

TANZANIA / JUDGMENT

20180704 TZCA Mwanza

COURT
TZCADECIDED
4 July 2018

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE COURT OF APPEAL OF TANZANIA ATMWANZA (CORAM: MMILLA, J.A., MUGASHA, J.A.,
And MWANGESI, J.A.) CRIMINAL APPEAL NO. 462 OF 2015 A. B. N. @ A. A,

..... APPELLANT VERSUS THE REPUBLIC. ■

..... ■ ■ .. I ■ ■ RESPONDENT (Appeal from the decision
of the High Court of Tanzania at Mwanza) (De- Mello, J.) Dated the 28th day of January, 2014 In
HC. Criminal Appeal No. 43 of 2014 JUDGMENT OF THE COURT 26 th June & 5th July, 2018
MMILLA, J.A.: In this appeal, A s/o B @ A. A (herein to be referred to as the appellant), then 17
years of age, is contesting the decision of the High Court, Mwanza Registry, dated 28.01.2014 in
Criminal Appeal No. 43 of \ 2014. The appeal before that court was against the decision of the
Mara Resident Magistrates' Court at Musoma in Criminal Case No. 27 of 2012 in which he was
charged with the offence of rape contrary to sections 130 (2) (e) and 131 of the Penal Code Cap. 16
of the Revised Edition, 1

2002. After a full trial, he was found guilty, convicted and sentenced to thirty (30) years
imprisonment term. On appeal to the High Court as · aforesaid, his appeal was held to be
out of time and subsequently rejected summarily. That decision triggered the present
appeal to the Court. · The facts of the case as discerned from the proceedings of the trial
court were not complicated. The victim of rape was a 16 years old girl named L d/o C who
testified as PW1. She was staying with her mother at Kigera Bonde Kati, in Musoma
Municipality and was then in Form III at Paroma Secondary School. On 10.01.2012 around
15:00 hours, PW1 left home for Lamamba Street to attend tuition lessons. On the way she
met the appellant who was in the company of · five other persons. The latter was alleged to
have been armed with a knife. The appellant and his colleagues forcefully took PW1 to
Nyakato area near Violet Bar. At that area, they ordered her to enter into a certain house
under construction in the company of the appellant while his colleagues remained outside.
When they were in the said house, the appellant forcefully removed her underwear and
raped her amid threats to kill her if she raised alarm. 2 After quenching his lustful desire,
the appellant stood up to stretch. At that point in time, the complainant seized that
opportunity and ran away towards home. She immediately informed her mother what the
appellant, a person who was familiar to both of them, did to her. The complainant's
mother, Yustina d/o Beda, who testified as PW2 examined PW1's female organ. Apart from
her observation that she had no underwear, PW2 detected that there were mucus and

blood stains thereat, a fact which confirmed that PW1 was sexually molested as claimed. She promptly reported the incident at Musoma Central Police Station, where she was instructed to send her child to hospital for examination and treatment. The complainant's version of rape was further confirmed by PW3 Wille s/o Fanuel Dishon, then a Clinical Officer at Musoma at Musoma Government Hospital who had examined and treated her. PW3 testified that apart from the fact that her female organ had bruises, he also noticed vaginal discharge material which was mixed with blood, but that there were no sperms. On the other hand, the police commenced investigation that led into the appellant's arrest whom they eventually charged with rape. 3 The appellant's defence was very brief. In essence, it constituted a general denial that he did not commit the charged crime. As already stated, after a full trial he was convicted and sentenced to 30 years imprisonment term. The judgment of the trial court was rendered on 8.2.2013. The appellant presented the notice of appeal to the officer in-charge of prison on 13.2.2013, but was filed in the Registry of the High Court at Mwanza on 27.2.2013. After he was supplied with copies of the proceedings and judgment, he prepared the memorandum of appeal which he forwarded to the Registry of the High Court on 31.3.2014. Finally, the admission form was placed before the Hon. Judge on 12.9.2014, she endorsed that the appeal was out of time, and on 28.1.2015 she summarily rejected it, hence the present appeal. The appellant filed a six (6) points memorandum of appeal, the grounds of which when closely examined boil down to two major complaints as follows; one that, the first appellate judge erred in her finding that the notice of appeal was filed out of time; and two that even where it was to be said that the notice of appeal was filed out of 4 time, which is not, the first appellate judge erred in dismissing the appeal instead of striking it out. On the date of hearing this appeal the appellant appeared in person and fended for himself; whereas the respondent/ Republic enjoyed the services of Ms Maryasinta Lazaro, assisted by Ms Mwanahawa Changale, learned State Attorneys. At the commencement of hearing of the appeal, the appellant urged the Court to adopt his grounds of appeal and chose for the Republic to make their submission first, reserving his right to respond if need would arise. We accordingly invited Ms Lazaro to begin. Ms Lazaro declared at the very beginning that they were supporting the appeal. She grouped the appellant's grounds of appeal in the like way we have reformulated them. Ms Lazaro submitted in respect of the first ground that the first appellate judge wrongly found that the notice of appeal was filed out of time. She contended that in terms of section 361 (1) (a) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA), the appellant was bound to present it within a period of 10 days from the 5 date of delivery of judgment. She argued that since the judgment of the trial court was delivered on 8.2.2013, and because the appellant promptly prepared the notice of appeal and handed it over to the Prison Officer in-charge on 13.2.2013, which was only after five days had elapsed, it meant he did what was required of him to do. She emphasized that regardless the fact that the said notice of appeal was presented for filing at the Registry of the High Court on 27.2.2013, his appeal was in time because the date on which the prisoner presents the notice of appeal to the Prison Officer for transmission to the particular court is what counts. She referred us to the case of Kabira Sabiro and Others

v. Republic, Criminal Appeal No. 191 of 2010, CAT (unreported). For that reason, Ms Lazaro urged the Court to find that the notice of appeal was filed in time, therefore that the appeal was erroneously rejected. She asked us to find merit on this ground. Turning to the second ground, Ms Lazaro submitted that even where it was to be said that the notice of appeal was filed out of time, which is not, still the first appellate judge was not supposed to reject the appeal summarily, instead she ought to have complied with the 6 provisions of section 364 of the CPA which governs summary rejection of appeals. She said the judge was required to have first carefully gone through the record and satisfied herself that the appeal lacked merit. She retorted that there is ample evidence that she did not satisfy herself as such because she did not put it on record that she read it before taking the drastic measure she took. She referred us to the case of Idd Kondo v. Republic [2004] T.L.R,362, a case which illustrates what the first appellate judge ought to have done. She likewise asked us to find merit on this ground. Over all, she urged the Court to allow the appeal. Ms Lazaro submitted further that, although the usual way forward would have been to remit the record to the High Court with instructions to hear and determine the appeal on merit, she was of the view that the Court takes an exception to that general rule by clothing itself with powers under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) and release the appellant from jail on account that great injustice was done in the case because the appellant, who as aforesaid was then 17 years of age, was a juvenile who did not in the first place deserve the punishment that was imposed on him in the circumstances of the offence he was charged with. She rested her submission. On his part, the appellant submitted that he supported all what the learned State Attorney said and prayed the Court to allow the appeal and release him from prison. The first key issue calling for determination and decision is whether the notice of appeal was filed out of time. As already pointed out, the judgment of the trial court was rendered on 8.2.2013. The appellant presented the notice of appeal to the officer in-charge of prison on 13.2.2013, which was within a period of 5 days counted from the date on which the judgment was delivered. However, the personnel of the prison officer in-charge presented the said notice of appeal at the High Court, Mwanza Registry on 27.2.2013. We wish to point out that procedurally, the date on which a convict submits the documents of appeal to the prison officer in-charge with intention of assisting him to transmit them to the court is in principle the date from which it is calculated as being the date on which he filed his appeal. It is certain that the Prison Authority plays a crucial role in the administration of justice in processing, preparing and dispatching to our courts documents relevant to the prisoners' legal demands - See the case of Kabira Sabiro and Others v. Republic (supra) in which the Court said that:- "Inspiration on how to deal with an appellant who is in prison can also be drawn from the Court of Appeal Rules as observed by this Court (Munuo, J.A.) in MZA Criminal Application No.3 of 2002 - Bhoke s/o Maneno @ Sigwa v. Republic. In that case the justice of appeal observed that:- "It seems to me that the above Rule envisages a situation where, as is the case here, a prisoner gives Notice of Appeal, and, or the memorandum of appeal, but the responsible prison officer negligently or by oversight fails to transmit it to the Court within time or at all. Although the Court of Appeal Rules do not

apply to the High Court, the rationale behind Rule 68 (Old Rules now Rule 75) would apply to all cases where a prisoner gives his notice of appeal . but the prison officer defaults in transmitting the same to court." 9 Rule 68 (1) of the Court of Appeal Rules, 1979 (replica of Rule 75 (1) in the New Rules) which the Court was referring to in that case provided that:- "If the appellant is in prison, he shall be deemed to have complied with the requirement of Rules 61, 65, 66 and 67 or any of them if he gives to the officer-in-charge of the prison in which he is serving sentence a written notice of his intention to appeal and the particulars required to be included in the memorandum of appeal or statement, pursuant to the provisions of those Rules. " In view of the above, since the appellant in the present case presented his notice of appeal to the prison officer in-charge within time, we find that the first appellate judge erred in her finding that the notice of appeal was filed out of time. Even where it was to be said that the notice of appeal was filed out of time, which we have said was not the case, still the first appellate judge ought not to have rejected the appeal summarily as she did. The reason is clear that the learned judge did not hear the parties on the merits of the matter. Thus, she ought to have struck out the 10 incompetent appeal so as to give the appellant chance to apply for extension of time in which to appeal - See the cases of Emmanuel Luoga v. Republic, Criminal Appeal No. 281 of 2013 CAT, and Petro Tlemu v. Richard Dawitte & another, Criminal Appeal No. 2 of 2014 CAT, (both unreported). In the former case of Emmanuel Luoga v. Republic the Court stated that:- "After carefully examining the circumstances under which the first appellate court dismissed the appeal, we hasten to say that we agree with Mr. Mkude that that court was in error. We are of the view that upon being satisfied that the appeal was incompetent for reasons it assigned, it ought to have struck out the appeal instead of dismissing it The reason is clear that by dismissing the appeal, it implied that there was a competent appeal before it which was heard and determined on merit which is not the case. " Equally important is the fact that rejection of an appeal summarily is governed by the provisions of section 364 (1) of the CPA. That section provides that:- 11 "364 (1) On receiving the petition and copy required by section 362, the High Court shall peruse the same and.-

- (a) If the appeal is against sentence and is brought on the grounds that the sentence is excessive and it appears to the court that there is no material in the circumstances of the case which could lead it to consider that the sentence ought to be reduced; or
- (b) If the appeal is against conviction and the court considers that the evidence before the lower court leaves no reasonable doubt as to the accused's guilt and that the appeal is frivolous or is without substance; or
- (c) If the appeal is against conviction and the sentence and the court considers that the evidence before the lower court leaves no reasonable doubt as to the accused's guilt and that the appeal is frivolous or is without substance and that there is no material in the judgment for which the sentence ought to be reduced, the court may forthwith summarily reject the appeal by an order certifying that upon perusing 12 the record, the court is satisfied that the appeal has been lodged without any sufficient ground of complaint. " Noti~eably, this

provision does not require that reasons should be given for rejecting the appeal summarily. However, as we said in the cases of *Idd Kondo v. Republic* (supra), *Mussa William v Republic*, Criminal Appeal No, 24 of 2010, *Ramadhani Kateile v. Republic*, Criminal Appeal No. 253 of 2010 and *Paulo Mayai v. Republic*, Criminal Appeal No. 286 of 2014 (all unreported), there are certain matters to be considered before the court may reject an appeal summarily. In the case of *Idd Kondo v. Republic* (supra) the Court underscored the following principles which have to be taken into account when considering summary dismissal:- "1. Summary dismissal is an exception to the general principles of criminal law and Criminal Jurisprudence and therefore/ the powers have to be exercised sparingly and with great circumspection.

2. The section does not require reasons to be given when dismissing an appeal summarily. However, it is highly desirable to do so. 13 •
3. It is imperative that before invoking the powers of summary dismissal a Judge or a Magistrate should read thoroughly the record of appeal and the memorandum of appeal and should indicate that he/she has done so in the order summarily dismissing the appeal.
4. An appeal may only be summarily dismissed if the grounds are that the conviction is against the weight of the evidence or that the sentence is excessive.
5. Where important or complicated questions of fact and/or law are involved or where the sentence is severe the Court should not summarily dismiss an appeal but should hear it
6. Where there is a ground of appeal, which does not challenge the weight of the evidence or allege that the sentence is excessive, the court should not summarily dismiss the appeal but should hear it even if the ground appears to have little merit'- In the circumstances of the present case, the record does not show that the first appellate judge read the contents of the record of 14 • appeal before she rejected the appeal summarily. We think that there is every justification to agree with Ms Lazaro that it was improper. Consequently, we find and hold that this ground too has merits and we allow it. Under normal circumstances, the way forward would have been to remit the record to the High Court with instructions to re-admit and hear the . appeal afresh before a different judge. However, in the circumstances of this case, we have, as opined by Ms Lazaro, found it indispensable to take an exception to that usual practice. The reason is clear that, as at the date of commission of the charged crime of rape, the appellant was 17 years of age, thus a juvenile. Under the law, a boy of 18 years or less, and if a first offender like the appellant in this case, is required to be sentenced to corporal punishment only - See section 131 (2) (a) of the Penal Code which provides that:- "1J1 (2): Notwithstanding the provisions of any law, where the offence is committed by a boy who is of age of eighteen years or less, he shall-
 - a) if a first offender, be sentenced to corporal punishment only; 15 ..
 - b)

- c) , See also the cases of Simon Erro v. Republic, Criminal Appeal No. 85 of 2012 CAT, Mohamed Hamis v. Republic, Criminal Appeal No. 114 of 2013 CAT and Iovitus Johansen v. Republic, Criminal Appeal No. 509 of 2015 (all unreported). In the case of Simon Erro v. Republic, the court stated that:- ". . . Since the record shows that he was or could have been 16, and since he had no previous convictions, he should have been given the benefit of the doubt and treated under section 131(2)
- (a) ... it seems to us that had the two courts below addressed themselves to the requirements of section 131 (2) (a), the only punishment to the appellant would have been corporal punishment, not the illegal sentence of life imprisonment. Having found this anomaly, it is the duty of this Court to rectify the records of the two courts below. In order to correct the illegal sentence, we shall fall back to the revisional jurisdiction of the Court that is provided for by section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002. In the event, the proceedings of the trial and first appellate courts are hereby revised by setting aside the sentence of life in prison imposed on the appellant. " 16 For reasons just assigned, and since so far the appellant in the present case has served five (5) years in prison, we invoke the powers under section 4 (2) of the AJA, on the basis of which we set aside the illegal sentence which was imposed against him, and order his immediate release from prison unless he is being continually held for some other lawful cause. Order accordingly. DATED at MWANZA this 4th day of July, 2018. B. M. MMILLA · JUSTICE OF APPEAL S.E.A.MUGASHA JUSTICE OF APPEAL S. S. MWANGESI JUSTICE OF APPEAL I certify that this is a true copy of the original. B.A.to DEPUTY REGISTRAR COURT OF APPEAL 17

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/331444/source_file/bae3f565c5ae8fa1/20180704_TZCA_Mwanza.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/a-so-b-a-a-v-the-republic-rape-tzca-2018--6a3ea5293b1caa912982174f

Prepared on 14 October 2026 · Esheria