

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MKUYE, J.A., GALEBA, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL No. 307 OF 2019

RAFAEL CHAGULA APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP) RESPONDENT

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

(Mashauri, J.)

dated the 11th day of July, 2019

in

Criminal Appeal No. 131 of 2018

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JUDGMENT OF THE COURT

9th & 15th February, 2022

KIHWELO, J.A.:

The appellant Rafael Chagula was arraigned before the Resident Magistrates' Court of Katavi at Mpanda in Economic Case No. 12 of 2017 in which he was indicted for trial with the offence of unlawful possession of government trophy contrary to the provisions of section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule as amended by section 16 (a) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016, sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, [Cap 200

R.E 2002; now R.E 2019]. It was alleged in the particulars of the offence that on 16.02.2017 on or about 02:00 HRS at Kapalamsenga Village within the District of Tanganyika in Katavi Region the appellant was found in unlawful possession of government trophy, to wit, two elephant tusks weighing fifteen kilograms (15 Kgs) and 102.33 kilograms (102.33 Kgs) of elephant meat with the value of fifteen United States Dollars (USD 15 000) equivalent to Tanzanian Shillings, Thirty Three Million, Four Hundred Ninety Four Thousand, Eight Hundred and Fifty (Tshs. 33, 494, 850.00) only, the property of the Government of United Republic of Tanzania without a trophy import certificate or a CITES permit from the Director of Wildlife Division. He pleaded not guilty to the charge and a full trial ensued. When the trial came to an end, the appellant was found guilty and accordingly, he was convicted and sentenced to serve a prison term of twenty (20) years.

His attempt to challenge the finding and sentence of the trial court proved futile as the High Court (Mashauri, J.) upheld both the conviction and sentence. Disgruntled with the decision of the first appellate court, the appellant has come to this Court on a second appeal protesting his innocence. In an attempt to vindicate his innocence, he has lodged ten (10) grounds of grievance. Nonetheless, for reasons that will shortly become

apparent, we think that it will be unnecessary for us to address the points raised in the memorandum of appeal just as we need not recapitulate the factual background leading to the arrest, arraignment and the ultimate conviction of the appellant.

When the appeal was placed before us for hearing on 09.02.2022, the appellant appeared in person, unrepresented. When called upon to address us on the grounds of appeal, he implored us to adopt the grounds of appeal and urged us to consider them in determining the appeal. He also opted to let the respondent Republic respond to his grounds of appeal, while reserving his right of rejoinder, if need would arise.

On the other hand, the respondent Republic was represented by Ms. Hongera Malifimbo and Ms. Marietha Maguta both learned State Attorneys who bravely resisted the appeal.

Before we could go into the hearing of the appeal in earnest, we prompted the parties to address us on whether the appeal before the first appellate court was properly lodged in terms of the requirement of the law in particular section 361 (1) (a) of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA) bearing in mind that the impugned judgment of the trial court was delivered on 28.08.2017 and the notice of intention to appeal to

the first appellate court is dated 22.10. 2018 more than a year and there is no record of extension of time to lodge notice of appeal out of time.

In response the appellant being a lay person not conversant of the law was fairly brief and admittedly argued that he did not lodge the notice of appeal in time or seek extension of time to lodge the notice of appeal because his attempt proved futile. He further contended that, as a prisoner he was transferred from one prison to the other as such he could not manage to lodge the notice of intention to appeal until on 22.10.2018. In particular, he submitted that he was transferred from Mpanda Kalila Prison to Sumbawanga Central Prison before he was again transferred to Mollo Prison in Sumbawanga township. Under those circumstances, the appellant argued that he could not manage to lodge the notice of intention to appeal or apply for extension of time to lodge the notice of appeal because as a prisoner he was dependent upon prison authorities and with those transfers from one prison to the other it was practically impossible to do so until on 22.10.2018. Finally, the appellant, politely submitted that he had no problem going back to the first appellate court to pursue his rights subject to obtaining extension of time by that court.

On their part, the learned State Attorneys meticulously and briefly argued that according to the record of appeal the instant appeal was filed out of time and there is no record that an extension of time was granted and, therefore, the instant appeal was entertained by the first appellate court out of time prescribed by section 361 (1) (a) of the CPA. Consequently, the proceedings and judgment of the first appellate court were a nullity. As to the way forward, the learned State Attorney, beseeched us to exercise revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 ("the Act") and nullify the proceedings and judgment of the first appellate court.

After a careful consideration of the submissions by the parties the issue before us is a narrow one and that is whether the instant appeal is properly before the Court.

We think we should first appreciate what the provisions of section 361(1)(a) of the CPA provides:

"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,

save that in computing the period of forty-five days the time required for obtaining a copy of the proceedings, judgment or order appealed shall be excluded.” [Emphasis added]

Quite clearly, in the instant appeal there is no record indicating that the appellant having being disgruntled by the decision of the trial court lodged a notice within the time prescribed before preferring an appeal to the first appellate court and in any event having failed to lodge the notice of intention to appeal within time prescribed by law the appellant ought to have lodged an application for extension of time to lodge the notice of appeal out of time. That does not seem to have been done by the appellant.

Looking critically at the provision of section 361 (1) (a) of the CAP, which governs criminal appeals to the High Court from the Resident Magistrates’ Courts, it is clear to us that, by all standards the provision is unambiguous, and it leaves no room for an intended appellant to lodge the appeal without first giving notice of intention to appeal within the time

prescribed by the law. In our respectful opinion, we think that, the above provision tells it all. It is, we think, apparent that the appellant ought to have filed the notice of intention to appeal within ten days or failure of which to have obtained extension of time to do so out of time. In the absence of that, the first appellate court lacked jurisdiction to entertain the appeal as it did, to hold otherwise would lead to undesirable consequences. It has long been established and we think there is ample authority for maintaining that appellate jurisdiction springs from statute. There is no such thing as inherent appellate jurisdiction, see for example, **Attorney General v. Shah** (1971) EA 50.

Luckily, this Court has had occasion to pronounce itself on the issue of the bar by the High Court to entertain and determine a criminal appeal from the Resident Magistrates' Court in the absence of a valid notice of appeal. In the case of **Ntinyabangira F. Kuteleza @ Robert Mwami v. Republic**, Criminal Appeal No. 161 of 2006 (unreported) the Court held that:

"Failure to give written notice of appeal within ten days, deprives the High Court power to entertain the appeal."

Corresponding observations were made in the case of **Salimu Alphan v. Republic**, Criminal Appeal No. 547 of 2016 (unreported) where this Court faced with more or less analogous situation it stated that:

"In the same breath, since in the instant appeal the appellant did not lodge a notice of appeal before lodging his appeal to the High Court, we are constrained to agree with the contention of the learned State Attorney that, the first appellate Court in entertaining the appeal, embarked on a nullity, and as such, the said proceedings cannot be left to stand..."

See, also **Reverend Ernest K. Mrema v. Alex Mrema and 6 Others**, Criminal Appeal No. 387 of 2017, **Mustafa Rajabu and Another v. Republic**, Criminal Appeal No. 104 of 2015, **Samson Marco and Another v. Republic**, Criminal Appeal No. 446 of 2016 and **Ally Ramadhani Shekindo and Sadick Said @ Athumani v. Republic**, Criminal Appeal No. 532 of 2016, (all unreported).

The above said and done, we are satisfied that the purported appeal before the High Court which is the basis of the instant appeal was a nullity having being entertained in violation of the mandatory requirement of the law and its proceedings and judgment cannot be spared. Consequently, in

terms of section 4 (2) of the Act, we hereby nullify the proceedings and judgment of the High Court. Meanwhile the appellant is advised to go back to the High Court and commence proceedings in accordance with the law, if he so wishes.

Order accordingly.

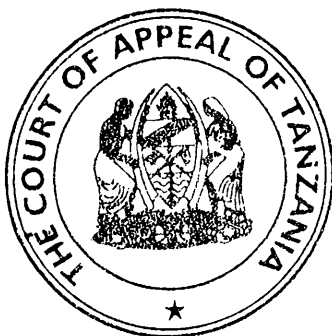
DATED at **MBEYA** this 14th day of February, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

Judgment delivered on this 15th day of February, 2022 in the presence of the appellant in person, unrepresented and Safi Kushindi Amani learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL