LEGAL PRINCIPAL DISCUSSED

Citation	Parties	Legal Principles Discussed
IN THE COURT OF APPEAL OF TANZANIA AT DODOMA. CRIMINAL APPEAL NO. 167 OF 2008. KILEO J.A, MASSATI, J.A AND ORIYO J.A	**ANDREA MTINDA VS. THE REPUBLIC** (Appeal from the Decision of the High Court of Tanzania at Dodoma, Kwariko J.)	1. The law recognizes the appellant in prison as having fulfilled the requirements of section 361 of the Criminal Procedure Act once he has presented his papers to the officer in charge of the prison. The time between the presentation of papers to the prison officer to the time the latter lodges them with the Registrar of the High Court is to be excluded in computing time available for lodging under section 361 of the Criminal Procedure Code. 2. It is the law and practice that whatever is stated on oath has to be challenged by another statement in oath in the form of counter affidavit.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 167 OF 2008

ANDREA MTINDA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Kwariko, J.)

dated the 4th day of July, 2007
in
Misc. Criminal Application No. 54 of 2004

RULING OF THE COURT

15 & 23 March 2010

ORIYO, J.A.:

The appellant was convicted as charged by the District Court of Singida, of the offence of rape, contrary to sections 130 (1) (2) (e) and 131 (a) of the Penal Code, Cap 16, RE 2002. As the victim was aged 9 years, he was sentenced to life imprisonment on 2/12/1999. Aggrieved by the decision, he desired to appeal to the High Court at Dodoma.

Apparently the appellant later realized that the requisite time to appeal had run out. So he first sought leave of the High Court to file Notice of Appeal and subsequently the appeal itself, out of time. The application was lodged on 22nd March 2005. The reasons for the delay were given in the affidavit accompanying the application. The respondent Republic did not file an affidavit to controvert that of the appellant.

However when the application was called on for hearing on 21/5/2007, the learned State Attorney who appeared for the respondent Republic, informed the learned High Court judge that the Republic was contesting the application, which he did, infact. The appellant's application was dismissed on 4/7/2007 in the following words of the learned High Court Judge:-

> "In the absence of sufficient reasons to extend the time to file the same this application is hereby dismissed in its entirety."

The appellant did not give up, as on 18/7/2007, he lodged in the High Court a Notice to Appeal to this Court against the ruling of 4/7/2007 followed by a Memorandum of Appeal filed on 2/11/2008.

When the appeal was called on for hearing before us, the appellant appeared in person while the respondent Republic was represented by Mr. Faraja Nchimbi, learned State Attorney. Mr. Nchimbi raised a preliminary objection, for which notice had been duly filed in this Court. The objection was to the effect that:-

> **The Memorandum of Appeal is inconsistent with the Notice of Intention to appeal lodged by the appellant.**

In an effort to elaborate on the objection, the learned State Attorney stated that the Notice of Appeal filed by the appellant showed that the intended appeal was against the refusal by the High Court to grant extension of time. However, stated the learned State Attorney, the grounds of appeal in the Memorandum of Appeal lodged in this Court are on the merits of the appeal and not on the

High Court's order of refusal to extend time. Mr. Nchimbi submitted that the Notice of Appeal and the grounds of appeal do not agree and it renders the appeal before us incompetent.

When Mr. Nchimbi was given an opportunity to peruse the original trial record, he retracted his submissions on the preliminary objection and the incompetency of the appeal.

Mr. Nchimbi stated that he had discovered from the original trial record that the appellant had in fact given a Notice of Appeal in time. He told us that the Notice of Appeal from Singida Prison to the trial court had been forwarded through a Saving Telegram of 8/12/1999; and copied to the High Court at Dodoma. In the circumstances, the learned State Attorney abandoned the preliminary objection, so to say. He submitted that in view of what had been revealed by the original trial record that the Notice of Appeal had been timely filed, the decision of the High Court delivered on 4/7/2007 cannot stand. The learned State Attorney urged us to

exercise the Court's revisional powers in terms of Section 4 (2) of the Appellate Jurisdiction Act, Cap 141, RE 2002.

On our part, we had occasion to peruse the original trial record and we have no reason to differ with the learned State Attorney's submissions. The record confirms that the Notice of intention to appeal against the trial court's decision in Criminal Case No. 213 of 1999 delivered on 2/12/1999 was timely given on 8/12/1999. The Notice of Appeal was given **within a period of 6 days only** after the date of the judgment. It is obvious here that the appellant's Notice of Appeal was given within the period of ten (10) days in compliance with the clear provisions of Section 361 (1) (a) of the Criminal Procedure Act, Cap 20, RE 2002. We agree with the learned State Attorney's submission that the learned High Court Judge erred in the decision dated 4/7/2007.

As we patiently listened to Mr. Nchimbi's submissions, two simple and pertinent questions arose in our minds. One, was whether the contents of the trial record were brought to the attention

of the learned High Court Judge. If not; to us, it amounts to a serious omission as in this case where a serious miscarriage of justice could have been occasioned to the appellant. We are convinced that had the contents of the Saving Telegram reference No. 112/SING/I/IV/189 of 8/12/1999 signed by ASP M.S. Matimla of Singida Prison been brought to the attention of the learned High Court Judge, she would have realized that the appellant's Notice of Appeal was timely given in terms of Sections 361 read together with 363 of the Criminal Procedure Act, Cap 20 R.E. 2002. Section 361 provides:-

> "(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,

> (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 supplied)

However, subsection (2) of Section 361 above endows the High Court with discretion to admit an appeal out of the prescribed periods stipulated above.

In its wisdom, the Parliament, alive to the restrictions faced by prisoners, legislated Section 363 specifically to cater for appellants who are in prison. It states the following:-

> "If the appellant is in prison, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison, who shall thereupon forward the petition and copies to the Registrar of the High Court."

Though the provision does not state in so many words, there is no gainsaying that the law recognizes the appellant in prison as having fulfilled the requirements of Section 361 of the Criminal Procedure Act once he has presented his papers to the officer in charge of the prison. It is our understanding that the time between the presentation of papers to the prison officer to the time the latter lodges them with the Registrar of the High Court, is to be excluded in computing time available for lodging under Section 361.

The second, simple and pertinent question alluded to above was whether it was proper for the respondent Republic's counsel to be allowed to challenge the contents of the applicant's affidavit by way of a mere statement from the bar. We are settled in our minds that it is both the law and practice that whatever is stated on oath has to be challenged by another statement on oath, in the form of a counter affidavit. This was not done in this case.

With respect, we have noted in the course of the sessions here that this is a recurring problem. The Republic is allowed in most

cases to controvert affidavits of appellants/applicants by mere statements from the bar. This is not appropriate. The Republic, like any other respondent, is supposed to file a counter affidavit where it does not agree with the contents of the affidavit. Mere contention at the bar is not sufficient. A copy of the counter affidavit must be served on the applicant/appellant well in advance to give adequate time to prepare. The counter affidavit also assists to put one on notice of and prepare for what is expected of at the hearing.

As already stated above, the learned State Attorney urged us to exercise the Court's revisional powers in terms of section 4 (2) of the Appellate Jurisdiction Act which provides as follows:-

> "(2) for all purposes of and incidental to the hearing and determination of any appeal and in the exercise of the jurisdiction conferred upon it by this Act, **the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and**

> **jurisdiction vested in the court from which the appeal is brought."** (emphasis supplied)

We have taken considerable time to deliberate on the circumstances pertaining in this case. We agree with the learned State Attorney that this is a fit case to invoke the Court's revisional powers. Therefore, we revise, quash and set aside the proceedings and orders in Miscellaneous Criminal Application No. 57 of 2004 in the High Court at Dodoma. And being mindful of Rule 2 of the Court Rules, 2009, we invoke the powers of the High Court under Section 361 (2) of the Criminal Procedure Act, to grant extension of time to the appellant, retrospectively, to file Memorandum of Appeal. We do that which the High Court ought to have done. The extension granted is such, so as to make the memorandum of appeal on record, dated 14 September, 2004 to have been brought within time. We direct that the matter be remitted to the High Court to hear the appellant on the grounds of appeal as soon as possible. The appeal to proceed before another Judge who has not handled the matter before.

DATED at DODOMA this 22nd day of March, 2010.

E.A. KILEO
JUSTICE OF APPEAL

S.A.L. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

(E.Y. MKWIZU)
DEPUTY REGISTRAR