

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: OTHMAN, C.J., KIMARO, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 10 OF 2015

ANGUMBWIKE KAMWAMBE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mrema, J.)

Dated 22nd day of June, 2004

in

Misc. Criminal Application No. 26 of 2003

.....

JUDGMENT OF THE COURT

25TH & 28TH April, 2016

OTHMAN, C.J.:

On 15/5/2002, the District Court of Rungwe at Tukuyu in Criminal Case No. 296 of 2001 convicted the appellant, Angumbwike Kamwambe of the offence of rape c/s 130(1)(c) and 131(1) of the Penal Code, Cap 16 R.E. 2002 and sentenced him to the mandatory term of thirty years imprisonment.

Aggrieved, on 30/5/2003, he preferred at the High Court Misc. Criminal Application No. 26 of 2003 seeking an extension of time under section 361 of the Criminal Procedure Act, Cap 20 R.E. 2002, within which

to file a notice of appeal out of time against the decision of the District Court. On 22/6/2004, the High Court (Mrema, J.) dismissed the application.

Undissuaded, on 19/8/2004, the appellant yet again filed a similar application, registered as Misc. Criminal Application No. 26 of 2003 seeking under section 361(a) of the Criminal Procedure Act an extension of time to file a notice of appeal out of time against the judgment of the District Court. The High Court, (Mrema, J.) on 21/06/2005 also dismissed the application.

Thereafter, the appellant made several attempts to pursue his right of appeal, but was unsuccessful for want of compliance with the law and procedure. These ultimately culminated with a grant to the appellant of an extension of time by the High Court (Chocha, J.) on 18/3/2014, to file a notice of appeal out of time to the Court under Rule 68 (1) of the Court of Appeal Rules, 2009 against the decision of the High Court (Mrema, J.) delivered on 22/6/2004.

The appellant filed his notice of appeal on 20/3/2014.

At the hearing of the appeal, the appellant, a layperson and who spoke through a court interpreter (Kin'yakyusa – English- Kin'yakusa) was unrepresented and fended for himself. The respondent Republic was represented by Mr. Basilius Namkambe, learned State Attorney.

We advert, as we must, on the preliminary point of objection raised by respondent Republic that the appellant's notice of appeal was incompetent for citing a non-existing judgment.

Mr. Namkambe's essential submission was that the appellant's notice of appeal was defective as it referred to 22/6/2014 as the date of the Judgment being appealed against, while the one to have been correctly impugned was dated 22/6/2004.

It is well settled by Rule 68(1) of the Court of Appeal Rules, 2009 that in a criminal appeal, it is the notice of appeal that institutes an appeal. In relation to the preliminary objection, first, we wish to point out that the appeal is not against a judgment as contended by the respondent Republic, but is against the order or ruling of the High Court. Second, closely reading the notice of appeal as a composite whole, although it has imperfections (e.g. it is addressed to the Register of the High Court, instead of the Registrar of the High Court), in our respectful view, it correctly cites in the body of that important instrument, Misc. Criminal Application No. 26 of 2003, the proper impugned decision, the date it was delivered, i.e. 22/06/2004 and the judge who pronounced it (Mrema, J.). In the circumstances of the case, and bearing in mind Rule 2 and Rule 4(2)(b), we are persuaded that Rule 68 (1)(2) and (7) were complied with and accordingly, we find that the preliminary objection has not been made out.

Dealing next with the merits of the appeal, the appellant did not have much to submit, except to say that he has been to the High Court several times over the years, to be precise about eleven years (from 2003 -2014), in an attempt to appeal against the decision of the District Court, to no avail. The Court, he pleaded, should assist him so that he complies with the required law and procedures in instituting his intended appeal.

On his part, Mr. Namkambe, admitted that there were serious irregularities in the proceedings of the High Court. He lucidly submitted that it was not proper for the learned Judge on 22/6/2004 to dismiss the appellant's application for an extension of time to file a notice of appeal out of time. The proper course was for the court to strike out the appellant's incomplete application on the ground that his accompanying affidavit was defective as the learned High Court Judge had correctly held. He invited the Court to invoke its revisional jurisdiction under section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 and to declare a nullity, quash and set aside both the decisions of the High Court (Mrema, J.) dated 22/6/2004 and 21/6/2005.

We have closely scrutinized the record. In his ruling dated 22/06/2004, in the first Misc. Criminal Application No. 23 of 2006, the learned Judge detected that the applicant's affidavit that had accompanied the Chamber Summons seeking an extension of time within which to file a notice of appeal out of time against the decision of the District Court in Criminal Case No. 292 of 2001, delivered on 15/2/2002 was defective as it was neither certified by any relevant prison officer at Tukuyu Prison nor

routed through the prison authorities. That notwithstanding, he delved into and determined the merits of the District Court's judgment. He held that the appellant's intended appeal had no overwhelming chances of success because the evidence against him was water-tight. He dismissed the application.

With respect, we fully agree with Mr. Namkambe that the High Court seriously erred. Having found out that the applicant's application was defective for want of a proper affidavit in support of the Chamber Summons, the proper course of action was for it to have struck out the incompetent application. Moreover, it also fell into an addition error in determining pre-maturely, the merits of the District Court's judgment on an application for an extension of time (under section 361(2) of the Criminal Procedure Act) to file a notice of appeal out of time against the Judgment of the District Court.

In an identical situation, in **Kassana Shabani and Rajabu Shabani V.R.**, Criminal Appeal No. 476 of 2007, (CAT, unreported) we stated:

"whether that intended appeal had any prospects of success, was not of moment at that stage"
(Emphasis added).

In **Anyitike Mwakasenga V.R.**, Criminal Appeal No. 146 of 2010 (CAT, unreported) the Court plainly stated that on an application for an extension of time within which to lodge a notice of appeal out of time, the

High Court would be sliding into a serious error when delving into the merits of a non-existing appeal. Indeed, there was no appeal before the High Court, on 22/06/2004, on which it could legitimately decide the merits or otherwise of the District Court's judgment. Even the required and mandatory notice of appeal did not exist.

Furthermore, as the ruling itself bears out, the High Court also seriously misdirected itself on what was actually before it. It considered that it was determining *an application for leave to appeal out of time*, when what was in fact before the court was *an application for an extension of time* to file a notice of appeal out of time. In fairness to the High Court, the appellant and the respondent Republic contributed to the errors, by respectively, urging it that it was determining an application for leave to appeal and that the appellant's intended appeal did not stand any good chance of success on an eventual appeal.

Following the ruling of the High Court on 22/6/2004, the appellant by Chamber Summons accompanied by an affidavit, filed on 19/8/2004 lodged another application (also numbered Misc. Criminal Application No. 26 of 2003) under section 361(1) of the Criminal Procedure Act seeking an extension of time to file a notice of appeal out of time against the judgment of the District Court.

In his ruling, delivered on 21/06/2005, the learned Judge reasoned and held:

*"This is a second application by the applicant Angumbwike Kamwambe brought u/s 361(a) of the Criminal Procedure Act, 1985. **The first application was filed on the 30th of May, 2003**, whereas the instant application was filed on the 19th of August, 2004. The former application was heard on the 22/6/2004 in the presence of the applicant. **Although the application was found to be substantially incompetent on the ground of defectiveness of the applicant's affidavit, it was also the holding of this court that even if the applicant's application for leave to file notice of appeal out of time was allowed, the intended appeal would bear no good results in favour of the applicant. It was specifically and precisely held that the applicant's intended appeal did not have the slightest chance of success on the account that the evidence on record was water-tight against the innocence of the applicant accused.***

By that order it is not gainsaying that this court was effectively rendered functus officio by virtue of section 373(1)(a) and 366(1)(a)(ii) of the Criminal Procedure Act, 1985. In other words, since the order of this court dated 22/06/2004 had the effect of determining conclusively the intended appeal, this court cannot any longer be invited to reverse its decision that very clearly pronounced that the

evidence on record proved beyond reasonable doubt the guilty of the applicant. In effect, therefore, the proper avenue that lay at the door of the applicant was to appeal against that order to the Court of Appeal; or could also have moved the court by way of review if the applicant was of the view that the order was fraught with an error apparent on the face of the record.

.....
the applicant's application..... is hereby dismissed, especially on the basic reason that the applicant's intended appeal does not have even the slightest chance of success. Accordingly it is so ordered.

A. C. Mrema, J.

21/6/2005 (Emphasis added)".

Having already dismissed the first Misc. Criminal Application No. 26 of 2003 on 22/6/2004 the High Court, as correctly held by the learned judge was *functus officio* and was barred from entertaining and determining the second Misc. Criminal Application No. 26 of 2003 on the same subject matter and between the same parties. The learned Judge was perfectly right in categorically observing that the High Court could no longer be invited to reverse its own decision. We agree with Mr. Namkambe that the entertainment and determination of the second application by the High Court was also highly irregular.

With great respect, again in the later application, the High Court fell into grave error in going a step further and this time around, at even greater length in examining the evidence and the merits of the judgment of the Rungwe District Court in Criminal Case No. 292 of 2001 that the appellant had intended to appeal against. Furthermore, instead of striking out the incompetent application as it was required to, the High Court erroneously dismissed it.

In the facts and circumstances demonstrated, and for all the above reasons, we are constrained to invoke our revisional jurisdiction under section 4(3) of the Appellate Jurisdiction Act and proceed to nullify, quash and set aside the proceedings and ruling of the High Court dated 21/06/2005. We equally quash and set aside the High Court's ruling dated 22/6/2004 and substitute it with an order to strike out the appellant's incompetent application instituted as the first Misc. Criminal Application No. 26 of 2003.

Made aware of the applicant's manifest desire to pursue his right of appeal under section 359(1) of the Criminal Procedure Act, and by the myriad attempts he has vainly made so far to obtain it, and should he still desire to do so on a proper footing, we wish to state that he is at liberty to institute a new and proper application before the High Court under section 361(2) of the Criminal Procedure Act, for an extension of time to file a notice of appeal out of time against the judgment of the Rungwe District Court delivered on 15/05/2002.

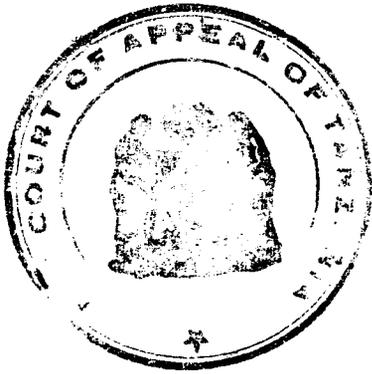
Given the visible language and other barriers he faces, we draw the attention of the prison authorities of the need to assist him so that he complies with the dictates of the law. We accordingly allow the appeal to the extent indicated above.

DATED at **MBEYA** this day of 27th April, 2016.

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL



I certify that this is a true copy of the original.


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL