IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 316 OF 2014

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

MOHAMED SAID @ MUDDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision/Judgment of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

dated the 14th day of July, 2014

in

HC. Misc. Criminal Application No. 131 of 2012

JUDGMENT OF THE COURT

8th & 11th December, 2015

RUTAKANGWA, J.A.:

The appellant, together with his wife, Neema d/o Paulo, were convicted as charged with two counts involving Unlawful Possession of Fire Arms and Ammunitions by the District Court of Sengerema District *("the trial court")*. They were sentenced to ten (10) years of imprisonment on each count, the prison sentences being ordered to run concurrently. They were evidently dissatisfied with the convictions and sentences. They resolved to establish their innocence by appealing to the High Court at Mwanza.

As far as we are concerned in this appeal, the appellant instituted Criminal Appeal No. 131 of 2012 *("the appeal").* When the appeal was on 26th March, 2013, placed before Sumari, J. for admission, the learned judge noted:-

> ***"DR***
>
> *Appeal summarily rejected for want of notice of appeal."*

We noted with grave concern that the summary rejection order was made on the standard admission form dated 13/3/2013 which clearly shows that *"the notice of Intention to appeal does appear to have been given within the prescribed period. The appeal is in time."*

Indeed strange things happen under the sun. This is because despite the clear order summarily rejecting the appeal, correctly or otherwise, the matter was called on for orders before I. Arufani, D.R. on 2nd April, 2013. The Deputy Registrar fixed the appeal for mention on 6th May, 2013 with orders that the parties be notified.

On 6th May, 2013, the appellant appeared in person before the Deputy Registrar, while the respondent Republic was represented by Ms.

Mwandenya, learned State Attorney. The appeal was then fixed for mention on 1st July, 2013. The record is silent on why the appeal was not called on for mention on that day.

However, the matter was again before Sumari, J. on 2nd September, 2013, and representation was the same as on 6th May, 2013.

Ms. Mwandenya is on record saying:-

> *"Since this court had rejected this appeal for want of notice of appeal, now there is a notice which clearly shows that it is not genuine, for it reads it was filed on 9/8/2013 by (sic) Sengerema District Court and* that it was presented for filing in this Court on 9/8/2012, which transaction is purely dubious. I pray the appeal to be struck out and the appellant ordered to follow procedures to file his appeal."

The appellant responded as follows:-

> *"I don't know all these anomalies. My appeal was filed on 14/10/2012."*

The learned judge then thus ruled:-

> *"The order dated 26/3/2013 for summary rejection for want of notice is still in force. If the appellant*

wants to pursue his appeal he must follow the legal requirements rather than playing tricks to influence this court to try his appeal. It is so ordered."

With that order reminiscent of the legendary Hobson's choice, the appellant was at cross-roads. He had no choice if he wanted to pursue his intended appeal, short of appealing the summary rejection order to this Court. Presumably unaware of that right, he chose to comply with the directions of the learned judge. He instituted Misc. Criminal Application No. 38 of 2013 *("the application")* in the same court seeking extension of time within which to lodge the notice of appeal and the appeal out of time.

The chamber summons instituting the application was premised on s. 361 (2) of the Criminal Procedure Act, Cap. 20, Vol. I, R.E. 2002 ("the C.P.A.") and was supported by two affidavits, one of himself and another by ASP Z. M. Tibwakawa, of Butimba Prison.

The most pertinent paragraphs of the applicant's affidavit, we have satisfied ourselves, were 3, 4, 5, 6 and 7. These read as follows:-

"2. *THAT, the said Judgment totally aggrieved me and I informed the prison officer in charge of my desire to appeal, on 6th day of August, 2012 during my being admitted to Sengerema*

(Kasungamile) Prison Sengerema - where the right of appeal was sufficiently explained and understood by me.

3. *THAT, given my intention to appeal, the said Prison officer in charge requested me to reduce such an intention into writings, which I did and later handed my hand draft notice of intention of appeal before the Prison Officer i/c. on 7th August, 2012, purposely, for typing endorsement of Certification clause and (timely) onward transmission of the document to the trial Court.*

4. *THAT, on 9th day of August, 2012 after the hand - draft had been typed I was called at the admissions office where upon, signed it and was accordingly assured that it would be filed with the trial Court in the prescribed time.*

5. *THAT, I was transferred to Butimba C. Prison on 2nd Feb. 2013 then I received a copy of the Judgment on 15th February, 2013. I prepared and handed my petition of appeal to the officer incharge of Butimba C. Prison on 19th February 2013, where it was transmitted to the Court.*

6. *THAT, on hearing the appeal on 2nd September, 2013 in the Court I got it ruling that it was struck out due to the notice of intention of Appeal was in out of the time.*

7. *THAT, I do still believe that the ruling of Hon. Sumari Judge, which struck out my previously petition of appeal, thus accused*

to would not bar me to file an instant application for extension of time to lodging the notice and petition of appeal."

On his part, A.S.P. Tibwakawa, in the most relevant paragraphs of the affidavit, deponed as follows:-

"2. THAT, I have gone through the applicant basic Affidavit Paragraph 1 - 8 of the contents there in and I subscribe to all what has been advanced as they account of the real situation obtained.

3. THAT, as the applicant signed his desire to appeal before the Prison Officer incharge of Kasungamile Prison 9/08/2012 which fact is borne in my mind from the annotation on the applicant Prisoner's Record during his being admitted at Butimba central Prison, a notice of appeal was fully drawn and signed by the applicant and transmitted to Court of appeal as per copy of notice on his record.

4. THAT, I believe both applicant the Prison authorities did squarely what was required of them regarding a notice of appeal."

The respondent Republic did not file any counter-affidavit. At the hearing, it neither opposed nor supported the application. Ms. Angelina Nchalla, learned State Attorney, left the matter entirely within the discretion of the judge to *"proceed either way."*

In her ruling, the learned judge, after observing that Ms. Nchalla had resisted the application, went on to hold thus:-

> *"The crucial issue to be addressed and without disrespecting my senior learned Judge still stands and, I tend to agree* ***"Notice of Appeal"*** *is wanting. It is apparent therefore that it ought to be complied to as ordered and, it being hope-lessely out of time the law is also evident as to which way forward. My hands are therefore tied to venture into this application and which I believe has skipped that crucial procedural step as ordered* ***23rd of March & 2nd of September 2013*** *lest I tread on raging waters against the orders of my learned Senior Judge.*
>
> *Let me in the interest of justice while holding as I do, remind the Applicant that in such scenario* ***'good and sufficient'*** *reasons have to be adduced and to which could then avail, if any. It is in the same vein that unless and until the* ***Notice of Appeal out of time*** *is heard on merit the Right of Appeal and out of time is incompetent. The case of* ***Msafiri Kaduruma*** *Vs.* ***The Republic Criminal Appeal No. 75 of 2003*** *refers.*

In the above findings, I hereby dismiss this Application and reiterate the orders of Judge Sumari to still be in force.
Let it be so ordered."

The appellant was aggrieved by that ruling, hence this appeal supported by a five-point memorandum of appeal. The appellant is principally faulting the learned High Court Judge in finding herself bound by the ruling *"of her learned Senior Judge i/c,"* and failing to determine the application basing on the two affidavits in support of the chamber summons. He is accordingly urging us to *"quash the summary rejection order and restore the appeal."*

At the hearing of the appeal the appellant appeared in person fending for himself. He urged us to allow the appeal as he had lodged the notice of appeal in time.

For the respondent Republic, Ms. Zaituni Mseti, learned State Attorney, appeared and supported the appeal. Her smoking gun in supporting the appeal was her unequivocal contention that the learned High Court Judge had wrongly dismissed the application because the applicant was not pursuing the appeal which had been summarily rejected, but was seeking

extension of time within which to lodge a notice of appeal and his intended appeal out of time. As such, she reasoned, and quite correctly, the hands of the learned judge were not tied by the order of Sumari, J. She accordingly urged us to allow the appeal by quashing the impugned ruling and directing the High Court to hear and determine the applicant's application on merit.

After her brief but focused submission we were anxious to tap her wisdom on the propriety of the order summarily rejecting the appellant's appeal. At first she was disposed to support the order because it had been lodged without the appellant lodging a written notice of intention to appeal.

But we probed her further focusing our attention on section 361 (1) (a) of the C.P.A. and the letter dated 9th August, 2012, from the officer-in-charge of Kasungamile Prison, Sengerma. In this letter, it is explicitly shown that the appellant and his wife on admission to that prison, had *"expressed their intention to appeal to the High Court of Tanzania against the whole decision of the District Court of Sengerema on which they were sentenced to ten years imprisonment . . ."* On being aware of this letter which was received by the trial on the same day (8/9/2012), she readily conceded her error. She then changed her stance and opined that the order summarily rejecting the appeal was erroneously made. To be fair to her, we have to

point out that we traced this letter requesting for copies of proceedings and judgment in the original trial court's record of proceedings. It is not in the record of appeal before us.

Further to that, we also traced in the same record, the original notice of intention to appeal which had been given contemporaneously with the letter mentioned above. It is this notice of intention to appeal which Ms. Mwandenya had unjustifiably labelled *"purely dubious"*, and had earned the appellant a strong rebuke he did not deserve from the learned judge. We are saying so without any fear of being contradicted because the typed date on that letter, bearing the undisputed signature of one ASP. M. S. Mkisi, Officer-in-charge of Kasungamile Prison, is *"9/8/2012"*. The learned judge and State Attorney, apparently, had concentrated on the date endorsed on the trial court's rubber stamp.

In the light of these disturbing revelations, Ms. Mseti pressed us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 (*"the A.J.A."*) to quash and set aside the summary rejection order and restore the appellant's appeal.

In disposing of this appeal, we shall begin by appreciating Ms. Mseti's prompt appreciation of the fatal errors committed by the High Court, increasing the appellant's mental torture (as he shed tears in Court), which has made our work in search for justice much easier. That said, we should quickly point out that having gone through the proceedings in the High Court, the impugned ruling, the grounds of appeal and Ms. Mseti's submission before us, we are settled in our minds that this appeal has a lot of merit. We join hands with Ms. Mseti and respectfully hold that the High Court misapprehended the nature and substance of the application before it and the reliefs that were being sought therein. The appellant had pursued what Sumari, J. had directed him to do on 2nd September, 2013. Therefore, it was a shocking surprise to him to be told by the same High Court that its hands were tied and the *"orders of Judge Sumari"* were still inforce.

As it is glaringly clear that the appellant's application was for extension of time to lodge the notice of appeal and the appeal out of time, we find ourselves constrained to allow this appeal. We accordingly quash and set aside the impugned ruling dated 14th July, 2012. Under normal circumstances, we would have had two options open to us: either to remit the High Court record to it with instructions to hear and determine the

application or proceeding under s. 4(2) of the A.J.A. to grant the extension of time. We shall pursue neither option here for reasons which are already obvious.

As conceded by the respondent Republic, the learned High Court judge had erred in law and on established facts to summarily reject the appellant's appeal. We agree and we have a few reasons for supporting this stance.

Firstly, the summary rejection order does not show the relevant legal provision under which it was predicated. If the High Court acted under s. 364 (1) of the CPA, then it was wrong. This provision does not confer jurisdiction on the High Court to summarily reject an appeal for "want of a notice of appeal". In an almost analogous situation, this Court in the case of **MSAFIRI HASSAN MASIMBA v. R,** Criminal Appeal No. 425 of 2007 (unreported), held that summarily rejecting an appeal on the ground of being time barred *"offended the cardinal rule of natural justice, to the effect that nobody should be condemned unheard, or limitation is not one of the prescribed grounds for summarily rejecting an appeal.* Indeed, the established facts in this appeal fully vindicate this position. Had the learned

High Court judge heard the appellant, he would have convinced her that he had not been in breach of s. 361 (1) (a) of the C.P.A.

Secondly, summary rejection powers should be sparingly invoked. This Court in the case of **IDDI KONDO v. R** [2004] T.L.R. 362 underscored the following principles before summarily rejecting an appeal:-

> *"(1) Summary dismissal is an exception to the general principles of Criminal Law and Criminal Jurisprudence and, therefore, the powers have to be exercised sparingly and with great circumspection.*
>
> *(2) to (4) . . . not applicable*
>
> *(5) Where important or complicated questions of fact and/or law are involved or where the sentence is severe the Court should not dismiss an appeal but should hear it."*

Thirdly, a serious charge as that of murder, armed robbery, rape, etc; which carry heavy minimum statutory sentences of death or imprisonment, would not usually qualify for summary rejection: See, for instance, **CHRISTOPHER NZUNDA & TWO OTHERS v. R.,** Criminal Appeal No. 152 of 2006 (unreported).

Lastly, it is elementary knowledge that unlike Rule 68 (1) of the Tanzania Court of Appeal Rules, 2009 *("the Rules")* which requires an intended appellant to give and lodge a written notice of appeal, there is no such requirement under s. 361 (1) of the C.P.A.

In an identical situation, this Court in **MSAFIRI H. MASIMBA** (supra) lucidly held as follows:-

> *"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. . ."*

So was the case here. Indeed the appellant had not only given an oral notice of intention to appeal, but as already sufficiently demonstrated he went a step further, unnecessary as it was, to give a formal notice of intention to appeal. We respectfully think that with a modicum of care this appeal would have been avoided: See also **CHARLES MABULA V. R.** Criminal Appeal No. 191 of 2012. How true then is the saying: *"More haste, less speed."*

he went a step further, unnecessary as it was, to give a formal notice of intention to appeal. We respectfully think that with a modicum of care this appeal would have been avoided: See also **CHARLES MABULA V. R.** Criminal Appeal No. 191 of 2012. How true then is the saying: *"More haste, less speed."*

In conclusion, as it has been established that the appellant had given notice of his intention to appeal within three (3) days, the learned High Court judge, in our respectful holding, erred in summarily rejecting his appeal. We therefore invoke s. 4(2) of the A.J.A. to quash and set aside the said summary rejection order. We restore the appellant's appeal in the High Court and order that it be heard as expeditiously as possible.

DATED at MWANZA this 11th day of December, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL