

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 260 OF 2018

MAUNDA S/O MOGOSI @ NYAMBAROKERA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Bukuku, J.)

**dated the 31st day of July, 2018
in
Criminal Appeal No. 84 of 2018**

RULING OF THE COURT

9th & 13th May, 2022

RUMANYIKA, J. A.:

The appellant, Maunda Mogosi @ Nyambarokera was charged of the offence of rape contrary to sections 130 (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019]. It was alleged that on 8th October 2016 at about 20:00 hours at Ntuzu area in Butiama village, he carnally knew a twelve (12) years old girl (herein the victim). He was tried by the Resident Magistrate's Court of Mara at Musoma, (the trial court), convicted and ordered to serve the mandatory custodial sentence of thirty

(30) years and twelve (12) strokes of the cane. He was aggrieved with the conviction and sentence meted against him by the trial court. He appealed to the High Court of Tanzania, at Mwanza, where, unfortunately the appeal was not heard on merit for it was found to have been filed out of time. The High Court Judge dismissed it based on the time bar. Aggrieved by that decision, the appellant has preferred the present appeal.

When the appeal came up for hearing on 09/05/2022, Mr. Tawab Yahya Issa, learned State Attorney represented the respondent Republic while on the other hand, the appellant, unrepresented, appeared in person. In his memorandum of appeal, the appellant raised two grounds of complaint which can be paraphrased as follows: **First**, the High Court erroneously held that the appeal was filed out of time, **Second**, that after holding that the appeal, if at all, was filed out of time, the High Court Judge erred in dismissing it instead of striking it out.

At the commencement of the hearing, Mr. Issa rose up readily supporting the appeal, in that the appeal at the High Court should have been struck out instead of being dismissed. Additionally, as the appellant was not heard on the merits of the appeal, it should not have been dismissed. Rather, it should have been struck out. The learned State

Attorney contended further that in any event the appeal was filed within time.

On that basis therefore, Mr. Issa urged the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA), and nullify the impugned proceedings, quash the decision of the High Court and allow the appellant to have his appeal determined on merits by the High Court before another Judge. To back up his argument, Mr. Issa relied on our decision in the case of **Hussein Lazaro Wanumbi & 2 Others v. Republic**, Criminal Appeal No. 187 of 2010, (unreported) in which, having ruled that the appeal ought to have been struck out instead of being dismissed, we quashed the decision of the High Court and directed that the appellants be allowed to file an application for extension of time to file a fresh notice of appeal so that the appeal can be heard on merits by the High Court.

On his part, the appellant being a layman, had nothing much to say. He simply acceded to what had been submitted by the learned State Attorney.

On our part, going by the record of appeal at page 42, it will be noted that the appellant filed a Notice of Appeal on 20th November 2017, just five days after the decision of the trial court. On the same date, he requested for copies of the judgment and other relevant documents for appeal purposes. The documents were supplied to him on 2nd February 2018. Upon receiving the copies, the appellant lodged the petition of appeal on 1st March 2018 which was 27 days after receiving the said copies.

The provisions of section 361 (1) (a) and (b) of the Criminal Procedure Act, [Cap. 20, R.E. 2002, now R.E. 2019] (the CPA), require the notice of appeal to be filed within the first ten days and the petition of appeal within 45 days of the impugned decision, whereas, the time taken to obtain all the required documents are to be excluded. The provisions of the CPA read 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, 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)

It needs no over emphasis to state that a competently lodged notice of appeal, as is the case before us, initiates a competent criminal appeal. The above being the position, with respect, the High Court erred in deciding that the appellant's appeal was filed out of time. As indicated earlier on, the appellant had ten days but he lodged his notice of appeal within the first five days. Similarly the appeal was instituted well within the time prescribed by law as demonstrated above.

Moreover, we are at one with Mr. Issa that the appellant was not afforded a right to be heard for the learned High Court Judge dismissed the former's appeal summarily. This is vividly seen at page 47 of the record of appeal. It is our considered view that the learned High Court Judge ought to have heard the parties before pronouncing the said unfortunate dismissal order. Parties' right to be heard is very paramount and ought to be observed all the time before a court of law gives its decision, for failure to do so leads to violation of the principles of natural justice hence miscarriage of justice. We observed so in **Barnabas William v. Republic**, Criminal Appeal No. 254 of 2018 (unreported).

Having been confronted with a similar situation as above stated, in the case of **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251 we took the same stance and said as follows:

"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among attributes of equality before the law... "

In the premises, we are of the firm view that the appellant was not at all heard before his appeal could be dismissed. It follows therefore that the matter was neither heard on merits nor was it time barred.

As regards the second point for our determination, even if the appellant's appeal was time barred, which was not, instead of dismissing the appeal, as it happened, the remedy would have been to strike it out. At this juncture we wish to recite our decision in the case of **Yahya Athumani Kissesa v. Hadija Omari Athumani & 2 Others**, Civil Appeal No. 105 of 2014, (unreported) where we observed as follows:

*"...What this Court ought strictly to have done ... 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 that there was no proper appeal capable of being disposed of ...** "*

Given the above cited authority, we think, in all fairness that time barred criminal matters in the courts of law are incompetent matters whose remedy is to be struck out.

The above being the position, and having stated that the appeal was filed within time, we find merits in this appeal and allow it. The decision of the High Court is hereby quashed and reversed under section 4 (2) of the AJA. We further order and direct that the criminal appeal in the High Court that gave rise to this appeal be set down for hearing and determination on merits according to law.

It is so ordered.

DATED at MWANZA this 13th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The judgment delivered this 13th day of May, 2022 in the presence of the appellant in person and Mr. Emmanuel Luvunga, learned Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL