IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 519 OF 2016

MIBURO COSMAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Rutakangwa, J.)

dated the 27th day of November, 2002
in
Criminal Application No. 34 of 2002

RULING OF THE COURT

27th April & 5th May, 2020

MWARIJA, J.A.:

The appellant, Miburo Cosmas was convicted of the offence of rape by the District Court of Kibondo. He was consequently sentenced to 30 years imprisonment. Aggrieved by conviction and sentence, he intended to appeal to the High Court but since he was late to institute a notice of intention to appeal, he applied for extension of time to do so. However, his application was dismissed by the High Court (Rutakangwa, J. as he then was) on the ground that the appellant's conviction was based on his unequivocal plea of guilty and therefore, under s.360(1) of

the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA), he was barred from appealing.

Aggrieved further by the decision of the High Court, the appellant intended to appeal to this Court but again, time to do so was not on his side. He thus moved the High Court under s.11(1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (now R.E. 2019) (the AJA) seeking an order granting him extension of time to institute a notice of appeal. That application was dismissed on 2/10/2006 by Mziray, J (as he then was). The learned Judge found; first, that the appellant did not establish any sufficient cause for the delay and secondly, that the intended appeal is untenable in terms of the provisions of s.360(1) of the CPA because the appellant was convicted on his own plea of guilty.

Against that decision, the appellant appealed to this Court vide Criminal Appeal No. 4 of 2007. However, that appeal could not proceed to hearing. His advocate, Mr. Mtaki, learned counsel, decided to withdraw it on 2/11/2009.

Undaunted, the appellant preferred two subsequent applications; Misc. Criminal Applications No. 164 of 2015 and No. 104 of 2016 (the 3rd and 4th applications respectively). In both applications, he applied for extension of time to appeal to this Court. The 3rd application was struck

out by Utamwa, J. on the ground that the appellant did not specify whether he intended to appeal against the decision of Rutakangwa, J. or that of Mziray, J.

Following the decision of Utamwa, J., the appellant filed the 4th application specifying therein that he intended to appeal against the decision of Mziray, J arising from Misc. Criminal Application No. 1 of 2004 (the 2nd application). That application was heard and determined by Rumanyika, J. who granted it. The learned Judge was of the view that the appellant was not to blame for the delay in filing a notice of appeal after the decision sought to be challenged by the appellant. He found that, the fact that the appellant was in prison and thus preparation of his documents depended on the assistance of the prison authorities, constituted sufficient cause for the delay.

At the hearing of the appeal which was conducted through video conferencing, the appellant appeared in person while the respondent Republic was represented by Mr. Juma Masanja, learned Senior State Attorney.

Before the appeal could proceed to hearing, we wanted to satisfy ourselves on whether or not the same is competently before the Court. In particular, we wanted to ascertain whether the order of the High

Court (Rumanyika, J.) granting the appellant extension of time to institute a notice of appeal is valid. We were so prompted by the facts, first, that the order was granted subsequent to the order of the same Court (Mziray, J.) refusing the application for grant of the same order. We therefore invited the appellant and the learned Senior State Attorney to address us on the competence or otherwise of the appeal.

In response, the appellant submitted that the order granting him extension of time is valid and that therefore, the appeal is competently before the Court. Being unrepresented, he could not give any further elaboration on that stance.

On his part, Mr. Masanja submitted that the decision dated 13/6/2016 is invalid because the same Court had previously, in the 2nd application, denied the appellant extension of time to institute a notice of appeal for want of sufficient cause for the delay. The learned Senior State Attorney argued that the subsequent Judge lacked the requisite jurisdiction after his predecessor had dismissed the previous application in which the appellant sought to be granted the same relief. He urged us to invoke the provisions of s.4(2) of the AJA and proceed to nullify the subsequent proceedings in the 4th application, set aside the order and consequently, strike out the appeal for being incompetent.

In rejoinder, the appellant urged us to consider the efforts which he had taken in an attempt to institute an appeal and have leniency on him on account that the defects in his previous applications occurred because he lacked the necessary legal knowledge.

As stated above, the order granting the appellant extension of time to file a notice of appeal and subsequently the present appeal, was given after the ruling handed down by Mziray, J. who refused to grant the same order previously sought by the appellant in his 2nd application. Although in paragraph 12 of his affidavit filed in support of his 4th application the appellant indicated that he intended to appeal against the decision of Mziray, J., in his notice of appeal filed after obtaining extension of time vide the order of Rumanyika, J., it is shown that the appellant intended to appeal against the decision of Rutakangwa, J. Indeed, that is what the record and the memorandum of appeal reflect. It is noteworthy to state here also that in his 4th application, the appellant relied on the same cause of the delay which was advanced in his 2nd application; that the delay was occasioned by the prison authorities to whom the appellant did not have control. In the 4th application, the learned Judge agreed with the appellant that since he was a prisoner who depended on the prison authorities to prepare and

transmit his notice of appeal, the delay was due to sufficient cause. The learned Judge stated as follows in his order at page 64 of the record of appeal:

> *"The issue is whether delay due [to] the wrongly taken steps by a person even to render matters struck out by courts is good/sufficient ground.... There can [be no] two sets of law; one for free clients and the other one for inmates yes! But the fact will always remain that unlike for the case of free and out of prison court users, remadees or prisoners as the case may be, have very minimal if no controls over documents purportedly prepared by them in prison cells. This in my considered opinion is not negligence of oneself. It is rather good and sufficient ground for the delay.*
>
> ***Application is granted. Applicant to lodge, within 10 days from today*** *a properly drafted notice of appeal...."*
>
> [underlining is ours]

With respect, we find that the learned Judge strayed into an error. As pointed out above, the application had previously been refused by

Mziray, J. who had this to say in his ruling at page 30 of the record of appeal:

> *"From the record I note that the decision of the High Court was delivered on 27/11/2002 and this application was filed on 2/3/2004 which is about one year and three months from the decision of the High Court.* ***I don't think that the prison authorities are to blame for this delay. I believe the applicant was not serious to pursue his rights."***
>
> [Emphasis added].

From that decision, there is no gainsaying that the High Court was *functus officio* to entertain the 4th application. It is trite law that when a court finally disposes of a case, it seizes to have jurisdiction over it. The application of this principle was emphasized in the case of **Tanzania Telecommunication Company Limited and Others v. Tri-Telecommunications Tanzania Limited** [2006] I EA 393. In that case, the Court cited a passage in the decision of the Court of Appeal for Eastern Africa in the case of **Kamuli v. R** [1993] E.A. 540 where that court stated as follows:

> *"A further question arises, when does magistrate's court become functus officio and we*

agree with the reasoning in the ***Manchester City Recorder case*** *that this case only be when the court disposes of a case by a verdict of not guilty or by passing sentence or making* ***some orders finally disposing of the case****."*

- See also the case of **The Director of Public Prosecutions v. Ally Nur Dirie and another** [1988] TLR 252. In that case, the respondent's application for bail was refused by the High Court (Chua, J.) for *inter alia,* the following reasons:

> *"1. That the charge being serious one involving ivory of great monetary value is likely to attract a severe punishment in the event of the applicant[s] being found guilty. That being the case the [applicants are] likely to find means to avoid justice, including absconding.*
>
> *2. That the applicant[s] being non-Tanzanian[s] may be tempted to flee even if [their passports are] impounded."*

After the decision of Chua, J., the respondents filed another application for bail before the same court. That application was heard by another Judge (Mwakibete, J.) who released them on bail. On appeal, the Court held that, since the above stated reasons upon which

the respondents were denied bail are static, the High Court was *functus officio* as regards the respondent's application for bail. The position in the case at hand is similar and therefore, the High Court erred in entertaining the appellant's 4th application.

That said and done, we invoke the revisional jurisdiction vested in the Court by s.4(2) of the AJA and hereby nullify the proceedings in Misc. Criminal Application No. 104 of 2016 and set aside the order arising therefrom. As a consequence, the appeal which was based on the nullified order is struck out for being incompetent.

DATED at **TABORA** this 4th day of May, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This Ruling delivered on 27th day of April, 2020 in the presence of the Appellant in person via video conference and Mr. Miraji Kajiru, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL