

**IN THE COURT OF APPEAL OF TANZANIA  
AT MBEYA**

**(CORAM: NSEKELA, J.A., MSOFFE, J.A., And ORIYO, J.A.)**

**CRIMINAL APPEAL NO. 101 OF 2007**

**1. MANENO S/O MUYOMBE  
2. MASUMBUKO S/O MUSSA .....APPELLANTS**

**VERSUS**

**THE REPUBLIC .....RESPONDENTS**

**(Appeal from the decision of the High Court of Tanzania  
at Mbeya)**

**(Mrema, J.)**

**dated the 17<sup>th</sup> day of June 2005**

**in**

**Misc. Criminal Application No. 46 of 2004**

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**JUDGMENT OF THE COURT**

**26<sup>th</sup> November, 2010 & 28<sup>th</sup> January, 2011**

**ORIYO, J.A.:**

The appellants, Maneno Muyombe and Masumbuko Mussa, are challenging the decision of the High Court, Mbeya, (Mrema, J.) which dismissed their joint application for the enlargement of time within which to lodge an appeal out of time.

The appellants were jointly charged with another person who is not a party to this appeal, with the offence of Armed Robbery, contrary to

section 285 and 286 of the Penal Code, Cap 16 R.E 2002, in the District Court of Mbozi District, at Vwawa. At the conclusion of Criminal Case no. 35 of 2004, the appellants were convicted and sentenced to 30 years imprisonment.

Before this Court, were the two appellants separate memoranda of appeal, each containing several grounds of complaints. But for our purposes, there was only one valid ground of appeal in each memorandum of appeal. The complaint was that the High Court erred to dismiss their application for extension of time without considering their reasons for the delay. The appellants prosecuted their appeal in person while the respondent Republic was represented by Mr. Vincent Tangoh, learned Senior State Attorney.

As laymen, the appellants did not say anything helpful apart from repeating what was already contained in their Memoranda. Mr. Tangoh, learned Senior State Attorney, supported the appeals. He stated that according to the record, what was before the High Court was an application to appeal out of time and the reasons for the delay were given

in the supporting affidavit of the appellants. He submitted that the High Court erred to dismiss the application without discussing the reasons for the delay.

We shall begin with the reasons advanced by the appellants for the delay to file their appeals timely. These are contained in paragraph 3 of the supporting affidavit, which, in part, reads as follows:-

*"3. That we delayed to lodge an appeal to the High Court ... for the reason that after the district court to supply (sic) a copy of judgment on 10/6/2004 we prepared our petition of appeal soon and handed over it (sic) to the prison authority for typing purposes, but the prison typist delayed to type our petition of appeal after the typewriter machine being (sic) damaged (sic) for the above reason our petition of appeal typed late (sic) and caused to be lodged to the High Court out of time."*

That was the reason given by the appellants for the delay to lodge their appeal within time.

The High Court Ruling dated 17/6/2005 dismissed the application on reasons other than those contained in the affidavit. It is stated in the opening paragraph of the Ruling as follows:-

*"This is an application filed u/s 361 (b) of the Criminal Procedure Act, 1985, the applicants are Maneno Muyombe and Masumbuko Mussa, and are seeking for enlargement of time to file their intended appeal out of the prescribed 45 days of limitation. Their main complaint is contained at paragraph 3 of their joint affidavit in support of their application".*

It is obvious from the first paragraph of the Ruling that the learned Judge was quite alive to what was before him and the reasons thereof as shown above. After hearing the submissions from the learned State Attorney for the respondent and the appellants who had nothing much to say in addition to what was before the Court, the learned High Court Judge,

*"refused the application and dismissed it."*

To use the court's own words, the learned judge said:-

*"On that score, therefore the applicants' application for leave to appeal out of time would be of (sic) useless exercise because their intended appeal would have no merit as explained above. For this reason and the other reasons already shown above the applicants' application is refused and also dismissed."*

With respect, we think that the learned High Court Judge took off on the right course but was thereafter swerved and trespassed into a territory not covered in the application before him.

Now, the issue for determination before us is whether the learned High Court Judge was justified to dismiss the application in the light of the reasons given in paragraph 3 of the affidavit and the clear provisions of section 361 of the Criminal Procedure Act, Cap 20, R.E. 2002. We shall reproduce it here for ease of reference:-

*"361. – (1) subject to subsection (2) no appeal from any finding sentence on 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 finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and*

*(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.*

*(2) The High Court may, **for good cause**, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed."*

*(The emphasis is ours.)*

The appellants' application was made to the High Court under Section 361 (b) of the then Criminal Procedure Act, 1985, which is now Section 361 (2), thereof.

We have indicated earlier on that the learned High Court Judge made a brief reference to the appellants' reasons for the delay, but it is apparent from the record that he did not accord them any weight. We have read the six (6) typed pages Ruling thoroughly, but we have found no other place in the decision where the appellants' reasons for the delay are discussed except as reproduced on page 1 of the Ruling.

It is clear to us from the record that the application for the extension of time to appeal was lodged in the High Court way back on 19 August 2004. A copy of the application was duly served on the respondent Republic. But we have also noted from the record the following:-

**One**, that until the date the application was heard, there was no counter affidavit lodged by a State Attorney to counter the averments of fact in the appellants' affidavit. **Two**, neither was there a preliminary objection lodged by the Republic to challenge the legality of the application for

extension of time. **Three**, the appellants' joint affidavit was certified by the officer-in-Charge of the Prison where the appellants were held. It was certified that the reasons given by the appellants in their joint affidavit were genuine. The Certificate appended at the bottom of the affidavit read as follows:-

**"CERTIFICATION**

*I do certify that what is stated by the applicants in their affidavit is true for (sic) the best of my knowledge and belief.*

*Sgd.*

*OI/C RUANDA PRISON MBEYA".*

In view of the wording of Section 361 (2) (formerly Section 361 (b)), all that is required of the appellant is to show "good cause" before the High Court can invoke its discretionary powers to extend time. This raises another crucial issue on whether or not the reasons advanced by the appellants constitute "**good cause**" under Section 361 (2) (*supra*).



The reason advanced in the High Court by the appellants is as per paragraph 3 of their joint affidavit that the prison typist delayed in typing the documents because the prison typewriter broke down. There is no gainsaying that prison officials are supposed to ensure that once received, the prisoners' documents are processed, typed and filed within time. In the present appeal where the typewriter malfunctioned; the appellants as prisoners had no say in what was to be done. And by the time the prison typewriter was serviced and functioning, the appellants were already late to file the appeal. And as mentioned earlier, the affidavit was certified by the prison officer. Had the reason not been genuine, prison officer would not have certified it.

Rule 75 of the Court of Appeal Rules provides the following: -

*"75.-(1) If the appellant is in prison, he shall be deemed to have complied with the requirements of Rule 68, 72, 73 and 74 or any of them by filing Form B/1, Form C/1 and handing over to the officer in-charge of the prison in which he is serving sentence his intention to appeal and the particulars required to be included in the*

*memorandum of appeal or statement, pursuant to the provisions of these Rules.”*

Sub-rule (3) provides for the duties of the officer in-charge of a prison upon receipt of the documents listed in sub-rule (1) above. It provides:

*“(3) An officer-in-charge of a prison receiving the form, memorandum of appeal or statement under this rule, shall forthwith endorse them with the date and time of receipt, and shall forward them to the Registrar of the High Court or the Registrar or deputy registrar, as the case may be.”*

In our view, the reasons advanced by the appellants constitute good cause for the delay; it was nothing else but the truth.

We wish to digress a bit at this juncture as it is now only two weeks since this Court’s Sessions in Mbeya, began. We have noted with concern what appears to be a recurring, common problem with the lower courts in Mbeya of dismissing intended appeals when in fact the intended appeals

are not yet before the courts. The dismissals, are, in most cases done when the lower courts are considering applications of this nature; for leave to appeal out of time. A similar concern was expressed by this Court in the case of **Kassana Shabani and Another vs Republic**, Criminal Appeal no. 476 of 2007 (unreported), where it was stated: -

*"Since there appears to be a recurring or a perennial problem, we would like to take this opportunity to make it clear that once an applicant under section 361 of the Act has satisfactorily accounted for the delay in giving notice of appeal or filing a petition of appeal, extension of time ought to be granted as a matter of right."*

We think we have sufficiently demonstrated how and where the High Court erred when determining the appellants' application for extension of time to appeal in Misc. Criminal Application No. 46 of 2004. Given the above stated reasons, we allow the appeal. In the result, the ruling of the High Court dated 17 June 2005 is quashed and set aside. Under normal circumstances, we should have remitted the record to the High Court with

an order that the application be heard on merits **de novo** before another Judge of the High Court. However rule 47 of the Court Rules, 2009 provides: -

*"47 Whenever an application may be made either to the Court or to the High Court, it shall in the first instance be made to the High Court or tribunal as the case may be but **in any criminal matter the Court may in its discretion, on application or of its own motion give leave to appeal or extend the time for the doing of any act, notwithstanding the fact that no application has been made to the High Court.**"*

(Emphasis ours).

We think this is a proper case to exercise our discretion under Rule 47 of the Court Rules. This will save the appellants from further delay if we are to remit the matter to the High Court. We therefore grant the appellants extension of time to lodge their respective Notices of Appeal within ten (10) days from the date of delivery of the judgment. In terms of Rule 75(1) and (3) of the Court Rules above, the Officer in Charge, Ruanda

Prison, Mbeya, where the appellants are held, should expeditiously comply with the provisions of the Rule.

It is accordingly ordered.

DATED at DAR ES SALAAM this 13<sup>th</sup> day of December, 2010.

H. R. NSEKELA  
**JUSTICE OF APPEAL**

J. H. MSOFFE  
**JUSTICE OF APPEAL**

K. K. ORIYO  
**JUSTICE OF APPEAL**



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

A handwritten signature in black ink, appearing to read "E. Y. Mkwizu", written over a horizontal line.

(E. Y. Mkwizu)  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**