IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MJASIRI, J.A., LILA, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 61 OF 2015

BETWEEN

1. BINAISA PHARES SUMWA RASTA
2. PETER MUSSA MAKENGE @ CHONGO } **..... APPELLANTS**
3. ALPHONCE CHARLES @ DOGO MZEE

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Nyangarika, J.)

dated the 14th day of April, 2010
in
Miscellaneous Criminal Application No. 28 of 2009

RULING OF THE COURT

21st & 25th August, 2017

NDIKA J.A.:

This is a joint appeal by three appellants, namely, Binaisa Phares Sumwa Rasta, Peter Mussa Makenge @ Chongo and Alphonce Charles @ Dogo Mzee from the decision of the High Court (Nyangarika, J.) in Miscellaneous Criminal Application No. 28 of 2009 dismissing the appellants' quest for extension of time to lodge notice of intention to appeal and to file a fresh appeal in the High Court against a decision of the District Court of Mwanza District (the trial court).

The background to this matter is briefly as follows: the appellants were each convicted by the trial court on 19th April, 2006 of armed robbery contrary to section 287A of the Penal Code, Cap. 16 RE 2002. As a result, each of them was sentenced to thirty years imprisonment. Dissatisfied, they separately lodged appeals in the High Court of Tanzania at Mwanza, which were registered as Criminal Appeals Nos. 22, 23 and 24 of 2007. The said appeals, contesting the appellants' respective conviction and sentence, were subsequently consolidated and dealt with in the record in respect of Criminal Appeal No. 22 of 2007.

As it turned out, on 25th June, 2008 the High Court (Sumari, J.) struck out the aforesaid consolidated appeal on the ground that it was hopelessly time-barred. For ease of reference, we reproduce the said order of the High Court, which was rather brief, as follows:

> ***"ORDER***
>
> ***SUMARI, J:***
>
> *As well submitted by the State Attorney this appeal is hopelessly out of time. The appeal is therefore struck out."*

Aggrieved, the appellants moved the High Court vide Miscellaneous Criminal Application No. 24 of 2008 for restoration of their consolidated appeal on the ground that it was filed in time as they lodged their respective notices of intention to appeal within time. The High Court (Mackanja, J.) dismissed that application on 18th February, 2009. The Court reasoned that:

> *"From the nature of the decision by which the consolidated appeals were dismissed (sic), the appeals cannot be re-admitted. The applicants may, if they have evidence to prove the errors apparent on the record, file an application for revision. Otherwise the only course of action which is open to them is to appeal against the order of this Court by which the appeals were dismissed (sic)."*

We find it apposite at this point to interpose and observe that it is evident that in the aforesaid decision the High Court inaccurately characterized the disposal of the consolidated appeal by Sumari, J. as "dismissal" as opposed to "striking out".

Undeterred, the appellants jointly lodged another application (i.e., Miscellaneous Criminal Application No. 28 of 2009) in the High Court under

section 361 (1) and (2) of the Criminal Procedure Act, Cap. 20 RE 2002 (CPA) for extension of time to file notice of appeal as well as a fresh appeal against the trial court's decision. That application came to naught as the High Court (Nyangarika, J.) dismissed it on 14th April, 2010 on the ground that it showed no sufficient cause for enlargement of time.

As indicated earlier, the aforesaid decision of the High Court (Nyangarika, J.) is the subject of the present appeal. Each appellant has raised, in a separate Memorandum of Appeal, five common grounds of complaint as follows:

> *"1. THAT, the Hon. High Court Judge had no legal and/or factual basis upon which to dismiss the appellant's application instead of striking it out.*
>
> *2. THAT, the High Court Judge did not realize that the appellant's appeal within the High Court was competent as per the principle of computation outlined under the terms of the CPA Cap. 20 before rejecting his application.*
>
> *3. THAT, the blemish of negligence was improperly shifted to the appellant regardless of mistrial in appellate stages was made out of the appellant's control.*

4. THAT, there are irregularities, illegality and/or apparent error on the face of record (proceedings) hindered the appellants' appeal which remains unresolved.

5. THAT, in the event, this Court is requested to comply with section 4 of the Appellate Jurisdiction Act to revise the proceedings and orders of the High Court in Appeal No. 22 of 2007, Misc. Criminal Application No. 24/2008 and also Misc. Criminal Application No. 28/2009 to dispense justice."

At the hearing of the appeal, the appellants appeared in person, unrepresented while Mr. Castus Ndamugoba, learned Senior State Attorney, represented the respondent/Republic.

Before the hearing of the appeal commenced in earnest, we asked the parties to address us on the correctness, legality and propriety of the order of the High Court (Sumari, J.) of 25th June, 2008 quoted above that struck out the appellants' consolidated appeal. We did so while fully aware that although the present appeal primarily seeks to challenge the dismissal by the High Court (Nyangarika, J.) in Miscellaneous Criminal Application No. 28 of 2009 of the appellants' pursuit for enlargement of time to lodge notice of

appeal and a fresh appeal before the High Court, ultimately the kernel of the appellants' complaint appears to be the contention that the consolidated appeal was competent and that it ought not to have been struck out. Indeed, that claim, it seemed to us, could be inferred from the content of the second, fourth and fifth grounds of appeal.

For obvious reasons, Mr. Ndamugoba was the first to address us on the above point. In his brief address, Mr. Ndamugoba faulted the High Court's order striking out the appeal. He acknowledged that since it is on the record that the appellants were supplied with copies of the trial court's judgment on 2nd January, 2007 after they applied for them on 22nd April, 2006 (that is, three days after the trial court convicted them on 19th April, 2006), the forty-five days limitation period for appealing ought to have been reckoned from 2nd January, 2007 in terms of the provisions of section 361 (1) of the CPA. Noting that the appellants' Memoranda of Appeal are rubber stamped to have been received by the High Court on 25th January, 2007, Mr. Ndamugoba concluded that the appellants' appeals appear to have been lodged within time. Nonetheless, he surmised that the said appeals might have been time-barred as he saw no proof that they were lodged after the appellants had duly filed their respective notices of intention of appeal.

Given the circumstances, Mr. Ndamugoba urged us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 (AJA) to revise, quash and set aside the order of the High Court dated 25th June, 2008 that struck out the consolidated appeal if there is proof that the appellants duly filed notices of intention to appeal to the High Court. On the same reasoning, he prayed that the proceedings and decisions in Miscellaneous Criminal Applications Nos. 24 of 2008 and 28 of 2009 that ensued on the back on the erroneous striking out of the consolidated appeal be revised and nullified. As to the consequential order that should be made, he submitted that the High Court be ordered to hear and determine the consolidated appeal.

On their part, the appellants maintained that their consolidated appeal was wrongly struck out by the High Court on 25th June, 2008. They said that they lodged their respective separate appeals within the prescribed limitation period after they were supplied with copies of the trial court's judgment. Then, they allayed Mr. Ndamugoba's fears that their appeals were vitiated on account of failure to lodge the prerequisite notices of intention to appeal. In this respect, they asserted that the appeals were preceded by notices duly lodged on 20th April, 2006, which was only one day after they were convicted. Copies of the notices that they presented to this Court from the

dock attest to this claim. On this basis, the appellants pressed that their consolidated appeal be reinstated and that it be heard and determined expeditiously in view of the fact that they had since their respective convictions been waiting to have their day before the High Court in their first appeal for about eleven years.

Having heard the parties and examined the record before us, we are of the firm view that the circumstances of this matter enjoin us to consider the invocation of our revisional powers under section 4 (2) of the AJA. Under the aforesaid provisions, this Court can revise a decision or proceedings in the course of dealing with an appeal.

In determining the correctness, legality and propriety of the order of the High Court that struck out the appellants' consolidated appeal, we are enjoined to decide whether the aforesaid appeal was lodged in compliance with the provisions of section 361 (1) of the CPA, which govern criminal appeals to the High Court from a subordinate court other than a subordinate court exercising its extended powers. For ease of reference, we reproduce the said provisions as follows:

"(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; and*

(b) has lodged ***his petition of appeal within forty-five days from the date of the finding, sentence or order,***

save that in computing the period of forty-five days the ***time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded.****"*[Emphasis added].

The above provisions are definite and unmistakable. They require an intending appellant, aggrieved by a subordinate court's decision, to not only lodge his notice of intention to appeal within ten days from the date of the decision but also file the intended appeal within forty-five days from the date

of the impugned decision. In addition, the proviso to the said provisions excludes from the computation of the forty-five days limitation period the time required for obtaining from the subordinate court a copy of the decision sought to be challenged.

Although the original record of the consolidated appeal (Criminal Appeal No. 22 of 2007 was not availed to us as it was reportedly untraceable, the materials before us (particularly the appellants' Memoranda of Appeal lodged in the High Court) support the common position taken by the parties. First and foremost, it is evident that the appellants were supplied with the copies of the trial court's judgment on 2nd January, 2007 after they applied for them on 22nd April, 2006 (that is, three days after the trial court convicted them). Secondly, it is common ground that the forty-five days limitation period for appealing ought to have been reckoned from 2nd January, 2007 in terms of the proviso to sub-section (1) (b) of section 361 of the CPA. Thirdly, it is unmistakable that the appellants' separate appeals were stamped to have been received by the High Court on 25th January, 2007, which was about twenty-three days after the day of reckoning. Moreover, the copies of the notices dated 20th April, 2006 availed to us by the appellants confirm that they lodged their respective notices of intention to appeal to the High Court in time. On these facts, we are fully satisfied that the appellants' consolidated

appeal was lodged in time and that the High Court's order of 25th June, 2008 striking out that appeal was erroneous and untenable.

It seems to us that the erroneous view by the High Court that the appeal was time-barred emanated from its failure to exclude the time required for obtaining from the subordinate court a copy of the decision sought to be challenged from the computation of the forty-five days limitation period. From the wording in which the High Court's order is couched, it appears that the Court simply banked upon the learned State Attorney's submission that the appeal was out of time without ascertaining the proper day of reckoning of the prescribed limitation period after excluding the period required for obtaining a certified copy of the impugned decision.

Upon the foregoing analysis, we invoke our revisional powers under section 4 (2) of the AJA and proceed to quash and set aside the High Court's order of 25th June, 2008 striking out the consolidated appeal (i.e., Criminal Appeal No. 22 of 2007). Moreover, on a parity of the same reasoning and logic we quash and set aside entire proceedings and decisions in Miscellaneous Criminal Applications Nos. 24 of 2008 and 28 of 2009, which ensued on the back on the erroneous striking out of the consolidated appeal. Consequently, we order that the appellants' consolidated appeal be heard

and determined by the High Court as expeditiously as possible taking into account that they have had to wait for over nine years for their day before the High Court following the flawed disposal of their appeal.

It is so ordered.

DATED at **MWANZA** this 23rd day of August 2017.

S. MJASIRI
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL