IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 425 OF 2007

MSAFIRI HASSAN MASIMBA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Mbeya)

(Mrema J.)

dated 12th day of June 2007
in
Misc. Criminal Application No. 61 of 2005

.....

JUDGMENT OF THE COURT

3rd & 5th June 2013

RUTAKANGWA, J.A:

The appellant was convicted by the District Court of Iringa (the trial court) as charged of the offence of armed robbery. He was sentenced to a prison sentence of thirty years. This was on 4th August, 1995. He was aggrieved by the conviction and sentence. After obtaining the copies of judgment and proceedings sometimes in

2004, he lodged his appeal in the High Court at Mbeya, (**vide** Criminal Appeal No. 103 of 2004), (the appeal).

The appeal never lived long enough to meet the reasonable expectations of the appellant. It was "dismissed prematurely" by Mrema, J. (as he then was) on 12/10/2005. We have used the words 'dismissed prematurely' not without good cause. This is because the appeal was dismissed at the stage of admission on account of "being hopelessly time barred." The learned first appellate judge reached this conclusion because, as he put it "while dealing with the cases for admission," he had found no "evidence confirming whether or not the appellant ever filed a notice of appeal". This finding, we have noted, was arrived at in the absence of both parties in the appeal.

Despite the dismissal of his appeal the appellant was determined to establish his innocence. He then lodged Misc. Criminal Application No. 61 of 2005 (the application) in the same High Court under the Appellate Jurisdiction Act, Cap 141, (the AJA), seeking extension of time to lodge a notice of appeal to this Court against the

said decision of Mrema, J. As fate would have it, the application was heard and determined by the same learned judge who dismissed it.

In dismissing the application the learned judge reasoned firstly, that the application was misconceived because:-

> "... There has not been any judgment of this court to be appealed against to the Court of Appeal of Tanzania."

Secondly, the learned judge was settled in his mind that the applicant had no "overwhelming chances of winning his intended appeal." To justify this holding, he embarked on a fresh evaluation of the entire evidence, at the end of which he concluded thus:-

> " From the overwhelming evidence against the applicant, the trial Court was right to reject his defence because it raised no reasonable doubt against the prosecution case.
> In the light of the above exposition I am satisfied beyond reasonable doubt that the

> conviction and sentence was properly meted out. Therefore it goes without more say that the applicant's application is devoid of any merit since his intended appeal has no slightest chance of success. In the result this application is hereby dismissed forth with. The conviction and sentence confirmed."

Again, the appellant was aggrieved, hence this appeal. The main complaint here is that he was condemned unheard in violation of Article 13 (6)(a) of the Constitution of 1977.

When the appeal was called on for hearing, the appellant appeared before us in person fending for himself. He adopted his main ground of complaint and had nothing to say in elaboration. The respondent Republic, on the other hand, was represented by Mr. Francis Rogers, learned State Attorney.

At first Mr. Rogers challenged the competence of the appeal as the notice of appeal indicated that the appellant was appealing against the decision of Mrema, J. in sustaining his

conviction for "Armed Robbery with violence" and the sentence of "Thirty years Imprisonment." To Mr. Rogers, this was a fatal defect as Mrema, J., only dismissed the application for extension of time. All the same, at the Court's prompting, he readily conceded that Mrema, J. erred in law is "dismissing" Criminal Appeal No. 103 of 2004, because the provision of Section 361 (1) of the Criminal Procedure Act, Cap. 20 (the Act), do not require an intended appellant to lodge a written notice of appeal. On the basis of this error, he urged us to invoke section 4 (2) of the Appellate Jurisdiction Act (the AJA), to revise and nullify the ruling of Mrema, J. dismissing the appeal and all subsequent proceedings including the one which gave rise to this appeal, and restore Criminal Appeal No. 103 of 2004 in the High Court at Mbeya.

We have given due consideration to the submissions of Mr. Rogers before us. We have found ourselves in total agreement with him in respect of the ruling of Mrema, J., dated 12th October, 2005. But, we have failed to accept his assertion that the notice of appeal is incurably defective.

Regarding the notice of appeal, we are in agreement with Mr. Rogers that the matter before Mrema, J., was indeed an application for extension of time to lodge a notice of appeal to this Court out of time. However, as we have already amply demonstrated above, the learned High Court judge instead of dismissing the application, he proceeded to "delve into the whole evidence upon which conviction was grounded", as he elegantly put it, and at the end of the day, he dismissed the yet to be lodged appeal in anticipation and confirmed the conviction and sentence. This was a grave error in law, not only because there was no appeal before him but worse still, the appellant was condemned by him unheard. Another glaring error is that having categorically dismissed Criminal Appeal No. 103 of 2004, he could not competently entertain the application for extension of time while the dismissal order which, in our respectful opinion, was appealable under the S. 6 (7) (a) of the AJA, was still subsisting. All told, since the learned High Court judge had ruled, albeit wrongly, in the application that the conviction of the appellant was properly entered, and had thereby confirmed the conviction and sentence, substantive justice

compels us to hold that the notice of appeal which instituted this appeal did not violate the provisions of Rule 68 (2) of the Rules. That erroneous ruling and order were appealable under the AJA.

Reverting to the ruling of 12th October, 2005, we have found ourselves with no flicker of doubt in our minds that it is bad in law for three sound reasons. One, it was given in utter violation of the mandatory provisions of Article 13(6) (a) of the Constitution of 1977, as rightly contended by the appellant. Two, it offended the cardinal rule of natural Justice, to the effect that nobody should be condemned unheard, as limitation of time is not one of the prescribed grounds for summarily rejecting an appeal. Three, unlike Rule 68(2) of the Rules which requires an intended appellant to give a written notice of appeal and lodge it in triplicate, S. 364 (1) of the C.P.A. has no such requirement. Even an oral notice of intention to appeal given to the trial court or the prison officer on admission into prison will suffice. In this case, therefore, it was wrong for the learned judge to hold that the appellant had failed to file a notice of appeal and proceed to dismiss the appeal. To us, the difference between "giving"

a notice of intention to appeal and "filing" or "lodging" a notice of appeal is, in our respectful opinion, too glaring to need elucidation. After all, if no notice of intention to appeal had been given, the appellant would not have been supplied with the copies of judgment and proceedings.

In view of the above, we respectfully find that the learned High Court judge erred in law in dismissing Criminal Appeal No. 103 of 2004. In the exercise of our revisional jurisdiction, under S. 4 (2) of the AJA, we hereby nullify, quash and set aside the ruling and order of the High Court dated 12th October, 2005. We accordingly restore the said appeal in the High Court and order that it be heard forthwith, if it will be admitted. In the exercise of the same revisional powers, we nullify and set aside all the proceedings and orders in Misc. Criminal Application No. 61 of 2005 which gave rise to this appeal. But for the erroneous dismissal of Criminal Appeal No. 103 of 2004, the application would not have seen the light of day.

In fine, we allow the appeal. We insist that the appellant's appeal should be given first priority by the High Court.

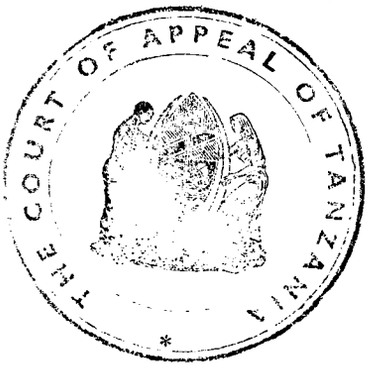
DATED at **MBEYA**, this 4th day of June, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
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