

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

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.,)

CRIMINAL APPEAL NO. 532 OF 2016

**1. ALLY RAMADHANI SHEKINDO.....1ST
APPELLANT**
**2. SADICK SAID @ ATHUMANI.....2ND
APPELLANT**

VERSUS

THE REPUBLIC

RESPONDENT

**(Appeal from the judgment of the High Court of Tanzania
at Arusha)**

(Moshi, J)

dated 18th day of July, 2016

in

Criminal Appeal No. 35 of 2016

RULING OF THE COURT

3rd & 11th December, 2018

MWARIJA, J.A.:

In this appeal, the appellants, Ally Ramadhani @ Shekindo and Sadick Said @ Athumani, have appealed against the decision of the High Court (Moshi, J) in Criminal Appeal No. 35 of 2016. That appeal arose from the decision of the District Court of Babati in Criminal Case No. 311 of 2010. In that case, the appellants and another person, Petro Patrick @ Paulo, were charged with the offence of gang rape contrary to Section 131 A and (2) of the Penal Code [Cap. 16 R.E. 2002].

It was alleged that on 12/9/2010 at about 23.30 hrs at Majengo Mapya area within Babati District in Manyara Region, the appellants and the said Petro Patrick, had a carnal knowledge

of one Awaki Martine without her consent. At the trial, the prosecution relied on the evidence of

five witnesses and documentary exhibits including the medical examination report of the victim, the said Awaki Martine, who testified as PW1. On their part, in their defence, the appellants relied on their own evidence.

At the conclusion of the trial, the learned trial Resident Magistrate found that the case against the appellants had been proved beyond reasonable doubt. He thus found them guilty and proceeded to sentence them to life imprisonment. He also ordered each of them to pay PW1 a compensation of TZS 1,000,000/= for the injuries sustained by her as a result of their acts.

The appellants were aggrieved by the decision of the trial court. They appealed to the High Court but their appeal was unsuccessful hence this second appeal.

At the hearing of the appeal, the appellants appeared in person, unrepresented whereas the respondent Republic was represented by Ms. Elizabeth Swai, learned Senior State Attorney. The respondent had earlier

on, by a notice filed on 28/11/2018, raised a preliminary objection on the point of law that:

“The appeal is improperly before the Court as there was no notice of appeal before lodging the appeal to the High Court.”

As the rule of practice demands, we had to determine the preliminary point of objection first. Submitting in support of that point, Ms. Swai argued that the appellants had filed their appeal in the High Court without having given notices of appeal as required by section 361 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E 2002] (the CPA). Making reference to page 60 of the record, the learned Senior State Attorney contended that, although the 1st appellant had initially applied for extension of time to lodge a notice of appeal, he later withdrew the application and did not thereafter; file another application to that effect. As

for the 2nd appellant, Ms. Swai submitted that he did not take any initiative to apply for extension of time within which he could institute a notice of appeal.

In the circumstances, Ms. Swai argued, the appeal is incompetent because it was instituted contrary to the provisions of S. 361(1) (a) of the

CPA. She said that, the absence of the appellants' notices of appeal rendered the proceedings of the High Court a nullity because the same were in effect, conducted without jurisdiction. In support of her argument, she cited the case of **Salimu Alphan v. Republic**, Criminal Appeal No. 13 of 2015 (unreported).

In response, the 1st appellant opposed the argument made by the learned Senior State Attorney. He contended that, immediately after his imprisonment, he prepared his notice of appeal and gave it to the officials of the prison in which he was incarcerated. The 2nd appellant gave similar submission. He contended that he prepared his notice on the same date and together with that of the 1st appellant, was handed to the Officer

In-charge of the prison on 18/4/2011. The Court noted from the original record of the High Court, that the notices of appeal shown to have been signed by the appellants on 12/4/2011 and endorsed by the Officer In-charge of Arusha Central Prison on 12/4/2011, are contained therein. The notices are not however, endorsed by the Registrar of the High Court. Ms. Swai argued that, since the notice were not endorsed, the same are not valid for purpose of compliance with S.361 (1) (a) of the CPA.

We have duly considered the submissions of the learned Senior State Attorney and the appellants. It is not disputed that on 12/4/2011, six days after delivery of the impugned judgment, the appellants prepared their notices of intention to appeal and handed them to the Officer In-charge of Arusha Central Prison. The said officer endorsed the notices on 18/4/2011. It is also a correct position that, although they are in the original record of the High Court, the notices were not endorsed by the registry of the High Court to signify that the same were presented for filing.

Given the above stated position, the pertinent issue is whether or not the appellants complied with S. 361 (1) (a) of the CPA. The provision states as follows:

“ 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.....”

As stated above, the appellants prepared their notices of intention to appeal and gave them to the Officer In-charge of the prison in which they were incarcerated. It was the duty of the prison officials to transmit the notice to the High Court. Similarly, it was the duty of the Registrar of the High Court to ensure that the notices are endorsed and filed. As for the appellants, since they were in prison, after preparing and handing their notices to the Officer In-charge of the prison, they discharged their

obligation. - See for example, the case of **Sostenes s/o Nyazagiro v. The Republic**, Criminal Appeal No. 12 of 2013 (unreported). In that case, in which a somewhat similar situation occurred, the Court stated as follows:

“His [appellant’s] only obligation was giving notice of intention to appeal and leave the rest of the process to the Prison Authorities. An analogous situation is that shown in Rule 75 of the Court of Appeal Rules, 2009, where the appellant who is in prison is deemed to have complied with Rules 68, 72, 73 and 74 or any of them by merely filling in form B/1 or Form C/1 and handing it over to the Prison Officer In-Charge who fills in the particulars at the bottom of the form as is required of him”.

In the present case, the Officer In-charge of the Arusha Central Prison endorsed the notices which were consequently transmitted to the High Court. The appellants cannot thus, be blamed for the failure by the registry of the High Court, to endorse the notices which were timely prepared and transmitted to it. It cannot be said that the appellants did not give their intention to appeal.

For these reasons, we agree with the appellants that they gave notices of their intention to appeal in compliance with S. 361 (1) (a) of the CPA. Their appeal before the High Court was therefore, competent. In the event, we hereby overrule the preliminary objection. The appeal should proceed to hearing.

DATED at **ARUSHA** this 10th day of December, 2018

A.G.MWARIJA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL