IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MKUYE, J.A., KIHWELO, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL No. 262 OF 2021

JOSEPH PETER @ LILENGA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matogolo, J.)

dated the 11th day of December, 2020

in

DC. Criminal Appeal No. 25 of 2020

.....

JUDGMENT OF THE COURT

8th & 13th December, 2023

KIHWELO, J.A.:

In the Court of Resident Magistrate of Njombe, Joseph Peter@ Lilenga, the appellant was arraigned, tried and convicted on a charge with two counts of rape and armed robbery and he was sentenced to serve a term of thirty years for each count and the sentences were to run concurrently. When apprehended before the trial court, the appellant denied the charge, whereupon the prosecution featured four witnesses, a cautioned statement of the appellant (exhibit P1) and a PF3 (exhibit P2).

In the nutshell, the case for the prosecution was to the effect that, on the fateful day, around 23:00 p.m. or so, Maria Ndendya, the victim (PW1) was sleeping in their house, when, all of the sudden, the room's entrance door was forced open and one unwelcome visitor stormed into the room. The victim took a torch and flashed towards the unwelcome visitor and was able to identify the appellant. The appellant became apprehensive and asked the victim why she was flashing light towards him, and her immediate response was that she identified him as the masonry who worked nearby and she regularly offered him food and local brew. The appellant then climbed up on the bed, removed his trouser and forced himself on the victim. Thereafter, the appellant demanded to be given money while threatening to set the house on fire if she did not cooperate. He then went ahead searching for money until he found TZS. 202,500 which was hidden under the mattress. The appellant beat the victim while demanding for more money, dragged her outside the house and left her there while he went back in the house to search for more money using the victim's torch.

It is at that moment the victim escaped to the neighborhood but did not wail about to attract help from neighbours owing to the fact that she was stark naked. The victim hid in that neighborhood until in the morning

when her husband, Yustin Mlowe (PW2) came back from his watchman job and discovered what befell her.

The duo reported the matter at first to the Village Chairman where the victim named the appellant as the perpetrator of the crime, and later, they went to the police where they told the police that the victim visually identified the appellant who was well known to them as a regular visitor, following which the appellant was arrested the following day and his cautioned statement (exhibit P1) was taken by G 8386 Detective Corporal Andrew (PW3) and the wheels of justice turned into motion.

Furthermore, the victim was taken to Njombe Health Center where she was medically examined by Dr. Frida Mwapwele (PW4) who filled the PF3 (exhibit P2). With this detail, so much for the version told by the prosecution witnesses on the occurrence.

In reply, the appellant reiterated his complete disassociation from the prosecution accusations. He did not quite refute the detail about being a masonry, but sturdily refuted knowing the victim and that, he came to know the victim when she came to testify in court. His account was to the effect that, on the day of his arrest he was at his usual place of work when two

police officers arrived and arrested him. According to the appellant, he was taken to the police station where he was tortured in order to confess for the crime he did not commit and was forced to sign exhibit P1.

On the whole of the evidence, the trial court accepted as truthful the claims by PW1 to the effect that, she recognized the appellant who was well known to her to be the intruder who perpetrated the rape and robbery. The trial court also accepted as truthful the claims by PW2 who saw the victim for the first time immediately after the incident. The trial court equally, accepted as truthful the claims by PW4 the medical practitioner who examined the victim and filled exhibit P2. The appellant's disassociation to the accusations was considered by the trial court but rejected as it was considered to be an attempt to evade justice. In the upshot, the appellant was found guilty and convicted as hinted earlier on.

On the first appeal, the High Court (Matogolo, J.) found no valid cause to interfere with the findings of the trial court and the appeal was, accordingly, dismissed in its entirety. Unamused, he presently seeks to challenge further his conviction and sentence, and presently appeals upon a memorandum which is comprised of five (5) points of grievance. Nonetheless, for reasons that will shortly come to light, we think that, it will

be unnecessary for us to recite the details of the memorandum of appeal, just as we need not recapitulate the arguments for and in opposition to the appeal.

At the hearing before us, the appellant was fending for himself, unrepresented, whereas the respondent Republic had the services of Mr. Tito Ambangile Mwakalinga, learned State Attorney. When called upon to address us on the grounds of appeal, the appellant fully adopted the memorandum of appeal but he deferred its elaboration to a later stage, if need be, and impressed on us to permit the respondent Republic to submit first.

When given the floor Mr. Mwakalinga meticulously and briefly argued that the appeal before the first appellate court was improperly lodged and wrongly determined. Expounding the defect, the learned State Attorney submitted that, the impugned judgment of the trial court was delivered on 11th October, 2019 and the notice of appeal was lodged on 12th October, 2019. Elaborating further, the learned State Attorney contended that, it is very unfortunate that the appeal before the first appellate court was lodged on 17th June, 2020 which is 250 days from 11th October, 2019, despite the fact that certified copies of the judgment and proceedings were ready and collected on 11th October, 2019. The learned State Attorney argued that, this

is contrary to the mandatory requirements of section 361 (1) (b) of the Criminal Procedure Act, Cap. 20 (the CPA), which requires an appeal to be filed within 45 days from the date of finding, sentence or order. In his view, since jurisdiction to determine the appeal is statutory, therefore, the first appellate court had no jurisdiction to entertain the appeal and the appeal before us is therefore incompetent, as such the appellant should be advised to go back and regularize his appeal. He paid homage to our earlier unreported decision in **Rafael Chagula v. Republic**, Criminal Appeal No. 307 of 2019 to facilitate his proposition. Having heard the submissions of the learned State Attorney, the appellant unreservedly and admittedly conceded that the appeal before the first appellate court was lodged out of time.

In the light of the foregoing submissions, the vexing issue which stands for our determination is whether or not the appeal before the first appellate court was proper before it.

Our starting point in the deliberation of the above issue we think, should involve appreciating what the provisions of section 361(1) of the CPA provides:

"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 shall be excluded."

[Emphasis added]

We have emboldened the excerpt of the provision above to exemplify that, entertaining an appeal against conviction, sentence or order is, apart from lodging the notice of appeal within the prescribed time, subject to the appellant(s) lodging the petition of appeal within 45 days from the date of the impugned decision.

The provision of section 361 (1) (b) of the CPA, is very categorical and clear and leaves no room for any ambiguity in that, any intended appellant, having lodged the notice of appeal within the prescribed time, has to lodge the petition of appeal within 45 days. However, in computing the period of 45 days, there has to be excluded the period necessary for the preparation of such documents by reckoning the period from the date such documents were obtained.

Now, coming back to the instant appeal before us, as rightly submitted by the learned State Attorney, the impugned judgment of the trial court was delivered on 11th October, 2019 and the appellant lodged the notice of appeal on 12th October, 2019 within the time prescribed under section 361 (1) (a) of the CPA which is not in dispute though. However, the appellant did not lodge the appeal before the first appellate court until on 17th June, 2020 which is more than eight (8) months from the date the impugned decision was delivered and without leave in total violation of section 361 (1) (b) of the CPA, and bearing in mind that certified copies of the judgment and proceedings were ready and collected by the appellant on 11th October, 2019. The appellant himself admitted in reply that, he lodged the appeal out of time prescribed by the law.

In our respectful opinion, we think that, since in the instant appeal the appellant did not lodge the petition of appeal before the first appellate court within forty-five days from the date of the impugned decision, the first appellate court lacked jurisdiction to entertain the appeal as it did, and therefore, we are constrained to agree with the contention of the learned State Attorney that, the first appellate court in entertaining the appeal, embarked on a nullity. Ordinarily, the first appellate court ought to have struck out the appeal for being incompetent before it, unfortunately, that was not done. It has long been established, and we think there is ample authority for saying that appellate jurisdiction springs from statute. There is no such thing as inherent appellate jurisdiction, see for example, **Attorney General v. Shah** (1971) EA 50.

Indeed, the question which presently confronts us is what needs to be done. The purported appeal before the first appellate court which is the basis of the instant appeal was a nullity having being entertained in violation of the mandatory requirements of the law and therefore, its proceedings and judgment cannot be spared. To us, there can be no option for the instant appeal to remain before us, and the only viable option is to invoke the

revisional jurisdiction of the Court to nullify the proceedings and judgment of the first appellate court.

Consequently, in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141, we hereby nullify the proceedings and judgment of the High Court. Meanwhile the appellant is advised to go back to the High Court and commence proceedings in accordance with the law, if he so wishes.

DATED at **IRINGA** this 12th day of December, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2023 in the presence of the Appellant in person and Messrs. Burton Mayage and Simon Masinga, learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL