

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

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

CRIMINAL APPEAL NO. 420 OF 2021

SAID SHAIBU MWIGAMBO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Mtwara)

(Muruke, J)

dated the 28th day of July, 2021

in

Criminal Appeal No. 40 of 2021

JUDGMENT OF THE COURT

21st & 28th March, 2023

MWANDAMBO, J.A.:

The appellant was aggrieved by the decision of the High Court sitting at Mtwara which dismissed his appeal from conviction and sentence of life imprisonment for being time barred. He has appealed to this court on two but related grounds of appeal.

A background to the appeal may be briefly set out thus: The District Court of Ruangwa District convicted the appellant on three counts of unnatural offence which earned him the mandatory sentence; life imprisonment. The trial District Court delivered its judgment on

02/10/2020. Three days later, on 05/10/2020 to be exact, the appellant expressed his intention to appeal which he did by way of a notice of intention to appeal duly certified by the Ruangwa Prison In-charge on 06/10/2020 ready for transmission to the court for filing. Through that notice the appellant requested the trial court to supply him with copies of judgment and proceedings to enable him prepare a petition of appeal. It was not in dispute that the notice of appeal was filed before the High Court at Mtwara on 08/10/2020, six days after the delivery of the judgment convicting the appellant.

According to a copy of the petition of appeal, the appellant was supplied with the certified copies of judgment and proceedings on 02/04/2021 and filed the petition of appeal before the High Court on 28/04/2021, a period of 26 days from the date he was supplied with certified copies of proceedings and judgment.

On 26/07/2021 the appeal was called on the hearing during which, the presiding judge observed that it seemed to her that the appeal was lodged out of time. The learned Senior State Attorney who appeared that day seized the moment to address the court that indeed the appeal was lodged out of time contrary to the provisions of section 361 (1) (b) of the

Criminal Procedure Act (the CPA). This was so, the learned Counsel argued, certified copies of judgment and proceedings were ready for collection on the date of the impugned decision yet, the appellant took six months to lodge his petition of appeal well beyond 45 days prescribed under section 361 (1) (b) of the CPA. Accordingly, the court was urged to dismiss the appellant's appeal.

In his reply, the appellant informed the High Court that he did not obtain a copy of judgment until April, 2021 considering that, immediately after his conviction, he got transferred from Ruangwa to Lindi Prison and upon obtaining the copy, he lodged his petition of appeal. All the same, High Court found no purchase in the appellant's explanation reasoning that the record clearly showed that the judgment sought to be challenged was certified on 02/10/2020 and so the appeal filed on 28/04/2021 was time barred. It thus dismissed the appeal and hence, the instant appeal.

The memorandum of appeal comprises two grounds which relate to one and the same complaint, that is, in dismissing the appellant's appeal for being time barred, the High Court erred for not taking into account that as a prisoner, with limited movement, he could not have obtained certified copies of judgment and proceedings on his own except with the

assistance and or facilitation of the prison authority. It is the appellant's further complaints that, immediately after entering prison at Ruangwa and having signed a notice of intention to appeal, he was transferred to Lindi Prison which made it difficult for him to obtain the necessary documents for the purposes of his appeal.

The appellant appeared in person, unrepresented at the hearing of the appeal and urged the Court to find merit in his appeal based on the grounds of appeal. He had nothing to add at that stage. Instead, he preferred to let the respondent Republic reply to his grounds reserving his right to a final word if such need would arise.

Ms. Jacqueline Werema, the learned State Attorney who appeared representing the respondent Republic expressed her stance in support of the appeal. Ms. Werema was resolute that the first appellate court wrongly dismissed the appeal for being time barred. The learned State Attorney pointed out that, contrary to the High Court the appeal was not time barred considering the date on which the appellant received a copy of the judgment and date he lodged his petition of appeal. According to the learned State Attorney, it was wrong for the High Court to reckon the period prescribed for filing a petition of appeal in terms of section 361 (1)

(b) of the CPA based on the date of certification of the judgment and proceedings in the absence of any proof that the appellant who was a prisoner was aware of such certification.

The learned State Attorney argued that, at any rate even assuming the appeal was indeed time barred, it was not proper to dismiss it but to strike it out. Going forward, Ms. Werema, invited the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act (the AJA) by quashing the order dismissing the appellants' appeal before the High Court with an order directing that court to determine the appeal on merit. For his part, the appellant was in full agreement with the submissions by the learned State Attorney and the proposed way forward.

Our starting point in the determination of this appeal is none but section 361 (1) (b) of the CPA which stipulates:

"Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant-

(a) ... (n. a.) (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."

It is plain from the above provision that entertaining an appeal against conviction, sentence or order is conditional upon the appellant who has filed a notice of intention to appeal, lodging his petition of appeal within 45 days from the date of the impugned decision. However, the legislature in its wisdom anticipated circumstances in which copies of proceedings, judgment or order may not be available immediately after the delivery of judgment. There is no gainsaying that such circumstances are not uncommon in our midst. It thus made allowance for the period necessary for preparation of such documents by reckoning the period from the date such documents are obtained. In our considered view, the phrase ready for collection presupposes that the court responsible for preparing the documents notifies the appellant and in this case through the Prison to which he was committed to that effect. It was not disputed that the appellant was and still is a prisoner whose movements are restricted thereby depending entirely on the assistance of the prison officers for follow up of the necessary documents from courts. It is uncommon that the appellant got transferred from Ruangwa Prison to which he was committed to serve his sentence to Lindi Prison, outside the

local limits of the trial court. Besides, it was not suggested that the trial court did at any time notify the appellant through Ruangwa Prison that copies of judgment and proceedings he had requested in his notice of intention to appeal were ready for collection on the date shown in the judgment. Logic and common sense would dictate that where the copies of judgment and proceedings are not made available to the parties upon delivery of such judgment or an indication that they were available on a particular date, the appellant who had requested such copies would be notified accordingly. It seems to us to be inconceivable to expect convicts serving prison sentences to be able to know that the documents they requested are ready for collection let alone constantly making follow ups with the court for such documents. At any rate, it defeats logic and common sense that the documents were ready for collection on 02/10/2020 in the absence of any proof that the appellant's request through his notice duly communicated to the trial court was attended to.

It is glaring from the proceedings of the High Court that at the very outset, it formed an opinion that the appeal was out of time and invited parties to address it. The learned Senior State Attorney representing the respondent Republic, grabbed the opportunity persuading the learned judge that indeed, the petition of appeal was filed out of time reckoned

from the same date the impugned decision judged from the date shown in the copy of judgment. There was, however, no suggestion that the appellant was given such a copy on the date of the judgment. Neither was there any evidence that the proceedings were similarly ready for collection on the said date. That notwithstanding, the learned judge found purchase in the learned Senior State Attorneys' argument which confirmed her doubts regarding delayed filing of the petition of appeal. Consequently, it dismissed the appeal. With respect, the High Court was wrong in holding that the petition of appeal was filed out of time resulting into the dismissal of the appeal before it.

To begin with, in the absence of any material to justify a finding that the copy of the judgment was ready for collection on 02/10/2020 based on the date shown therein, the High Court made a serious error the more so without any proof that the copies of proceedings were similarly ready for collection on that date. On the contrary, the only material available on record was a petition of appeal indicating that a copy of the judgment was availed to the appellant on 02/04/2021 at Lindi Prison away from Ruangwa Prison to which he was committed after the conviction and after he had expressed his intention to appeal parallel with a request for copies of judgment and proceedings for the purpose of the

intended appeal. It is equally glaring that the appellant had his petition ready for transmission to the court on 24/04/2021 and the same was filed in Court on 28/04/2021 well within 45 days prescribed by section 361 (1) (b) of the CPA after excluding the period necessary for the preparation of the copies of judgment and proceedings.

It is evident from page 49 of the record of appeal that the dates referred to above were duly certified by the Lindi Prison superintendent. Surprisingly, despite the appellant's explanation that he got transferred to Lindi Prison and hence was late in obtaining a copy of the judgment until April, 2021, the High Court had no regard to such explanation in its ruling. Instead, it downplayed it as misconceived aimed at asking it to extend the time *suo motu* which would be against the decision of the Court in **Aidan Chale v. Republic** [2005] T.L. R. 76. Be it as it may, we have not seen anything in the proceedings suggesting that the appellant asked the court to extend the time *suo motu* so we shall not belabour the point any further. Having rejected the appellant's explanation, the High Court embraced the arguments advanced by the Senior State Attorney and dismissed the appeal.

In our view, the High Court took into account irrelevant factors in dismissing the appellant's appeal disregarding the relevant ones which clearly show that the petition of appeal was timeously filed. As urged by Mr. Werema, it was wrong for the High Court to dismiss the appeal for being filed out of time.

Next for our consideration is the correctness and propriety of the ultimate order dismissing the appeal had it been indeed time barred. Ms. Werema urged that the course open to the court in such case was to strike out the appeal for being incompetent. We understood Ms. Werema urging that dismissing the incompetent appeal was not the appropriate order because it was not determined on merit. We agree with the learned State Attorney that all being equal, the delayed filing of the petition of appeal had the effect of rendering the appeal incompetent. The court was barred from entertaining an incompetent appeal for, it was as good as none had been instituted in the first place. The court could only make an order striking it out instead of dismissing as it did.

The foregoing aside, there is more to the order dismissing the appeal with a significant seriousness. It is glaring from the ruling of the High Court that the learned judge was influenced by a decision of the

same court sitting at Mwanza; **The Director of Public Prosecutions (D.P.P) v. Revocatus Deogratus @ Nahonge**, Criminal Appeal No. 44 of 2019 (unreported). It is plain from the ruling of the High court that it excerpted a passage from that decision indicating that, section 3 (1) of the Law of Limitation Act the (Act) was invoked to dismiss an appeal which was found to have been filed out of time oblivious of the existence of section 43 (a) of the same Act which excludes its application in criminal proceedings. The appeal before the High Court was in criminal proceedings which are expressly excluded by section 43 (a) of the Act. It can no longer be doubted that the reliance on **Revocatus Deogratus's** case (supra) premised on an inapplicable statutory provision in dismissing a criminal appeal was, with respect, a serious error. Neither was the dismissal order sanctioned by section 361 (b) of the CPA.

To recap, the order dismissing the appellant's appeal was not only made in misapprehension of the facts on the record but also illegal for lack of statutory authority.

Going forward, as urged by Ms. Werema, in view of the illegality and impropriety of the order dismissing the appellant's appeal, we are constrained to exercise our revisional power vested in the Court by section

4 (2) of the AJA by quashing the impugned decision and the resultant order as we hereby do for being a nullity. Having quashed the said decision and order, we direct that the record be remitted to the High Court for hearing and determination of the appellant's appeal in Criminal Appeal No. 40 of 2021 before another judge.

It is accordingly ordered.

DATED at **MTWARA** this 23rd day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Judgment delivered this 28th day of March, 2023 in the presence of the Appellant in person and Mr. Enoshi Gabriel, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

