

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM KILEO, J.A., MJASIRI, J.A., And MASSATI, J.A.)**

**CRIMINAL APPEAL NO. 202 OF 2009**

**TUSEKILE DUNCAN..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

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

**(Lukelelwa J.)**

**dated the 2<sup>th</sup> day of June, 2009**

**in**

**Misc. Criminal Application No. 37 of 2008**

**JUDGMENT OF THE COURT**

15<sup>th</sup> & 20<sup>th</sup> October, 2014

**MJASIRI, J.A.:**

This appeal arises from the Ruling and Order of the High Court in Mbeya, in respect of Miscellaneous Criminal Application No.37 of 2008 (Lukelelwa,J). The appellant applied for extension of time within which to file a notice of appeal after failing to do so within the prescribed period under the law. His application was dismissed by the High Court, hence the appeal to this Court. The intended appeal to the High Court is against the decision of the District Court of Mbeya in Criminal Case No 283 of 2003, wherein the appellant was convicted of conspiracy to commit a felony c/s

384 of the Penal Code, Cap 16 R.E. 2002 (the Penal Code) and attempt to commit an offence c/s 381 and 363 of the Penal Code. Upon conviction the appellant was given a conditional discharge for a period of six months. Aggrieved by the High Court's refusal to extend time to appeal to the High Court the appellant lodged this appeal. The appellant presented a three point memorandum of appeal which is reproduced as under:

- 1. The learned Judge erred to disregard the evidenced excuse of prolonged illness which prevented appellant to lodge her appeal within time.*
- 2. The learned Judge erred to hold appellant liable for the inaction of her counsel.*
- 3. The learned Judge erred to prejudge the prospects of the intended appeal without hearing the appellant and the other party.*

At the hearing of the appeal the applicant was represented by Mr. Justinian Mushokorwa, learned advocate while the respondent Republic had the services of Mr. Achilles Mulisa, learned State Attorney.

In arguing ground No. 1, Mr. Mushokorwa submitted that the High Court Judge erred in law in disregarding the illness of the appellant. He was of the view that good cause was established. Mr. Mulisa on his part, submitted that good cause was not established. He stated that the appellant was not ill the entire time and some days had lapsed without the appellant taking any action.

In relation to ground No 2, Mr. Mushokorwa submitted that the appellant had instructed an advocate to file a notice of appeal on her behalf, Mr. V.C. Mkumbe but no action was taken by the advocate. The appellant should not be penalized for the negligence of counsel. Mr. Mulisa on the other hand argued that as no affidavit was filed by the advocate that he was asked by the appellant to represent her, proves that the appellant was not making a follow up.

With regard to the third ground, Mr. Mulisa conceded that the Judge was wrong in concluding thus:

*"In the case at hand, having gone through the proceedings and judgment of the trial District Court, I don't think*

*that justice clearly indicates that the rules should be relaxed”.*

Section 361(2) of the Criminal Procedure Act R.E. 2002 provides as under:

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

The High Court Judge found no good cause for extending the period of appeal. In the circumstances the judge exercised his discretion to refuse the application for extension of time to file an appeal. Can this Court interfere with the Judge’s discretion? **In Mbogo and another v Shah (1968) 1 EA 93** Newbold P; stated as under:-

*"A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise*

*of his discretion and that as a result there has been misjustice."*

The main issue for consideration and determination is whether or not good cause was established by the appellant when extension of time to file the appeal was sought.

In **Rv Governor of Winchester Prison exp Roddie** [1991] AU ER 931 at Page 934 which was cited in **Aidan Chale v Republic**, Criminal Appeal No 130 of 2003 CAT (unreported), good cause was defined as under:-

*"It will usually consist of some good reason why that which is sought should be granted. It need not be something exceptional. To amount to good cause there must be some good reason for what is sought".*

Paragraphs 7 & 8 of the affidavit in support of the application clearly stated that the appellant was ill suffering from periodic malaria attacks and was represented by Mr. V.C. Mkumbe, advocate.

It is for the appellant to satisfy the Court that the judge was wrong or misdirected himself. We are of the considered view that the appellant's illness constitutes good cause. It has also been established that the appellant instructed Mkumbe Advocate. We also

agree with counsel that the judge was not justified to reach the conclusion he did, as reproduced on page 4 of the judgment.

Therefore in the light of all facts and circumstances, it would be just and reasonable to set aside the dismissal order. We accordingly allow the appeal and we extend time to the appellant to file her appeal in the High Court. We order that the Notice of Appeal be lodged within ten (10) days from the date of the judgment and the memorandum of appeal be filed within forty five (45) days from the date of filing the notice of appeal.

DATED at MBEYA this 20<sup>th</sup> day of October, 2014.

E.A.KILEO

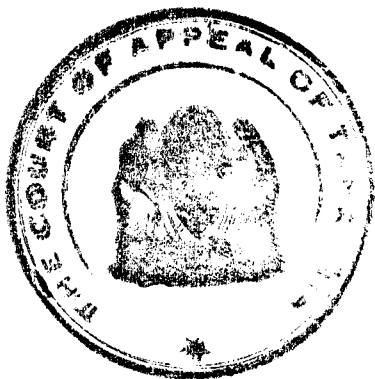
**JUSTICE OF APPEAL**

S. MJASIRI

**JUSTICE OF APPEAL**

S.A.MASSATI

**JUSTICE OF APPEAL**



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

A handwritten signature in black ink, appearing to read "P.W. Bampihya".

P.W.BAMPIKYA

**SENIOR DEPUTY REGISTRAR**

**COURT OF APPEAL**