

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 33 OF 2022

ZUBERI KANYIKA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

(Originating from the decision of the District Court of Wanging'ombe at
Njombe in Criminal Case No. 19 of 2021)

RULING

Date of Ruling: 12.09.2022

S.M. KALUNDE, J.:

ZUBERI KANYIKA, the applicant herein, is aggrieved by the decision of the Wanging'ombe sitting at Njombe (hereinafter "the trial court") in **Criminal Case No. 19 of 2021**. In the said proceedings the applicant was charged and convicted of rape contrary to sections 130(1) and 131(1) of **the Penal Code [CAP. 16 R.E. 2019]** now [CAP. 16 R.E. 2019]. He was sentenced to thirty years imprisonment. He filed the present application seeking for the following orders: First, that this Court be pleased to extend time within which lodge a notice of appeal and appeal out of time; and second, any other reliefs this Court may deem just to grant."

The application is brought under the provisions of section 361(2) of **the Criminal Procedure Act [Cap. 20 R.E. 2022]**. In addition to that the application is being supported by an affidavit dully sworn by the applicant. The application has not been contested by the respondent. When the application came for hearing of, the applicant appeared in person unrepresented whereas the Respondent, Republic was represented by **Ms. Pienza Nichombe**, learned State Attorney.

Upon taking the floor, the applicant, who is a lay person, prayed to adopt the affidavit filed in support of the application and prayed that the application be granted so that he can file the Notice of Appeal and the intended appeal. On her part, Ms. Nichombe informed the Court that the applicant lodged an appeal within the prescribed period. She added that the said appeal was struck out by this Court after the Notice in support of the appeal was discovered to be defective. She reasoned that the present application is meritorious within the meaning of section 361(2) of the CPA. Her view was that having struck out an incompetent appeal lodged on time the said period should not be used in calculating the timeous of the appeal. She prayed that the application be granted.

I need not be detained much on this application. There is glaring evidence in the records before me that the applicant duly complied with the requirements under section 361(2) of the CPA. His appeal was, however, declared to be incompetent and struck out. He immediately lodged the present application seeking an extension of time to file a Notice of Appeal and the Appeal out of time. The applicant right of

appeal is still guaranteed under section 359 (1) of the CPA. However, that right is subject to compliance with the conditions set out under provisions section 361 of the CPA. See the Court of Appeal decision in the case of **Sospeter Lulenga v The Republic**, Criminal Appeal No. 107 of 2006 where the Court (Munuo, J.A) held:

"To exercise the right of appeal stipulated under the provisions of section 359 (1) and (2) of the Criminal Procedure Act, 1985 Cap 20 R.E. 2002, the appellant had to comply with the mandatory provisions of Section 361 of Cap 20 ..."

Under the cited provision above any person aggrieved by any finding, sentence or order made or passed of a subordinate court other than a subordinate court exercising its extended powers may appeal to this Court upon issuance of Notice of Appeal within ten (10) days from the date of the finding, sentence or order. Thereafter the applicant would be required to file the appeal within forty five (45) days from the date of obtaining a copy of the proceedings, judgment or order appealed against.

In the present case the applicant complied with the above conditions and lodged a notice of appeal within time and subsequently he lodged an appeal. However, this Court made a finding that the notice and hence the appeal was incompetent. Immediately, thereafter the applicant lodged the present application. This is because the applicant was aware that without compliance with the mandatory requirements of

section 361 of the CPA, the applicant would not be allowed to approach this Court on an appeal. The respective section reads:

*"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.*
- (2) **The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed.**" [Emphasis is mine]*

The requirement to file a notice of appeal and appeal with the prescribed was underscored by the Court of Appeal in **Binaisa Phares Sumwa Rasta & 2 Others vs. Republic**, Criminal Appeal No. 61 of 2015 (unreported) where the Court (Ndika, J.A) stated:

"The provisions of Section 361 (1) of the CPA are definite and unmistakable. They require an intending

appellant, aggrieved by a subordinate court's decision, to not only lodge his notice of intention to appeal within ten days from the date of the impugned decision, but also file the intended appeal within forty-five days from the date of the decision.

Considering the circumstances in the present case, I am satisfied that the application has demonstrated "good cause" within the meaning of section 361(2) of the Criminal Procedure Act. I will therefore proceed to grant the application. Consequently, I order the applicant to file the Notice of Appeal within ten (10) days from today. In addition to that I grant the applicant twenty eight (28) days within which to file an appeal. In terms of section 361(1)(b) the said period shall exclude the time required for obtaining a copy of the proceedings, judgment or order appealed against.

It is so ordered.

DATED at IRINGA this 12th day of SPETEMBER, 2022.




S. M. Kalunde

JUDGE