

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: WAMBALI, J.A., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO 545 OF 2020

ALBERTO MTEGAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Kente, J.)

dated 2nd day of November, 2020

in

DC. Criminal Appeal No. 02 of 2020

JUDGMENT OF THE COURT

22nd & 27th March, 2023

MAIGE J.A.;

At the District Court of Ludewa (the trial court), the appellant was charged with the offence of rape contrary to section 130(1)(2)(e) and 131(1) of the Penal Code. He was, upon trial, convicted as charged and sentenced to life imprisonment. The High Court of Tanzania at Iringa (Kente, J.) upheld his conviction and sentence on first appeal. Still aggrieved, the appellant preferred this appeal.

The allegation in the charge was that; on 21st day of March, 2019 (the material date) at Lupanga Village within Ludewa District in Njombe

Region (the village), the appellant had carnal knowledge of a girl aged 9 years otherwise referred to as the "victim" or "PW2".

The facts on which the appellant was convicted was as follows. The victim was about 9 years old at the time of the incident. She was living with her mother Bonita Mtega (PW1) and her step father, the appellant at the village. She testified that, on the material date when she came back from school, she found the appellant and her young siblings Lucy and Joshua. The appellant took her into the bedroom and caused her to sleep on the bed where he removed her clothes and inserted his penis into her vagina.

When all these were happening, it would appear, PW2 was not at home. She had gone to clinic with one of her children. When she came back home and proceeded to the bedroom, she found the appellant and the victim sleeping on the bed. She asked them what they were doing but they never replied. Soon thereafter, the appellant and the victim woke up and put on their clothes. The matter was reported to the village executive officer, Theresia Issa Kisega (PW3) and then to the police. The victim was subsequently taken to hospital and on examination by Dr Musa Emmanuel Lugwisha (PW4), it was established as per exhibit P1 that she had been raped.

In his defence, the appellant generally denied to have committed the offence.

The trial court found that, the prosecution evidence was sufficient to prove the case beyond reasonable doubt. It thus convicted and sentenced the appellant as aforesaid. On appeal, the High Court shared the same view with the trial court. Still unhappy, the appellant has initiated the instant appeal. He has, in the memorandum of appeal, listed four grounds which can be paraphrased as follows:

- 1. That given the nature of the appellant's defence evidence, the High Court was wrong in determining the appeal without satisfying itself on the mental capacity of the appellant.*
- 2. That the High Court Judge erred in law and fact in convicting the appellant despite the discrepancies in evidence and charge on the age of the victim.*
- 3. That the High Court was wrong in not doubting the evidence of PW1 and PW2 who are relatives in a situation where the appellant and his wife (PW2) were in misunderstanding.*
- 4. That the case against the appellant was not proved beyond reasonable doubt.*

At the hearing, the appellant appeared in person and without representation. The respondent Republic was represented by Mr. Alex Mwita, learned Senior State Attorney.

At the out-set, the Court having noted that, the first appeal to the High Court was not preceded by a notice of appeal as section 361 (1) (a) of

the Criminal Procedure Act, Cap. 20 R.E., 2022 (the CPA) requires, invited the parties to address it on the issue. Being a layman, the appellant had nothing to comment on the issue rather than urging the Court to set him free.

On his part, Mr. Mwita submitted that as the notice of appeal is that which initiates an appeal to the High Court, in the absence of that, the High Court could not have jurisdiction to entertain the appeal. He, therefore, urged us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) and quash the proceedings and judgment of the High Court for being a nullity.

On our part, we hasten to say that at any given level, an appeal is a creature of the law. Any person intending to lodge an appeal before the court of law therefore, must do so in accordance with the law. We agree with the learned State Attorney that, under section 361(1) (a) of the CPA, a criminal appeal to the High Court starts with a notice of appeal which the appellant has to give within ten days from the date of the judgment of a subordinate court. The respective section provides 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."

From the above provision, it is clear to us that, the jurisdiction of the High Court to entertain criminal appeals from subordinate courts is conditional upon the appellant giving a notice of appeal. In the absence of the notice, therefore, we agree with the learned Senior State Attorney, the High Court cannot be said to have jurisdiction to entertain the appeal. Dealing with a similar issue, the Court held in **George Daudi v. R**, Criminal Appeal No. 428 of 2018 [2019] TZCA 502; [12 December, 2019 TANZLII], that:

"In the present case, we are firm that the absence of the Notice of Appeal in the High Court vitiated the appeal before the Court, and we declare that it was incompetent."

See also **Renatus Muhanje v. R**, Criminal Appeal No. 417 of 2019 [2019] TZCA 103; [10 May, 2019 TANZLII] and **Joseph Lugala v. R**, Criminal Appeal No. 512 of 2020 [2023] TZCA 130; [21 March, 2023 TANZLII].

In the present case, the record of appeal is very clear that, the appellant did not, before logging the petition of appeal to the High Court, give a notice of appeal as required by section 361(1) of the CPA. That being the case, the High Court acted without jurisdiction in entertaining

the appeal. In effect, therefore, whatever it did was a nullity in law from which a proper appeal to the Court could not arise. In the circumstance, we invoke our powers under section 4 (2) of the AJA and nullify the proceedings and set aside the judgment of the High Court. In DC Criminal Appeal No. 2 of 2020.

Order accordingly.

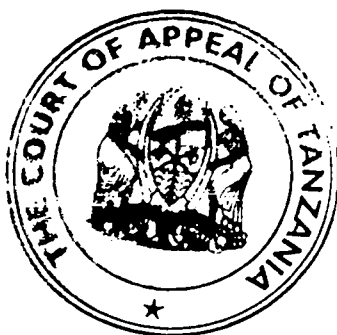
DATED at IRINGA this 25th day of March, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 27th day of March, 2023 in the presence of the appellant in person and Ms. Hope Charles Massambu, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL