

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

CRIMINAL APPEAL NO. 209 OF 2013

(CORAM: RUTAKANGWA, J.A., MANDIA, J.A., And MUSSA, J.A.)

**CHAMBA S/O NDANGAMILA APPELLANT
VERSUS**

**THE REPUBLIC RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania
at Tabora)**

(Songoro, J.)

dated the 15th day of October, 2014

in

Criminal Application No. 17 of 2012

JUDGMENT OF THE COURT

2ND & 12th December, 2014

MANDIA, JA.:

The appellant was one of six accused persons who appeared before the District Court of Kahama at Kahama on a charge of Armed Robbery. After due trial, they were all convicted and on 15/1/1999 each was sentenced to thirty (30) years imprisonment on 15/1/1999.

On 15th March, 2012, thirteen years after conviction, the appellant lodged a Chamber Application in the High Court of Tanzania at Tabora. The Chamber Application consisted of a Chambers Summons supported by an

affidavit deponed by the appellant, in which the appellant stated that on entering prison on 15/1/1999 he expressed his intention to appeal and signed the notice of appeal, prepared the petition of appeal and gave all the relevant documents relating to his appeal to the prison officer at Malya Prison for onward transmission to the High Court. The appellant prayed to the High Court that he be granted extension of time within which to file his appeal because the appeal documents he handed over to the prison authorities were not delivered in time, thus making his appeal time barred.

Apart from the affidavit deponed by the appellant, there was also a supplementary affidavit deponed by the officer in charge Uyui Central Prison dated 28th February, 2012 which goes thus:-

"I, the undersigned, Do hereby make oath and categorically state as follows:-

- 1. **That** I am that officer in charge of Uyui Central Prison – Tabora, quite sure with what I am state (sic).*
- 2. **That** the above mentioned Prison applicant conformed here since 2007 when he was convicted at Kahama District Court and transferred to central Prison via to Malya*

Prison following his long sentence of thirty (30) in jail.

3. ***That*** *it is true that the cause of delay the appeal of this prisoner was due to Prison authority at Malya Prison where was he first admitted and prepared his appeal and handed it over to prison in order to be typed and sent it to High Court in time but Malya Prison authority they failed to done the ought to do hence the appeal of this Prisoner was delayed.*

4. ***That*** *it undisputed fact that the prisoner has no power to compel the Prison officer to present his appeal in time hence this delay occurred.*

5. ***That*** *I humbly pray that the applicant's application be granted, because the cause of delay was beyond his control my lord.*

Dated at Tabora this 28th day of February, 2012.

Sworn/affirmed by

***THE OFFICER I/C
UYUI CENTRAL PRISON
TABORA.***

On 15/10/2012 the application for extension of time was brought up for hearing before the High Court. The applicant informed the High Court that he expressed his intention to appeal in time but constant movement between Malya and Maswa Prisons affected the filing of his application for extension of time within the required time. The State, represented in the High Court by Ms. Mandago, State Attorney, did not oppose the application.

The High Court, in its ruling dated the same day 15/10/2012, accepted that both the appellant's affidavit and the Affidavit of the Officer in charge Uyui Prison established the fact that the applicant expressed his intention to appeal in time. The High Court noted that the State did not oppose the application. The same Court however went on to hold that since there were no affidavits from Kahama or Malya Prisons where the appellant was moved to before finally being moved to Uyui Central Prison, there is no proof that the appellant had expressed his intention to appeal when he first entered prison. The High Court declined to accept the veracity of the affidavit deponed by the Officer in Charge of Uyui Central Prison where the appellant was last held before lodging the application for extension of time. It consequently found that the appellant has not shown good cause

for extension of time, and dismissed the application. Aggrieved by the decision of the High Court, the appellant has filed the present appeal.

The appellant appeared in person, unrepresented, at the hearing of this appeal. The respondent Republic was, on the other hand, represented by Ms Juliana Moka, learned State Attorney.

Arguing the application, the applicant repeated the arguments he made in the High Court. Ms Juliana Moka, learned State Attorney, supported the application. She argued that at page 45 of the record there is a petition of appeal which shows that the appellant expressed his intention to appeal on 19/1/1999 which is only four days from the date of conviction i.e 15/1/1999. We have observed that the so called petition of appeal at pages 44 and 45 of the record has no registry number, and shows clearly that it has not been presented for filing in the High Court of Tanzania, Tabora. We will therefore not place much store on this purported petition of appeal. The learned State Attorney, however, went on to argue that Section 361 (1) (a) of the Criminal Procedure Act, Chapter 20 R.E. 2002 enjoins an intending appellant to give notice of his intention to appeal within ten days from the finding, sentence or order being contended and that, for an appellant serving

a prison sentence, the burden of transmitting the petition of appeal and all accompanying documents falls on the officer in charge of the prison where the appellant is held. We accept this reasoning. Our attention was also drawn to two authorities of this Court that shed light on the construction of sections 361 (1) and 363 of the Criminal Procedure Act. These authorities are **BUCHUMI OSCAR** versus **THE REPUBLIC**, Criminal Appeal No. 295 "B" of 2011 (unreported), **SOSTHENES NYANZAGIRO** versus **THE REPUBLIC**, Criminal Appeal No. 12 of 2003 (unreported) and **NZEYIMANA ZENO** versus **THE REPUBLIC**, Criminal Appeal No. 54 of 2007 (unreported). The central theme of the authorities cited above is that for an appellant who is under prison custody his/her obligation is merely to express an intention to appeal within ten days following conviction by a court, and that what follows thereafter in terms of forwarding of the documents of the appeal to the appropriate court within the time allowed by the law is the duty of the Officer in charge of the prison where the intended appellant is held. In the case before us, the appellant is arguing that soon after he entered prison to start his sentence he indicated that he desired to appeal against his conviction and sentence. This allegation of fact has not been controverted. This means the appellant has complied with the provisions of

section 361 (1) (a) of the Criminal Procedure Act. The next hurdle he faced was compliance with Section 361 (1) (b) of the Act. As rightly argued by Ms. Juliana Moka, Section 363 of the Criminal Procedure Act places the burden of complying with section 361 (1) (b) on the shoulders of the officer in charge of the prison where the appellant is held. The ruling of the High Court dismissing the appellant's application for extension of time has the following passage:-

"Turning to the applicant's application, I find there is no report or affidavit from Kahama Prison or Malya, which shows the applicant expressed his intention to appeal on time but the prison authorities delay (sic) to submit it on time. Furthermore, there is no evidence that, the applicant fall sick and that prevented him to file an appeal on time."

This observation by the learned High Court Judge is curious. The learned Judge is of the opinion that the prison authorities at Kahama or Malya Prison should have sworn an affidavit. By doing so it means the prison officers are taking over the duty of satisfying the requirements of S. 361 (1) (a) from the prisoner to themselves. As we said earlier it is only the

intended appellant who is required to show that he has expressed an intention to appeal. Page 48 of the record shows that the appellant notified the court that he had expressed his intention while at Malya Prison, a fact which was supported by the learned State Attorney appearing for the respondent Republic. If the question of expression of intention to appeal was settled at the hearing of the application, why did the learned judge require an affidavit from prison authorities to prove a fact already established? The quotation above also shows that the learned judge wanted affidavital proof that sickness on the part of the appellant and delay by the prison authorities led to the appeal being time barred. In this respect we can do no better than quote our sentiments in **NZEYIMANA S/O ZENO** versus **THE REPUBLIC**, Criminal Appeal No. 458 of 2007 (unreported) where, at p.7 of the judgment, we observed thus:-

"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 in charge 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 the 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 sentenced, any delay should be explained by 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."

The rationale behind this purposive interpretation of section 363 is given in **ALFRED CHINGA** versus **THE REPUBLIC**, Criminal Appeal No. 73 of 2008 where this Court held:-

"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 think that is why the prison official of Uyui could be bold enough to file an affidavit in support of the appellant's application because he was far moved from the scene of the default. Those at the center of the default

i.e. Kahama and Malya Prison Officers could not swear affidavits, and the High Court insisting that they do was stretching credulity too far.

On the material placed before us, we are of the opinion that the appellant has made a good case for extension of time. We therefore allow the appeal. The appellant is granted extension of time to file his appeal. The intended appeal should be filed within forty five days of delivery of this judgment.

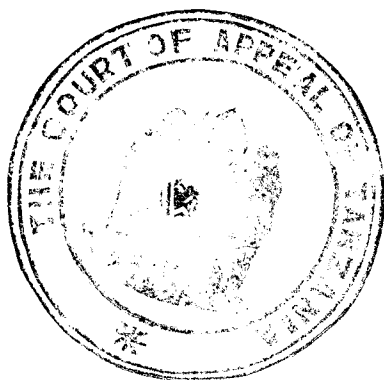
DATED at **TABORA** this 11th day of December, 2014.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL