

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MBEYA
AT MBEYA

Criminal Appeal No.26/2020

Originating from Chunya District Court Crim Case

No.106/2019

JOHN MSHAMA SANYIWAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of Judgment: 30.06.2020

DR. MAMBI, J.

In the District Court of Chunya the appellant was charged with an offence with the offence of rape c/s 130 (2) (e) and 131(1) of the Penal Code, Cap 16 [R.E.2002]. It was alleged that on the 1st day of Maya 2019 at Makongorosi Village within Chunya District, Mbeya Region the accused did have canal knowledge to one young girl aged 11 years old. The Trial Court found the accused guilty as charged. He was convicted and sentenced to thirty imprisonment.

The appellants was aggrieved and preferred nine grounds of appeal in this court.

During hearing that was done electronically through virtual court, the appellant appeared unrepresented while the respondent was represented by the learned State Attorney Mr. Kihaka. Before the matter went on further the learned State Attorney for the respondent also raised a point that this appeal is time bared since the appellant appealed out of time contrary to the law that is Section 361 (1) (b). On the other hand, the appellant in briefly stated that he was not aware if he was rime bared and since he was in the prison he had control. He prayed to withdraw his appeal.

I have carefully gone through the submissions from both parties and records from the trial court. In my considered view the main issue that need to be determined before even determining the appellant's ground of appeal is the point of limitation raised as to whether the present appeal is time barred or not. This means that the court has to determine as to whether this appeal has been filled within time as required by the law or not. General matters related to time limitation to appeal and application on criminal cases are provided under section 361 (2) of The Criminal Procedure Act, Cap 20 [R.E 2002].

In my considered the main issue for determination is whether this appeal is incompetent for non-compliance of section 361 of the Criminal Procedure Act, Cap 20 [R.E.2002].

I wish to refer to section 361 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002] and quote as follows:

(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) ...

(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.*

(2)

The wordings of the above provision of the law are self-explanatory. It is clear that the law requires that any person intending to appeal must appeal **within forty five days** from the date of the finding, sentence or order or. The law further provides 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. This means that if the appellant files his appeal after 45 days of expire date his appeal will be incompetent unless he first files an application for an extension of time. It is on the records that the judgment by the trial court was delivered on 30 of August in 2019 while the appellant filed his notice of his intention to appeal on 17/09/2019 almost after seventeen days. This means that failure to abide to the law, that appeal will be incompetent and the court cannot entertains such incompetent appeal as per section 361 (1) of the Criminal Procedure Act, Cap 20 [R.E.2002]. In this regard, this section bars the court to entertain appeal unless the appellant has given notice of his intention to appeal within ten days from the date of the finding, sentence or order.

Having gone through the records and noticed that the appeal was

filed out of time, it means that the appeal is incompetent for non-compliance of law. In this regard it became clear to me that the appellant has not complied with the requirements of the law that is section 361 (1) (b) of the Criminal Procedure Act, Cap 20 [R.E.2002]. This was in contravention of the provisions of the law. In my considered view, since the appellant did not comply with the mandatory requirements of the law, it is as good as saying there is no appeal at this court. I also wish to refer the Law of Limitation Act. The relevant provision is section 14 (1) of the Law of Limitation Act Cap.89 [R.E. 2002] which provides as follows:-

*"14-(1) Notwithstanding the provisions of this Act, the court may, **for any reasonable or sufficient cause**, extend the period of limitation for the institution of an appeal or an application, other than an application for such execution of a decree, and **an application for such extension may be made** either before or after the expiry of the period of limitation prescribed for such appeal or application (emphasis mine)".*

Reference can be made to the decision of the court in **Joseph Ntongwisangue another V. Principal Secretary Ministry of finance & another Civil Reference No.10 of 2005** (unreported) where it was held that:

"in situation where the application proceeds to a hearing on merit and in such hearing the application is found to be not only incompetent but also lacking in merit, it must be dismissed. The rationale is simple. Experience shows that the litigations if not controlled by the court,

may unnecessarily take a very long period and deny a party in the litigation enjoyment of rights granted by the court.

Reference can also be made to the decision of the court of Appeal of Tanzania in ***The Director of Public Prosecutions v. ACP Abdalla Zombe and 8 others*** Criminal Appeal No. 254 of 2009, CAT (unreported) where the court held that:

“this Court always first makes a definite finding on whether or not the matter before it for determination is competently before it. This is simply because this Court and all courts have no jurisdiction, be it statutory or inherent, to entertain and determine any incompetent proceedings.”

From the foregoing brief discussion, I am of the settled mind that the purported appeal is incompetent and cannot stand as a valid appeal.

There is no doubt that from the records it has taken a long time (180 days) since the judgment was delivered and the time the appellant received the copy. Looking at the intention of Section, it is clear that the provision has expressly stated that the party aggrieved by the decision of the District Court may appeal within forty five days from the date of decision or order. In such circumstances it is my firm view that this appeal is time barred and for this ground alone is capable of disposing the whole appeal. In this regard I don't see any merit of discussing the appellants' ground of appeal and respondent's reply. In my considered view, the remedy to the party failed to appeal within the time prescribed is clearly provided in the same provision that the court may extend the time within which a party can lodge his appeal if the party moves the court to do so.

There a lot of authorities that has addressed the issues of time limitation in filing appeals out of time. In this regard, I wish to refer and subscribe to the position in the case **TIMA HAJI VERSUS AMIRI MOHAMED MTOTO & MAMBA AUCTION MART CIVIL REVISION NO. 61 OF 2003** where the court observed that:

*For the Applicant to benefit from the provisions of Section 14 (1) above, the applicant must have made an application for extension of time either before or after the expiry of the period of limitation and in that application, the applicant must show "reasonable **or sufficient cause**" for the court to extend the time.*

I hold the similar position with above decision that for the appellant in our case to enjoy and benefit from Section 14 (1) and section 41 (2) of the Written Laws (Miscellaneous Amendments) Act No.4 of 2016, read together with section 361 (2) of CPA the appellant was required or need to make an application for extension of time either before or after the expiry of the period of limitation showing "reasonable **or sufficient cause**" for the court to extend the time if he wishes to do so.

It is very clear from this case the appellants have not made any such application for extension of time. This means that the appellants cannot therefore avail themselves the benefits under Section 14 (1) of the Law of Limitation Act and the proviso of section 361 (2) of CPA. The consequences of an application or proceeding or appeal which is time barred as also observed by the court in **TIMA HAJI case (supra)** are clearly spelt in Section 3 of the Law of Limitation Act

states:

*"3 -(1) Subject to the provisions of this Act, every proceedings described in the first column of the Schedule to this Act and **which is instituted after the period of limitation prescribe therefore opposite there to in the second column, shall be dismissed***

whether or not limitation has been set up as a defence."


I agree with the respondent that this appeal is time bared and the appellant has not advanced and presented any reasons for delay and the extent of such delay. Indeed the appellant has also prayed to withdraw and re-file his appeal afresh. The appeal was not brought timely before this court since it was brought after 16 days instead of 10 days as required by the law. The court in **TANZANIA DAIRIES LTD v CHAIRMAN, ARUSHA CONCILIATION BOARD AND ISAACK KIRANGI 1994 TLR 33** observed that:

*"Once the law puts a time limit to a cause of action, **that limit cannot be waived** even if the opposite party desists from raising the issue of limitation"*


Pursuant to the foregoing, I am of the firm considered view that this appeal has no merit since it is time bared and the appellant has failed to file an application for an extension of time with sufficient reasons for his delay. In the view of aforesaid, this appeal is dismissed for being time bared. It is accordingly ordered so. I feel it is requisite however, to advise the appellant that if he wishes to further pursue his right to appeal, he is at liberty to file his application for an

extension of time to appeal out of time before filling his notice of intention to appeal and the petition of appeal.

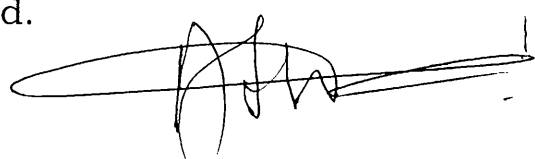



DR. A.J. MAMBI
JUDGE
26.5. 2020

Judgment delivered in Chambers this 30th day of June, 2020.


DR. A.J. MAMBI
JUDGE
30.6. 2020

Right of appeal explained.


DR. A.J. MAMBI
JUDGE
30.6. 2020