

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., KIMARO, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO.172 OF 2013.

IKOI SUGAJI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the ruling of the High Court of

Tanzania at Dodoma)

(Masanche, J.)

dated 22nd November, 2006

in

Misc. Application No.21 of 2004

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JUDGMENT OF THE COURT

16th & 18th September, 2013

KIMARO, J.A.:-

The appellant was on 25th November, 2011 convicted by the District Court of Kondoa at Kondoa for the offence of unnatural offence on his own plea of guilty, contrary to Section 154 (1) (a) of the Penal Code as amended by the Sexual Offences (Special Provisions Act) Act, No. 4 of 1998. He was sentenced to imprisonment for thirty years and 10 strokes of the cane.

Dissatisfied with the conviction and the sentence, the appellant, after the period of appeal had elapsed, made an application to the High Court to appeal out of time. His application No. 36 of 2004 was dismissed by the late S. N. Mafuru Senior Resident Magistrate (Extended Jurisdiction) as she then was, on 29th July, 2004 for not disclosing sufficient cause. His appeal against that decision to the Court, Criminal Appeal No. 210 of 2004 was struck out on 17th May, 2006 for non-compliance with section 45(2) of the Magistrates Courts Act, 1984 as amended.

In another attempt seeking for extension of time to file an appeal out of time, Misc. Criminal Application No. 21 of 2004 filed in the High Court, was again dismissed for the same reasons that he failed to give sufficient cause for the delay. The applicant filed yet another application Misc. Criminal Application No. 1 of 1997 in the same Court but it was struck out for taking a wrong step. The applicant was advised to lodge an appeal against the decision which dismissed his application. Instead of complying with the advice that was given, the applicant, may be out of ignorance, lodged Criminal Appeal No. 21 of 2012 which was struck out 11th March, 2013 because of having an invalid notice of appeal.

It was then that he filed this appeal. The appellant has filed three grounds of appeal but ground two is a repetition of ground one. His grounds of appeal remain essentially two. In ground one, the applicant faults the learned judge for looking at the merits of the appeal itself instead of confining himself to the application for extension of time to file the notice of intention to appeal together with the appeal. In his second ground the complaint is that the learned judge failed to address the question of his detention in prison which restrained his movement and so he could not personally take action to ensure that the appeal was filed in time.

During the hearing of the appeal the appellant appeared in person. The respondent Republic was represented by Ms. Rosemary Shio, learned Senior State Attorney.

In arguing the appeal the appellant felt safer to hear what the learned State Attorney had to say in respect of the grounds of appeal before he commented on them.

The learned State Attorney supported the appeal. She agreed that the learned Judge was wrong in dismissing the applicant's application and for not confining himself to the merit of the application. She said what was before the learned judge was an application and not an appeal. The learned judge, said the learned Senior State Attorney, acted wrongly in deciding an appeal which was not yet before the court. Regarding the second ground of appeal, the learned Senior State Attorney said that the learned judge erred when he did not take into consideration the fact that the appellant was not in a position to personally ensure that the documents required for filing his appeal were filed in court in time because his movement was restrained because of being in prison. She said that decision entirely depended on the Prison Officer in Charge of the Prison in which the appellant was serving the sentence. For that reason, the learned Senior State Attorney said the appellant had no share of blame in failing to file the appeal in time. In this respect, she was of a considered opinion that the appeal by the appellant has merit and she prayed that the appeal be allowed.

The support of the appeal by the learned Senior State Attorney made things easier for the appellant as he no longer had the obligation of

convincing the Court that his appeal has merit. For that reason, he chose not to make any reply.

As already indicated, the appellant pleaded guilty to the offence of unnatural offence contrary to section 154 (1) (c) of the Penal Code as amended by the Sexual Offences Special Provisions Act No. 4 of 1998. The application which was before the High Court was filed under section 361 (a) and (b) of the Criminal Procedure Act, No. 9 of 1985 by way of Chamber summons and it read as follows:-

“Let all sides of the parties attend before the Hon. District Registrar in Chambers on the 29th July, 2004 at 09.00 am. when the application for leave to lodge the notice of appeal and the appeal out of time shall be heard.”

It is apparent from the Chamber Application that the application by the appellant was asking for leave to lodge notice of appeal and appeal out of time. It is indicated that the application was to be heard by the District Registrar. That is of course wrong, because District Registrars do not have such powers. But so long as the application was filed in the High Court and the prayers which were sought for were indicated, we do not consider

the omission to specify that the application was to be heard by a judge to be fatal.

In dismissing the application by the appellant, the learned Judge who heard the application, (Masanche J.) as he then was held that:-

"Indeed the applicant pleaded guilty to the offence of unnatural offence (sodomising a child) contrary to section 154(1) (a) of the Act No.4 of 1998 (SOSPA). The child he sodomized was under ten(10) years old. He was a houseboy to the parents of the child. The PF3 tendered in court shows that the complainant had "abrasion wounds around the anus" and that when the said doctor was examining the body, the boy felt "severe pain during introducing the index figure."of the said doctor. Indeed his intended appeal has no chances of success."

The application which was filed by the appellant was supported by his own affidavit explaining why the appellant failed to file his appeal in time. This included failure to get the copy of the proceedings in time much as he expressed his intention to appeal in time. Later on he was transferred from Kondoia Prison where he was first admitted to serve the

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sentence, to Isanga Central Prison, several months after his conviction. Then he explained the fate which befell on the several applications he made subsequently in trying to find accessibility to court for hearing of his appeal.

During the hearing of the application, in the High Court on 11th September , 2006 the only submission the applicant made in court, as evidenced by the record of appeal on page 29 was:-

“I was late in appealing”

The respondent Republic which was represented by Mr. Mayeye Senior State Attorney, assisted by Mr. Rwegasira, a (trainee) made the following reply:-

"He says that the prisons did not give him the copy of the judgment and proceedings. We object to the application. He pleaded guilty. Section 390 of the Criminal Procedure Act –he only appealed against sentence. He cannot appeal against the conviction and sentence."

The appellant was not afforded any opportunity to make a reply. Instead, the learned judge went on to dismiss the application on the reasons indicated above.

With respect to the learned judge of the High Court then, we agree with the learned Senior State Attorney that the learned Judge erred in law in diverting the subject of the application which was before him by addressing matters which were not before the court and without even giving the appellant the right to be heard on that subject.

The application which was before him was an application for extension of time to file a notice of intention to appeal and an appeal out of time. The learned judge in determining the merit of the appeal without any ground of appeal before him was definitely in error. The learned judge greatly misdirected himself. His jurisdiction was limited to the application for extension of time for filing the notice of intention to appeal and the appeal. The right to hearing before any decision is made against any person is fundamental. We find ground one of appeal having merit and we allow them.

Regarding the second ground of appeal we are also satisfied that the affidavit of the applicant sufficiently accounted for the delay in filing the notice of intention to appeal. The mere fact that he was in prison with no freedom to move out of the prison to file the documents, and also taking

the factual situation that the applicant had no ability to force the Prison Officer in Charge to have them prepared and filed in time sufficiently accounted for the delay. His transfer to another Prison also added another setback to his problem.

Under the circumstances we find the appellant's appeal having merit and we allow it. The appellant is given ten days from the delivery of this judgement to file the notice of intention to appeal as well as the appeal within a period of ten days from the date of the delivery of this ruling. We accordingly order.

DATED at DODOMA this 17th of September, 2013.

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL