

TANZANIA / JUDGMENT

charles luhemeja vs republic

2023 tzca 125 20 march 2023

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20 March 2023

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IN THE COURT OF APPEAL OF TANZANIA AT TABORA rCORAM: MUGASHA. J.A., KEREFU, 3.A.
And MWAMPASHI. J.A.^ CRIMINAL APPEAL NO. 10 OF 2020 CHARLES
LUHEMEJA.....APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT (Appeal from the
decision of the High Court of Tanzania at Tabora) (Rumanyika. 3.) dated the 14th day of
December, 2017 in Criminal Appeal No. 138 of 2017 RULING OF THE COURT 17th & 2ffn March,
2021 MWAMPASHI. 3.A.: The appellant herein, CHARLES LUHEMEJA, was charged and convicted
of the offence of unnatural offence contrary to section 154 (1)

- (a) and (2) of the Penal Code [Cap 16 R.E. 2002; now R.E.2022] (the Penal Code) by the District Court of Urambo at Urambo (the trial court). Having so convicted on 30.05.2017, he was sentenced to life imprisonment. The conviction and sentence aggrieved the appellant but as he had failed to lodge a notice of appeal and petition to the High Court within the prescribed time, he applied for extension of time to lodge both the notice of appeal and the petition vide High Court Miscellaneous Criminal Application No. 144 of 2017. The said application was granted by the High Court (Rumanyika, J. as he then was) on 11.09.2017 by making the following order: "The applicant to lodge a notice and memorandum of appeal within 10 (ten) and 45 (forty-five) working days respectively". Pursuant to the above order, the appellant lodged the notice of appeal on 12.09.2017 and the petition of appeal on 18.10.2017. However, on 14.12.2017, when the appellant's appeal was called on for hearing, it was confronted by a notice of a preliminary objection by the respondent to the effect that the notice of appeal was wrongly lodged in the High Court Registry instead of the trial District Court. The objection was instantly sustained and the appeal was dismissed on account that it is a long established practice that notices of appeal to the High Court are filed in the respective subordinate trial courts and that the appellant's notice of appeal ought to have been filed in the District Court of Urambo. The appellant was thus directed to file the notice of appeal in the trial District Court. Aggrieved with the dismissal of his appeal and having been granted leave to file the notice of appeal to this Court, out of time on 24.08.2018, the appellant has preferred the instant appeal raising the following two grounds of complaint:

1. That, the learned High Court Judge erred in law to dismiss the appellant's appeal instead of striking it out.
 2. That, the appellant's appeal, having not been determined on merit, the learned High Court Judge erred in law to dismiss it. When this appeal came on for hearing before us, the appellant entered appearance in person whereas the respondent Republic was represented by Mses. Mwamini Yoram Fyeregete, learned Senior State Attorney and Lucy Enock Kyusa, learned State Attorney. When invited to argue his appeal, the appellant adopted the grounds of appeal as listed in the memorandum of appeal and urged us to allow the appeal. Upon taking the floor, Ms. Fyeregete, at the outset, expressed her stance that she was not resisting the appeal. She argued that as the appeal had not been heard on merit, the High Court erred in dismissing it. To buttress her argument, she referred us to our recent decision in Maunda s/o Mongosi @ Nyambarokera, Criminal Appeal No. 260 of 3 2018 (unreported) where it was restated that an incompetent or time barred appeal has to be struck out and not to be dismissed. Ms. Fyeregete, further argued that the notice of appeal was properly lodged in the High Court and that it was wrong for the appellant's appeal to have been dismissed on account that the notice ought to have been filed in the trial District Court. She thus implored us to invoke the revisional powers bestowed on the Court under section 4
- (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2022] (the AJA), quash and set aside the High Court dismissal and restore the appellant's appeal. Having heard the brief submissions made by the parties and examined the record before us, we find that the pertinent issue for our determination is whether it was proper for the learned High Court Judge to dismiss the appellant's appeal on account of the notice of appeal being filed in the High Court. Before venturing into the determination of the appeal on the basis of the two grounds raised by the appellant, we find it appropriate to first consider the issue Ms. Fyeregete has raised that the notice of appeal which was found to be improperly filed in the High Court was, in fact, properly filed. She contended that there was a misdirection on part of the High Court Judge when he held that the notice ought to have been filed in the trial District Court and also when he directed that the appellant should file his notice of appeal to the trial District Court. On this, we entirely agree with Ms. Fyeregete that, under the circumstances of this matter, where the notice of appeal was filed in the High Court pursuant to the order of the same court dated 11.09.2017, and as the High Court was seized with the relevant record, it was impracticable for the notice of appeal to be filed in the trial District Court. The notice of appeal was therefore, properly filed in the High Court. The decision and direction by the High Court that the notice of appeal was improperly filed in the High Court and that it should be filed in the trial District Court were therefore erroneously made. Our finding above that the notice of appeal was properly filed in the High Court and that the decision to dismiss the appeal was therefore erroneously made, suffices to dispose of the appeal. However, for the sake of thoroughness, we find it not harmful if we also say a word on the grounds raised in support of the appeal. The fact that the appellant's appeal, i.e. DC. Criminal Appeal No. 138 of 2017, was not heard on merit but that it was dismissed for being incompetent on account that the relevant notice of appeal was lodged in the High Court

instead of the trial District Court, cannot be disputed. The position on what is the appropriate remedy where a matter before the court is found incompetent is also settled. Where a matter before the court is found to be incompetent, the appropriate remedy is for the matter to be struck out and not dismissed. The position has been restated by the Court in a number of decisions including in Cyprian Mamboleo v. Eva Kioso & Another, Civil Application No. 03 of 2010, John Constantine v. Mohamed Sleyem, Civil Application No. 25 of 2012, Yahya Athumani Kissesa v. Hadija Omar Athumani & Two Others, Civil Appeal No. 105 of 2014, Yusuf Shaban Matimbwa v. Exim Bank (T) Limited and Two Others, Civil Application No. 162/12 of 2021 (all unreported) and Maunda s/o Mongosi @ Nyambarokera (supra) which was cited to us by Ms. Fyeregete. It should however be pointed out that the position had been well stated by the defunct Eastern African Court of Appeal in Ngoni Matengo Cooperative Marketing Union Ltd v. Alimahomed Osman [1959] EA 577, where it was observed that: "In the present case therefore, when the appeal came before the court, it was incompetent for lack of the necessary decree...this court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a property constituted appeal at all. What this court ought to have done in each case, was to 'strike out the appeal as being incompetent,' rather than to have dismissed it; for the latter phrase implies that a competent appeal has been disposed of while the former phrase implies that there was no proper appeal capable of being disposed of". Since, as we have alluded to above, there is no dispute that the appellant's appeal which had not been heard on merit was dismissed for being incompetent instead of being struck out, as the law requires, the two grounds of appeal, which are both on the complaint that the High Court erred in dismissing the appeal, have merit. We, thus, hold that the High Court erred in dismissing the appellant's appeal. We emphasize that the High Court ought to have struck out the appeal instead of dismissing it. As on what should be the way forward, we accept the invitation by Ms. Fyeregete that, on the basis of our finding that the notice of appeal was, in fact, properly filed in the High Court and that it was a misdirection on part of the High Court Judge to have held that it was not properly filed, the issue which was not raised as a ground of appeal, then this is a fit case for us to invoke our revision jurisdiction under section 4

- (2) of the AJA. That being the case, we accordingly invoke such powers, quash and set aside the High Court ruling dated 14.12.2017 and restore the appellant's appeal, that is, DC. Criminal Appeal No. 138 of 2017. We also direct for an expedited hearing and determination of the restored appellant's appeal. DATED at TABORA this 20th day of March, 2023. S. E. A. MUGASHA JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL A. M. MWAMPASHI JUSTICE OF APPEAL The Judgment delivered this 20th day of March, 2023 in the presence of the Appellant in person and Ms. Tunosia John Luketa, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original. DEPUTY REGISTRAR COURT OF APPEAL s

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Prepared on 14 October 2026 · Esheria