

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

**(CORAM: MUGASHA, J.A., KEREFU, J.A. And MWAMPASHI, J.A.)**

**CRIMINAL APPEAL NO. 570 OF 2019**

**ENOCK PETER .....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

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

**(Bongole, J.)**

**dated the 28<sup>th</sup> day of October, 2019**

**in**

**(DC) Criminal Appeal No. 9 of 2019**

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**JUDGMENT OF THE COURT**

15<sup>th</sup> & 20<sup>th</sup> March, 2023

**KEREFU, J.A.:**

The appellant preferred this appeal against the ruling of the High Court of Tanzania at Tabora in (DC) Criminal Appeal No. 9 of 2019 (Bongole, J) dated 28<sup>th</sup> October, 2019. In that ruling the High Court sustained a preliminary objection to the effect that the appellant's appeal was hopelessly time barred.

A brief background in respect of this matter can be stated as follows. The appellant together with two others, namely, Salum Juma @ Dizoo and Said Juma Ibrahim (the second and third accused

respectively), who are not parties to this appeal, were jointly and severally charged with two counts of armed robbery and being found in possession of properties suspected to have been stolen contrary to sections 287A and 312 (1) and (b) of the Penal Code [CAP. 16 R.E. 2002] (now R.E. 2022) (the Penal Code). The appellant and his colleagues denied the charge laid against them and therefore, the case had to proceed to a full trial.

At the end of the trial, the trial court, on 4<sup>th</sup> January, 2019 acquitted the second and third accused in both counts on account that the prosecution had failed to prove the case against them to the required standard. However, the appellant was found guilty, convicted and sentenced to serve imprisonment term of thirty (30) years.

Aggrieved by that decision, the appellant on 7<sup>th</sup> January, 2019 filed a notice of intention to appeal to the High Court and on 19<sup>th</sup> February, 2019, he lodged the petition of appeal. However, the said appeal was confronted with a notice of preliminary objection raised by the respondent to the effect that it was lodged out of the time prescribed by section 361 (1) (b) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA). The appellant contended that he prepared his appeal within time and handed it over to the prison authorities. Having considered the

arguments by the parties, the learned High Court Judge sustained the preliminary objection and dismissed the appeal for being hopelessly time barred.

The decision of the High Court prompted the appellant to lodge the current appeal to express his dissatisfaction. In the memorandum of appeal, the appellant has raised three grounds of appeal which can be conveniently paraphrased as follows:

- 1. That, the learned High Court Judge erred in law to dismiss the appellant's appeal instead of striking it;*
- 2. That, the appellant having called for and received the trial court's certified documents on 18<sup>th</sup> January, 2019 and the time to appeal being within 45 days, he was entitled to benefit from the safeguard stipulated under the proviso to subparagraph (b) of section 361 (1) of the CPA; and*
- 3. That, the appellant's appeal having not been determined on merit, the learned High Court Judge erred in law to dismiss it.*

When the appeal was called for hearing, the appellant entered appearance in person whereas Ms. Lucy Enock Kyusa, learned State Attorney appeared for the respondent Republic.

Upon being given an opportunity to argue his appeal, the appellant abandoned the first and third grounds of appeal and he submitted only on the second ground. On that ground, the appellant faulted the learned High Court Judge to find that the appeal was hopelessly time barred while the same was lodged within the prescribed time by the law. To substantiate his argument, he referred us to page 124 of the record of appeal where it was clearly indicated that, he lodged the notice of intention to appeal on 7<sup>th</sup> January, 2019 and received the copy of the trial court's proceedings and judgment on 18<sup>th</sup> January, 2019. Subsequently, on 19<sup>th</sup> February, 2019, after lapse of only thirty (30) days from the date of receipt of the said documents, he lodged the petition of appeal.

The appellant also added that, he prepared the petition of appeal on 11<sup>th</sup> February, 2019 and handed it over to the Prison authority to process the same. That, he being a prisoner behind bars he had no control of the said process including making a follow up on his appeal process as he depends much on the Prison authority. On that basis, the appellant urged us to find that the High Court erred in its decision and implored us to allow the appeal, quash and set aside the dismissal order and remit the case file to the High Court to proceed with the hearing of the appeal on merit.

In response, Ms. Kyusa was quick to point out that the respondent does not oppose the appeal as pursuant to section 361 (1) (a) (b) and (2) of the CPA, the appeal was lodged within the prescribed time. To clarify on this point, she as well referred us to page 124 of the record of appeal and argued that, since the appellant received the said documents on 18<sup>th</sup> January, 2019 and lodged the petition of appeal on 19<sup>th</sup> February, 2019, the appeal was lodged within time as the appellant was entitled to benefit from the safeguard provided under section 361 (1) (b) of the CPA. On that basis, she also urged us to allow the appeal, quash and set aside the High Court's dismissal order and direct the High Court to proceed with the hearing of the appeal on merit.

In rejoinder, the appellant had nothing useful to add as his appeal was not opposed by the respondent.

On our part, having examined the record of the appeal and considered the submissions made by the parties, the germane issue for our determination is whether it was proper for the learned High Court Judge to dismiss the appellant's appeal on account of being time barred.

Before embarking on the determination of the said issue, we find it apposite to state that, save for the appeals instituted by the Director of Public Prosecutions (the DPP), criminal appeals to the High Court against

the decisions of the subordinate courts are governed by the provisions of section 361 (1) (a) (b) and (2) of the CPA. For the sake of clarity, the said provisions provide that:

*"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." [Emphasis added].*

In terms of the above cited provisions, it is clear that, an appeal to the High Court should be preceded by a notice of intention to appeal which should be lodged in the trial court within a period of ten (10) days from the date of the impugned decision. Thereafter, an appeal must be

filed within a period of forty-five (45) days from the date of the delivery of the impugned decision. However, in the case of delay, section 361 (1) (b) of the CPA excludes the period required for obtaining of a copy of the proceedings, judgment or order for the purpose of pursuing an appeal. In addition, under section 361 (2) of the CPA, the High Court is vested with discretion, upon good cause, to admit an appeal filed beyond the prescribed time under the law.

In the instant appeal, having considered the submissions made by the parties in the light of the record, it is clear to us that, both parties are at one that the learned High Court Judge misdirected himself to find that the appellant's appeal was time barred as pursuant to the above provisions the said appeal was lodged within the time prescribed by the law. We, respectfully, share similar views as, indeed, the record bears it out that the impugned decision, in DC Criminal Case No. 45 of 2018, was delivered on 4<sup>th</sup> January, 2019. Thereafter, and being aggrieved, the appellant, within three days, that is on 7<sup>th</sup> January, 2019, he lodged the notice of intention to appeal. Subsequently and upon receipt of the trial court's proceedings and judgment on 18<sup>th</sup> January, 2019, he lodged the petition of appeal before the High Court on 19<sup>th</sup> February, 2019, after a lapse of only thirty (30) days from the date of receipt of the said documents. We take that view because, the proviso to section 361 (1)

(b) quoted above is self-explanatory that, in computing the forty-five (45) days, the time requisite for obtaining a copy of the proceedings, judgment or order appealed from shall be excluded. There are several authorities by this Court which interpreted the applicability of this provision of the law. See for instance the cases of **Sospeter Lulenga v. Republic**, Criminal Appeal No. 108 of 2006 and **Mateo Paulo & Another v. Republic**, Criminal Appeal No. 398 & 400 of 2016 (both unreported). Specifically, in **Sospeter Lulenga** (supra), the Court observed that:

*"As far as the ground for delaying to file the petition of appeal in time is concerned, there is ample evidence by the officer in charge of Isanga Central Prison at the bottom of the petition of appeal in the High Court (pages 24-25 of the record of appeal) indicating that the date of conviction was on 27/12/2004. On the following day, that is, on 28/12/2004, the copy of judgment was applied for. It was never supplied till more than a year later, that is, on 30/3/2005. 11 days later, that is, on 31/3/2005, the appellant lodged his petition of appeal. Thus, although judgment was delivered on 27/12/2004, the 45 days required within which to file the petition of appeal accrued from the date when the copy of judgment was received, that is, on 20/3/2005. Thus, when the appellant lodged his petition of appeal on 31/3/2005, it was still within time in*



*terms of the proviso to section 361 (1) (b) of the Criminal Procedure Act, 1985..."*

Likewise, in the latter case the Court had the following to say:

*"...It can be inferred from those provisions, on the one hand, that it is the filing of an appeal (petition of appeal) which should be preceded by the intending appellant being served with a copy of the proceedings and judgment."*

Similarly, in the instant appeal, since there is a clear proof at page 124 of the record of appeal that the appellant received the copy of the proceedings and trial court's judgment intended to be appealed against on 18<sup>th</sup> January, 2019 and he lodged the petition of appeal before the High Court on 19<sup>th</sup> February, 2019, after lapse of only thirty (30) days from the date of receipt of the said documents, we are of the settled view that the appeal was lodged within the prescribed time by the law.

In the circumstances, we agree with the parties that it was erroneous for the learned High Court Judge to find that the appellant's appeal was hopelessly time barred as such finding is not supported by the record. We thus find the second ground of appeal with merit.

In view of the aforesaid, we allow the appeal, quash and set aside the ruling and order of the High Court dismissing the appeal. We hereby

restore the appellant's appeal as it was lodged within the time prescribed by the law. Consequently, we remit the case file to the High Court for the expedited hearing of the appeal.

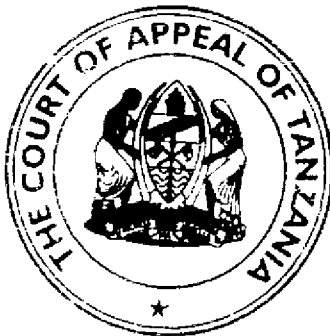
**DATED** at **TABORA** this 17<sup>th</sup> day of March, 2023.


S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Judgment delivered this 20<sup>th</sup> day of March, 2023 in the presence of the Appellant in person, and Ms. Tunosia John Luketa, 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**