IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: JUMA, C.J., MMILLA, J.A. And LEVIRA,J.A.)

CRIMINAL APPEAL NO. 349 OF 2016

HUSSEIN RAMADHAN BEKA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of High Court of Tanzania at Mwanza)

(Hon. De-Mello, J.)

dated the 30th day of December, 2013
in
Criminal Appeal No. 106 of 2013

JUDGMENT OF THE COURT

24th & 27th March, 2020

JUMA, C.J.:

The appellant HUSSEIN RAMADHAN BEKA, was on 22/11/2006, convicted by the District Court of Nyamagana District (Mhina—RM), of armed robbery contrary to Section 287A of the Penal Code Cap. 16 Vol. 1 of the laws as amended by Act No. 4/2004. He was sentenced to serve thirty years in prison. It took the appellant almost seven years until 28/10/2013, when he filed his petition of appeal in the High Court at Mwanza to contest the decision of the trial district court.

In his Petition of Appeal to the High Court, the appellant indicated that it was on 07/10/2013 when he applied for a copy of the Judgment of the trial

court. He drew his petition of appeal to the High Court on 09/10/2013. He finally lodged his first appeal in the High Court on 28/10/2013.

It is apparent from the record of this appeal that the appellant did not have the chance to argue his grounds of appeal before the High Court because, De-Mello, J. in the absence of the parties, issued an order dated 30/12/2013 dismissing his appeal. The first appellate Judge stated:

> *"Owing to computation, the Appeal is **'Time Barred'**.*
> *It is in violation of the law. I dismiss it accordingly."*

In this second appeal, the appellant has raised six grounds of appeal. In their essence, these grounds take exception to the way the first appellate Judge had dismissed his appeal without giving him any hearing. The appellant strongly believes that, counting from 07/10/2013 the date he received a copy of the decision of the trial court, to 18/10/2013 when he filed his first appeal; he was within time for his first appeal to be heard on merit by the High Court. He was also aggrieved that the first appellate court dismissed his appeal instead of striking it out.

At the hearing of this appeal on 24/03/2020, learned Senior State Attorney Mr. Juma Sarige appeared for the respondent Republic. He was assisted by learned State Attorney Ms. Gisela Alex. The appellant, who was

unrepresented, relied on his grounds of appeal. He urged us to allow the learned State Attorneys to first address his grounds of appeal.

Mr. Sarige addressed all the six grounds of appeal together. He at the very outset supported the appeal. He submitted that the appellant is fully justified to complain against the Order of De-Mello, J. which dismissed his appeal. He submitted that the first appellate Judge should have struck out the appeal instead of dismissing it if she thought that the appeal was not competently before the High Court. Mr. Sarige referred us to our decision in **MTURI CHOMBA IBRAHIM VS. R.,** CRIMINAL APPEAL NO. 217 OF 2011 (unreported) to cement his argument that because the High Court had no jurisdiction to entertain the appellant's appeal, it should have struck it out instead of dismissing it.

Mr. Sarige next gave reasons why he thought that the High Court lacked requisite jurisdiction to hear the appellant's first appeal. The learned State Attorney invited us to look through the record of this appeal and submitted that there is nowhere the appellant appears to have given any notice to express his intention to appeal against the decision of the trial District Court of Nyamagana which had earlier on 22/11/2006 convicted the appellant for armed robbery, and sentenced him to serve thirty years in prison. In so far as Mr. Sarige was concerned, the dates when he applied for

a copy of the judgment of the trial court and the date he received that copy, have no relevance to the appellant's legal obligation to lodge a written or oral notice of his intention to appeal against the decision of Nyamagana District Court. Without that Notice of intention to appeal, Mr. Sarige added, the appellant's first appeal was not legally before the first appellate Judge who should not have dismissed that first appeal.

Mr. Sarige concluded by arguing that because the appellant was not heard by the first appellate Court, he should be allowed to go back to the High Court to seek an extension to enable him to file his intention to appeal to the High Court.

In his brief reply, the appellant at first blamed it on the prison officers for misplacing a notice of his intention to appeal to the High Court. When we pressed him to mention the prison officers who had misplaced his notice, he relented and agreed with Mr. Sarige that his first appeal was indeed and in fact incompetently before the High Court and should have been struck out instead of being dismissed by the first appellate Judge. The appellant promised to revert back to the High Court to seek an extension of time to enable him to file his notice of intention to appeal to the High Court.

From the submissions on grounds of appeal, it is clear to us that Mr. Sarige and the appellant, stand on a common ground that when the

appellant lodged his appeal in the High Court at Mwanza on 28/10/2013, he had not given a notice within ten days, of his intention to appeal against his conviction by the trial court as section 361(1)(a) of the Criminal Procedure Act, Cap. 20 (the CPA) required of him. This provision states:

> *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;*
>
> *(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].

We heard earlier how the appellant made a half-hearted attempt to suggest that it was the prison officers after all, who had misplaced a notice of his intention to appeal, which he had prepared within the ten days. But, having examined the record of this appeal; we found nothing to show what

the appellant was doing to initiate his appeal for almost seven (7) years. This period spanned from 22/11/2006, when he was convicted by the trial court, right up to 28/10/2013 when he lodged his petition to appeal to the High Court.

The duty is always on the appellant to show that he had indeed handed over a notice of his intention to appeal to the prison authorities. In **ALLY RAMADHANI SHEKINDO & SADICK SAID @ ATHUMANI VS REPUBLIC**, (Criminal Appeal No. 532 of 2016) [2018] TZCA 295; [10 December 2018 TANZLII] the appellants had similar problems of missing notice of intention to appeal as the appellant had before the High Court and before us. They were however able to prove that they had handed over their notice of intention to appeal to the prison authorities. **ALLY RAMADHANI SHEKINDO** and **SADICK SAID @ ATHUMANI** (the appellants in that case) had filed their appeal in the High Court without having given notices of appeal as required by section 361 (1) (a) of the CPA. They were faced with a preliminary objection for their lack of notice of intention to appeal to the High Court at Arusha from the decision of District Court of Babati. The two appellants contended that, immediately after their imprisonment, they had duly prepared their notices of appeal and had handed the same over to

their prison officers. It was later on established that they indeed had filed their notices under Section 361(1) (a) of the CPA. The Court stated:

> *".... 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)."*

The law in Tanzania is prettily settled that there can be no competent criminal appeal in the High Court against the decision of a magistrate court where the appellant had not given notice of his intention to appeal within ten (10) days from the decision he wants to overturn. This Court said as much in **RENATUS MUHANJE VS REPUBLIC** (Crim Appeal No.417 of 2016) [2019] TZCA 103; [10 May 2019, TANZLII] while deliberating the provisions of section 361 (1) (a) of the CPA:

> *"It is vivid that the appellant is required to give notice of intention to appeal within ten (10) days from the decision*

sought to be impugned and lodge a memorandum of appeal within forty-five days from the date of the impugned decision."

Mr. Sarige is in our view fully supported by several decisions of this Court in submitting that; upon finding that the appeal was incompetently before the High Court, the first appellate Judge should have struck out the incompetent appeal instead of dismissing it, as she did. One such decision is the case of **FRANCIS PETRO VS REPUBLIC** (Criminal Appeal No.534 of 2016) [2019] TZCA 304; [27 August 2019 TANZLII] where the Court stated:

*"Had it **[High Court]** 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...*

..... 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." [Emphasis added].

Inasmuch the appellant had not given a notice of his intention to appeal to the High Court within ten days from 22/11/2006 when he was convicted by the District Court of Nyamagana, his first appeal was incompetent before the High Court. We also have no doubt that the first appellate Judge should have struck out the appeal instead of dismissing it.

For the foregoing reasons, we are minded to exercise our power of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141. We nullify, quash and set aside all the proceedings before the first appellate High Court together with the resulting Order dated 30/12/2013.

In case the appellant is still determined to appeal against the decision of the District Court of Nyamagana, as he had stated so in his submissions; subsection (2) of section 361 of the CPA provides him with a way forward. He has to go back to the High Court at Mwanza. This provision states:

> *"(2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed."*

Subsection (2) of section 361 of the CPA was discussed in the case of **FRANCIS PETRO VS REPUBLIC** (supra), where this Court gave the following guidance:

> *"...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."*

In the case of **MOHAMED SHANGO, HASSAN JUMA & SEIF JUMANNE VS. R.**, CRIMINAL APPEAL NO. 62 OF 2016 (unreported), this Court also gave advise on what an intending appellant should do; when he has delayed to give notice of his intention to appeal to the High Court within ten days of decision he wants to appeal against:

> *"...However, we wish to advise the appellants that they may, if they so wish, start afresh to process their appeal to*

the High Court by taking two steps. One, by making an application for extension of time to give notice of intention to appeal out of time. Two, to file an application for leave to appeal out of time as time starts to run from the date of finding, sentence or order."

We order accordingly.

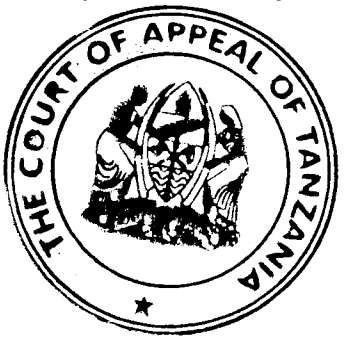
DATED at **MWANZA** this 25th day of March, 2020.

I. H. JUMA
CHIEF JUSTICE

B. M. MMILLA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 27th day of March, 2020 in the presence of the appellant in person and Ms. Lilian Meli, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL