

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MBEYA DISTRICT REGISTRY)
AT MBEYA
DC CRIMINAL APPEAL No. 79/2019

(Originated from Cr. Case No. 37/2016, District Court of Mbeya at Mbeya)

1. SILVANUS s/o HASHIM @ NGOSHA	} APPELLANTS
2. MATEO s/o MWAEGA		

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of Judgment.03.02.2020

DR. MAMBI, J.

In the District Court of Mbeya the appellants(Silvanus s/o Hashim@ Ngonsha and Mateo s/o Mwaega) were charged with an offence of armed robbery c/s 287A(1) (a) (b) (2) of the Penal Code, Cap 16 [R.E.2002]. They were also charged for being found with unlawful possession of stolen goods c/s 311 of the Penal Code, Cap 16 [R.E.2002] and unlawful possession of fire arms c/s 20 and 60 of the Fire Arms Ammunition Act.They were found guilty and convicted. The trial court sentenced them to serve 30 years imprisonment. The appellants were aggrieved and preferred twelve grounds of appeal in this court.

During hearing, the appellant appeared unrepresented while the respondent was represented by the learned State Attorney Mr. Prosista. Before the matter went on further the learned State Attorney for the respondents also raised a point that this appeal is time bared since the appellants appealed out of time contrary to the law that is Section 361 (1) (b). She argued that the notice of appeal was filed out of time after almost three years, She further argued that even the petition of appeal have not been properly appealed since the name of the appellant is not under the first paragraph and some grounds of appeal.

On the other hand, the appellant in briefly stated that he were not aware if they were time bared and since they were in the prison they had control.

I have carefully gone through the submissions from both parties and records from the trial tribunals. In my considered view the main issue that need to be determined before even determining the appellants' 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. It is on the records that the matter originated from the District Court of Mbeya. I have gone through the records and found that the judgment was delivered on 11.07.2017 and the appellant received the copy on 28.08.2017 but he filled an appeal on 12.10.2017 (almost 77 days). 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. One must first file his notice of appeal within ten days after the judgment. 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. 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 appellants have 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 appellants did not comply with the mandatory requirements of the law, it is as good as saying there is no appeal at this court. 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 (almost three) since the judgment was delivered. Looking at the intention of above provisions of the law, 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.

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)".*

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. The appeal was not brought timely before this court since it was brought within 77 days instead of 45 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 hisdelay.

I have also noticed that the petition of appeal filed to this court was not properly pared as at same point the petition appears to address one appellant only. For instance the first paragraph of the petition reads as follows:

“I Silvanus s/o Hashimu @ Ngosha here in after referred to as appellant was being the 1st and 6th accused persons appeals to this hon. Court against the above mentioned decision.”

In this regard, the petition of appeal does not reflect all the appellants. If the appellants are still interested in this appeal, they have to draft the new petition of appeal subject to time limitation.

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 appellants that if they wish to further pursue their right to appeal, they are at liberty to file his application for an extension of time to appeal out of time before filling theirnotice of intention to appeal and the petition of appeal.



DR. A.J. MAMBI

JUDGE

02.03. 2020

Judgment delivered in Chambers this 2nd day of February, 2020.



DR. A.J. MAMBI
JUDGE
02.03. 2020

Right of appeal explained.



DR. A.J. MAMBI
JUDGE
02.03. 2020