

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

DC CRIMINAL APPEAL NO. 50 OF 2023

MESHAKI MAWATA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the District Court of Kilolo at Kilolo)

(Hon. L.M. Sizya - RM)

dated the 24th day of August, 2021

in

Criminal Case No. 87 of 2020

JUDGMENT

Date of Last Order: 12/02/2024 &

Date of Judgment: 04/03/2024

S. M. Kalunde, J.:

In this appeal, the appellant, MESHAKI MAWATA, is challenging the conviction and sentence meted on him by the District Court of Kilolo sitting at Kilolo (hereinafter "the trial court") in Criminal Case No. 87 of 2020. At the trial court the appellant was charged and convicted with an offence of rape contrary to sections 130(1) & (2)(e) and 131(1) & (3) of **the Penal Code [Cap. 16 R.E. 2019]**. It was alleged that on the 11th day of August, 2020, at Kitowo Village within the District of Kilolo in Iringa Region, the appellant had carnal knowledge of PDM

(name and identity withheld in accordance with **Chief Justice Circular No. 2 of 2018**), a girl of five (5) years.

The brief factual background of the case is as follows: on the fateful day Yusta Kisava (**Pw3**) and Joyce Mbegalo (**Pw6**) were coming from the farm. Upon arrival at the "Korongo la Kuchota Maji" area they saw the appellant running from a nearby bush whilst holding his trouser. When Pw2 went to the said bush, she saw the victim laying down on her back naked. The victim (**Pw5**) informed Pw3 that she was raped by the appellant. According to the records, the victim was Pw2's granddaughter. Immediately, after discovering the victim, Pw3 inspected her and noticed some bruises in her vagina. Thereafter, she notified Festo Mawata (**Pw7**), a member of the local militia about the incident. Pw7 directed Pw3 and Pw6 to take the victim to her mother. On the same day Pw7 arrested the appellant and send him to Mtitu Police Station.

RDS (**Pw4**), the victim's mother testified that the victim was 6 years old having been born in 2014. To support this, she tendered the victims birth certificate, **Exhibit PE3**. The witness testified further that, on the 11th day of August, 2020, she was notified by Pw7 that her daughter had been raped. Upon receipt of the information, she rushed home to see what had happened. On arrival, she inspected the victim

and noticed some bruises on her vagina. Thereafter she reported the matter to Mtitu Police Station.

The victim was subsequently supplied with a Police Form No. 3 for medical examination. The next day, on the 12th day of August, 2020, at around 15:00Hrs, the victim was medically examined at Kilolo Dispensary by Sabasi Modestus Haule (**Pw2**). At the conclusion of the examination Pw2 concluded that the victim was penetrated by a blunt object. His conclusion was based on an observation of a swollen labia majora and labia minora. He also noticed bruises and spots of blood clot on the victim's vagina. The Police Form No. 3 was admitted in evidence as **Exhibit PE2**. An investigation into the matter was launched. It was led by G. 3565 DC Aman (**Pw1**). As part of investigation, Pw1 visited the scene of crime and drew a sketch map **Exhibit PE1**.

In his defence, the appellant denied the charges. He recounted that on the 12th day of August, 2020, he was arrested by Pw7 and Aristoto Ng'akonda for being suspected of stealing maize, the property of Mandela Kilave. Thereafter, he was taken to Mtitu Police Station and his charges changed to rape. Three days later he recorded a confession statement.

His defence did not save him. The trial court believed that the prosecution had discharged the duty to prove the charges against the appellant. He was found guilty and convicted accordingly. Subsequently, he was sentenced to thirty (30) years imprisonment.

Dissatisfied by that decision, the appellant lodged the present appeal. He has predicated his appeal on the following summarized grounds of appeal; **first**, that the trial court erred in convicting him without conducting *voire dire* on the victim; **second**, the trial court failed to notice that the victim failed to mention him during her testimony; **third**, the trial court erred in convicting the appellant based on hearsay evidence; **fourth**, the trial court erred in convicting the appellant while there was no cautioned statement; and **five**, the trial magistrate erred in convicting the appellant on the basis of Exhibit PE1.

Ahead of her submissions, Ms. Radhia Njovu, learned State Attorney representing the respondent, Republic, raised a point of law to the effect that the Notice of Appeal moving the Court in the present appeal was defective making the entire appeal incompetent.

In elaborating her position, Ms. Njovu made reference to the Notice of Intention to Appeal attached as part of the record of appeal and submitted that the said notice indicate that it was lodged on the 09th day of September, 2021. The learned state attorney went on to

argue that, given that the impugned decision was delivered on the 24th day of August, 2021, by filing the notice of appeal on the 09th day of September, 2021, the appellant lodged the same sixteen days after the date of the decision which was contrary to the provisions of section 361(1)(a) of **the Criminal Procedure Act [Cap. 20 R.E. 2022]** (hereinafter "the CPA"). The learned counsel concluded that, since the notice of appeal was defective, the entire appeal is defective and ought to be struck out so that the appellant may apply for extension of time to lodge the application for extension of time to file the notice and appeal out of time.

For his part, the appellant had nothing of legal significant to add. However, he complained that he has been living under difficult conditions which has made the prosecution of the case nearly impossible. He argued that immediately after his conviction he lodged a notice of appeal and requested to be supplied with copies of the judgment and proceedings. Immediately, thereafter he was transferred to another prison and his appeal was not lodged on time. He stated that his appeal would have not been filed if it was not for the intervention of the Regional Prisons Officer (RPO). He requested that his appeal be heard regardless.

I have carefully considered the submission of the parties in light of the records before the court. Having done so, I think it is now opportune to consider the merits of the preliminary objection. It is trite that an appeal processes to this court in criminal appeals is commenced by filing a notice of intention to appeal in terms of section 361(1)(a) of the CPA. The respective section reads:

*"361.- (1) Subject to subsection (2), **an appeal** from any finding, sentence or order referred to in section 359 **shall not 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]

In the case of **Lazaro Mpigachai vs Republic** (Criminal Appeal 75 of 2018) [2022] TZCA 50 (22 February 2022 TANZLII), the Court of

Appeal (**Koroso, J.A.**) discussed the applicability of the above provision of the law and observed that:

*"Essentially, in terms of section 361(l)(a) and (b) of the CPA for the appeal to be within time, an intended appellant must do the following steps: **One**, to give or file a notice of intention to appeal within 10 days after the delivery of the challenged finding, sentence, or order and **two**, to file the petition of appeal should within 45 days from date of the finding, sentence or order. The provision also expounds on the modality of computing time related to limitation. Particularly, it states that, in computing the 45 days to file the petition of appeal, the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded. In essence, the provision underscores that when computing the 45 days of filing the petition of appeal, the time that is used to obtain proceedings, judgment and order is automatically excluded."*

See also **Sospeter Lulenga vs. The Republic**, Criminal Appeal No. 107 of 2006; **Binaisa Phares Sumwa Rasta & 2 Others vs. Republic**, Criminal Appeal No. 61 of 2015; and **Buchumi Oscar vs. Republic**, Criminal Appeal No. 61 of 2015 (all unreported).

In the instant case, the impugned decision was delivered on 24th day of August, 2021. It is also not disputed that the notice of intention

to appeal in the instant case was lodged to this court on the 09th September, 2021. As correctly, submitted by Ms. Njovu, by lodging the notice of intention to appeal on the 09th September, 2021, the appellant was late by almost fifteen days. This is clearly beyond the 10 days prescribed under section 361(1)(a) of the CPA. It goes without saying that the said notice of appeal was filed out of time and without leave of the court. The same is declared as incompetent before the court.

As I have pointed out above, in criminal appeals, an appeal process to this court is commenced by filing a notice of intention to appeal in terms of section 361(1)(a) of the CPA. Thus, once the stated notice of appeal is defective the entire appeal becomes incompetent as its very foundation is defective. The way forward regarding an incompetent appeal was discussed in the case of **Leons Silayo Ngalai vs Hon. Justine Alfred Salakana**, Civil Appeal No. 38 of 1996 cited in **Petro Nyasa & 2 Others vs. Simon Domela & 3 Others**, Civil Appeal No. 29 of 2011, in which the Court of Appeal (Kimaro, J.A.) held that:

*"An incompetent appeal amounts to no appeal...
Under such circumstances what the court does is to
strike out the purported appeal off the register."*


Ms. Njovu submitted that, and correctly so, if the appellant wished to file a notice of appeal and appeal out of time, he should have filed an application for extension of time to do so under section 361(2) of the CPA instead of filing the same out of time and without leave or orders of the court.

For the above reasons, I am constrained to make a finding that the notice of intention to appeal in the instant case was filed out time in contravention of section 361(1) (a) of the CPA. This makes the entire appeal incompetent. That said and done, the incompetent appeal is hereby struck out.

The appeal is disposed accordingly.

DATED at IRINGA this 06TH day of MARCH, 2024.




S.M. KALUNDE
JUDGE

