IN THE HIGH COURT OF TANZANIA
AT IRINGA

(DC) CRIMINAL APPEAL NO. 35 OF 2009

(ORINATING FROM IRINGA D/COURT
C.C. N0. 679/98

ALOYCE MGOVANO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Mkuye, J

The appellant Aloyce Mgovano was charged and convicted of the offence of rape contrary to sections 130(1) (e) and 131 of the Penal Code, Cap 16 R.E 2002. He was alleged to have had carnal knowledge of one Tumliche d/o Mtekele, a girl who was aged 6 years old on the 11/12/1998 at about 1.00 hrs at Vitano Village within the District and the Region of Iringa.

Following conviction, he was sentenced to life imprisonment. Dissatisfied with both conviction and sentence he has appealed to this court.

The appellant was not represented while the respondent Republic was represented by Mr. Mgavilenzi, learned State Attorney.

The appellant fronted three grounds of appeal which, after a careful extraction the following emerge:

1) The trial Magistrate erred in not calling the statements recorded by witnesses at the police station as required by section 166 of Tanzania Evidence Act.

2) The trial magistrate erred in relying on hearsay evidence of PW1,PW3,PW4,PW5,PW6,PW7 and PW8 as they were just told of what happened and that the trial magistrate did not warn himself on the danger of convicting the appellant basing on a single witness (PW2).

3) Magistrate erred in sustaining conviction basing on the weakness of appellant's defence.

When the appeal came for hearing the appellant declined to add anything until the respondent Republic responds to the grounds of appeal.

Mr. Mgavilenzi learned State Attorney for the respondent Republic while declining to support the appeal, on the 1st ground argued that it was not a duty of the court to call for whiteness's statements and that two, Section 166 provides that the explaination given at the time of recording statement can be used to prove the case.

With regard to the 2nd ground of appeal Mr. Mgavilenzi submitted that it was not true that the trial magistrate based on hearsay evidence. But rather the magistrate convicted the appellant on the strength of PW2 (the victim's mother) who saw the appellant on top of the victim and that the appellant was frightened and apologized to her by saying *"Samahani mama nimechanganyikiwa"*

PW2, Mr. Mgavilenzi argued, further, saw the appellant's trouser pulled down while the victim holding her underpant. PW2, he further argued, raised alarm and other people came to the scene of crime and helped to apprehend the appellant. Most of the other witnesses heard when the appellant admitted the commission of the offence before the village chairman. But further to that the appellant admitted to the police when his caution statement was recorded and admitted in court without objection as Exh. P1. But also the Doctors (PW8)'s evidence confirmed that the victim was raped as per Exh P2.

Mr. Mgavilenzi further rebutted ground No. 3 in that the appellant was not convicted basing on the weakness of defence evidence. Instead the appellant was convicted on the strength of the prosecution evidence adduced by 8 witnesses who proved that he committed the offence.

Mr. Mgavilenzi lastly supported the life imprisonment metted out against the appellant in that it was within the law as the victim was aged 6 years.

Admittedly, though the appeal was argued in its entirety, I think the first point for consideration in this case before me is a procedural one, and it is whether or not the appeal at hand is properly before the court.

Unfortunately, also, I did through my inadvertence, not ask the parties to address me on this issue.

However, after having perused the court record I came across an order by my learned brother Hon Jundu J (as he then was) dated

2/3/2009 in Misc. Crim. Application No. 18 of 2008 granting leave to the applicant/appellant to file his appeal out of time. That order further directed the appellant to file his appeal on or before 16/4/2009. The said order reads as here under:

> *"On the premise, this application is hereby granted, that is leave is hereby granted to the applicant to lodge his appeal out of time. The applicant is hereby ordered to file his appeal on or before 16/4/2009. Let the applicant be so notified".*

This order is grounded on technically. It is based on the principle that in order for an appeal to be competent before the court it has to be filed in accordance with the law, that is, the provisions of section 361(1)(a) and (b) of the Criminal Procedure Act, Cap 20 R.E. 2002. If it is not filed within the above subsection then it should be filed in accordance with the leave of the court granted under section 361 (2) of the same Act which reads:

> *"361 (2) The High Court may, for good cause, admit an appeal not withstanding that the period of limitation prescribed in this section has lapsed"*

The provision cited above, clearly, does not specify the time limit within which to file the appeal following the grant of leave. I do not think that, it was the intention of the Parliament to give indefinite period for filing appeals to persons granted leave to appeal out of

time. If that was the intention then the time limitation under Section 361(1) (a) and (b) would be meaningless.

In practice however, courts, in granting such extension of time have prescribed/specified the period within which the person granted such leave has to file his/her intended appeal. I think the reason is simple. As I have already stated, the extended time for filing an appeal cannot be left indefinite as it will keep courts in suspense. On the other hand it puts the appellant under obligation to take a prompt measure if he wishes to pursue his appeal.

The appeal at issue, though by the order was required to be filed on or before 16/4/2009, the record shows that it was presented for filing on 30/6/2009. The stump also indicates so. This means that the appeal was filed 75 days after the time specified for its filing. This was an ordinately lapse of time.

Perhaps the question that follows is what was the effect of an order dated 2/3/2009. In my view, the order was valid from the date of its issue to 16/4/2009.

In other words, that was the valid period within which the appellant was required to file his appeal. From 16/4/2009 order ceased to have effect. The appellant failed to comply with the requirements of the order. He filed his appeal after the order that granted leave had ceased to have effect. This means in other words, he had filed his appeal after the extended time had lapsed. The filing of the appeal on 30/6/2009 had no leave of the court. It means therefore there is no appeal before the court for non compliance with the order which specified period for filing it. The appeal is therefore

incompetent before the court and it is bound to be struck out. With regard to the appeal which was heard in its entirety it apparent that it was miscconcieved since once the leave of he court had ceased have effect, then there was no basis for arguing such appeal. There was no appeal to be argued.

Under the circumstances, I am constrained to hold that this appeal is not properly before the court and it is hereby stuck out. The appellant may if he so wishes apply to appeal out of time.

Ordered accordingly.

R.K.MKUYE

JUDGE

15/11/2010

Date: 21/4/2010

Coram: R.K.Mkuye, J

Appellant: Present

Respondent: Mr. Matitu State Attorney for Republic

Delivered on this 21st day of April 2010 in the presence of the appellant and Mr. Matitu, State Attorney for the Respondent Republic.

R.K.MKUYE

JUDGE

21/4/2010