

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 553 OF 2021

RAMADHANI RAJABU @ KULES APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara

(Muruke, J)

dated the 5th day of October, 2021

in

Criminal Appeal No. 123 of 2020

JUDGMENT OF THE COURT

16th & 28th March, 2023

MKUYE, J.A.:

The appellant, Ramadhani Rajabu @ Kules together with an accomplice who was acquitted by the trial court, were charged before the District Court of Masasi at Masasi of three counts namely; the 1st count of committing burglary contrary to section 294(1) (a); 2nd count of stealing contrary to sections 258 and 265; and in the alternative for the appellant alone, committing an unnatural offence contrary to section 154 (1) (a) of the Penal Code (the Penal Code). Upon a full trial, the appellant was convicted on the 1st and 3rd counts and was sentenced to twelve months

and thirty years imprisonment, respectively, which sentences were ordered to run concurrently. He was acquitted on the 2nd count and his accomplice was acquitted on all counts.

Aggrieved, the appellant appealed to the High Court whereupon he lodged a notice of appeal on 17th July, 2020 after the judgment of the District Court sought to be impugned was handed down on 14th July 2020; and the petition of appeal was lodged on 15th December, 2020.

Prior to the hearing of the appeal before the High Court, the respondent Republic lodged a preliminary objection (the PO) as shown at page 74 of the record of appeal to the effect that the appeal was time barred for being filed out of the prescribed statutory time limit.

During the hearing of the said PO, it was argued that the appeal was out of time since a copy of proceedings was ready for collection by 21st July, 2020 and the impugned judgment was certified on 15th July, 2020. It was argued further that the appellant having lodged the petition of appeal on 15th December, 2020, there was a lapse of 143 days instead of being lodged within 45 days as required by section 361 (1) (b) of the Criminal Procedure Act (the CPA). It was contended further that in terms

of section 3 (1) of the Law of Limitation Act (the LLA), any matter filed out of time was liable to be dismissed, and was so prayed.

The High Court agreed with the respondent's argument and found that the appeal was filed after a period of 4 months and 21 days from when the copy of proceedings was certified to be ready for collection on 21st July, 2020 and dismissed it.

Aggrieved with that decision, the appellant on 11th October, 2021 lodged a notice of appeal to appeal against that decision. Before this Court he has filed grounds of appeal which basically do not correspond with or reflect what the appellant ought to have appealed against (the decision of the High Court) as the appeal was not heard on merit but it was dismissed for being time barred. In other words, the appellant has fronted grounds of appeal challenging the substance of the case on the basis of the District Court's decision.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented whereas the respondent Republic had the services of Mr. Joseph Mbuggo, learned Senior State Attorney.

Before the hearing could commence in earnest, we prompted the parties whether the appeal before the High Court was properly dismissed

considering that the petition of appeal was filed out of time reckoning the time from 21st July, 2020 when a copy of proceedings was certified and ready for collection.

Mr. Mauggo conceded that going by the record of appeal at page 71, the petition of appeal was filed within time. He elaborated that according to the summary provided at the end of the petition of appeal it shows that the appellant received a copy of proceedings on 9th December, 2020. He, therefore, contended that by filing the petition on 15th December, 2020, it was filed within time. Considering the nature of the case, and for the interest of justice he beseeched the Court to invoke its revisional powers under the provisions of section 4 (2) of the Appellate Jurisdiction Act (the AJA) and quash the High Court's decision and its order and direct that the appeal be heard by that court on its merits.

On his part, the appellant insisted that the appeal was not heard. He welcomed the concession by the learned Senior State Attorney stressing that for the interest of justice the appeal be heard on its merit.

We have anxiously examined the record of appeal and considered the submissions by both sides and, we think the issue for our determination is whether the appeal before the High Court was time barred and if so, whether it was proper for the High Court to dismiss it.

Section 361 (1) of the CPA which governs the filing of appeals in the High Court provides as follows:

"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 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 fort-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 by this section has lapsed."*[Emphasis added]

The thrust of the above cited provision is that the appeal process from the subordinate court begins by filing a notice of intention to appeal within ten (10) days of the decision sought to be impugned as per paragraph (a) of subsection (1) and the petition of appeal is to be lodged

within forty five days from the date of impugned judgment. However, there is a proviso to it that in computing the period of forty five days, the time requisite for obtaining a copy of proceedings, judgment or order to be appealed against is to be excluded. It is noteworthy that the provision is couched in imperative form meaning that it has to be complied with.

In the matter at hand, it is notable that the impugned decision was handed down on 14th July, 2020. The appellant dutifully lodged his notice of intention to appeal on 17th July, 2020 which was within ten days as prescribed under section 361 (1) (a) of the CPA. The petition of appeal was lodged on 15th December, 2020 as clearly indicated at page 70 of the record of appeal. On the face of it, one may think that the appeal was filed out of time counting from 14th July, 2020 when the judgment was delivered which means that the petition of appeal would have been expected to be lodged latest by 28 August, 2020.

In its decision, the High Court found the appeal time barred after having reckoned the period from 21st July, 2020 when the certified copy of proceedings was ready for collection to 15th December, 2020 when the petition of appeal was lodged in the High Court which was 153 days after the date when the decision sought to be delayed was delivered or 147

days after the copy of proceedings was certified and not when the same was supplied to the appellant.

It should be noted that, in terms of section 361 (1) (b) of the CPA the time limitation for filing of a petition of appeal to the High Court starts to run against the appellant after receiving a copy of proceedings, judgment or order of the trial court. This we stated in the case of **Chamba s/o Ndangamila v. Republic**, Criminal Appeal No. 209 of 2013 (unreported) while citing the case of **Nzeyimana s/o Zeno v. Republic**, Criminal Appeal No. 458 of 2007 (unreported) that:

"... we also take note of section 361 (b) of the Criminal Procedure Act which requires an appeal to be lodged within forty five days from the date of finding. We also take note that this limitation of period has a saving provision which excludes the time required for obtaining proceedings judgment, order, appealed against ..."

Going by the dictates of the above authority it seems to us that in this appeal, the High Court strayed into an error applying the procedure not provided for under the CPA. We say so because, after perusing the CPA, we have been unable to see the condition requiring the preferred appeal to be reckoned from the period when the copy of proceedings, judgment or

order was certified as being ready for collection. Even if such was a requirement, we wonder how a prisoner could have been aware that the documents for appeal purposes were ready for collection more so, when taking into account that he being a prisoner depends on the assistance of prison authority.

At any rate, we were able to see the summary of events in the appeal process as shown out page 71 of the record of appeal which reflects the following:

*"Date of conviction 14/07/2020.
Date of receiving proceedings.....09/12/2020.
Date of lodging memorandum of appeal.....09/12/2020
Date of memorandum of appeal forwarded.....
10/12/2020."*

Although this is not provided for in the law, it seems to us to be a good and settled practice which is meant to facilitate parties to see whether the appeal is within time or not. If we go by the wording of section 361 (1) in which the period spent for obtaining the copy of proceedings is excluded, then this appeal would have been not time barred. This is so because, picking from 17th July, 2020 when the notice of appeal was filed 10 days of the decision, the appellant was supplied with a copy of proceedings and judgment on 9th December, 2020 and he

lodged the appeal on 15th December, 2020 which was well within the prescribed time.

In this regard, we are satisfied that it was inadvertence on the part of the High Court Judge to find that the appeal was time barred and dismiss it. We, therefore, agree with both the learned Senior State Attorney and appellant that the appeal was, in fact, lodged within time.

Apart from that, we have noted that in arguing the PO the learned State Attorney sought to find the remedy from section 3 of the LLA. It is unfortunate that High Court agreed with him and relied on it to dismiss the appeal. However, we think, the learned State Attorney misled the Court because section 43(a) of the same Act prohibits its application in criminal proceedings.

Nevertheless, we asked ourselves, assuming the appeal was time barred whether it was proper for the High Judge to dismiss it, particularly so, when taking into account that it was not heard on its merit. In answering this issue, we are mindful that dismissal and striking out are distinct and their consequences are not similar. While dismissal connotes that there was competent appeal which was heard and determined, the striking out implies the appeal was incompetent and therefore could not

have been heard – (See **Juma Nhandi v. Republic**, Criminal Appeal No 289 of 2012 (unreported).

In this regard we are settled in our mind that, it was wrong for the High Court Judge to dismiss the appeal which was not heard on merit for being out of time. In that situation, the best option was to strike it out which would have enabled the appellant to come back subject to time limitation.

We understand that the learned Senior State Attorney urged the Court to invoke its revisional powers and quash the decision and set aside the order of the High Court under section 4(2) of the AJA. The said provision provides:

*"(2) For all purposes of and incidental to the hearing and determination of any appeal and in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition any other power, authority and jurisdiction conferred by this Act, **have the power of revision and the power, authority and jurisdiction vested in the Court from which the appeal is brought.**"*

Having considered the circumstances of this case, we are settled in our mind that the interest of justice dictates that we agree with him. We

are of the view that this is a fit case for invocation of the said provisions of the law. Thus, in terms of section 4 (2) of the AJA, we hereby nullify the proceedings, quash and set aside the ruling and order of the High Court in Criminal Appeal No. 123 of 2020. We further direct that the matter be remitted to the High Court in order for the appeal to be heard on merit before another Judge expeditiously.

DATED at MTWARA this 24th day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

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

