

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUNUO, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 26 OF 2000

BETWEEN

SADIKI ALLY..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court of
Tanzania at Dar es Salaam)**

(Ihema, J.)

**dated the 15th day of January, 2000
in**

Misc. Criminal Appeal No. 32 of 1999

JUDGMENT OF THE COURT

MSOFFE, J.A.:

On 28/4/99 the District Court of Morogoro, Makwandi RM, convicted the appellant of Armed Robbery and sentenced him to the statutory thirty years term of imprisonment. On 13/9/99 the appellant filed an application at the High Court seeking leave to file a notice of appeal out of time. Together with the application he annexed a memorandum of appeal. On 15/11/99 the application was called on for hearing. Since both parties were absent it was adjourned for hearing on another date with an order that the parties be notified. On the appointed date it was not heard. Then, there followed a number of adjournments in which there was always an order for the appellant to be notified.

Ultimately, on 15/5/2000 the High Court decided to determine the application in the absence of the appellant. Apparently no reasons were assigned for proceeding without him. The learned judge heard Mr. Ntwine, a State Attorney, and then wrote and delivered a Ruling dismissing the application. The Ruling read, in substance, as follows:-

“I have perused the chamber application and the affidavit accompanying the application as well as the record of the trial court. I agree with the submissions of Mr. Ntwine, learned State Attorney that the application does not contain sufficient reasons for extension of time for appeal. Equally the evidence on record at the trial militates against the appellant and the intended appeal -----“

This is an appeal against the above decision. There are two grounds of appeal which read as follows:-

1. That the appellant was CONDEMNED by the High Court UNHEARD.
2. That it was the High Court which failed to assist the Appellant to

appear and prosecute his application.

3

Messrs. Ndolezi and Kameya, learned counsel, appeared for the respective parties. The thrust of Mr. Ndolezi's submission was that the appellant was not given the opportunity to be heard. All of his arguments centred on this major point, hence we do not have to repeat here each and every detail of his submissions on the point. On the other hand, Mr. Kameya maintained the view that it was not true that the appellant was condemned unheard. According to him, the appellant indicated in the memorandum of appeal that the court could proceed without him. Further, that the fact that the court always made orders for the appellant to be notified did not necessarily mean that he should be served. In conclusion, he urged that the appellant was heard in that the judge looked at the application in its entirety and was satisfied that there were no good reasons for the failure to appeal within time.

In our view, the appeal has merit for a number of reasons. **One**, the fact that the Court always made orders for the appellant to be notified meant, in essence, that he was to be notified to attend at the hearing. The notification could not have meant otherwise. **Two**, the judge did not record anywhere in the proceedings, reason(s), if any, for determining the application in the absence of the appellant. If there were good reasons for dispensing with the presence

of the appellant the judge ought to have made a record to that effect. **Three**, the fact that the appellant indicated in the memorandum of appeal that he did not wish to attend was immaterial. Up to that stage, the existence of the memorandum of appeal was inconsequential because leave to appeal out of time had not be granted. Thus, strictly speaking, no appeal had actually been filed at the High Court at that point in time. In any case, the appellant did not indicate anywhere in the chamber application that he did not wish to appear and be heard.

For the above reasons, the appeal is allowed. The Ruling of the High Court is quashed and set aside. The said High Court is ordered to determine the application for enlargement of time to file notice of appeal on merit.

DATED at DAR ES SALAAM this 9th day of February, 2005.

E. N. MUNUO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

J. H. MSOFFE
JSUTICE OF APPEAL

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

S. A. N. WAMBURA
SENIOR DEPUTY REGISTRAR