminary objection initially contained two points but Ms Mwanda dropped the second point and remained with the first one. In this point it is submitted that the appeal is improperly before the Court. Arguing the preliminary objection before us Ms Mwanda submitted that the appeal was improperly before the Court for two reasons. One, that it was not filed within the time specified by the law and secondly that the grounds of appeal go to the merits while the decision, the subject of appeal was concerned only with whether there was sufficient cause for extending the time to appeal. This Court availed to the learned Senior State Attorney certain documents which were in the record of the High Court in DC CR. APPEAL NO. 18 of 2006 and asked her to consider

whether, in view of those documents, the appellant's appeal to the High Court was in the first place time barred as claimed by the High Court (Lila, J.) These documents included a letter from the Officer in charge of Singida Prison dated 4. 1. 2006 which was accompanied with the appellant's notice of intention to appeal. The letter with reference SAV: No: 112/SING/1/VIII/303 was received in the High Court at Dodoma as per date stamp on 6.01.2006. The notice of intention to appeal is dated 29/12/2005. The memorandum of appeal which was endorsed by the Officer in charge of the prison show that the appellant gave his notice of intention to appeal the same day that the judgment in the District Court was delivered, which appears to have been on 29th December 2005. He received the copy of judgment on 17/2/2006 and his grounds of appeal were forwarded on 20.03.2006 which was within the 45 days of the date in which he received the copy of judgment.

After she had perused the above documents Ms Mwanda readily conceded that the appellant's appeal in the High Court was in time. She asked the Court to invoke its powers of revision provided for under section 4 (2) of the Appellate Jurisdiction Act to quash and set aside the proceedings and orders in both the case before Lila, J. and the application before Kwariko, J.

The High Court was prompted by Mr. Mayeye, learned State Attorney to satisfy itself on whether the appeal was in time. Lila J. having perused the record found that the appeal was time barred as it was presented for filing on the 12th day of April 2006. What escaped the learned judge's attention is the endorsement by the officer in charge of the prison that the memorandum of appeal was forwarded on 20th day of March which was well within the 45 days provided for after receipt of the copy of judgment.

Section 361 (1) of the Criminal Procedure Act, Cap 20 states:

> **(1) 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 a 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.

The letter from the officer in charge of prison forwarding the petition of appeal is dated 20.03.2006 which tallies with the entries in the petition of appeal. This letter along with the petition of appeal does not bear the court's date stamp which signifies poor record keeping. It would not be fair to blame the appellant for the court's poor record keeping. The judge relied only on the endorsement of the RMA that it was presented for filing on 12th day of April 2006 without considering the fact that the letter from the prison authority forwarding the petition of appeal was dated 20.03.2006. What the appellant, who was in prison, was required to do was to present his petition of appeal to the officer in charge of the prison, which he did. Section 363 of the CPA is relevant in this respect. It provides:

"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."

We are of the settled mind that the import of this provision is that once an appellant who is in prison has presented his petition of appeal to the

officer in charge of the prison as was the case in the matter before us, then he ought to be taken as having complied with the requirements of section 361 (1) (b) of the CPA. We draw inspiration in our holding from Rule 75 (1) of the Court of Appeal Rules, 2009 (previously Rule 68), which caters for appellants who are in prison. The said provision states:

> **"75.-(1) If the appellant is in prison, he shall be deemed to have complied with the requirements of Rules 68, 72, 73 and 74 or any of them by filing Form B/1 and handing over to the officer in charge of the prison in which he is serving sentence his intention to appeal and the particulars required to be included in the memorandum of appeal or statement, pursuant to the provisions of those Rules."**

Rules 72 and 75 are the ones most relevant with regard to our drawing of inspiration. Rule 72 provides for time within which a memorandum of appeal is to be filed. In the case of an appellant who is not in prison the memorandum is supposed to be filed within twenty one days of receipt of the record of appeal. In the case of an appellant who is in prison, the time between the appellant's conviction and sentence and his arrival at the prison to which he was committed as well as the time between the signing of the form, memorandum of appeal or statement to the officer in charge of the prison and its lodging by him with the

Registrar of the High Court or the Registrar or Deputy Registrar, as the case may be is to be excluded in computing the time available for lodging the memorandum of Appeal in the Court. (Rule 75 (2).

When the appellant was given an opportunity to address the court he made the following statement:

> *"It is not true that I filed the appeal late. I filed my appeal in time but being under the prison authority I don't know if it was brought in time. I pray my appeal be heard. I pray the court to look at its record."*

It appears that despite the appellant's plea the court did not give its record a careful scrutiny. Unfortunately this is not a state of affairs that is unique to this case. Our experience, particularly in the course of these sessions, show that often times a trial court's (and even High Court's) records especially when it comes to such documents as notices of appeal and petitions of appeal are not thoroughly scrutinized by the High Court. The non-scrutiny of these records may sometimes interfere with an appellant's right to a trial within reasonable time.

If the learned judge had properly scrutinized the contents of the documents we have discussed above we have no doubt that he would have found that the appeal by Inyasi Gabriel was within time.

In the result, having deliberated on the matter as above we find that the learned judge in DC. CR. APPEAL No 16 of 2006 misdirected himself when he found that the appeal by Inyasi Gabriel before him was time barred. In the same vein, the application before Kwariko, J. which was born out of the order of striking out of the appeal by Lila, J. was a misconception. We are, in the circumstances inclined to agree with Ms Mwanda who at the end appears to have abandoned her preliminary objection, that this is a fit case to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, which we hereby do, to quash and set aside all the proceedings and orders made pursuant to DC. CR. APPEAL No. 18 of 2006 and Misc Cr. Application No.15 of 2007. The proceedings and orders in the above mentioned matters are quashed and set aside. The matter is remitted to the High Court for it to proceed to hearing of the appeal before another judge other than the two who have already handled it.

It is ordered accordingly.

Dated at Dodoma this 16th Day of March 2010

E. A. KILEO
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.

E. Y. MKWIZU

DEPUTY REGISTRAR