IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 289 OF 2012

JUMA NHANDI .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High Court

of Tanzania at Mwanza)

(Nyangarika, J.)

dated 19th day of April, 2010
in
Criminal Appeal No. 32 of 2009

JUDGMENT OF THE COURT

1st & 2nd August, 2013
JUMA, J.A.:

This Criminal Appeal No. 289 of 2012 by Juma Nhandi the appellant traces its origin back to a Criminal Case No. 113/2009 at the Primary Court of Mkula in Magu District. The appellant is before us, aggrieved by the decision of the High Court to dismiss his appeal because he did not file his appeal within 30 days of the decision of the District Court sitting as a first appellate court. His five grounds of appeal he lodged in this Court may be

distilled into two basic areas of complaint. **First,** is dismissal of his second appeal to the High Court. **Second,** is the SUMMARY REJECTION ORDER of the High Court which rejected his application for "certificate in the point of law." The appellant is specifically concerned that his appeal and application were respectively dismissed and summarily rejected by the learned Judge without so much as informing him the proper forum he should pursue his appeal.

As we pointed out earlier, the appellant and two others were charged with the offence of Robbery with Violence contrary to section 285 and 286 of the Penal Code, Cap. 16. Only the appellant was convicted and sentenced by the Primary Court to serve fourteen years in prison. Aggrieved with the conviction and sentence, he lodged his first appeal, Criminal Appeal No. 32/2009 to the District Court of Magu. His appeal was not only dismissed on 21st May, 2009, but the appellate District Court enhanced his sentence from fourteen (14) years in prison, to fifteen (15) years.

Still aggrieved, he moved on to the High Court to initiate his second appeal. And it was in the High Court where confusions and mix-ups set in.

On 8th July, 2009 the appellant filed in the High Court two documents simultaneously. The first document was his notice of intention to appeal against the decision of the district court which he filed under section 361 (a) of the Criminal Procedure Act, Cap. 20. Second document he lodged was his Memorandum of Appeal (Criminal Appeal No. 51). These two documents were incidentally lodged forty seven days after the district court had dismissed his first appeal.

The Ruling of the High Court (Nyangarika, J.) dismissing his appeal, was delivered on 19th April, 2010 when the learned Judge said:

> *"The appeal was filed on 7/10/2009 but the judgment of the first appellate court was delivered on 21/5/2009.*
>
> *Under provision of s. 25 (1) (b) of MCA, the present appeal was to be filed within 30 days from the date of the judgment of the first appellate court.*
>
> *..... I agree with the State Attorney that the appeal is hopelessly time barred. I therefore dismiss the appeal."*

Undeterred and after another interlude of five months, on 6/9/2010 the appellant filed what he described as a "certificate point of law." As fate would have it, it was Nyangarika, J. who again handled the application for

certification of the point of law. On 21st April, 2011 he summarily rejected it in the following way:

SUMMARY REJECTION ORDER

"...In view of my Judgment (Nyangarika, J.) delivered on 19.4.2010, the application filed on 8/9/2010 purported to be in the words; "certificate point of law" cannot be maintained and is hereby summarily rejected.

Order accordingly

K.M. Nyangarika,
JUDGE"

At the hearing of this appeal, the appellant informed this Court that he would prefer Mr. Anesius Kanunura, the learned State Attorney to address the Court first. At the very outset, the learned State Attorney took a position of supporting the appeal. He submitted that although the appellant was indeed time barred when he lodged his Memorandum of Appeal in the High Court, the learned Judge should not have dismissed that appeal as if he had heard it on merits. According to Mr. Kanunura, the learned Judge should have struck it out. He submitted that by striking out that appeal that had been filed out of time, would have afforded the

appellant an opportunity of going back to the same High Court to seek an extension of time. And, by dismissing it, the appellant had no option other than filing this appeal to this Court.

Mr. Kanunura then volunteered his own thoughts about the logic behind the decision of the appellant to file an application for a "certificate point of law," which was summarily rejected by the High Court. According to the learned State Attorney, the appellant applied for certification of point of law because he thought that it was the only way, he could finally come to this Court to appeal against the dismissal of his appeal by the High Court. Mr. Kanunura submitted further that Nyangarika, J. should instead have struck out the application because the "SUMMARY REJECTION ORDER" which he issued is unknown in an appeal originating from the primary court.

The appellant being a lay man could not offer much in response to the questions of law which Mr. Kanunura had raised. All the same, the appellant conceded that indeed he had filed his second appeal to the High Court well out of the prescribed period of limitation. He expressed his

concern why the High Court dismissed his appeal without advising him how to file a fresh appeal.

After perusal of the order dismissing the appeal to the High Court and also the "summary rejection order" of the same court, we are in agreement with the learned State Attorney that the learned Judge should have struck out the incompetent appeal that was filed out of time and advise the appellant to seek an extension of time before filing a competent appeal to the High Court. Since the appellant lodged his memorandum of appeal well outside the thirty days prescribed by section 25 of the Magistrates Courts Act, Cap. 11, there was no appeal before Nyangarika, J. to dismiss as he did. He should have struck it out.

Dismissal and striking out of an appeal are as distinct as they have different connotations and consequences in law.

By the learned Judge dismissing the appellant's appeal implied that there was a competent appeal that he heard and disposed of. But the appellant had filed his appeal before the High Court outside the prescribed period. This implied that there was no proper appeal capable of being heard and dismissed on merit. By dismissing an appeal which was not in

the first place competently before him, the learned Judge erred in law. The difference between dismissal and striking out has been discussed by this Court through several of its decision. Though a civil case, CIVIL APPEAL NO. 27 OF 2003, **1. HASHIM MADONGO 2. CHARLES LEOLE, 3. DAMAS KAGERE VS. 1. MINISTER FOR INDUSTRY AND TRADE, 2. ATTORNEY GENERAL, 3. DAR ES SALAAM REGIONAL TRADING CO. LTD** (CAT at DSM, unreported) is relevant. We referred **NGONI MATENGO COOPERATIVE MARKETING UNION LTD. VS ALIMAHOMED OSMAN** (1959) EA 577 at page 580 where 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. But it is the substance of the matter that must be looked at, rather than the words used..."*** *(Emphasis supplied)*

Section 25 of the Magistrates' Courts Act, Cap 11 (MCA) prescribes for the right of appeal "where a district court confirms the acquittal of any person by a primary court or substitutes an acquittal for a conviction." In addition, it not only prescribes thirty days period within which to lodge the appeal, it also vests the High Court with power to "extend the time for filing an appeal" from district as a court of first appeal, to the High Court. Section 25 of MCA which governs all appeals from primary courts provides:

> 25 (1) Save as hereinafter provided–
>
> (a) in proceedings of a criminal nature, any person convicted of an offence or, in any case where a district court confirms the acquittal of any person by a primary court or substitutes an acquittal for a conviction, the complainant or the Director of Public Prosecutions; or
>
> (b) in any other proceedings any party,
>
> if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, **within thirty days after the date of the decision or order, appeal therefrom to the High Court**; and the **High Court may extend the time for filing an appeal either before or after such period of thirty days has expired**. [Emphasis provided].

It is true that after the High Court (Ngarika, J.) had dismissed his appeal on 19th April, 2010, the appellant had no recourse other than that of coming to this Court on an appeal, which he did. But what followed in the High Court after that dismissal was uncalled for. **First,** it was uncalled for the appellant after dismissal, to go back to the High Court with an application for "*certificate of point of law.*" **Secondly,** it was similarly uncalled for the learned Judge to summarily reject that application, he should have struck it out. In terms of section 28 of MCA, the High Court can only summarily reject an appeal but not an application. The relevant section 28 provides:

> *28 (1) Subject to the provisions of subsection (2) of this Section, a judge of the High Court may, if satisfied that an appeal in any proceeding of a criminal nature has been lodged without sufficient ground of complaint,* ***summarily reject the appeal.*** [Emphasis Added].

For all the reasons we have set out above, we find it appropriate to allow the appeal. We also invoke this Court's powers of revision under sub-section (3) of section 4 of the Appellate Jurisdiction Act and quash and set aside the Ruling of the High Court (Nyangarika, J.) dated 19th April, 2010

dismissing the appellant's appeal in HC Criminal Appeal No. 32 of 2009. We similarly quash and set aside the summary rejection order of the High Court dated 21st April, 2011. The appellant is given thirty days from the date of this decision to file an application in the High Court for enlargement of time to appeal.

DATED at MWANZA this 1st day of August 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL