IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 340 OF 2021

BAHATI MHENGA ..... APPELLANT

versus

THE REPUBLIC ..... RESPONDENT

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

(Matogolo, J)

dated 13th day of November, 2019

in

DC. Criminal Appeal No. 35 of 2019

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JUDGMENT OF THE COURT

12th & 20th March, 2024

MASHAKA, J.A.:

The appellant, Bahati Mhenga, was charged and convicted before the Resident Magistrates' Court of Njombe of the offence of rape contrary to section 130(1) and (2)(e) and 131(3) of the Penal Code [Cap 16 R.E 2002]. He was convicted and sentenced to 30 years imprisonment. His appeal to the High Court was unsuccessful, hence this appeal.

It was alleged that, on 17th October, 2016 at Lwanzari village within the District and Region of Njombe, the appellant had carnal knowledge of a girl (name withheld) aged ten (10) years old. In proving the charge,

the prosecution relied on the oral evidence of four witnesses and two documentary evidence. While the appellant paraded one witness in the defence case.

The facts which led to the conviction of the appellant can be recounted as follows: PW1 a standard three student had not attended school on the 17/10/2016 which prompted Ansila Petro Ngailo (PW2), her school teacher, to enquire about her absence at school that day. On 18th October, 2016 the teacher went looking for PW1 at her home at Palianzali and found her in the bush. Upon questioning her, PW2 was told that PW1's fellow students were bullying her that she was pregnant. On further questioning, PW1 admitted to PW2 that she had sexual intercourse with the appellant and her own father Joseph Lugala. PW2 reported the matter to the head teacher of Nyagawa Primary School who informed the village government and the police.

It was PW1's contention that on 17th October, 2016 at about 13:00 hours the appellant found her collecting fire woods, using force he took her into the bush, covered her mouth not to raise alarm and raped her. She testified that the appellant threatened her with a knife not to tell anyone of what happened. Thus, that was her reason for not telling anyone about what had happened until PW2 asked her.

She was taken to hospital on 20th October, 2016 where Blandina Kahwa (PW3), medical officer, examined her. PW3 established that there was penetration in her vagina. The appellant was apprehended and interrogated in the course of which he confessed to have committed the offence and recorded a cautioned statement (exhibit L2).

In his defence, the appellant disassociated from the charge and raised a defence of alibi. He stated that on the material day he went to Idete village, and when he came back to Lwanzari village, his home village, the place where the alleged rape is alleged to have occurred, he was faced with the accusation against him.

The trial court was impressed that the prosecution proved the case beyond reasonable doubt and was not convinced with the defence case as it did not cast any doubt on the prosecution case. It convicted the appellant.

Aggrieved, the appellant lodged RM Criminal Appeal No. 76 of 2017 before the High Court of Tanzania at Iringa. The learned Judge found that sections 361 (1) (a) and 362 (1) of the Criminal Procedure Act (the CPA) were offended. The High Court Judge held that the appellant had directed his Notice of Appeal to the Njombe District Court which had not acted on the challenged court decision and orders, he found the notice of appeal

filed on 27/01/2017 incompetent and the same rendered the appeal before the first appellate court incompetent. The RM Criminal Appeal No. 76 of 2017 was struck out for want of a competent notice of appeal. On 16th April, 2018, the appellant filed Misc. Criminal Application No. 10 of 2018 praying for extension of time to lodge appeal out of time in which the first appellate court granted 30 (thirty) days extension of time to lodge his intended appeal. The appellant processed his appeal and lodged it on 06/09/2018 only to be struck out for being incompetent as it was lodged by a defective notice of appeal. It was ordered that subject to the law of limitation; the appellant was at liberty to initiate the appeal process afresh. He processed for extension of time to file notice of appeal and petition of appeal which was granted only to the extent of filing a petition of appeal within thirty days. Ultimately, he filed the petition in DC Criminal Appeal No. 35 of 2019 which the High Court took the same position by endorsing the findings of the trial court as to PW1's credibility and also found the cautioned statement to be of evidential value implicating the appellant. The appeal was dismissed for want of merit hence this second and final appeal.

For reasons to be explained, we will not reproduce the grounds of appeal as there is a procedural irregularity which we think it may dispose of the appeal.

Before us, the appellant appeared in person and fended for himself and the respondent/Republic enjoyed the services of Mr. Tito Ambangile Mwakalinga, learned State Attorney.

At the commencement of hearing, the appellant adopted his four grounds of appeal and prayed to the Court to consider and allow them, resulting in setting him free. We invited Mr. Mwakalinga to respond and at the outset, he brought to our attention that the appeal was incompetent for lack of notice of appeal, an omission offending section 361 (1) of the CPA. He argued that after the DC Criminal Appeal No. 76 of 2017 was struck out for want of a competent notice of appeal, later when the appellant processed his appeal there was no notice of appeal filed to initiate the appeal process. To reinforce his argument, he referred to the case which had similar circumstances of **Joseph Lugala v. The Republic**, Criminal Appeal No. 512 of 2020 (unreported), where the Court held that the absence of the notice of appeal was overlooked by the first appellate court which proceeded to hear the appeal on merit although it was incompetent and the emanating proceedings of the said court were a nullity. He implored the Court to invoke its revision powers to nullify the proceedings of the High Court in DC Criminal Appeal No. 35 of 2019 and set aside the decision for emanating from a nullity.

In rejoining, the appellant agreed with the learned State Attorney that he had not filed a notice of appeal. He nonetheless reiterated his prayer to the Court to allow the appeal and set him free.

Having heard the submissions by Mr. Mwakalinga and the concession of the appellant, it is undisputed that there was a petition of appeal lodged by the appellant before the first appellate court without a notice of appeal as per requirement of the law to contest a decision of the subordinate court. Basically, what is on record is only the petition of appeal.

We perused the record of appeal and satisfied ourselves that undeniably, there was no notice of appeal filed in the High Court at the time the appellant attempted to challenge the decision of the Resident Magistrates' Court of Njombe which had convicted and sentenced him of the offence of rape.

The omission is against the dictates of section 361 (1) (a) of the CPA which stipulates: -

> *"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".

[Emphasis added].

As observed and emphasised in the excerpt above, that is the position of the law as correctly argued by Mr. Mwakalinga. Following the striking out of DC Criminal Appeal No. 76 of 2017 for which the notice of appeal dated 27/01/2017 in the appeal lodged was found incompetent, the notice suffered the same consequence of being struck out. Also, it applied to DC. Criminal Appeal No. 35 of 2019 which was lodged with no notice of intention to appeal which initiates the appellate process.

The appellant in Misc. Criminal Application No. 21 of 2019 filed on 01 April, 2019 had averred and prayed in his supporting affidavit that the High Court be pleased to extend time to lodge notice of appeal and petition of appeal out of time. The order issued as gleaned at page 56 of

the record of appeal, showed that time extended to the appellant was only to file petition of appeal within thirty days. Regrettably, the learned Judge overlooked the fact that the appellant had also pleaded for extension of time to file notice of appeal and did not grant extension of time to file the notice of appeal. When the DC Criminal Appeal No. 35 of 2019 was called up for hearing, it is unfortunate the first appellate court overlooked this anomaly and proceeded to hear and determine the appeal on merit while it was incompetent.

We subscribe to the stance in **Joseph Lugala v. The Republic,** (supra) cited by Mr. Mwakalinga that:

> *"The failure of the appellant to lodge the notice of appeal rendered the appeal before the first appellate court incompetent because the omission offended the provisions of section 361 (1) of the CPA".*

Also, in **George Daudi v. The Republic,** Criminal Appeal No. 428 of 2018 (unreported), the Court dealt with a similar situation and had this to say:

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

judgment, conviction and sentence before that court were a nullity".

We respectfully decline the appellant's prayer to proceed with hearing of the appeal before us because it is incompetent as it emanates from a nullity. Therefore, the purported appeal in this Court is incompetent and we accordingly strike it out.

We are aware that the petition of appeal is still intact in the High Court but it cannot stand without a notice of appeal a requirement stipulated under section 361 (1) (a) of the CPA. The purported appeal by the appellant before the High Court has no legs to stand on, hence there is no appeal before the High Court. In consequence, we accept the invitation to invoke section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019. We revise and nullify the proceedings of the first appellate court in DC. Criminal Appeal No. 35 of 2019. We quash the judgment and set aside any orders resulting from it.

Inadvertently, on the part of the learned Judge, he did not grant extension of time to file a notice of appeal and only proceeded to grant such extension to file petition of appeal as prayed for by the appellant. The appellant is not to be held responsible for the oversight. We order the High Court to consider afresh the Misc. Cr. Appl. No. 21 of 2019 for

extension of time to file both notice of appeal and petition of appeal to rectify the error caused by the court and without further delay to enable the appellant process his appeal. The appellant to remain in custody awaiting determination of his application which should be expedited.

DATED at **IRINGA** this 19th day of March, 2024.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of March, 2024 in the presence of the appellant in person and Mr. Sauli Makori, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL