

TANZANIA / JUDGMENT

michael kyando vs republic

2023 tzca 141 27 march 2023

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27 March 2023

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IN THE COURT OF APPEAL OF TANZANIA ATIRINGA f CORAM: WAMBALI. J.A.. SEHEL. 3.A. And MAIGE. J.A/1 CRIMINAL APPEAL NO. 544 OF 2020 MICHAEL KYANDO..... APPELLANT VERSUS THE REPUBLIC.....RESPONDENT (Appeal from the Judgment of the High Court qf Tanzania at Iringa) (Matoqolo, 3.1 dated the 03rdday of August, 2020 in DC Criminal Appeal No. 07 of 2020 JUDGMENT OFTHE COURT 17,h & 27": March, 2023 SEHEL. J.A.: The appellant, Michael Kyando, was arraigned before the District Court of Mufindi at Mafinga (the trial court) for the offence of rape contrary to sections 130 (1) (2) (e) and 131 of the Penal Code, Cap. 16 R.E. 2002 (Now R.E. 2022). It was alleged that on 23rd and 24th February, 2017, the appellant had carnal knowledge with MK, a girl of ten (10) years old. He denied the allegation thus a full trial ensued. In a bid to prove the allegation, the prosecution featured a total of five (5) witnesses and tendered one (1) exhibit, namely PF3 of the victim. The appellant gave his defence under oath and called two (2) witnesses. At the end of the trial, the trial court, in its judgment delivered on 12th October, 2017, found the appellant guilty as charged. Consequently, it convicted the appellant and sentenced him to life imprisonment. He was also ordered to pay compensation to the victim at the tune of TZS. 3,000,000.00. On 20th October, 2017 the appellant lodged a notice of appeal to Mufindi District Court and on 4th June, 2017 he filed his petition of appeal. His appeal was admitted and registered as DC. Criminal Appeal No. 23 of 2019 (the first appeal). When the said first appeal was placed before the High Court of Tanzania at Iringa (the first appellate court), it was stricken out on account that the notice of appeal made reference to a non-existent District Court. Still in quest to challenge the conviction and sentence of the trial court, the appellant filed an application for extension of time within which to file a notice of appeal and the appeal. As there was no objection to the application, the High Court granted the appellant an extension of time to lodge the appeal within thirty days from the date the order was made. The said order reads: "As such the respondent has not contested this application, the same is hereby granted. The applicant is given thirty days from today to lodge his appeal. It is so ordered. P.M. Kente Judge 15/04/2020." On 21st April, 2020, the appellant lodged the petition of appeal and his appeal was registered as Criminal Appeal No. 7 of 2020, the subject of the present appeal. After hearing the parties' submissions on the appeal, the High Court did not see substance in the appeal. Accordingly, it dismissed it for lacking merit. The appellant has appealed to this Court. In his

memorandum of appeal, he raised a total of five grounds of appeal and at the hearing of the appeal, he added three more grounds of appeal. However, for reasons that will become apparent shortly, we shall not reproduce the grounds of appeal. It suffices to state here that the grounds of appeal focused on the merit of the appeal whereas the respondent raised a procedural irregularity regarding the appeal before the first appellate court. At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas Ms. Chivanenda Luwongo, learned Senior State Attorney assisted by Ms. Magreth Mahundi, [earned State Attorney, appeared for the respondent Republic. When the appellant was invited to argue his appeal, he preferred for the learned Senior State Attorney to reply first to his grounds of appeal, reserving his right of rejoinder later should it be necessary to do so. Ms. Luwongo made her reply submission not on the grounds of appeal raised by the appellant, but on a point of law that, there was no competent appeal before the first appellate court as there was no notice of intention to appeal given by the appellant. Elaborating on that, she elucidated that the appellant sought an extension of time to lodge notice of his intention to appeal and to file an appeal after his first appeal was stricken out. That application, she said, was granted and the appellant was ordered to lodge his appeal within thirty days from the date of the order issuing extension of time. Thereafter, the appellant lodged a petition of appeal without giving notice of his intention to appeal to the High Court. It was the submission of the learned Senior State Attorney that, in terms of section 361 (1) (a) of the Criminal Procedure Act, Cap. 20 R.E. 2022 (the CPA), no appeal shall be entertained unless a notice of intention to appeal is given within ten days from the date of findings, sentence or order. It was her view that it is the notice of appeal that initiates a criminal appeal and since the appellant did not give any notice of his intention to appeal to the High Court from the decision of the District Court of Mufindi at Mafinga, the first appellate court had no jurisdiction to hear and determine the appeal, as it did. She therefore urged the Court to invoke its revisional power provided under section 4

- (2) of the Appellate Jurisdiction Act, CAP. 141 R.E. 2019 (the AJA) to quash the proceedings of the High Court in DC. Criminal Appeal No 7 of 2020 and set aside the judgment made therefrom. In reply, the appellant beseeched the Court to consider the time he spent in prison and prayed that he be set free from prison custody. Having heard the submission of the learned Senior State Attorney, we find that the issue for our determination is whether the appeal by the appellant before the High Court was proper. Ms. Luwongo argued that it was incompetent because there was no notice of intention to appeal. On this, we wish to start our discussion with the provisions of the law governing criminal appeals originating from the subordinate courts, other than appeals by the Director of Public Prosecutions and the ones from the subordinate courts exercising extended jurisdiction, to the High Court. The right of the aggrieved party from the findings, sentence or order issued by such subordinate court is provided under section 359 and the procedure of instituting the appeal is stipulated under section 361 (1) of the CPA that reads: "361(1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall 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, in the case of a sentence of corporal punishment only, within three days of the date of such sentence;
- 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," [Emphasis added]. The above provision of the law is crystal clear that an intended appellant is mandatorily required to give notice of intention to appeal within ten days from the date of finding, sentence or order. This requirement has been emphasized in several decisions of this Court including the case of Sostenes s/o Nyazagiro v. The Republic, Criminal Appeal No. 12 of 2013 (unreported), where the Court echoed the following: "...no appeal shall be entertained unless the appellant has, under section 361 (1) (a) of the CPA, given notice of his intention to appeal within ten days from the date of finding, sentence or order. The ten days limitation applies for all prospective appellants, whether in Prison or not. After giving notice, an intended appellant is required, under section 361 (1) (b) of the CPA, to file his appeal within forty-five days from the date of the finding, sentence or order." [Emphasis added] (See also: Amiri Omary v. The Republic, Criminal Appeal No. 299 of 2015 [2015] TZCA 16; [19 August, 2015, TANZLII]; Omari Abdallah v. The Republic, Criminal Appeal No. 38 of 2016 [2016] TZCA 271; [29 June, 2016 TANZLII] and Renatus Muhanje v. The Republic, Criminal Appeal No. 417 of 2016 [2019] TZCA 103; [10 May 2019, TANZLII]; It is therefore necessary for the appellant to give notice of his intention to appeal before instituting the petition of appeal. Such notice is not necessarily required to be in written form. Even an oral notice of intention to appeal given to the trial court or the prison officer on admission into prison will suffice- see: our decision in the case of Msafiri Hassan Masimba v. The Republic, Criminal Appeal No. 425 of 2007 (unreported). In the present appeal, we have thoroughly reviewed the entire record of appeal but we failed to find any notice, of whatever form, issued by the appellant of his intention to appeal to the High Court from the decision of the District Court of Mufindi at Mafinga. There is a plethora of authorities to the effect that, in the absence of a notice of intention to appeal, there was no competent appeal before the High Court, and that, the proceedings and orders made therefrom by the High Court were a nullity thus entitling the Court to quash the proceedings of that appellate court and set aside the decision made therefrom. For instance, in our recent decision in the case of Joseph Lugala v, The Republic, Criminal Appeal No. 512 of 2020 [2023] TZCA 130; [21 March, 2023; TANZLII] we stated that: "Failure of the appellant to lodge the notice of appeal rendered the appeal before the High Court incompetent because the omission offended the provisions of section 361 (1) (a) of the CPA.. It follows that since the appellant's appeal at the High Court was incompetent, it had to be struck out so that he would have approached the same court to seek extension of time in terms of section 361 (2) of the CPA to lodge the notice of appeal and process the appeal if he was still interested to appeal against the decision of the trial court." From the above position of the law, though we understand that the appellant had been in prison custody since 2017 but our hands are tied

up. The law requires and we do hereby find that the High Court illegally entertained the appellant's appeal as there was no notice of intention to appeal. In the light of the above, we invoke our revisional powers provided under section 4 (2) of the A3A and hereby nullify and quash the proceedings of the decision of the High Court in DC. Criminal Appeal No. 7 of 2020 and proceed to set aside the judgment arising therefrom. If the appellant still wishes to pursue his intended appeal before the High Court, he is at liberty to go back and apply for extension of time to process the appeal in accordance with the law. DATED at IRINGA this 25th day of March, 2023. F. L. K. WAMBALI JUSTICE OF APPEAL B. M. A. SEHEL JUSTICE OF APPEAL I. J. MAIGE JUSTICE OF APPEAL The Judgment delivered this 27th day of March, 2023 in the presence of appellant in person and Ms. Hope Charles Massambu, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original. 10

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Prepared on 13 October 2026 · Esheria