

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 534 OF 2016

FRANCIS PETRO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Opiyo, J.)

dated the 19th day of August, 2016

in

(DC) Criminal Appeal No. 71 of 2016

JUDGMENT OF THE COURT

20th & 27th August, 2019

KWARIKO, J.A.:

Before the District Court of Mbulu, Francis Petro, the appellant, was arraigned with the offence of rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code [CAP 16 R.E. 2002]. For the purpose of hiding the identity of the victim of the sexual offence, we shall only refer to her initials 'CN'. In the particulars of the offence it was alleged that on 10/5/2015 at about 16:00 hours at Getanyamba Village within Mbulu District in Manyara Region the appellant had carnal knowledge of 'CN' a girl of 13 years of age.

Having denied the charge, the appellant was fully tried. In the end he was found guilty, convicted and sentenced to thirty (30) years imprisonment. The appellant was aggrieved by that decision and his appeal before the High Court was dismissed for being time barred. Undaunted, the appellant is before this court challenging the order of the High Court.

In order to appreciate what took place before the High Court, we wish to reproduce its proceedings dated 19/8/2016 when the appellant's appeal was called on for hearing as follows: -

"Date: 19/8/2016

Coram: DR. M. Opiyo, J.

Appellant: Present

Respondent: Diaz Makule S/A

C/C Beatrice

Makule

Hon. Judge the matter is for hearing, but his accordance (sic) to S. 361 (1) of the CPA notice was filed out of time that there is no proper notice before this court we pray the appeal to be dismissed. The notice was filed on 11/Jan/2016 while the judgment was

delivered on 16/9/2016. By the time it was filed the time had already elapsed.

Appellant:

I was jailed at Mbulu. So it is admissions office that made my appeal to be out of time. I inquired from admissions office but it was already late.

Order: *It is obvious that the appeal is time barred because the notice was filed out of time. This court has no any option rather than dismissal of the whole appeal for being time barred.*

***Sgd
DR. M. OPIYO
JUDGE.
19/8/2016"***

It is against this order that the appellant filed this appeal raising three grounds of appeal which boil down to the following ground of appeal:-

That, the High Court judge erred in law and fact in not affording the appellant the opportunity to be heard thus offending Article 13 (6) (a) of the Constitution of the United Republic of Tanzania.

At the hearing of the appeal, the appellant appeared in person fending for himself whilst Ms. Riziki Mahanyu, learned State Attorney, represented the respondent Republic. In his submission, the appellant contended that the High Court denied him an opportunity of being heard. He argued that when he was called for the hearing of his appeal, the State Attorney raised a preliminary objection that the appellant's notice of intention to appeal was filed out of time. He argued that he gave reasons why the notice was not time barred but the High Court dismissed his appeal without affording him opportunity to be heard. He contended that he was denied his legal and constitutional right and urged us to allow his appeal.

For her part, the learned State Attorney started by supporting the appellant's appeal. She argued that although the appellant's notice of intention to appeal was time barred, the High Court erred in dismissing the appeal. It was her submission that the dismissal order could have only been made had the appeal been there and upon it being heard on merit. The learned counsel argued further that the order of dismissal curtailed the appellant's right to apply to file the notice out of time. Had the High Court only struck out the appeal, the appellant could have gone back to the High Court to apply to file the

notice out of time, she argued. To fortify her arguments, Ms. Mahanyu referred us to the decision of the Court in **Cyprian Mamboleo Hizza v. Eva Kioso and Another**, Civil Application No. 2010 (unreported) which distinguished between dismissal and striking out.

Upon being probed by the Court, Ms. Mahanyu submitted that when the appeal was called on for hearing, the appellant was accorded opportunity to be heard after the submission from the State Attorney only that the order that followed curtailed the appellant's right to process his appeal according to law. She added that the High Court ought to have composed a ruling on the preliminary objection instead of making the order subject of this appeal. Following the State Attorney's submission, the appellant had nothing to say in rejoinder.

We have considered the ground of appeal and the submissions from both parties. Reading from the proceedings of the High Court reproduced above, it is clear, as rightly submitted by the learned State Attorney, that the appellant was heard after the State Attorney had raised a preliminary objection that the appellant's notice of intention to appeal was filed out of time. Thus, the order of the High Court was given after hearing both sides only that the appellant referred to his

appeal instead of the notice of intention to appeal which was the basis of the preliminary objection. We are therefore satisfied that the appellant's complaint that he was not heard is devoid of merit and we hereby dismiss it.

The above notwithstanding, we are constrained to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] for we are satisfied that the order of the High Court was irregular. We have taken this route because the legality of that order has not been one of the grounds of appeal. In our view, that order suffers from two ailments. **Firstly**, after the High Court had heard both parties who had differing positions, it ought to have prepared a reasoned ruling citing relevant provisions of the law. The order could have been appropriate had the applicant conceded to the objection.

Secondly, since the appeal was not heard on merit, it was not proper for the High Court to dismiss it. Had it found the appeal incompetent by reason of the late filing of the notice of intention to appeal, it should only have struck it out so that the appellant could have been placed in a position to apply for extension of time to file his notice of intention to appeal. In the Eastern African Court of Appeal

case of **Ngoni-Matengo Co-operative Marketing Union Ltd v. Alimahomed Osman** [1959] EA 577, which was applied with approval in the **Cyprian Mamboleo Hizza** case (supra) a distinction was made between the terms '*striking out*' and '*dismissing*'. It was said thus: -

".....This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it: for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of."

It is also worth noting that the delay to file the notice of intention to appeal does not make the appeal time barred. This is so because the law provides different time limits for filing the notices of intention to appeal and appeals. Section 361 (1) (a) (b) of the Criminal Procedure Act [CAP 20 R.E. 2002] provides thus: -

"(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.”

It follows from the foregoing that, the notice of intention to appeal being out of time, its effect is only to render the appeal incompetent whose remedy is to strike it out. This is what the High Court should have done in this case. Conversely, the appeal can be held to be time barred if it is filed outside the prescribed time. Thus, the High Court ought only to have struck out the appeal so that the appellant could process it again according to law. The dismissal of the appeal by the High Court curtailed the appellant's right to process his appeal according to the law. Hence, the order of dismissal was illegal which we here by quash and set aside. Having so held, we therefore step into the shoes of the High Court and find the appellant's appeal

before it incompetent on account of the notice of intention of appeal being filed out of time and strike it out.

Consequently, should the appellant wish to process his appeal, he is at liberty to go back to the High Court and to apply for extension of time to file his notice of intention to appeal and process his appeal according to the law.

DATED at **ARUSHA** this 26th day of August, 2019.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 27th day of August, 2019 in the presence of the Appellant in person and Ms. Riziki Mahanyu learned State Attorney appeared for the respondent is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL

