

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 13 OF 2016

ZUBERI YAHAYA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Dyansobera PRM - Extended Jurisdiction.)

dated the 1st day of August, 2008

in

DC. Criminal Appeal No. 2 of 2008

JUDGMENT OF THE COURT

11th & 13th December, 2018

MUGASHA, J.A.:

In the District Court of Mpanda, the appellant was charged with rape contrary to section 130 (1) (2) (e) and 131 of the Penal Code as amended by section 5 and 7 of the Sexual Offences Special Provisions Act No. 4 of 1998.

It was alleged that, between 8th and 10th July, 2007 at different times he did have carnal knowledge of one M.M aged fourteen (14) years.

After the trial court was satisfied that, the prosecution has through five witnesses, established its case beyond reasonable doubt, on 15th November,

2007, it convicted the appellant and sentenced him to thirty years imprisonment.

Aggrieved, the appellant filed an appeal to the High Court of Tanzania, Sumbawanga Registry on 14th January, 2008. As reflected at page 30 of the record of appeal, in accordance with section 45 (1) (a) of the Magistrates Courts Act, Cap 11 R.E. 2002, (the MCA) the appeal was transferred from the High Court Registry to the Resident Magistrates' Court to be heard by the Principal Resident Magistrate with Extended Jurisdiction. Upon hearing the appeal, the Principal Resident Magistrate with Extended Jurisdiction found it to be devoid of merit and dismissed it on 1st August, 2008.

As the appellant could not lodge a notice of appeal to the Court within thirty days as prescribed under Rule 68 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), vide Misc Criminal Application No. 88 of 2015, he filed in the High Court an application seeking extension of time to appeal to the Court. The said application was granted on 6th November, 2015 by Sambo,J., subsequent to which on 19th November, 2015 the appellant filed a notice to appeal to the Court seeking to challenge the decision of the Principal Resident Magistrate with Extended jurisdiction.

In the memorandum of appeal, the appellant has raised seven grounds which we have taken liberty not to reproduce for reasons which will be apparent in due course.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent Republic had the services of Ms. Lugano Mwakilasa, learned Senior State Attorney.

At the outset, the learned Senior State Attorney intimated to us that, the appeal is not properly before the Court because while the first appeal was heard and determined by the Principal Resident Magistrate with extended jurisdiction, the application for extension of time to file notice of appeal to the Court was determined by the High Court. She argued this to offend the mandatory dictates of section 11(1) the Appellate Jurisdiction Act, Cap 141 RE.2002 (the AJA) which directs the court which heard the appeal to entertain and hear such application for extension of time to appeal to the Court.

On the way forward, she urged us to invoke our revisional jurisdiction under section 4 (2) of the AJA, nullify the High Court proceedings and order the appellant to apply for extension of time before the court which heard and determined his first appeal.

On the other hand, the appellant had nothing useful to add apart from blaming the Prison Authorities in the matter.

What is for our consideration is the propriety or otherwise of the present appeal.

It is not in dispute that, the first appeal was heard and determined by the Principal Resident Magistrate with extended jurisdiction following the transfer of such appeal in terms of section 45 (2) of the MCA which provides:

The High Court may direct that an appeal instituted in the High Court be transferred to and be heard by a resident magistrate upon whom extended jurisdiction has been conferred by section 45(1)."

We wish to reiterate that, when a case is transferred to the Resident Magistrates' court so as to be tried by a Resident Magistrate with extended jurisdiction, nothing remains in the High Court. In that regard, once a formal order of transfer has been made, the transferred appeal shall be registered in the Court of Resident Magistrate, given a fresh number and be heard and determined by that court. As such, a Resident Magistrate conferred with extended jurisdiction to hear an appeal in the High Court, is deemed to sit at the High Court. Thus, the hearing and determination of that case is to be

done in that court and the appeal therefrom lies directly to this Court. See - **BAHATI NDUNGURU @MOSES VS THE REPUBLIC**, Criminal Appeal No. 519 of 2015, **ELLY MILLINGA VS REPUBLIC**, Criminal Appeal No. 268 of 2014 and **LUKELO UHAHULA VS THE REPUBLIC**, Criminal Appeal No. 333 of 2016 (all unreported).

As we recently said in **LUKELO UHAHULA VS THE REPUBLIC**, (supra), notwithstanding that, the High Court and the Court have concurrent jurisdiction in the exercise of powers conferred under section 11(1) of AJA, similarly, a subordinate court exercising extended jurisdiction has powers to extend time in respect of the matter it had tried in that capacity.

In the matter under security, since the appeal was transferred from the High Court and determined by a Principal Resident Magistrate with extended jurisdiction, the extension of time to file a notice of appeal to the Court ought to have been determined by that court and not the High Court. That is in line with the dictates of section 11(1) of the Appellate Jurisdiction Act, Cap. 141 RE.2002 which categorically provides:

"Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising

extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired”.

In the light of the stated position of the law, we are in agreement with the learned Senior State Attorney that, the order by the High Court granting extension of time is invalid because it had no powers to grant extension of time in an appeal which had been transferred to a subordinate court in the exercise of its extended jurisdiction. See - **OSCAR PENDEZA VS THE REPUBLIC**, Criminal Appeal No. 363 of 2015 (unreported).

On the way forward, we invoke our revisional jurisdiction provided under section 4 (2) of AJA to nullify the order of the High Court in Misc. Criminal Application No. 88 of 2015 which granted the extension of time to file an appeal to the Court. Having nullified the order, the notice of appeal lodged on 19th November, 2015 is invalid on account of having been filed out of time

beyond thirty days from the date of the impugned decision. In this regard, since in terms of rule 68 (1) of the Rules, it is the notice of appeal which institutes an appeal, the purported appeal is not competent for want of a valid notice of appeal. We as such, strike out the incompetent appeal. If the appellant so wishes, he may file a fresh application for extension of time to lodge notice of appeal to the Court in the same subordinate court.

It is so ordered.

DATED at **MBEYA** this 13th day of December, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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


A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL