

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

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

**CRIMINAL APPEAL NO. 458 OF 2007**

**NZEYIMANA S/O ZENO ..... APPELLANT**

**VERSUS**

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

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

**(Chinguwile, J.)**

**Dated the 27<sup>th</sup> day of July, 2007**

**In**

**Criminal Appeal No. 89 of 2003**

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**JUDGMENT OF THE COURT**

15<sup>th</sup> & 19<sup>th</sup> April, 2013

**MANDIA, J.A.:**

The appellant NZEYIMANA s/o ZENO appeared in the District Court of Kasulu at Kasulu on a charge of Rape c/ss 130 (1) (2) C and 131 (1) (3) of the Penal Code. The trial District Court found him guilty, convicted him and sentenced him to imprisonment for thirty years as well as passing on him an order of twelve strokes of the cane. The sentence on the appellant was passed on 19/11/2001. Two year later, on 2<sup>nd</sup> June, 2003, the appellant lodged in the High Court of Tanzania at Tabora an application for extension

of time within which to file an appeal against the decision of the trial District Court. The application consisted of a Chamber Summons supported by an affidavit sworn by the appellant himself. In his affidavit the appellant deposed that after the sentence of imprisonment was passed on him on 19/11/2001, he started serving his prison sentence on the same day at Kasulu Prison. Two days later, on 21/11/2001, he declared his intention to appeal in writing to the Prison Authorities at Kasulu Prison. On 22/11/2001, one day after declaring his intention to appeal, he was transferred to Bangwe Prison in Kigoma and about three months later, on 25/2/2002, he was again transferred to Uyui Prison in Tabora. The appellant gave the reason for the delay in lodging his application for extension of time as the dilatoriness caused by the Prison Officials at Kasulu Prison.

The application for extension of time within which to lodge an appeal was finally heard on 26/11/2005. Mr. Mulwambo, learned State Attorney, appeared for the respondent/Republic while the appellant appeared in person, unrepresented. Mr. Mulwambo moved the Court to accept the argument that the appellant should file an additional affidavit from the Prison Officials to support the appellant's contention that it is the Prison

Officials who are the source of the appellant's delay in lodging his notice of intention to appeal after he was convicted by the trial District Court. The High Court accepted the argument of the State Attorney and ruled that the appellant should file an additional affidavit from the Prison Authorities to show that they are the source of the delay by the appellant in filing his notice of intention to appeal after he was convicted on 19/11/2001. On 8/2/2006 the appellant made an appearance in court and informed the court that the Prison Officials had told him that they had sworn the affidavit as ordered by the Court. In reply the judge presiding over the proceedings recorded that there is no affidavit filed in court as claimed by the appellant. The appellant then prayed to the court to give him more time to follow up the matter. The court acceded to the appellant's request and adjourned the matter to 17/4/2006 for hearing. There followed a spate of five adjournments before different District Registrars of the High Court where no reasons for the adjournments were given. Finally the appellant appeared before a judge of the High Court on 23/7/2010. On this date the appellant appeared in person, unrepresented, while the respondent/Republic was represented by Mr. Lukosi, learned State Attorney. Mr. Lukosi moved the Court to dismiss the appellant's application

on the ground that there was on record an additional affidavit filed by the prison official at Uyui Prison instead of Kasulu Prison where the appellant had declared his intention to appeal. The court adjourned the matter to 27/7/2007 for ruling. On 27/7/2007 the High Court dismissed the appellant's application on the ground that the appellant's application should have had an affidavit of the Prison Officer of Kasulu Prison to explain the appellant's delay in filing his notice of appeal within ten days, and that the affidavit on record from the Prison Officer of Uyui Prison was not sufficient proof that the appellant is not the cause of the delay. The ruling of the High Court dated 27/7/2007 led to the present appeal.

At today's hearing the appellant was represented by Mr. Kamaliza Kayaga, learned advocate, while the respondent/Republic was represented by Ms Jane Mandago, learned State Attorney.

The appellant had lodged a self-drawn memorandum of appeal through the Prison Authorities. Mr. Kamaliza Kayaga, learned advocate for the appellant, lodged a supplementary memorandum of appeal under Rule 73 (1) of the Court of Appeal Rules, 2009, and based his arguments on the

supplementary memorandum of appeal. The supplementary memorandum contains only one ground of appeal, namely:-

*"...The Honourable Judge erred in law by relying on the bare statements of the State Attorney without having filed a counter-affidavit in objecting to the appellant's application."*

Amplifying on the ground of appeal, the learned advocate argued that in the absence of a counter-affidavit, the High Court should not have taken as the truth the statement of the learned State Attorney that there ought to have been an affidavit from the Prison Officials at Kasulu. The learned advocate cited the case of **KABULA JAMVYE versus THE REPUBLIC**, Criminal Appeal No. 283 of 2005 (unreported) in support of his argument.

Ms. Jane Mandago, learned State Attorney appearing on behalf of the respondent/Republic, did not support the order made by the High Court. She lent her support to the reasoning in the KABULA JAMVYE case (**supra**)

and added weight to her argument by citing the case of **ALFRED CHINGA versus REPUBLIC** Criminal Appeal No. 73 of 2008 (unreported).

We note that paragraph 2 of the affidavit in support of his application for extension of time in the High Court reads thus:

*"2. That, after applicant being sentenced I registered in Kasulu District Prison on 19/11/2001 and about 21/11/2001 I was signed the form of Intention to appeal and that the delayment of my form to appeal before your Honourable high court on the support it, is out of my willing."*

The English is rather convoluted, but the meaning is clear. The appellant is saying that two days after he started serving his sentence he signified, in writing, his notice of intention to appeal. He is showing that he has complied with section 361 (1) (a) of the Criminal Procedure Act which obliges an intended appellant to give notice of intention to appeal within ten days from the date of finding, sentence or order. Being a

prisoner, the appellant is governed by section 363 of the Criminal Procedure Act, Chapter 20 R.E. 2002 which reads thus:

*"363. If the appellant is in prison he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison, who shall thereupon forward the petition and copies to the Registrar of the High Court."*

For the purposes of section 363, therefore, all communication between a serving prisoner and the appellate court in respect of an intended appeal is routed through the Officer Incharge of the Prison where he is being held. As admitted by Ms. Jane Mandago, learned State Attorney, the appellant was subjected to frequent transfers from Kasulu Prison, Bangwe Prison in Kigoma and finally to Uyui Prison in Tabora. We also take note of section 361 (b) of the Criminal Procedure Act which requires an appeal to be lodged within forty five days from date of finding. We also take note that this limitation period has a saving provision which excludes the time required for obtaining proceedings, judgment or order appealed against. Since under section 363 the Prison Authorities are responsible for all

communication involving appellants serving prison sentences, any delay should be explained by the Prison Officials, and not the prisoners, in cases where the prisoner is shown to have complied with section 361 (1) (a) by giving his notice of intention to appeal as has happened in the present case. It was therefore not proper for the High Court to charge the appellant with the duty of explaining the delay through securing an affidavit from Kasulu Prison. As this Court said in **KABULA JAMVYE versus THE REPUBLIC**, Criminal Appeal No. 283 of 2005 (unreported),

*"With all due respect to the learned judge, we think that he erred to rely on the statements of the learned State Attorney from the bar. He should have filed a counter-affidavit. It was for the Republic to file affidavits from the Prisons. We wonder how the appellant could have requested the Prisons Authorities to file affidavits which would have accused them of inefficiency."*



73 of 2008 this Court made the following remark:-

*"It would, we think, be expecting too much to demand a prisoner/appellant to obtain and file an affidavit sworn by a prison officer hanging his own neck that he was responsible for the delay."*

We are therefore in agreement with Mr. Kamaliza Kayaga, learned advocate, that the statement from the bar made by the learned State Attorney was not sufficient to place the burden of securing an affidavit from the Kasulu Prison Officer.

We have also taken note of the fact that since giving notice of intention to appeal on his first day in prison, the appellant's situation has remained in limbo, largely through the frequent prison transfers he was subjected to. The notice has expired, and the time within which to appeal has also lapsed. The interests of justice calls for remedial measures in this unhealthy situation. It is now twelve years since the appellant expressed his intention to appeal, and he has not been heard yet. To expedite

matters we act under Rule 47 of the Court of Appeal Rules and allow the appellant's application for extension of time. We order that the appellant file a notice of appeal within ten days of the delivery of this judgment, and file his appeal within the statutory period as provided for in section 361 (2) (b) of the Criminal Procedure Act, thereafter the Prison Officer of Uyui Prison where the appellant is currently being held should forward the appeal documents to the High Court of Tanzania at Tabora for further process according to law.

**DATED at TABORA** this 16<sup>th</sup> day of April, 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**