

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

**(CORAM: MJASIRI, J.A., KAIJAGE, J.A., And MMILLA, J.A.)**

**CRIMINAL APPEAL NO. 38 OF 2016**

**OMARI ABDALLAH ..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of  
Tanzania at Tanga)**

**(Msuya, J.)**

**dated the 29<sup>th</sup> day of September, 2014**

**in**

**Criminal Appeal No. 43 of 2013**

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**JUDGMENT OF THE COURT**

**24<sup>th</sup> & 29<sup>th</sup> June, 2016**

**MMILLA, J.A.:**

Omari Abdallah (**the appellant**), is appealing against the decision of the High Court of Tanzania at Tanga which upheld the conviction and sentence of 30 years imprisonment which was passed against him by the District Court of Lushoto at Lushoto after he pleaded guilty to the charge of rape contrary to section 130 (2) (e) of the Penal Code Cap 16 of the Revised Edition, 2002.

The facts of the case were that on 29.3.2013 at about 19.00 hours at Kwegunda village within Lushoto District in Tanga Region, the appellant raped Zalika Ramadhani, a girl who was then 17 years old. When the charge was read over to him, he admitted to have committed the offence. He similarly admitted that the facts which were read over to him were correct. Consequent upon that, the trial court convicted and sentenced him to serve 30 years imprisonment. As aforementioned, his first appeal to the High Court was unsuccessful, hence this second appeal to this Court.

His memorandum of appeal raised two grounds; **one** that, the two courts below erred in holding that his plea was unequivocal; and **two** that, the two courts below erred in law and in fact when they failed to realize that the plea was unfinished.

Before us the appellant, who appeared in person and fended for himself, elected for the Republic to begin but indicated that he was going to submit later on if need would arise. On the other hand, Ms Sabrina Joshi, learned State attorney, represented the respondent Republic. Upon taking the stand, Ms Joshi asked for the Court's blessings to submit on a

legal point of law which she discovered a little while before the matter was called on for hearing. We granted her permission.

The point she raised was that the appellant did not give notice of intention to appeal to the High Court as required by section 361 (1) (a) of the Criminal Procedure Act Cap 20 of the Revised Edition, 2002 (CPA). She said that it was unfortunate that the error escaped the eye of the High Court. Relying on the case of **Mustapha Rajab & Another v. Republic**, Criminal Appeal No. 104 of 2015 CAT (unreported), she submitted that given such a situation, the High Court had no jurisdiction to entertain the appellant's appeal. She urged the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) and quash the proceedings and judgment of the High Court for being a nullity.

On the other hand, this being a legal point, the appellant, a self-confessed lay man, had nothing useful to say. He left the matter for the Court to determine.

On our part we hasten to say that at any given level, an appeal is a creature of the law. Any person intending to lodge an appeal before the court of law must do so in accordance with the law.

In the circumstances of the present matter, the governing provision of law is section 361 of the CPA. That section sets down some conditions to be met before a person may lodge his appeal to the High Court. One of those conditions is found under sub-section (1) (a) thereof which instructs a person intending to appeal to **give** notice of intention to appeal within a period of ten (10) days from the date of the decision. That section reads:-

*"361 (1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant—*

*(a) has **given** notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence."*

It is the position therefore that unless a person has **given** a notice of his intention to appeal, the High Court shall not entertain his appeal. It is essential to note however, that the phrase "**has given**" used in that section implies that a notice of intention to appeal may either be "**oral**" or "**written**" as was expressed in the cases of **Yazidu Nyoni v. Republic**, Criminal Appeal No. 137 of 2014 CAT and **David Langson v. Republic**, Criminal Appeal No. 44 of 2013 CAT (both unreported). In the former case of **Yazidu Nyoni v. Republic** (supra), the Court stated that:-

*"We would like however, to briefly say something concerning the confusion of the use of the words to "**file notice**" as against to "**give notice**" in an attempt to comply with the requirement under section 361 of the CPA. Unlike in the case of the Court of Appeal for which an aggrieved party is required to **give a notice in writing** if he/she intends to appeal against the aggrieving decision as stipulated under Rule 68 (1) of the Court of Appeal Rules, 2009, there is no direction under section 361 of the CPA that the notice by a party intending to appeal must be in writing. That means it can either be **oral** or in **writing** . . . We have found it useful to explain this in order to vouch confusion which may result into denial of justice*

*and/or to save as guidance when tackling matters touching on that provision."*

See also the case of **David Langson v. Republic** (supra) in which the Court said:-

*"...The appellant, under sections 359 (1) and 361 (a) of the CPA should **give** his notice of intention to appeal within ten (10) days from the date of delivery of this judgment. We have deliberately underscored the word "**give**" because the scheme of the CPA, unlike the court Rules, does not envisage the **lodging** of a formal or written notice of intention to appeal to the High Court: See, for instance, **Waziri Karoboia and Mabula Manyandoi v. R.**, Criminal Appeal No. 234 of 2011 dated 13<sup>th</sup> September, 2013 (unreported)."*

In the present case, we agree with the Ms Joshi that the appellant did not give notice of whatever form of his intention to appeal to the High Court. That being the case, the High Court erred in determining his appeal because it had no jurisdiction to do so. Thus, the proceedings and the judgment of the High Court were a nullity, making the appeal before us is incompetent.

For reasons we have given, we invoke the revisional powers we have under section 4 (2) of the AJA on the basis of which we quash the proceedings and judgment of the High Court.

By way of advice however, the appellant may, if he so desires, re-initiate the process of appeal to the High Court after he will have applied for extension of time to give notice of intention to appeal.

Order accordingly.

**DATED** at **TANGA** this 28<sup>th</sup> day of June, 2016.

S. MJASIRI  
**JUSTICE OF APPEAL**

S. S. KAIJAGE  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

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



  
P. W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**