

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SONGEA DISTRICT REGISTRY)**

**AT SONGEA**

**DC. CRIMINAL APPEAL NO. 24 OF 2021**

(Originating from the District Court of Mbinga Criminal Case No. 48 of 2021)

**SIMONI HYERA..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**RULING**

25.04.2022

**U. E. Madeha, J.**

Before the Mbinga District Court (the trial court) on 18.05.2021, the appellant was charged with the offence of rape contrary to *Section 130 (1) (2) (e) and 131 (1) of the Penal Code {Cap 16 R.E. 2019}*. He denied the charge. He has never been released on bail because he has no parents that meet the bail requirements. He remained in prison until 25.08.2021, the date of judgement. He was convicted and sentenced to thirty years imprisonment. Aggrieved by the sentence and the conviction he appealed to this Court.

At the hearing of the application, the applicants appeared in person, unrepresented, whereas, the respondent was represented by Ms. Helen Chuma; the learned State attorney.

Ms. Helen Chuma, learned State Attorney rose two points of preliminary objections, firstly, the appeal earlier lodged was incompetent because the appellant lodged the notice of the intention to appeal in the High Court rather than lodging it in the subordinate Court. Secondly, the notice of appeal was lodged out of time prescribed by law. She contended that the appellant lodged the notice of the intention to appeal to the High Court instead of lodging the notice to the subordinate Court. The learned counsel while arguing, she cited the case of **Mwesigwe Geoffrey Tito Bushahu v. The Republic** Criminal Appeal No. 355 of 2014 whereby the Court stated that:

*"361(1) Subject to subsection (2), no appeal from any findings, sentence or order referred to in section 359 shall be entertained unless the Applicant; -*

*(a) Has given notice of his intention to appeal to the subordinate Court within Ten days from the date of the finding. Sentence or order, in the case of sentence of*

*corporal punishment only, within three days of the date of such sentence."*

She also argued that since the notice of appeal supporting this appeal was lodged beyond the prescribed ten days contrary to section 361 of Criminal Procedure Act Cap 20 [R.E. 2019], which needs the appellant to file the notice of intention to appeal within ten days. The judgment was read on 25.8.2021, but the notice was lodged on 30.9.2021 which is almost thirty days after the conviction as a result the appellant was late to lodge the notice of intention to appeal. She prayed for the appeal to be struck out.

The appellant submitted that, while in prison, he handed over the notice of intention to file an appeal to the prison officer and lodged the notice of intention to appeal the next day after his conviction as prison officers assisted him in filing an appeal. The notice of intention to appeal is prepared by the prison officers, so they are the ones who have the forms and they are wrong about how to file them. He insisted that, they are used to lodge the notice of intention to appeal to the High Court.

In rejoinder submissions, the state attorney stated that the notice of intention to appeal was lodged on 30.9.2021. She added that there is no other remedy available to be able to hear and determine the appeal if the



appellant is late in lodging notice of intention to appeal. The appellant has the right to appeal, but he was late, and, seeing that the appellant's submissions were an afterthought, she requested that the appeal be struck out.

In view of the position rendered by the Court of Appeal in the case of **Mwesigwe Geoffrey Tito Bushahu (Supra)**, I concur with the Senior State Attorney for the Republic and see that the Appellant was required to file a notice of his intention of appeal in the subordinate Court where he was convicted and was eventually, required to submit the notice of intention to appeal within ten (10) days after the conviction. The appellant was convicted on 25.08.2021 he lodged the notice of intention to appeal on 30.9.2021 which is almost thirty days after the conviction. The appellant was late to lodge the notice of intention to appeal, hence, he is supposed to file the application for the extension of time to lodge the notice and appeal. The filed notice of appeal was contrary to *Section 361 (1) (a) of the Criminal Procedure Act Cap 20 (R.E. 2019)* in which it is stated that: -

*"361.- (1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the Applicant (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;"*

On the other hand, the State Attorney raised a preliminary objection on the point of law that, the appeal is improperly before the Court as the Appellant did not file his notice of intention to appeal at Tunduru District Court, but he filed the notice of intention to appeal at the High Court contrary to the provision of *Section 361 (1)(a) of the Criminal Procedure Act Cap 20 R.E. 2019*. A similar position was recently decided by the Court of Appeal of Tanzania in the case of **Farijala Shabani Hussein and Others v. the Republic**, Criminal Appeal No. 274 of 2012 CAT at Dar-es-Salaam. It was stated that

*"Addressing now the preliminary point of objection raised by the respondent, we deem it opposite to begin by extracting the relevant section 361 (1) (a) of CPA which makes provision for giving of notice of intention to appeal.*

*361(1) subjects to the 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 to the trial subordinate court within ten days from the date of finding, sentence of corporal punishment only, within three days of the date of such sentence."*

Having gone through the Applicant's form of notice of intention to appeal, I have seen the notice of intention to appeal was addressed to the High Court. The notice of intention to appeal was supposed to be addressed to the subordinate Court. The result of all this is the striking out of this appeal. The Applicant is required to apply for an extension of time to file the notice of intention in order to appeal outside the prescribed period.

Summing it up, the failure of the Appellant to file the notice of appeal at the subordinate Court renders the appeal incurably defective and as a result, the appeal has been rendered incompetent. Conclusively, the appeal is hereby struck out. Order accordingly.

**DATED and DELIVERED at SONGEA this 25<sup>th</sup> day of April 2022.**



**U. E. MADEHA**

**Judge**

**25/04/2022**