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

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

**CRIMINAL APPEAL NO. 191 OF 2010**

**BETWEEN**

**KABIRA SABIRO**
**JUMA MARWA** } .....**APPELLANTS**
**NYAIRIGA CHACHA**

**AND**

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

**(Appeal from the Judgment of the High Court of Tanzania at Mwanza)**

**(Nyangarika, J.)**

**dated the 19th day of May, 2009**
**in**
**Criminal Appeals No. 102 & 103 of 2009**

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## JUDGMENT OF THE COURT

23rd & 25th May, 2012

**KILEO, J. A.:**

Kabila Sabiro @ Kinoko, Juma Marwa and Nyairiga Chacha are aggrieved by the decision of the High Court (Mwanza Registry), in which their appeals Nos. 102 & 103 of 2009 were dismissed on account of their notices of intention to appeal having been filed out of time. They filed the following two grounds of appeal through the services of their legal counsel, Juristic Law Chambers:

1. *That, the Hon. High Court Judge erred in law and in fact in holding that the Notice of Appeal of the appellants which were signed on 7th August 2009 and handed over to prison officer in charge, were filed out of time.*
2. *That after holding that the appeals by the appellants were incompetent, the Hon. High Court Judge erred in law and in fact in dismissing the appeals.*

Mr.Deya Outa argued the appeal on behalf of the appellants. Mr. Sethi Mkemwa appeared on behalf of the respondent Republic. He did not oppose the appeal.

The crucial issue in this appeal is whether the notices of intention to appeal 'given' by the appellants were time barred.

Arguing the first ground of appeal before us Mr. Outa submitted that the Notice of Appeal which was given on 7/8/2009 was not out of time. The learned counsel for the appellants pointed out that upon their arrival in prison the appellants expressed their intention to appeal to the officer in

charge of the prison as certified by his letter to the trial District Court dated 10/8/2009. The learned counsel submitted further that the learned judge misdirected himself to think that the Notices of Appeal were filed on 30/12/2009.

On the second ground the learned counsel maintained that after finding that the appeal was incompetent, the learned judge ought to have struck it out instead of dismissing it. In support of this contention he referred us to **Hashim Madongo and Others v. Minister for Industry and Trade and Others**, Civil Appeal No.27 of 2003 (unreported).

We need not detain ourselves much. There is glaring evidence on the record that the appellants duly complied with section 361 (1) (a) of the Criminal procedure Act (CPA) contrary to the finding of the learned appellate judge that they had not so complied. The record shows that the Officer in charge of Tarime Prison wrote a letter to the District Court of Tarime on 10/8/2009 in which he asked for copies of proceedings and judgment so that the appellants could prepare their grounds of appeal and send them to the High Court. The letter was copied to the District

Registrar, High Court, Mwanza. The appellants were convicted and sentenced on 5/08/2009 so the letter by the Officer in charge of the Prison dated on 10/8/2009 clearly expressing the fact that the appellants intended to process their appeal was not time barred in terms of section 361 (1) (a) of the CPA. Unlike in the Court of Appeal where a written Notice of Appeal in a prescribed form has to be filed, in the High Court the law requires only that a notice be given. Such Notice may even be oral. Section 361 (1) (a) states:

> **"361 (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."**

In spite of the appellants' insistence that they had shown their intention to appeal while in prison, the learned appellate judge maintained that they had not shown a copy of their "Notice to Appeal". The letter from the

Prison Officer was brought to the attention of the learned judge but he came to the conclusion that the notice was time barred because it was registered with the trial court on 31/12/2009. We must state, with all due respect to the learned appellate judge, that he was laboring under a misconception. As we have already explained above, in the High Court an accused person needs only to give notice of his intention to appeal which the appellants duly gave as per letter of the Prison Officer in charge. The appellants being in prison it is to be expected that every action they take has to be through those under whose authority they are. Inspiration on how to deal with an appellant who is in prison can also be drawn from the Court of Appeal Rules as observed by this Court (Munuo, J. A.), in MZA Criminal Application No. 3 of 2002- **Bhoke s/o Maneno@ Sigwa v. Republic**. In that case the learned justice of appeal observed:

> " *It seems to me that that the above Rule envisage a situation, where, as is the case here, a prisoner gives Notice of Appeal, and, or memorandum of appeal, but the responsible prison officer negligently or by oversight fails to transmit it to the Court within time or at all. Although the Court of Appeal Rules do not apply to the High Court, the rationale behind Rule 68 would apply to all cases where a*

*prisoner gives his notice of appeal but the prison officer defaults in transmitting the same to court."*

Rule 68 of the Court of Appeal Rules which the learned justice was discussing provides:

> **"68. (1) If the appellant is in prison, he shall be deemed to have complied with the requirement of Rules 61, 65, 66 and 67 or any of them if he gives to the officer in charge of the prison in which he is serving sentence a written notice of 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."**

Having considered ground one as above we find merit in it and we allow it accordingly.

This would suffice to dispose of this appeal but we feel constrained to comment briefly also on the second ground. The complaint in this ground is that the learned judge erred to dismiss, instead of striking out an appeal he had found to be incompetent. The complaint has merit. Once the learned judge had found that the appeal before him was incompetent for

want of a Notice to Appeal then he ought to have struck it out. If an appeal is incompetent for want of a notice to appeal it means that there is no appeal, hence nothing to dismiss. In the case of **Ngoni Matengo Co operative Marketing Union Ltd. Vs Alimohamed Osman** (1959) E.A 577 which was cited in **Hashim Madongo**, supra, the Court of Appeal for Eastern Africa had occasion to discuss the distinction between *'striking out'* and *'dismissing'* an appeal. The court stated:

> *"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to strike out the appeal as being incompetent, rather than to have dismissed it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."*

In our discourse on the first ground of appeal we found that the appeal before the High court was competent as the appellants had given their notices of appeal within the time required by law.

In the circumstances, we allow the appeal and order that the matter be remitted to the High Court for it to proceed with the hearing, on merit, of Criminal Appeals Nos. 102 & 103 of 2009 before it.

It is ordered accordingly.

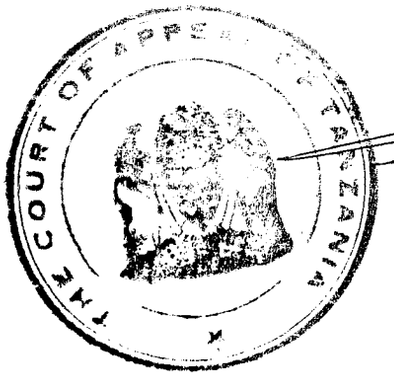
**DATED** at **MWANZA** this 24th day of May 2012.

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

E. A. KILEO
**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**