**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

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

**CRIMINAL APPEAL NO 265 OF 2006**

**DAVID MATIKU ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Decision/judgment of the High Court of Tanzania at Mwanza)**

**(Mihayo, J.)**

**dated the 20th day of September, 2006**
**in**
**Criminal Appeal No. 34 of 2005**

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**RULING OF THE COURT**

17 & 23 February, 2011

**MASSATI, J.A.:**

The appellant was convicted as charged, with the offence of robbery with violence, contrary to sections 285 and 286 of the Penal Code, (Cap.16 R.E. 2002) by the District Court of Tarime, in Mara Region. He was sentenced to 30 years imprisonment and twelve strokes of the cane. His appeal to the High Court (Mihayo, J.) was dismissed in its entirety. Still aggrieved, he has preferred an appeal to this Court.

In his five point memorandum of appeal, the appellant intended to assail the judgments of the two courts below on the major ground of insufficiency of evidence. At the hearing, the appellant was prepared to argue his appeal on his own. The Republic/respondent, was represented by Mr. Seth Mkemwa, learned State Attorney.

When the appeal was called on for hearing, Mr. Mkemwa rose to argue a point of preliminary objection, notice of which he had earlier filed in Court and served on the appellant this morning. That notwithstanding, the appellant was ready to proceed with the hearing of the preliminary objection.

The Respondent's point of objection was that:

> *" The Notice of appeal is time barred as per Rule 61(1) of the Tanzania Court of Appeal Rules 1979."*

Mr. Mkemwa, submitted that under Rule 61(1) of the Court of Appeal Rules, 1979 (old Rules) the appellant was required to file his notice of appeal within 14 days of the date of decision. In the present case, he submitted, the decision of the High Court was delivered on 20/9/2006. So, that notice should have been filed, latest, by 3/10/2006. Instead, it was filed on 13/10/2006; 10 days late. The notice was thus filed out of time. He went on to argue that, although the appellant appears to have signed the notice on 2/10/2006, there is no endorsement by the prison officer-in-charge as to the date and time he received it from the appellant. So, it was his view, that since a notice of appeal institutes an appeal, and since the notice in this case was filed out of time, and therefore incompetent, the appeal is also incompetent and should be struck out.

On his part, the appellant argued that since the judgment of the High Court was delivered in his absence on 20/9/2006, he came to know the results on 2/10/2006, and immediately launched his notice to the prison officer in-charge on 2/10/2006. If the latter delayed in transmitting it to the Deputy Registrar, he was not to blame. He prayed that we proceed to hear the appeal and dismiss the preliminary objection.

There is no dispute here, that a criminal appeal to this Court is instituted by filing a Notice of Appeal. Under the old Rules, the governing Rule was Rule 61 (1). Under that rule, the Notice of Appeal has to be lodged within 14 days of the date of the decision appealed against. However, for appellants who are in prison, Rule 68 (2) gives them certain benefits in the computation of time for the purposes of Rule 61(1). It provides thus:

> *"68(2) In any such case, in computing the time limited for lodging such notice .... there shall be excluded:-*
>
> *(a) the time between the appellant's conviction and his arrival at the prison at which he was committed; and*
>
> *(b) the time between the signing of the form, memorandum 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."*

But Rule 68 (3) is also important:-

> *"68 (3) An officer in-charge of a prison receiving the form, memorandum of appeal or statement under this rule,* ***shall*** *forthwith endorse them with the* ***date*** *and* ***time*** *of receipt and shall forward them to the Registrar of the High Court, or the Registrar or deputy registrar as the case may be."*

In our view, the application of Rule 68(2)(b) is conditional upon the prison officer-in-charge complying with Rule 68(3), in which the law imposes a duty upon him to endorse the **date** and **time** of receiving any of the documents listed therein from a prisoner/appellant. If this is done the period of limitation for filing the Notice of Appeal, will be reckoned from the date of the decision to the date and time endorsed by the prison officer in charge. If such date and time endorsement is not shown, time will be reckoned from the date of the decision appealed against to the date of filing it in court shown in the Notice.

In the present case the date of the decision of the High Court was 20/9/2006. The appellant has complained that he was not present when the judgment was delivered, impliedly inviting us to exclude such time until he came to know of it. But under Rule 68 (2) cited above, there is no room for excluding such time. This means that if an appellant absents himself from attending on the day of his judgment, he only does so at his own risk for the purposes of computing time for filing a notice of appeal. If he absents himself and the time for filing the notice lapses, his only remedy is to apply for extension of time. So, in this case, time began to run on 20/9/2006, which was the date of the decision. And as rightly pointed out by Mr. Mkemwa, the 14 days lapsed on 3/10/2006.

The appellant also pointed out that he presented his notice on 2/10/2006. It is true, that the notice appears to have been *"signed"* by the appellant on that date. But the date of *"signing"* by the Appellant, is not necessarily the date of presenting it to the prison officer in-charge, who, as shown above was supposed to have endorsed the date of such receipt either immediately after the *"certificate"* and signature, or below his signature. That endorsement is missing in the Appellant's Notice of Appeal. Therefore the period of reckoning for the purposes of Rule 61(1)

remains to be between 20/9/2006 and 13th October, 2005 when it was lodged in the High Court. As argued by Mr. Mkemwa, this was 10 days late.

In a number of decisions we made in this same sessions here in Mwanza, we emphasized that it was necessary for the prison officer in-charge to strictly comply with Rule 68(3) of the old Rules, if the appellants are to benefit from Rule 68(2). (see, **JUMA BUNYIGE V R,** Criminal Appeal No. 417 of 2007 (unreported) (Mwz) **JUMANNE MASHAMBA V R** Criminal Appeal No. 255 of 2007 (unreported) (Mwz). This is yet another demonstration of that laxity on the part of the prison officer-in-charge, to the detriment of the appellant.

Having said so, we now come to the inevitable conclusion that the notice of appeal in this case was lodged out of time. It follows that no appeal was lawfully instituted in this Court. The appeal being incompetent, we accordingly strike it out. The appellant may, subject to the law of

limitation, file a fresh notice of appeal to reinstitute his appeal, if he so wishes.

DATED at MWANZA this 19th day of February, 2011.

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

S. MJASIRI
**JUSTICE OF APPEAL**

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

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

J.S. MGETTA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**