IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 73 OF 2008

ALFRED CHINGA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Ruling of the of the High Court of Tanzania at Sumbawanga)

(Mmilla, J.)

dated the 14 day of November, 2007
in
Criminal Appeal No. 9 of 2007

JUDGMENT OF THE COURT

14 & 20 June, 2011

MASSATI, J.A.

The appellant was a young man of 20 in 2004, when he found himself on the wrong side of the law. On May 20, 2004, he and his colleague were arraigned for the offence of robbery, contrary to sections 285 and 286 of the Penal Code Cap 16 RE 2002. On April, 21st 2005, the District court of Sumbawanga before which they were tried, convicted and sentenced them to 15 years imprisonment each. The appellant was not present when the judgment was delivered. He was, however, subsequently arrested and started to serve his sentence on December 1, 2006. His attempts to appeal were blocked by limitation. He tried to

overcome that by applying for extension of time within which to file a notice of appeal in the High Court at Sumbawanga. He failed. He has now come to this Court to challenge that decision.

At the hearing of the appeal, the appellant appeared in person, and the Republic/respondent was advocated for by Mr. Tumaini Kweka, learned State Attorney.

The appellant filed a memorandum of appeal containing 9 grounds. At the hearing the appellant adopted the same.

Mr. Kweka attacked the said memorandum. He said that the memorandum and the Notice of Appeal do not rhyme, in that, whereas the Notice of Appeal shows that, the appeal was against the decision of Mmilla J. dated November 14, 2007, the grounds of appeal attack the decision of the trial court. In his view, the memorandum of appeal was defective. He suggested that, in the interests of justice, the memorandum of appeal should be struck out and the appellant be given time to file a proper memorandum, along the lines suggested by this Court in **EMMANUEL ANDREW KANENGO V. R.** Criminal Appeal No. 432 of 2007 (unreported).

The Court also solicited Mr. Kweka's views on the propriety of the High Court's decision. He submitted that so long as the decision was partly based on the appellant's failure to file an affidavit from a prison officer; and as long as it was nearly impracticable for a prisoner to get such an affidavit; and so long as the respondent did not file a counter affidavit to refute the appellant's contention, the decision was wrong in law. He therefore asked us to exercise our revisonal powers and revise the High Court decision. The appellant had nothing useful to add.

Rule 72(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) read together with Rule 72(4) and Form C in the First Schedule to the Rules, require that a memorandum of appeal, "set forth the grounds of objection to the decision appealed against". In the present case, the Notice of Appeal shows that the appellant intended to appeal against the decision of Mmilla J. dated 14th November, 2007. That decision only dismissed the appellant's application for extension of time. But, all the grounds of appeal attack the decision of the trial court. This is contrary to the Rule. Since the purpose of the Rule is to give notice to the respondent to know the appellant's case, non compliance deprives the other party of opportunity and the right to a fair hearing and therefore prejudicial. For

that reason, we agree with Mr. Kweka that such memorandum was incompetent and cannot be acted upon.

We think there are several options available to the Court on what to do in the circumstances. Mr. Kweka suggested that we do as the Court did in **KANENGO's** case. That is one. The other options flow from disregarding the memorandum of appeal, and bringing Rule 72(5) of the Rules, into play. Under that Rule, if there is no memorandum of appeal, the Court may either dismiss or adjourn the hearing of the appeal.

In **KANENGO's** case, the Court invoked Rule 47 of the Court of Appeal Rules, and granted extension of time to appeal to the Court. The justice of that case demanded such an action; but as this is a discretion, the circumstances of each case have to be taken into account. In the present case we have gone further and asked the parties to consider the propriety of the High Court's decision and the time it might take for the appeal to be finally heard on merit. This was neither raised nor considered in **KANENGO's** case. We think the justice of the present case demands more than that.

by another evidence by way of a counter affidavit, which the respondent in this case, did not file. So it remained unchallenged (see **NHUNDU LUFWEGHA v. R,** Criminal Appeal No. 133 of 2003 (unreported), and ANDREW **MTINDA v. R,** Criminal Appeal No. 167 of 2008), secondly, considering the predicament faced by prisoners, we think in practice it is easier for the respondent to secure an affidavit or a counter affidavit from a prison officer, than it is for a prisoner. It would, we think, be expecting too much to demand a prisoner/appellant to obtain and file an affidavit sworn by a prison officer, hanging his own neck that he was responsible for the delay. The same can be said about the other reasons forwarded by the High court for dismissing the application, because all reasons advanced by the appellant emanated from his affidavit. As the affidavit was not countered, all the allegations remained unchallenged. In the circumstances, it can only be said that the High Court had no reason at all, for disallowing the application.

For the above reasons and in the interests of justice, we are constrained to intervene. In exercise of our powers under section 4 (2) of the Appellate Jurisdiction Act (Cap 141 RE 2002) we revise the decision of the High Court and quash and set aside the order. In order to expedite the hearing of the appellant's appeal, we now do what the High Court ought to

In dismissing the application for extension of time, the learned judge of the High Court, reasoned partly:-

> *"... the applicant says...that he did not furnish a notice of intention to appeal because he was let down by the prison authority having ... signified immediately after admission at prison that he intended to appeal. He has submitted that although they promised to send to court the said notice the prison authorities did not file the said notice.*
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> .....
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> .....*this ground is weak because he did not file any affidavit in that regard to support his allegation. The affidavit of the relevant prison officer in the circumstances of this case was quite necessary because he was a material person".*

We agree with Mr. Kweka that this conclusion was unjustified. First, as the learned judge acknowledged in his ruling, the appellant's assertion was contained in his affidavit. As evidence, it could only be contradicted

have done; and allow the appellant's application for extension of time and order the appellant to file his notice of intention to appeal within 10 days hereof and to file his petition of appeal within 14 days thereafter by presenting them to the prison officer at the prison where he is currently held. The prison officer is to forward these documents to the High Court at Sumbawanga which is ordered to proceed to hear the appeal on merit once the necessary documents are ready.

It is so ordered.

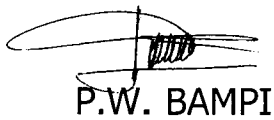
DATED at **MBEYA** this 16th day of June, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL