

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

(CORAM: JUMA, C.J., MKUYE, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO 1 OF 2020

ALONDA EKELA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the Judgment of Resident Magistrate Court
at Kigoma (Extended Jurisdiction)**

(A. A. Magutu- SRM Ext Jur)

dated the 05th day of August, 2016

in

DC. Criminal Appeal No. 1 of 2014

JUDGMENT OF THE COURT

28th & 29th June, 2021

JUMA, C.J.:

ALONDA EKELA was charged and tried in the District Court of Kasulu at Kasulu for the offence of rape contrary to section 5 (2) (e) of the Sexual Offences (Special Provision) Act No. 4 of 1998. The particulars of the charge were that on 16/1/2007 at around 11:00 hours at Nyarugusu Refugee Camp within Kasulu district in Kigoma Region, the appellant, had sexual intercourse with a 7-year-old girl who we shall refer to as **ADB**.

The brief facts leading up to this second appeal are that **ADB**, who testified as PW1, stated that her parents had gone to a funeral while she and her elder sister Noela Kibugila (PW3) remained at home. The appellant, who she knew and described as a stepfather and a neighbour at that refugee camp, arrived. He asked her to follow him up to his house to assist him in fetching water. The appellant locked the door, took her to his bedroom, and placed her on his bed. He removed her underwear and proceeded to have sexual intercourse causing her much pain. She cried when blood started to ooze from her vagina. The appellant gave PW1 fifty cents and asked her to keep the event secret.

When the appellant finally let her leave, PW1 went straight home to her elder sister, PW3. Although PW1 did not immediately disclose her ordeal, PW3 saw the blood flowing down from her vagina and prodded her for an explanation. PW1 finally explained to her sister what the appellant had done to her. In her evidence, PW3 testified that PW1 was in poor condition when she returned from the appellant's house. The clothes which PW1 had on, including her underwear, were soiled in blood. PW1 explained to PW3 all that the appellant did to her earlier. PW3 reported the incident

to the native guard post at the refugee camp, who arrested the appellant. PW1 recalled that she was sent to the Red Cross Hospital at Nyarugusu camp, where the medical officer who examined her confirmed the rape. PW1 tendered her medical examination report (Exhibit P1).

The victim's father, Ebula Nkumu (PW2), was at a funeral in another area of the refugee camp when his elder daughter (PW3) arrived around 23:00 hours to inform him about the rape of his daughter (PW1). Later, when PW2 returned home, his daughter explained how the appellant raped her. On 19/1/2007, Detective Sargent Alusante (PW4), a police officer visiting the police station at Nyarugusu refugee camp, recorded the appellant's cautioned statement (exhibit P2). PW4 testified that the appellant admitted to him that he had sexual intercourse with PW1.

In his defence, the appellant (DW1) acknowledged that he knew PW1, a daughter to his sibling brother. He recalls around 20:00 hours on 16/1/2007; he was at his house when native guards from the refugee camp came over and arrested him and took him to the police station, where the police charged him with rape of PW1.

The trial magistrate (P.O. Ang'ulo-SDM) was not in any doubt that the evidence of the victim (PW1), that of her sister PW3 who saw her bleeding from her vagina, the proof of the medical examination report (exhibit P2), and the appellant's confession, proved that PW1 was raped, by the appellant. Accordingly, on 25/4/2007, the trial magistrate convicted the appellant and sentenced him to serve life imprisonment.

The appellant was not satisfied with his conviction and sentence. His notice of intention to appeal dated 30/4/2007 finally reached the High Court registry at Tabora on 12/6/2007. The fate of the appellant's first appeal remained in abeyance until nine years later, on 2/3/2016, when Judge in-Charge Tabora invoked section 45 (1) and (2) of the Magistrates Courts Act, Cap. 11 and transferred the appeal to Kigoma Resident Magistrate's Court for hearing with extended jurisdiction by Anna Magutu—SRM.

In the Resident Magistrate's Court at Kigoma sitting to hear his appeal with extended jurisdiction, the appellant relied on four grounds of appeal. Firstly, he denied committing the serious crime of rape which PW1 alleged. Secondly, he insisted that the prosecution did not prove the case beyond

reasonable doubt. Thirdly, he faulted the trial magistrate for receiving his cautioned statement without subjecting it to an inquiry to determine its voluntariness. Fourthly, he claimed that from the totality of evidence, the prosecution failed to prove its case beyond a reasonable doubt.

The learned Senior Resident Magistrate with extended jurisdiction agreed with the appellant that the trial court denied him an opportunity to object before the trial court admitted the medical examination report (exhibit P1) and his cautioned statement (exhibit P2). The first appellate Senior Resident Magistrate expunged exhibits P1 and P2 from the record.

In dismissing the appeal on 5/8/2016, the learned Senior Resident Magistrate (extended jurisdiction) noted the evidence of the victim (PW1) not only proved the essential ingredient of penetration, but PW1 also proved that it was the appellant who had sexual intercourse with her.

According to Rule 68 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), an appellant initiates a criminal appeal to this Court by way of a notice of appeal, which must be filed within thirty days of the date of the decision that dismissed his first appeal. The appellant did not file his notice of appeal within thirty days of 5/8/2016 when the Senior Resident

Magistrate with extended jurisdiction disallowed his first appeal, the period that expired on 4/9/2016.

On 11/06/2019, the appellant lodged in the High Court at Kigoma his application for an extension of time to file his notice of appeal outside the thirty days prescribed by Rule 68 (1) of the Rules. On 26/08/2019, the High Court at Kigoma (Matuma, J.) granted him thirty days to file his notice of appeal to this Court. Finally, on 12/5/2020, the appellant filed this second appeal, which he based on six grounds of appeal.

At the hearing of this appeal on 28/06/2021, Mr. Adolf Maganda, Senior State Attorney, assisted by Mr. Yamiko Mlekano, Senior State Attorney, and Ms. Antia Julius, State Attorney, represented the respondent Republic. The appellant appeared in person by video link from Bangwe Prison in Kigoma. He stated that he would rather first hear the learned State Attorneys' submissions on his grounds of appeal before he replies.

Before the State Attorneys could submit on the grounds of appeal, we invited Mr. Maganda to address us on a jurisdictional issue, that is, whether this Court has jurisdiction to entertain this appeal in the first place. We asked him about the appropriateness of the High Court at Kigoma

(Matuma, J.) to hear and determine an application for extension of time to lodge a notice of appeal against a decision of a Senior Resident Magistrate with extended jurisdiction. Mr. Maganda looked through pages 42 to 50 of the appeal record, and he did not hesitate to concede that this appeal is not competently before this Court. The learned Senior State Attorney explained that although the appellant had correctly relied on section 11(1) of Appellate Jurisdiction Act, CAP 141 R. E. 2002 (the AJA) to seek an extension of time to file a notice of appeal that initiated this appeal, he made a jurisdictional error when he filed his application in the High Court at Kigoma. Instead, he should have filed it in the Resident Magistrate's Court at Kigoma. Accordingly, Mr. Maganda urged us to invoke our power of revision under section 4(2) of the AJA and strike out this appeal before us.

On his part, the appellant being a layperson, wondered aloud how the application for extension of time he filed in the High Court at Kigoma could today be the reason for striking out his second appeal. He insisted that the High Court at Kigoma should shoulder the blame. We agree with the appellant that the High Court registry at Kigoma, upon receiving the

application for extension of time to file a notice of appeal should have ordered a transfer of the application to a Magistrate with Extended Jurisdiction to hear the application for an extension of time. We say so because it was the Judge in-Charge of the High Court at Tabora (S.M. Rumanyika, J.) who, on 02/03/2016, issued the order transferring the appellant's first appeal to Kigoma Resident Magistrate's Court under section 45(1) and (2) of the Magistrates Courts' Act, Cap 11 R.E. 2002. The order assigned Hon. Anna Magutu—SRM to hear that first appeal with extended jurisdiction.

There are several decisions of the Court which reiterate that section 11 (1) of the AJA clearly makes a distinction that where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, has exclusive jurisdiction to extend the time for giving notice of intention to appeal from a judgment of the subordinate court concerned. Several decisions of the Court confirm this legal position: **OSCAR PENDEZA V. R.**, CRIMINAL APPEAL NO. 363 OF 2015; **LUKELO UHAHULA V. R.**, CRIMINAL APPEAL NO. 333 OF 2016; **ZUBERI YAHAYA V. R.**, CRIMINAL APPEAL NO. 13 OF 2016; **VYUMPUHOLE S/O ETIEN V.**

R., CRIMINAL APPEAL NO. 516 OF 2016 and **KESSY RAYMOND KIMWAGA V. R.**, CIVIL APPLICATION NO. 121/03 OF 2019 (all unreported).

In **LUKELO UHAHULA V. R.** (supra), the Court raised jurisdictional issue regarding an extension of time to file a notice of appeal, which the High Court Judge granted over an appeal against a decision of a Resident Magistrate with extended jurisdiction. The Court concluded that it was improper for the High Court to entertain the application for extension to file the notice of appeal on a matter which was not in the High Court Registry following its transfer to the Resident Magistrates' Court.

In the above circumstances where the High Court at Kigoma lacked jurisdiction to hear and determine the appellant's application meant for the Resident Magistrate's Court, the subsequent notice of intention to appeal, which the appellant filed on 18/09/2019, cannot initiate this second appeal. This Court has as a result, no jurisdiction to hear this appeal as the record of this appeal lacks a valid notice of appeal.

We are inclined to invoke our power of revision under section 4 (2) of the AJA to quash and set aside all the proceedings which the appellant

initiated by Chamber Application in Misc. Criminal Application No. 14 of 2019 in the High Court at Kigoma, together with the Ruling which Matuma, J. delivered on 26/08/2019. The door is open to the appellant to file a new application for an extension of time to file a notice of appeal.

Otherwise, this appeal is incompetent, and we accordingly strike it out.

DATED at KIGOMA this 29th day of June, 2021.

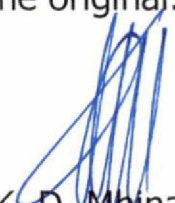
I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This judgment delivered this 29th day of June, 2021 in the presence of the Appellant in person by video link from Bangwe Prison in Kigoma and Ms. Antia Julius, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




K. D. Mhina
REGISTRAR
COURT OF APPEAL