IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., KEREFU, J.A and MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 156 OF 2019

SEMENI ISSA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Matuma, J.)

dated the 15th day of April, 2019

in

Criminal Appeal No. 185 of 2018

.....

JUDGMENT OF THE COURT

15th & 17th March, 2023

MUGASHA, J.A.:

In this appeal, the appellant is challenging the decision of the High Court, (Matuma, J) which sustained the decision of the District Court of Kigoma in which the appellant was convicted of the offence of malicious damage to property contrary to section 326(1) of the Penal Code, Cap 16 R.E. 2002 now R.E. 2022.

In the charge which was laid on the appellant's door, it was alleged by the prosecution that on 10/3/2017, at Bukunga Street the appellant did

maliciously damaged household items valued at TZS. 190,000.00 the properties of one Edward Mrisho.

After a full trial the appellant was found guilty, convicted as charged and sentenced to pay a fine of TZS. 100,000.00 or serve a jail term of twelve months in default. In addition, he was ordered to compensate the victim a sum of TZS. 190,000.00 being the value of damaged items. We have dispensed with the factual background underlying the appeal for the reasons that will become apparent in due course.

Discontented, the appellant unsuccessfully appealed to the High Court. When the appeal was called for hearing, the learned High Court Judge *suo motu* directed the parties to address him on the competence of the appeal for want of a proper notice of appeal alleged to have been filed beyond time prescribed under section 361 (1) (a) of the Criminal Procedure Act [Cap 20 R.E. 2022]. (the CPA) Although, the appellant struggled to impress on the Court that the notice of appeal was filed within the prescribed period, the learned trial Judge ruled that it was time barred and proceeded to strike out the entire appeal.

Subsequently, believing that he was clothed with jurisdiction to revise the matter, he invoked section 373 (1) of the CPA and invited the parties to address him so that he could determine the merits of the matter. Having

heard the parties, the learned trial judge re-evaluated the evidence, set aside the sentence imposed by the trial subordinate court and enhanced the term of imprisonment to a term of four years. Aggrieved, the appellant has knocked the doors of this Court seeking justice against what transpired before the High Court. Initially, he fronted five points of grievance in a Memorandum of Appeal dated 4/6/2019. Later, through his advocate, on 10/3/2023, the appellant filed another Memorandum of Appeal comprising one ground of complaint.

At the hearing of the appeal, in appearance was Ms. Stella Nyakyi for the appellant who was present in Court and Ms. Lucy Enock Kyusa, learned State Attorney, for the respondent Republic.

Before the commencement of the hearing, Ms. Stella Nyakyi prayed to abandon the initial memorandum of appeal and it was so marked. With leave of the Court, Ms. Nyakyi was permitted to add another additional ground pursuant to Rule 80 (5) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The additional ground reads as follows.

> *"That, the learned trial Judge erred in fact and in law to strike out the appeal on ground that the notice was filed beyond the prescribed period."*

Beginning with the additional ground, it was submitted by Ms. Nyakyi that, the appeal was wrongly struck out by the learned High Court Judge. On this, it was pointed out that, the notice of intention to appeal was filed on 22/10/2018 which was the 10th day after the delivery of the judgment of the trial court dated 12/10/2018. In this regard, it was Mr. Nyakyi's argument that the notice of intention to appeal to the High Court was filed within the time prescribed under section 361 (1) (a) of the CPA. On this account, she argued that, it was a misdirection on part of the learned High Court Judge to dismiss the appeal. Thus, Ms. Nyakyi implored on the Court to set aside the decision of the High Court and restore the appeal with a direction that the appellant's appeal be heard.

Upon being probed by the Court on the propriety or otherwise of the Judge invoking revisional powers after striking out the appeal, Ms. Nyakyi submitted that it was irregular. She argued that, after the appeal was struck out, there was nothing before the High Court to be revised because the learned High Court Judge had no jurisdiction to reopen the matter which was no longer before the High Court. She thus urged the Court to nullify the decision of the High Court and set aside the enhanced sentence. Ultimately Ms. Nyakyi implored on the Court to allow the appeal.

On the other hand, the learned State Attorney supported the appeal. Apart from submitting that the appeal was wrongly struck out because the notice of intention to appeal was filed according to the dictates of the law, she contended that the learned High Court was not clothed with jurisdiction to invoke revisional powers after he had struck out the appeal. On that account, she added that section 373 (1) (a) of the CPA. was wrongly invoked by the learned Judge.

After a careful consideration of the grounds of appeal, submission of learned counsel for the parties and the record before us, the issues for our determination are mainly; **one**, whether the appeal was properly before the High Court; and **two**, whether the learned trial judge had jurisdiction to invoke revisional jurisdiction to determine the merits of the appeal and enhance the sentence.

At the outset it is crucial to point out that, save for appeals instituted by the Director of Public Prosecutions, appeals to the High Court against the decisions of the trial subordinate court are governed by the provisions of section 361 (1) and (2) of the CPA which stipulate as follows:

> *"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."

According to the cited provisions, an appeal must be preceded by a notice of intention to appeal lodged at the trial court not later than ten days from the date of the decision which is intended to be appealed. This is followed by a petition of appeal which must be filed not later than 45 days from the date of the impugned decision of the subordinate court. In case of delay to file an appeal within the prescribed period, section 361 (1) (b) of the CPA excludes the period required for obtaining a copy of the proceedings,

judgment or order for the purpose of pursuing an appeal and as such, under section 361 (2) of the CPA, the High Court is vested discretion for good cause, to admit an appeal filed beyond the prescribed time.

In the present matter as correctly pointed out by the learned counsel for the parties, the notice of intention to appeal to the High Court was not time barred having been filed on 22/10/2018 which was ten days after delivery of the impugned decision of the trial subordinate Court. Although, the said dates appear in the impugned Ruling of the learned High Court Judge yet, with respect, such dates were not considered which resulted into the striking out of the appeal for want of a valid notice of appeal. Thus, since the notice of appeal was in accordance with the dictates of the provisions of section 361 (1) (a) of the CPA, it was a misdirection on the part of the learned High Court Judge to strike out the appeal on ground that it was time barred.

Subsequently, after the appeal was struck out what followed thereafter is mind boggling on account of what had transpired at the High Court as reflected at pages 53 to 54 of the record of appeal as hereunder:

> *"... "I entirely agree with the State Attorney that this appeal is hopeless filed out of time. Section 361 (1) (a) of the CPA supra clearly states that no appeal*

form any finding, sentence or order shall be entertained under the appellant has given notice of his intention to appeal within ten days from the date of the finding, sentence or order. In this appeal the appellant unreasonably delayed to give his notice that he could have not filed the notice is baseless. Why did he wait for the last minute? Why didn't he file the notice from the 1st day to the 9th day?

I therefore struck out this appeal for want of competent notice of appeal.

But since I have seen some material irregularity on the sentence meted on the appellant and since I am seized with the records of the parties and determine the matter on merit with revisional jurisdiction under 373 (1) (a) of the CPA as against appellate jurisdiction".

It is glaring that, after the learned High Court Judge had struck out the appeal, then he proceeded to re-open the case filed purporting to revise what transpired before the trial subordinate court. In the purported revision, the learned High Court Judge proceeded to re-evaluate the evidence, make own conclusions and ultimately did set aside the sentence imposed by the trial court with option of a fine and enhancing it to a term of four years' imprisonment. With respect, we think he followed a wrong path because

apart from being *functus officio,* he had no jurisdiction to entertain the matter considering that, after the appeal was struck out there was nothing before the High Court to warrant the learned High Court Judge to invoke revisional jurisdiction. This was contrary to the provisions of section 373 (1) of the CPA which gives the following direction before the High Court can invoke revisional jurisdiction as follows:

> *"373. (1) In the case of any proceedings in a subordinate court,* ***the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge, the High Court may–***
>
> *(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence; or*
>
> *(b) in the case of any other order other than an order of acquittal, alter or reverse such order, save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed not to be an order of acquittal."*

[Emphasis supplied]

According to the cited provision, what can be a subject for revision before the High Court is the record of the subordinate court which has been called for or which has been reported for orders or which otherwise comes to the knowledge of the High Court. This said provision was wrongly invoked by the learned High Court Judge because there was no record before him which could be subjected to revision. In essence, as the matter was no longer before the High Court and since revisional jurisdiction is the domain of the superior Court, the learned High Court Judge wrongly assumed the revisional jurisdiction of the Court stated under the provisions of section 4(3) of the Appellate Jurisdiction Act [CAP 141 R.E 2019].

At this juncture we wish to reiterate that, jurisdiction is a creature of statute and as such, it cannot be assumed or exercised on the basis of the likes and dislikes of the parties or even the court. That is why the Court has in several instances emphasized that, the question of jurisdiction is fundamental in court proceedings and can be raised at any stage of adjudication and it can as well be raised *suo motu.* As such, in adjudication the initial question to be determined is whether or not the court or tribunal is vested with requisite jurisdiction. See -**RICHARD JULIUS RUKAMBURA vs ISSACK NTWA MWAKAJILA AND ANOTHER**, Civil Application No 3 of 2004 (unreported). Prior to that, this Court in **FANUEL MANTIRI NG'UNDA**

VS HERMAN MANTIRI NG'UNDA & 20 OTHERS, Civil Appeal No. 8 of 1995 (unreported) had held thus: -

> *"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature ... (T)the question of jurisdiction is so fundamental that courts* ***must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial....*** *It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."*

[Emphasis supplied.]

What was said in the above decisions in respect of a trial court on the issue in question applies with equal force in the matter at hand whereby having struck out the appeal there was nothing before the High Court to warrant invoking revisional powers to revise the proceedings of the trial subordinate court. Given that the learned High Court Judge embarked on a nullity to re-open the struck out appeal, the resulting decision in which the sentence was enhanced as well stemmed from a nullity and it cannot be spared.

On the way forward, we nullify the High Court proceedings subsequent to the striking out of the appeal, quash the Ruling and Judgment of the High Court and set aside the enhanced sentence of four years. Furthermore, we restore the appellant's appeal as it is valid having been preceded by a valid notice of intention to appeal. Thus, we find the appeal merited and it is hereby allowed. Consequently, we remit the case file to the High Court for the expedited hearing of the appeal.

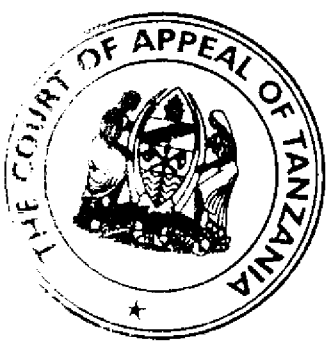
DATED at **TABORA** this 17th day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 17th day of March, 2023 in the presence of the appellant who was represented by Ms. Stella Thomas Nyakyi, learned counsel and Ms. Hannarose Kasambala, 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