IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

CRIMINAL APPEAL NO. 64 OF 2022

(Originating from the Judgement of the District Court of Mvomero, at Mvomero in Criminal Case No. 49 of 2021).

CHARLES ABEID ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

31st August, 2023

CHABA, J.

In the District Court of Mvomero, at Mvomero the appellant, Charles Abeid was charged with the offence of rape contrary to sections 130 (1), (2) (e) and 131 of the Penal Code [CAP 16, R. E. 2019].

It was alleged before the trial Court that, on the 08th day of June, 2021 at Mpapa Kihemba area within Mvomero District in Morogoro Region, the accused had carnal knowledge of one, MM (her names withheld), a girl of ten (10) years old. At the height of the trial, the trial court was satisfied that the prosecution had

proved its case beyond reasonable doubt, hence the appellant was forthwith found guilty, convicted and sentenced to 30 years imprisonment.

Aggrieved, the appellant has preferred this appeal based on the following six grounds of complaints, I quote: -

1. That, the learned trial SRM miserably erred in law and fact by convicting the Appellant while he violated the principles stipulated under section 127 (2) of the Evidence Act, she was asking questions in order to satisfy himself as to whether the child had sufficient intelligence instead of probing as to whether the child understood the nature of Oath.
2. That, the learned trial SRM erred in law and fact by holding that PW.1, PW.3 and PW.4 were credible witnesses while their oral evidence was marked with inconsistencies and contradicted themselves in respect of the report of the matter as follows: -
    (a) PW.1 testified that on 08/06/2021 when she was at the farm her young sister followed her at the farm area around morning hours and told her that, the victim is nowhere to be found. They decided to do checkup and managed to find the victim crying under the Mango tree nearly the accused's house and then reported the matter to the Village leader.
    (b) PW.3 testified in court that on 08/06/2021, we found her missing, they decided to look for her and found her lying under the Mango tree, thereafter they took the Victim to the hamlet leader (Mwenyekiti) PW.4 to report the incident.
    (c) PW.4 testified in court that on 08/06/2021 at 08:00am came two women to his place, Sira Joseph (PW.3) and Rehema to report the missing of the Child namely, Maryam, PW.1- Tatu d/o Said, victim's

mother was not among them, then they decided to make checkup around the village.

3. That, the learned trial SRM erred in law and fact to hold that prosecution proved the case beyond reasonable doubt while the case was badly investigated and eventually poorly prosecuted as there is no plausible explanation from prosecution as to why very material source evidence (the clothes that was used by victim to wipe the blood) was not produced to cement their case.
4. That, the learned trial SRM erred in law and fact by convicting the Appellant based on the weakness of his defence and not the strongest of evidence tendered by prosecution side contrary to the law.
5. That, the learned trial SRM erred in law and fact by convicting the appellant relying on the discredited evidence of PW.7 (Doctor) while he had not specified his professional qualifications to enable the trial court to determine that he was a qualified medical practitioner capable of conducting medical examination on PW.2 (the victim) contrary to the procedure of law.
6. That, the learned trial SRM - erred in law and fact by convicting the appellant while the prosecution failed to prove the case beyond reasonable doubts as per required standard of the law.

At the hearing of the appeal which was conducted orally on the 23rd March, 2023, the appellant appeared in person, and unrepresented whereas Ms. Theodora Mlelwa, the learned State Attorney entered appearance for the Respondent / Republic. However, for reasons which will be apparent later in this judgment, I see no need to reproduce the parties' submissions.

Being the first appellate Court, I am mindful of my duty to re-evaluate and analyse the evidence of the trial Court, before venturing into the parties' submissions for and against the present appeal. I had ample time to revisit the records of the trial Court as well as the instant appeal and came across with an apparent irregularity which touched the jurisdiction of this Court in entertaining the matter under consideration in as much as the requirement of the provision of section 361 (b) of the Criminal Procedure Act [CAP. 20 R. E. 2022] is concerned regarding the time limits to appeal to this Court against the decision of the District Court. I find it appropriate, for easy of reference and clarity, to reproduce the provision of section 361(1) of the CPA as hereunder: -

> *"Section 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:*
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> *(a) N/A...*
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> *(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.*

From the above provision, it is clear to me that, in computing the period of time limit to appeal, the period the aggrieved party awaited to be supplied with the copy of judgment is to be automatically excluded. This stance of law

has also been provided for under section 19 (2) of the Law Limitation Act, [CAP. 89 R. E. 2019] which articulates that: -

> *"In computing the period of limitation prescribed for an appeal, an application for leave to appeal, or an application for review of judgment, the day on which the judgment complained of was delivered, and the period of time requisite for obtaining a copy of the decree or order appealed from or sought to be reviewed, shall be excluded."*

Now, coming back to the matter under consideration, it is an uncontroverted fact that, the decision sought to be appealed against was delivered on the 31st March, 2022 and that, the appellant lodged his petition of appeal before this Court on 13th September, 2022 which is almost five months from the date of the delivery of the impugned judgment. Applying the above provision of the law to the matter at hand, it is apparent that the clock of time limit ought to have been started to run against the appellant from the date he was supplied with the copy of judgment. However, in my understanding of the interpretation of the law, the appellant ought to enjoy such an automatic exclusion only, if there is proof of the dates of the critical events for the reckoning of the prescribed limitation period, which includes the date of the impugned decision, the date on which a copy of the decree or judgment was requested and the date of the supply of the requested documents. This standpoint was expounded by our Supreme Court of the Land in the case of

Alex Senkoro & Others Vs. Eliambuya Lyimo (Criminal Appeal 16 of 2017) [2021] TZCA 104 (13 April 2021) (Extracted From www.tanzlii.org), where the Court of Appeal of Tanzania observed thus: -

> *".....Furthermore, this Court took a similar standpoint in two recent decisions where the proviso to section 379 (1) (b) of the Criminal Procedure Act, Cap. 20 R.E. 2002 [now R.E. 2019], an analogous exclusion stipulation, was considered: Director of Public Prosecutions v. Mawazo Saliboko @ Shagi & Fifteen Others, Criminal Appeal No. 2017; and Samuel Emmanuel Fulgence v. Republic, Criminal Appeal No. 4 of 2018 (both unreported).To illustrate the point, we wish to extract what we said in Mawazo Saliboko @ Shagi & Fifteen Others {supra) where the learned High Court Judge had decided that the exclusion was not automatic:*
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> > *"The learned Judge was of the view that, though the appellant filed the appeal within 45 days after being served with the copy of the proceedings, he ought to have applied for extension of time to do so because he was time-barred from the date of the impugned decision. On our part, we are of the decided view that the intention of the legislature under the proviso to section 379 (1) (b) of the CPA was to avoid multiplicity of, and delay to disposal of cases.*

That is why it provided for automatic exclusion of the time requisite to obtain a copy of proceedings, judgment or order appealed from, this is different where the intending appellant finds himself out of 45 days to file an appeal after receipt of the copy of proceedings. "[Emphasis added]

The CAT went further and expounded that:

"We need to stress what we stated in the above case that ***the exclusion is automatic as long as there is proof on the record of the dates of the critical events for the reckoning of the prescribed limitation period. For the purpose of section 19 (2) and (3) of the LLA, these dates are the date of the impugned decision, the date on which a copy of the decree or judgment was requested and the date of the supply of the requested document."*** *[Emphasis added].*

In the instant appeal, although the appellant knew that he was out of the prescribed time to lodge his appeal, he didn't bother to attach and or annex documents unfolding the date on which he requested the copies of the judgment, proceedings as well as the date of the supply of the same so that he would have been covered by the stated automatic exclusion. I am aware that, in his petition of appeal, it is indicated that the appellant was supplied with the

copy of judgment on 28th July, 2022, but in my humble view, the same is not sufficient evidence to prove his assertion in absence of any other document proving that, the appellant was availed with the copy of the judgment on the date shown in the petition of appeal which was just inserted by the Officer Incharge of the Ukonga Prisons. In this regard, it goes without saying that, in absence of such other proof, in my considered opinion, it is safe to conclude that, the appellant was supplied with copies of the judgment and perhaps the trial Court proceedings on 31st day of March, 2022 which is the date of delivery of the impugned judgment and the date when the same was certified as true and correct copy of the original judgment by the learned trial SRM, and the same was ready for collection.

The above finding was underscored by the Apex Court in the case of **Samuel Emmanuel Fulgence Vs. Republic (Criminal Appeal 4 of 2018) [2019] TZCA 380 (8 November 2019)** (Extracted from www.tanzlii.org), where upon being faced with akin situation, the CAT had the following to state:

> *"...That apart, the petition of appeal was filed on 26th day of February, 2016. In reckoning the forty-five days within which to lodge an appeal, the time requisite for obtaining a copy of the proceedings and judgment will be excluded. The record is silent as to when the proceedings were ready for collection. Nonetheless, the judgment of the Resident Magistrate Court was certified and was ready for collection on 28th day of October, 2015. The period from the date of*

acquittal of the appellant, that is, 21st day of August, 2015 to the date the certified copy of the judgment was ready for collection, that is, 28th day of October, 2015, is excluded in computing the forty-five days. As such the respondent ought to have filed its appeal latest on 13th day of December, 2015. It follows then that the petition of appeal filed on 26th day of February, 2016 was filed out of time. The High Court ought not to have entertained the appeal as it was time-barred".

From the above deliberation supported by binding precedents, I may safely conclude that, the instant appeal is incompetent before this Court for being filed out of time and without obtaining leave of the Court. With regard to the way forward, I have decided to seek guidance from the holding in the case of **Said Shaibu Mwigambo Vs. Republic (Criminal Appeal 420 of 2021) [2023]TZCA 148 (28 March 2023)** (Extracted from www.tanzlii.org), where the CAT underscored that:

"We agree with the learned State Attorney that all being equal, the delayed filing of the petition of appeal had the effect of rendering the appeal incompetent. The court was barred from entertaining an incompetent appeal for, it was as good as none had been instituted in the first place. The court could only make an order striking it out instead of dismissing as it did...".

In the same wavelength, and for reasons I have endeavoured to deliberate herein above, I hereby struck out this appeal for being time barred. It is so ordered.

DATED at **MOROGORO** this 31st day of August, 2023.

M. J. CHABA

JUDGE

31/08/2023

Court:

Judgement delivered under my Hand and the Seal of the Court this 31st day of August, 2023 in the presence of Mr. Shabani A. Kabelwa, Learned State Attorney who appeared for the Respondent / Republic and in absence of the appellant.

M. J. CHABA

JUDGE

31/08/2023

Court:

Right of Appeal to the parties fully explained.

M. J. CHABA

JUDGE

31/08/2023