

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KIMARO, J. A., MANDIA, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 12 OF 2013

SOSTENES s/o NYAZAGIRO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Tabora)**

(H.T. Songoro, J.)

Dated the 14th day of November, 2011

in

Criminal Appeal No. 73 of 2010

JUDGMENT OF THE COURT

2nd & 7th May, 2013

MANDIA, J.A.:

The appellant SOSTENES s/o NYANZAGIRO @ NYARUCHASHI appeared before the District Court of Kibondo District at Kibondo on a Charge of Rape c/s 130(1) and 131(1) of the Penal Code as amended by the Sexual Offences Special Provisions Act, No 4 of 1998. He was found guilty, convicted and sentenced to thirty years imprisonment. Aggrieved by

both the conviction and sentence he preferred an appeal to the High Court of Tanzania at Tabora. His appeal was dismissed in its entirety.

The appellant started serving his sentence from the date of conviction which is 6/5/2008. Two years later, on 10th October, 2010, the appellant filed a Chamber Application in the High Court of Tanzania at Tabora in which he prayed for extension of time within which to lodge a Notice of Appeal. In an affidavit accompanying the Chamber Summons which he took, out the appellant averred, in paragraphs 2,3,4 and 5, that he made his petition of appeal in time after conviction but the Prison Authorities delayed typing his petition until time for filing the same elapsed. He laid the blame for the delay on the Prison Authorities and claimed since he was a Prisoner subject to Prison Control he could not force the Prison Authorities to act with haste so that his petition is filed in time.

The application for extension of time was heard in the High Court of Tanzania at Tabora. On 14/11/2011 the High Court dismissed the appellant's application. At the bottom of page 47 of the record, the learned High Court Judge remarked thus:-

"I have considered the applicant application reason for delay of filing an appeal out of time as presented in paragraphs 3 and 4 of the applicant's affidavit and find that there is no indication or proof if the applicant expressed his willingness to appeal or presented a notice of appeal within statutory period or petition of appeal to Prison Authorities for typing."

Further down the ruling, at page 48 of the record, the learned High Court Judge went on to remark thus:-

"There is nothing from Prison Authorities supporting the applicant contention that there was a problem of typing facilities. For the above stated reason I find the applicant application has no merit. On that basis I declined to exercise the discretion provided under Section 361(2) of Criminal Procedure Act, Cap 20, and no leave is granted. In the end result the applicant

application is therefore dismissed for lack of merit."

The decision of the High Court of Tanzania at Tabora irked the appellant and he preferred an appeal to this Court against the order of the High Court which dismissed his application.

The appellant has filed a six-ground memorandum of appeal which essentially raises the following grounds of complaint, namely:-

- (1) That, he was convicted in the District Court of Kibondo at Kibondo on 5/5/2008, and one day later on 6/5/2008 he expressed his intention to appeal to the officer in charge of Kibondo Prison.
- (2) That he filed a first application through Kibondo Prison Vide saving telegram No. 112/KGM/3/Vol III/382 of 8/9/2008 but this was returned to the Prison Authorities at Kibondo by the District Registrar of the High Court because the District Court case was cited wrongly in the application and

that the appeal listed grounds of appeal instead of petition of appeal.

- (3) That while still in Prison he prepared a second application with the correct citation and this is the one that was heard and dismissed by the High Court.

The essence of the appellant's arguments is that from 5/5/2008 when he started serving his sentence he was a person subject to Prison discipline and control and had no say over how his appeal was processed after he gave notice of intention to appeal. If there was any delay, the appellant is laying the blame on the Prison Authorities.

At the hearing of this appeal the respondent was represented by Mr. Hashim Ngole, learned Senior State Attorney, while the appellant appeared in person, unrepresented. The appellant had nothing to add to the memorandum of appeal he lodged in Court.

Mr. Hashim Ngole, learned Senior State Attorney, argued that based on the material presented before it, the High Court was right in dismissing

the appellant's application for extension of time. He argued that the applicant is shown not to be serious judging from the delay of two years it took to process the appeal. Mr. Hashim Ngole, learned Senior State Attorney went on to argue that the appellant has presented new material in the appeal filed in this Court, and that, based on this new material, the appellant is shown to have expressed his intention to appeal. He argued that had the appellant showed to the High Court the material he had presented in the Court of Appeal, his application in the High Court would have been allowed. He therefore did not resist the application.

We take note of the arguments presented before us. For us the nagging question is where the obligation to process an appeal of a convicted Prisoner lies. Does it lie with the convicted Prisoner himself, or with the Prison Authorities? In the passages we have quoted from the High Court ruling, the learned judge seems to be of the view that it was the obligation of the appellant to prove that there was a problem with the typewriters at Kibondo Prison. Mr. Hashim Ngole seems to be of the same view when he remarked that the materials which the appellant presented during the hearing of the appeal in this Court would have absolved the

6

Officer in-Charge of the Prison where he is held. Section 363 is couched in

7

discretionary terms through the use of the word "may" which gives discretion to those who do not need to use the services of the Prison officer in charge to opt for alternatives like private lawyers outside the Prison. The appellant chose to use the services of the Prison Authorities. There is no indication that when the appellant entered prison on 5/5/2008 he carried with him writing materials and typewriters. When he was referring to broken down typewriters in his affidavit dated 10th October, 2010, the appellant necessarily was referring to typewriters belonging to the Prison Authorities at Kibondo. By arguing that the appellant should have furnished proof of broken down typewriters while he was a Prisoner both Mr. Hashim Ngole and learned High Court Judge were stretching credulity too far. The appellant was not running the Prison system. Rather, the Prison system was running him. We therefore find that the appellant had no obligation to furnish proof that the delay in filing his appeal was caused by broken down typewriters belonging to Kibondo Prison. His only obligation was in giving notice of intention to appeal and leave the rest of the process to the Prison Authorities. An analogous situation is that shown in Rule 75 of the Court of Appeal Rules, 2009, where for an appellant who is in Prison he is deemed to have complied with Rules 68, 72, 73 and 74 or

any of them by merely filling in Form B/1 or Form C/1 and handing it over to the Prison Officer in-Charge who fills in the particulars at the bottom of the form as is required of him.

In the memorandum of appeal, the appellant showed that he gave notice one day after entering Prison. Once he did that the appellant was home and dry. It was therefore not proper, indeed illogical, to expect the appellant to speed up the appellate process while in Prison. A similar situation existed in **NYEYIMANA s/o ZENO versus THE REPUBLIC**, Criminal Appeal No. 458 of 2007 (unreported). In that case this Court cited the cases of **KABULA JAMVYE versus THE REPUBLIC**, Criminal Appeal No. 283 of 2005 (unreported) and **ALFRED CHINGA versus THE REPUBLIC**, Criminal Appeal No. 73 of 2008 (unreported). We still subscribed to the views expressed in the cases we have quoted above.

We take note that since the appellant expressed his intention to appeal on 6/5/2008 while he was at Kibondo Prison five years have passed, and he has now been transferred to Uyui Prison in Tabora. This means the notice has expired, and the time within which to appeal has also expired.

Acting under Rule 47 of the Court of Appeal Rules, we order that the appellant file a notice of appeal within ten days of the delivery of this judgment. The appellant should then file his appeal in the High Court within forty five days, and thereafter the Officer in- Charge of Uyui Prison, where the appellant is currently held, should forward the appeal to the High Court of Tanzania at Tabora for further process in accordance with the law.

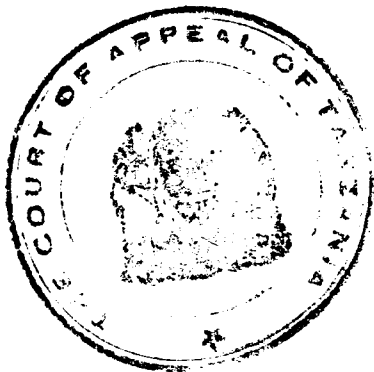
DATED at **TABORA**, this 4th day of May, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL