

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

(CORAM: WAMBALI, J.A., KOROSSO, J.A. And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 75 OF 2018

LAZARO MPIGACHAI APPELLANT

VERSUS

REPUBLIC RESPONDENT

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

(Bukuku, J.)

dated the 28th day of June, 2017

in

Criminal Appeal No. 41 of 2017

.....

JUDGMENT OF THE COURT

16th & 22nd February, 2022

KOROSSO, J.A.:

This is the second appeal. The appellant Lazaro Mpigachai was arraigned in the Resident Magistrate's Court of Geita at Geita charged with the offence of Rape contrary to sections 130(1)(2)(e) and 131 of the Penal Code, Cap 16 R.E. 2002, now R.E. 2019 (the Penal Code). The particulars of the offence are that the appellant (then the accused) on the 2/4/2016 at about 2.42 hours at Shinde Village within Geita District and Region, did have unlawful sexual intercourse with one girl aged 11

years, henceforth to be referred to as "GZ" or "the victim" (to conceal her identity). The appellant denied the charges.

Upon completion of a full trial, the appellant was found guilty of the offence charged, convicted, and sentenced to serve thirty (30) years imprisonment. Disgruntled by the trial court's decision, his appeal to the High Court, Criminal Appeal No. 41 of 2017 was dismissed by Bukuku, J. on the 28/6/2017, finding it to be out of time. Aggrieved, the appellant preferred the instant appeal.

The appellant's five grounds of appeal fronted in the memorandum of appeal lodged on the 16/1/2019 are essentially compressed into the following: **one**, impropriety of the High Court's dismissal order whilst the notice of intention to appeal and the petition of appeal was filed within time prescribed by the law; and **two**, that the order is irregular, devoid of requisite requirements, reasoning, and proper findings and thus prejudicial to the appellant.

On the day the appeal was called on for hearing, the appellant appeared in person, unrepresented and Ms. Lilian Meli Erasto, learned State Attorney represented the respondent Republic.

In amplifying his grievances, the appellant contended that, as fronted in the memorandum of appeal filed, his complaints were

centered on faulting the High Court's order dismissing his appeal for being out of time without affording him the opportunity to be heard and show that it was filed on time whereas he had filed both the notice of intention to appeal and memorandum of appeal within time. He thus prayed that his appeal be allowed. He however, urged us to allow the State Attorney to respond to his grounds of appeal and thereafter provide him an opportunity to rejoin if the need will arise.

Ms. Meli-Erasto on the other hand, prefaced her submissions alluding the fact that she was in support of the appeal. She contended that whilst she was aware of all the grounds of appeal filed by the appellant, her response was to focus on responding to one complaint that captures the essence of the appeal, that is, on whether the High Court Judge's dismissal of the appeal on the ground that it was time barred was founded on the law. The learned State Attorney argued that having perused the record of appeal, the challenged judgment of the Resident Magistrate's Court was delivered on the 31/8/2016 and that the appellant filed the notice of intention to appeal against the impugned judgment on the 1/9/2016 (page 30 of the record of appeal), that is, 2 days later. Undoubtedly, that was within time limit of ten (10) days period prescribed by section 361(1)(a) of the Criminal Procedure Act, Cap 20 R.E 2002, now R.E. 2019 (the CPA).

Equally, according to the learned State Attorney, there is evidence that thereafter the appellant lodged his petition of appeal against the decision of the Resident Magistrate's Court of Geita within 45 days in conformity with the provisions of section 361(1)(b) of the CPA. Expounding further, she argued that the record of appeal reveals that the appellant was served with a copy of the requisite proceedings and judgment on 17/1/2017 and he filed the petition of appeal on the 7/2/2017, that is, 20 days later. She maintained that this shows that the appellant's appeal was filed within the 45 days required under section 361(1)(b) of the CPA, stating that in computation of time on limitation period, the time to obtain a copy of the proceedings, judgment or order shall be excluded.

Further to the above, Ms. Meli- Erasto argued that considering the presented arguments in respect of the appeal, undoubtedly, the appellant filed the appeal within time, and thus the findings and dismissal order of the first appellate court of 28/6/2017 is erroneous. She implored the Court to thus find that the appeal was within time and in consequence, quash the Order of the High Court dated 28/6/2017 and restore Criminal Appeal No. 41 of 2017 before the first appellate court to enable the parties to argue the appeal.

Considering the arguments elucidated by the learned State Attorney, the appellant's rejoinder was in essence to join hands with what was submitted and reiterate his prayer for his appeal to be allowed and justice to take its course.

On our part, having carefully gone through the record of appeal, grounds of appeal and the submissions from both sides, we are of the view that as rightly urged by the learned State Attorney, the main issue for our determination in this appeal is whether the High Court's order for dismissal of Criminal Appeal No. 41 of 2017 for the reason that it was time barred, was proper. Our first point of intervention will be perusing through and pondering on the said order found at page 43 of the record of appeal. We find it pertinent to reproduce it and reads as follows:

"ORDER

BUKUKU, J.

The Appeal is filed out of time. It is dismissed.

Given under my hand and the seal of the court this 28th day of June, 2017.

Signed

A. E. BUKUKU
JUDGE

At Mwanza
28th June, 2017

The excerpt above shows that the High Court dismissed the appeal of the appellant for reason that it was filed out of time. Having traversed through the law with respect to the issues for determination in the instant appeal, we find section 361(1) (a), (b) and (2) of the CPA reproduced hereunder, relevant in the instant appeal:

"S. 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; 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.

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

Essentially, in terms of section 361(1)(a) and (b) of the CPA for the appeal to be within time, an intended appellant must do the following steps: **One**, to give or file a notice of intention to appeal within 10 days after the delivery of the challenged finding, sentence, or order; and **two**, to file the petition of appeal should within 45 days from date of the finding, sentence or order. The provision also expounds on the modality of computing time related to limitation. Particularly, it states that, in computing the 45 days to file the petition of appeal, the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded. In essence, the provision underscores that when computing the 45 days of filing the petition of appeal, the time that is used to obtain proceedings, judgment and order is automatically excluded.

In the case of **The Director of Public Prosecutions Vs Mawazo Saliboko @Shagi and 15 Others**, Criminal Appeal No. 384 of 2017 (unreported), we discussed the import of section 379(1) (b) and 361(1)(b) and stated: -

"... it follows therefore that an intended appellant is required to lodge his petition of appeal within forty-five days reckoned from the date of the receipt of the requisite copies."

And we further stated:

"On our part, we are of the decided view that, the intention of the legislature under the proviso to section 379(1)(b) of the CPA was to avoid multiplicity of, and delay to dispose of cases. That is why it provided for automatic exclusion of the time requisite to obtain copy of the proceedings, judgment or order appealed from. This is different where the intending appellant finds himself out of 45 days to file an appeal after receipt of the copy of the proceedings. In that case, he may apply for extension of time to file petition of appeal."

Suffice to say section 379(1)(b) of the CPA is similar in content and essence with section 361(1)(b) of the CPA save for the fact that section 379(1)(b) caters for appeals by the Director of Public Prosecution whilst section 361(1)(b) of the CPA addresses other appellants.

In the instant appeal, as rightly argued by the learned State Attorney and the appellant, the record of appeal shows that the Resident Magistrate's Court judgment that was appealed against was

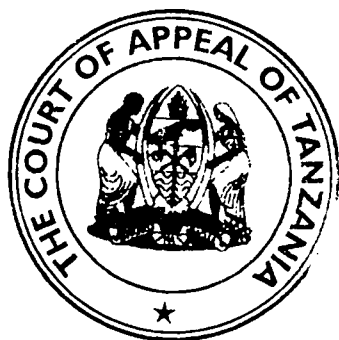
delivered on 31/8/2016. Similarly, the notice of intention to appeal was filed by the appellant on 1/9/2016, a mere one day later. The appellant received the requisite proceedings and judgment for processing his appeal on the 17/01/2017 as shown at page 32 of the record of appeal. The petition of appeal was filed 20 days later, that is, on 7/2/2017, thus, this was also filed on time. In the circumstances, certainly, the appeal was within time.

The above being the position, it is unfortunate that the dismissal order, the High Court judge did not explain on how she counted the relevant days or show that she took time to recount the days spent by the appellant in processing the appeal. We are of the view that had the High Court judge taken time to properly recount the number of days related to requisite time to appeal as provided for under section 361(1)(a) and (b) and considered section 361(2) of the CPA she would not have arrived at the finding she did in respect of Criminal Appeal No. 41 of 2017.

We are thus constrained and find that the High Court's finding and dismissal order that the appeal was out of time is, with due respect, in essence misconceived and flawed.

In the end, we allow the appeal and quash the order of the High Court dated 28/6/2017. We further order for restoration of Criminal Appeal No. 41 of 2017 so that the parties can be expeditiously heard on merit.

DATED at MWANZA this 21st day of February, 2022.



F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of February, 2022 in the presence of the appellant in person and Ms. Sophia Mgassa, learned State Attorney for the respondent/Republic is hereby certified as a true copy of original.

A handwritten signature in black ink, appearing to be "G. H. Herbert", written over a horizontal line.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL