

TANZANIA / JUDGMENT

20100601 TZCA Tabora

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IN THE COURT OF APPEAL OF TANZANIA AT TABORA (CORAM: RUTAKANGWA, J.A., MBAROUK, J.A. AND MASSATI, J.A.) CRIMINAL APPEAL NO. 249 OF 2007 STEPHANO LAURENT APPELLANT i VERSUS I THE REPUBLIC RESPONDENT i (Appeal from the Ruling of the High Court of Tanzania at Tabora) I (Chinguwile, J.) Dated the 25 th day of June, 2007 in; Criminal Appeal No. 110 of 2002 JUDGMENT OF THE COURT 31 MAY & 2 JUNE, 2010

RUTAKANGWA, J.A.: ' I The appellant was convicted as charged of the offence of Rape by I the trial District Court of Kibondo District. He was sentenced to thirty (30) I years in jail. This was on lih April, 2002. Aggrieved by the conviction and I sentence he lodged an appeal in the High Court at Tabora, against both. ' 1 - When the appeal was called on for hearing before Chinguwile J. on 16th May, 2007, its competence was challenged by Mr. Mulwambo, learned State Attorney, on behalf of the respondent Republic. Moving. the High Court to strike out the appeal before it, Mr. Mulwambo, said:- "Madame Judge before we proceed with the hearing of this appeal we wish to submit that this appeal is out of time and leave was not grantee/ to file it out of time. Judgment was delivered on 12/4/2004. Certified copy was issued on 7/5/2002. Memorandum of appeal was forwarded on 12/8/2008. It is sent (sic) about 57 days later. Not only that there is no notice of appeal according to the law and there is no application for extension of time. If he is interested in pursuing his appeal he should seek leave to file the appeal out of time. That is all. " The appellant was not taken aback by this challenge. He unequivocally told the learned first appellate judge that he gave his notice of intention to appeal within the prescribed time. He went on to assert that his memorandum of appeal was prepared at Bangwe prison, Kigoma and then forwarded to the High Court. In her ruling, the learned appellate judge upheld the preliminary objection. She thus ruled:- 2 "After going through the record I have noted that judgment was delivered on 12/4/2002. There is no notice of appeal. Certified copy of the judgment was issued on 7/5/2002 and a memorandum of appeal was forwarded on 12/8/2002, about 97 days since the date when a copy of judgment was collected. This being the case the appellant should have sought leave for extension of time to file a notice of appeal and leave to file appeal out of time instead of filing an appeal as if it was within time ... '[Emphasis is ours]. She accordingly struck out the appeal under section 361 (l)(a) and (b) of the Criminal Procedure Act, Cap 20, Vol. 1 R.E. 2002, (henceforth the Act). The appellant was aggrieved by that decision and accordingly lodged this appeal. In this appeal, the appellant is claiming that the High Court wrongly struck out his appeal as he had given the notice of intention to appeal and lodged the memorandum of appeal within the prescribed periods.

When this appeal came up for hearing before us, the appellant appeared in person, while the respondent Republic was represented by Mr. Jackson Bulashi, learned Senior State Attorney. The appellant urged us to accept his persistent and consistent assertions that he had not only given the notice of intention to appeal but did so within the stipulated time. Mr. Bulashi, on the other hand, had at first gallantly supported the . High Court ruling on the basis of the copy of the record of appeal which contains no copy of the said notice of appeal. He, however, was quick to admit that he had not had the opportunity of perusing the original records of the two courts below. This concession put us on alert. We were, therefore, forced to peruse the records of the two courts below. This exercise yielded results supporting the appellant's assertions. In the High Court record, we discovered that the appellant's appeal was admitted on 21 st May, 2003. The admission sheet vividly shows that the notice of intention to appeal was given within the prescribed period and that the appeal had been lodged in time. Coming after the admission sheet and note in that record, is the appellant's notice of intention to appeal, dated 13th April, 2002 (a day after the District Court judgment) and lodged in the High Court on 24 th May, 2002. We wish to observe in passing here, that we have found it necessary to give these details to 4 negate the possible perceptions to the effect that the notice of intention to appeal might have been placed in the High Court record after the appeal had been struck out. When these facts were brought to the attention of Mr. Bulashi, he promptly supported the appellant's appeal. He urged us to allow the appeal by quashing the order of the High Court striking out the appeal. Thereafter, he pressed, we should restore the appellant's appeal in the High Court and direct it to hear and determine it on its merits. In view of the conceded fact that the appellant did indeed give notice of intention to appeal to the High Court against the decision of the trial District Court within the ten-day limitation period we have had no difficulty in accepting Mr. Bulashi's invitation. As the appellant gave his notice of intention to appeal and within the prescribed time, we hold that the learned appellate judge wrongly struck out his appeal. It was also claimed in the High Court that the appellant had lodged his appeal out of time. This claim was based on section 361 (l)(b) of the Act. This provision requires every appellant (except the D.P.P.) to lodge his 5 petition of appeal within 45 days from the date of the impugned decision. However, this provision has a qualification to the effect 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. " In this particular case, the appellant applied to be supplied with copies of the proceedings and judgment on 13 th April, 2002. Going by the memorandum of appeal which was endorsed by the Officer Incharge of Bangwe Prison where the appellant was being held, the appellant received these documents on 23 rd July, 2002. : For the purposes of the limitation period under s. 361 (l)(b) of the Act, the cut off date was 23 rd July, 2002. There is no dispute on the fact that after preparing his petition of appeal, the appellant presented the same to the Officer incharge of Bangwe prison in accordance with the provisions of section 363 of the Act, for onward transmission to the High Court, on 1th August, 2002. By that date the stipulated 45 days had not yet expired. It goes without saying, therefore, that even the appeal itself was lodged in time. 6 For the foregoing reasons, we are of the firm view that the High Court erred in law and fact in striking out the appellant's appeal. We are accordingly enjoined by law to allow this appeal as we hereby do. The order of the High Court striking out the appellant's appeal is hereby quashed and set aside. We restore the appellant's

appeal in the High Court. We further direct that the appellants' appeal be heard by the High Court as expeditiously as possible. DATE at TABORA this 1st day of June, 2010. E.M.K. RUTAKANGWA JUSTICE OF APPEAL M.S. MBAROUK JUSTICE OF APPEAL S.A. MASSATI JUSTICE OF APPEAL I certify that this is a true copy of the original. COURTO 7

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