

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 262 OF 2009

MTANI ALFRED APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Mwanza)

(Nyangarika, J.)

dated the 16th day of August, 2010

in

High Court Criminal Application No. 30 of 2010

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JUDGMENT OF THE COURT

19th & 27th November, 2013

KAIJAGE, J.A.:

On 8/5/2006, the District Court of Musoma at Musoma convicted the appellant herein, Mtani Alfred, of the offence of armed robbery contrary to section 287A of the Penal Code as amended by Act No. 4 of 2004. Consequently, he was sentenced to serve a term of thirty (30) years imprisonment. He was aggrieved by such both conviction and sentence. After obtaining the copies of proceedings and judgment from the said trial court, he filed Criminal appeal No. 133 of 2009 in the High Court at Mwanza.

Believing that he had not given the requisite notice of his intention to appeal within ten (10) days of the date of conviction and sentence as required under section 361 (1) (a) of the Criminal Procedure Act, Cap 20 R.E 2002 (the Act), the appellant applied for and obtained an order withdrawing the said appeal. This was on 17/5/2010. Following the withdrawal of the said appeal, the appellant applied, vide High Court Criminal Application No. 30 of 2010, for an extension of time within which to give the notice of his intention to appeal and to appeal out of time. That application was dismissed, hence the present appeal.

Before us, the appellant has come up with a memorandum of appeal listing four(4) grounds. We think they could be condensed to one major ground, namely: that the High Court had no legal or factual basis upon which to dismiss the appellant's application for extension of time.

When the appeal was called on for hearing, the appellant appeared in person, fending for himself. He just adopted his memorandum of appeal and had nothing to say in elaboration. The respondent Republic, on the other hand, was represented by Mr. Yamiko Mlekano, learned State Attorney, who did not resist the appeal.

The learned State Attorney prefaced his submission in support of the appeal by, firstly, reporting on his findings in regard to the affidavital evidence featuring in the appellant's sworn affidavit and in the supplementary affidavit

sworn by the Officer in-charge, Butimba prison. Both affidavits were filed, in the High Court, in support of the applicant's application for extension of time.

Armed with the copies of relevant documents, the learned State Attorney informed the Court that, from the original records maintained at Butimba prison, he was able to confirm that the appellant timeously gave his notice of his intention to appeal to the High Court against the decision of the trial court. He further asserted that the appellant's written notice of his intention to appeal which was transmitted through the officer in-charge, Butimba prison, was duly lodged with the registry of the trial court on 15/5/2006. The trial court having convicted and sentenced the appellant on 8/5/2006, the latter's notice of his intention to appeal lodged on 15/5/2006 satisfied the mandatory statutory period prescribed under section 361(1) (a) of the Act, he said.

On the basis of the foregoing brief exposition, the learned State Attorney was of the view that the appellant was misled by the High Court into withdrawing his appeal believing that there was no notice of his intention to appeal given within the prescribed period in law. Apparently, the appellant appears to have been misled by an endorsement on the High Court's appeals admission form appearing at page 31 of the record. The said form was signed by the District Registrar and it bears an endorsement by the High Court Registry Officer thus:-

"No Notice of Appeal. Checked by Kagilwa.

Sgnd. i/c Cr. Section

19/3/2010."

On the strength of the foregoing unsatisfactory features, the learned State Attorney implored us to invoke our powers under section 4(2) of the Appellate Jurisdiction Act by, respectively, nullifying and setting aside the entire proceedings of the High Court and the order dismissing appellant's application for extension of time.

Indeed, at the Court's prompting, he correctly opined that, in view of the unchallenged affidavital evidence, the High Court should not have disallowed appellant's application for extension of time.

Save for his invitation to us to invoke our revisional powers, we are, with respect, in agreement with the findings and the views expressed by the learned State Attorney in his submission. We commence by examining the provisions of section 361 (1) (a) the Act. It provides:-

*"S.361 (1) (a) 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 sentence of corporal punishment only, within three days of the*

petition of appeal within forty-five days from the date of the finding, sentence or order.” [Emphasis supplied.]

In this case, paragraph 2 of the applicant’s affidavit filed in support of the application for extension of time within which to give the notice of intention to appeal and to appeal out of time was not controverted. It reads:-

2. That, in the course of admission at Musoma Regional Prison, I had promptly expressed a desire to appeal against the vested conviction and sentence to the prison officials on the very day of the fateful judgment.

In dismissing the application for extension of time, the High Court took no notice and made no reference to the appellant’s uncontroverted affidavital evidence in paragraph 2 of the affidavit. Although the affidavit was inelegantly drafted, it nevertheless carried a very clear message. On this, we are settled in our minds that had the High Court not overlooked that evidence, it should have found that appellant’s oral expression, to the prison officials, of his desire to appeal, constituted sufficient notice transmittable through the latter to the trial court within the period prescribed under the provisions of section 361(1)(a) of the Act.

Unlike Rule 68(2) of the Court of Appeal Rules, 2009 which requires an intending appellant to lodge **a written notice** of appeal, the provisions of section 361 (1)(a) of the Act do not have such a requirement. An intending appellant is not required to lodge a written notice of appeal. An oral notice of intention to appeal given to the trial court or the prison officer on admission into prison would normally suffice. (See, for instance, **MSAFIRI HASSAN MASIMBA V.R.**, Criminal Appeal No. 425 of 2007, CAT (unreported)).

It is also significant to observe here that the order of the High Court dated 17/5/2010 withdrawing appellant's appeal was made subsequent to the filing of the latter's petition of appeal on 5/11/2009. It be noted that appellant's petition of appeal as filed, was at the disposal of the High Court before the application for extension of time was dismissed. The said petition appearing at page 28 of the record, demonstrates the fact that the appellant was supplied with copies of proceedings and judgment by the trial court. Upon these glaring facts, we are settled in our minds that before dismissing appellant's application for extension of time, the High Court should have taken cognizance of the fact that, if no notice of his intention to appeal was given, the appellant could not have been supplied with copies of judgment and proceedings.

In the light of the above, we find that the High court erred in dismissing appellant's application. We consequently allow this appeal. The appellant is

respectively, give the notice of his intention to appeal and appeal out of time.

It is so ordered.

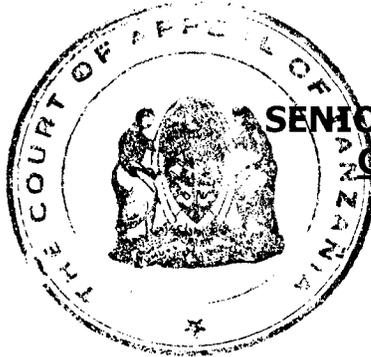
DATED at MWANZA this 25th day of November, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K. MUSSA
JUSTICE OF APPEAL

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



A handwritten signature in black ink, appearing to read "W.P. Bampihya", is written over the text below.

W.P. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL