IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 322 OF 2013

THOMAS PETER @ CHACHA MARWA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

dated the 11th day of September, 2013
in
Misc. Criminal Application Case No. 16 of 2012
.....

JUDGMENT OF THE COURT

28th May & 1st June, 2015
RUTAKANGWA, J.A.:

The appellant was convicted by the District Court of Nyamagana District of the offence of Armed Robbery and sentenced to thirty (30) years of imprisonment with six (6) strokes of the cane. He was immediately admitted at Butimba Prison Mwanza to begin serving his sentence. This was on 3rd June, 2010. Believing in his innocence, he resolved to challenge the conviction and sentences through an appeal to the High Court. After giving the requisite notice of appeal, he formally lodged his appeal in the High Court at Mwanza on 28th August 2010.

The appellant's appeal (the appeal) was registered as Criminal Appeal No.62 of 2010 and was assigned to Nyangarika, J. Slightly over a year later, on 7th September, 2011, the learned judge, **suo motu,** made this indisputably startling order:-

> *"ORDER OF SUMMARY REJECTION OF AN APPEAL*
>
> *The appeal filed on 28/8/2010 by the appellant is hereby summarily rejected on the ground that the notice of intention to appeal was purportedly lodged before the District Court of Nyamagana at Nyamagana on 16/6/2010, in contravention of the mandatory provisions of* ***section 36 (1) (a) of CPA*** *as the judgment of the trial court was delivered on 3/6/2010, thus, the said notice filed was time barred for almost three (3) days, from the date of the findings of the trial court.*
>
> *The appeal is therefore summarily rejected."*
>
> [Emphasis provided].

This summary rejection order, we must quickly point out, was made without both parties in the appeal being heard.

Upon hearing of the summary rejection of his appeal, the appellant lodged Criminal Application No. 16 of 2012 (the application) seeking extension of time within which to file a notice of intention to appeal out of time. The application was challenged by the respondent Republic, which argued that it was misconceived and therefore incompetent as the remedy of the appellant lay in an

appeal to this Court. In its ruling on the preliminary objection, the High Court (Mwangesi, J.) upheld the preliminary objection.

In upholding the preliminary objection, the learned judge reasoned thus:-

> *"Indeed, the effect of the summary rejection of the appeal by the applicant entered by this Court on the 7th September, 2011 meant that, the appeal had been determined on its merits. As such, this Court became functus officio in respect of the appeal. To that end, in the light of the holding in the case of* ***Edwin Urio*** *(supra), the application by the applicant as submitted by Madam Tibilengwa, learned State Attorney is unfounded and has to fail.* ***It is therefore dismissed."*** [Emphasis is ours.]

Aggrieved by the dismissal order the appellant has lodged this appeal.

Admittedly, the three grounds of appeal contained in a memorandum of appeal drawn by a lay hand, are incomprehensible. The best we could gather from these complaints is that the appellant is complaining that Nyangarika, J., had no justification to dismiss the appeal "without informing him the proper/competent remedy, and/ or an alternative venue to refile the same appeal to the same court." He is accordingly urging us to exercise our revisional powers to quash and set aside the order of Nyangarika, J. The memorandum of appeal, therefore does not support the notice of appeal lodged on 17th September, 2013 in relation to the order of Mwangesi, J. As if that is not sufficiently fatal, we have also found out that the notice of appeal purporting to institute this appeal is incurably defective. Although Mwangesi, J. "dismissed" the application for extension of

time for being incompetent, the said notice of appeal stipulates that the appellant is appealing against the conviction for armed robbery and a sentence of thirty years imprisonment. This fact escaped the attention of Mr. Mamti Sehewa, learned Senior State Attorney, who supported this appeal because Nyangarika, J. had erred in law in summarily rejecting the appeal on the ground of being time barred.

All things being equal, we would not have hesitated to strike out this apparently incompetent appeal immediately. In the interests of justice we shall not do so due to the glaring incurable irregularities in the decisions of both Nyangarika, J. and Mwangesi, J.

It is now common knowledge in our jurisprudence, that an incompetent proceeding cannot be determined on merit. It can only be struck out. For this reason, if Nyangarika, J. was convinced that the appeal before him was incompetent on account of being time barred, he had only one option. He had to strike it out and not reject it summarily. Under the scheme of our Criminal Procedure Act, Cap 20, only a competent appeal can be summarily rejected and then under section 364 and not section 360(1) (a). The summary rejection order, therefore with due respect, was illegal. We accordingly invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the Act) to proceed to nullify, quash and set aside the order of the High Court dated 7th September, 2011.

Furthermore, since Mwangesi, J. had found the appellant's application to be misconceived and incompetent the best he could do was to strike it out and not dismiss it. We again resort to section 4 (2) of the Act to nullify, quash and

set aside the dismissal order and substitute therefore an order striking out the entire application. What remedy then, avails the appellant in this incompetent appeal? It is said that where there is a right there is a remedy.

After scrutinizing the record, we have emerged convinced that Nyangarika, J., unjustifiably hastily summarily rejected the appeal. We have already shown that the trial District court judgement was delivered on 3rd June, 2011. On page 38 of the record of appeal, which was prepared by the High Court, we have found a "Notice of Intention to Appeal" (the notice) which was signed by the appellant and endorsed by the Officer-in-Charge of Butimba Prison on 7th June, 2010. Furthermore, the petition of appeal found on page 39 of the record of appeal shows that the appellant gave his notice of intention to appeal on 5th June, 2010 to the prison authorities. So as of 5/6/2010 the appellant was home and dry for he was not late even by a fraction of a second in giving the notice of intention to appeal. We respectfully hold that the learned judge erred both in law and fact in holding that the appellant was late by three (3) days in filing the notice. We are deliberately saying that he erred in law, because the CPA requires an intending appellant to give a notice of intention to appeal and not to lodge or file such notice:- **Msafiri Hassan Masimba v. R.,** Criminal Appeal No. 425 of 2007, and **Charles Mabula v. R.,** Criminal Appeal No. 191 of 2012 (both unreported), among others.

As we think we have sufficiently demonstrated, it is clear that the appellant had given his notice of intention to appeal against the judgment of the trial court to the prison authorities within the time prescribed under the CPA. Having quashed the summary rejection order, we restore the appeal and direct the High

Court to determine it as expeditiously as possible. Indeed, a short cut is not always the shortest way.

All said and done, we urge all those entrusted with this noble task of dispensing justice to adhere always to this simple but salutary principle:-

> *"In the administration justice speed is good, but justice is better."*

DATED at MWANZA this 30th day of May, 2015

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

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

Z.A. Maruma
DEPUTY REGISTRA
COURT OF APPEAL