IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

CRIMINAL APPEAL NO. 226 OF 2008

(CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.)

NORBERT KOMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Order of the High Court of Tanzania at Songea)

(Mackanja, J.)

dated the 18th day of December, 2000
in
Criminal Appeal No. 71 of 2000

JUDGMENT OF THE COURT

27th & 30th June, 2014

MSOFFE, J.A.:

This case has a fairly long, sad and chequered history. On 31/7/2000 the Appellant, aged 14 years at the time, was convicted of rape *in absentia* and sentenced to 30 years in prison and corporal punishment of six strokes of the cane. The trial District Court of Songea (Mwankenja, SDM) took this course of action in terms of section 226 (1) of the Criminal Procedure Act (CPA 20 R.E. 2002) (the Act). On 18/8/2000 he was arrested and committed to prison vide a committal warrant of that date issued by the District Court of Songea. Aggrieved, he desired to appeal to the High

Court. On 21/8/2000 he applied for a copy of judgment for appeal purposes vide letter Ref. No. 112/RUV/2/XII/65 from the Prison Officer, Songea, to the District Court at Songea. The record before us is not very clear as to what exactly happened thereafter but what is certain is that he later lodged a notice of appeal to the High Court. On 18/12/2000 Mackanja, J. struck out the appeal on account of the fact that the notice of appeal was filed beyond the period of ten days stipulated under section 361 (1) (a) of the Act. Undaunted, on 16//7/2002 he filed a notice of appeal to this Court seeking to challenge the decision of Mackanja, J. dated 18/12/2008 *(supra).* Since under section 61 (1) of the then Tanzania Court of Appeal Rules, 1979, a notice of appeal instituted an appeal, on 17/7/2008 this Court vide Criminal Appeal No. 124 of 2003 struck out the said appeal for being filed beyond the prescribed period of 14 days. On 23/7/2008 a single Justice of this Court (Othman, J.A., as he then was) enlarged time for him to file this appeal. Very unfortunately, it is not until now that his appeal is being determined!

As earlier observed, the conviction of the Appellant proceeded under section 226 (1) of the Act. Ideally, when he was arrested on 18/8/2000 he

ought to have been taken to the District Court of Songea for the said court to proceed under sub-section (2) thereto, which reads:-

> *(2) If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit.*

Apparently that was not done and it appears Mackanja, J. did not appreciate this point. If he had, certainly he would have remitted the record to the District Court for it to proceed under section 226 (2) above.

The question that immediately comes to mind now is this:- What should we do? Ideally, since the High Court did not discharge the duty it ought to have done, we could very easily remit the record to the District Court with directions to it to comply with section 226 (2) above. However, as shall be demonstrated hereunder, this course of action has its own difficulty.

As already mentioned, there is no dispute that the Appellant was 14 years old at the material time. Indeed, Ms. Tumaini Ngiluka, learned State Attorney appearing on behalf of the respondent Republic, agrees that much. If so, the Appellant ought not to have been sentenced to

imprisonment. On the contrary, in terms of section 131 (2) (a) of the Penal Code the lawful sentence to be meted to him should have been corporal punishment only. We have carefully thought whether we should remit the record for purposes of passing the sentence allowed by law or whether we should step into the shoes of the trial District Court and pass the lawful sentence. In the end, we have decided not to take any of the above steps. We are of the considered view that the period of 14 years the Appellant has been in prison to date serving an illegal sentence is more than enough punishment. We are anxious that he should no longer continue to serve the illegal sentence. After all, justice must not only be done but must be seen to be done.

In the event, for reasons stated, and in the spirit of substantive justice, in exercise of our revisional powers under section 4 (2) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002) we hereby vitiate the proceedings and decisions of the courts below. The Appellant is to be released from prison unless held on a lawful cause.

DATED at IRINGA this 27th day of June, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL