IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 13 OF 2015

HAMAD IDD MADALE FUNDIKIRA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mrema, J.)

dated the 15th day of June, 2004

in

Misc. Criminal Application No. 45B of 2003

JUDGMENT OF THE COURT

18th & 20th August, 2015

MASSATI, J.A.:

The appellant was charged with and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code by the District Court of Mpanda in the erstwhile Rukwa Region. He was sentenced to 30 years imprisonment. He was not happy with the decision. So he thought he could appeal against the conviction and sentence but found himself at odds with the statute of limitation. On that account his attempt to appeal

via Criminal Appeal No. 56 of 2002, was thus struck out by the High Court at Mbeya (Mrema, J.) on 19th March, 2003.

On 3/9/2003 the appellant filed a chamber summons in the High Court to apply for extension of time to file a notice of appeal. The chamber summons was supported by the appellant's affidavit. In there, he gave two reasons for the delay. They were in paragraphs 3 and 4. For ease of reference, they are reproduced below: -

> *"(3) That your lordship I had expressed my intention to appeal immediately of receipt of the judgment means when the High Court confirmed by conviction and sentence on the ..... day of ..... I notified to appeal to the High Court of (T) at Mbeya instantly unfortunately the Prison officers failed to forward and notice of appeal in time which was out of my opinion.*
>
> *(4) That your lordship what I have stated above is true for the best of my knowledge and belief.*
>
> *And as far I am still engaged myself in Prison I request leniency of your Honourable Court and beg to appeal out of the prescribed period."*

In addition to the affidavit, the applicant also attached a document labelled **"APPLICATION FOR JUDICIAL REVIEW"**. The allegations in the affidavit were not countered by the respondent. All these documents, were compiled in what was called Miscellaneous Criminal Application No. 45B of 2003, and placed before Mrema, J. for hearing.

After hearing the parties, in a ruling dated 15/6/2004, the High Court dismissed the application for extension of time; and held that the purported application for review was incompetent for having been lodged without any legal basis. With regard to the application for extension in particular, the learned judge found that:

> *"The applicant has totally and miserably failed to show good cause of the delay to comply with the mandatory provisions of section 361(a) and (b) of the Cr. P.A. 1985. All what he has attempted to do as an afterthought after he was awaken up by the Order dated 19/03/2003. That said, I find this application to have no merit and on that ground this application is hereby dismissed."*

The appellant was aggrieved by the order of dismissal and has come to this Court to challenge the said decision basically for three reasons, namely:

"1. *That Hon. Mrema, J. erred in law when he dismissed my application without discovering the reason of delay.*

2. *That Hon. Mrema, J. erred in law when he dismissed my application without considering that I the appellant was a prisoner who depended on prison Authority in each and everything about appeal hence delay was out of my control.*

4. *That Hon. Mrema, J. of the High Court didn't consider that I complied with the law as required under section 363 of CPA Cap. 20 R.E. 2002 and rule 75 (3) of the Court of Appeal Rules of 2009 by informing prison authority what I wanted to appeal.*

The 3rd ground of appeal is really a prayer that this Court itself grant extension of time under Rule 47 of the Court of Appeal Rules, 2009.

At the hearing of the appeal, the appellant appeared in person, and attempted to elaborate each of his grounds of appeal briefly before praying that the Court allows his appeal.

Ms. Catherine Paul, learned State Attorney, appeared for the respondent/ Republic. She did not resist the appeal. Arguing the grounds of appeal generally, the learned counsel submitted that it was true that the High Court did not consider the appellant's reasons for delay. Instead, the learned judge agreed with the State Attorney who appeared for the respondent that there was no affidavit from the prison officer to support the allegations. Relying on this Court's decision in **DAVID LANGSON v R**, Criminal Appeal No. 44 of 2013 (unreported) Ms. Paul submitted that the primary concern of the High Court at that stage was to probe into the reasons for the delay, not otherwise. Besides, the respondent did not file any counter affidavit to controvert the appellant's assertions in his affidavit she urged. As to the appellant's prayer to extend time under Rule 47 of the Court of Appeal Rules, 2009 (the Rules), the learned counsel's view was that the Rule only applies to applications for extension of time to appeal to the Court of Appeal, not to the High Court as was the case in the present case. She urged us to invoke section 4(2) of the Appellate Jurisdiction Act (Cap. 141 – R.E. 2002) instead, and extend time to the appellant to do the necessary. For this, she referred to us to our decisions in **NDURUWE HASSAN v R**,

Criminal Appeal No. 70 of 2004 (unreported) for inspiration. So, in the end, she asked us to allow the appeal.

The powers of the High Court to extend time to admit a criminal appeal out of time is embedded in section 361(2) of the CPA which reads as follows:

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

From the wording of that statute, it appears therefore, this power is discretionary, and in this case, the High Court has exercised its discretion and refused to admit the appellant's appeal out of time. The issue is, whether, as an appellate Court, we can interfere with that discretion?

The scope of interference by an appellate court with the exercise of discretion of a lower Court, has been postulated in several cases, but suffice it to cite only one; **MBOGO AND ANOTHER v SHAH** (1968) 1 EA. 93 where the Court of Appeal for East Africa stated through Newbold P. at page 96 that:

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

What were the circumstances of the present case?

In his affidavit, the appellant gave two reasons for the delay in paragraphs 3 and 4. First, that due to lack of stationery, the prison officials did not forward his intention to appeal within the requisite time despite his intimation to do so upon getting into the prison. Secondly, soon after being notified of the judgment of the High Court confirming his conviction; he immediately informed the prison officers of his dissatisfaction, and intention to appeal. They were the ones who delayed to convey the notice of that intention to the Court. As we pointed out earlier, these assertions were not controverted by the respondent, but the State Attorney, strongly objected to them orally in the course of arguing the application; for the major ground that there was no affidavit from the prison officer. And the learned judge accepted that argument. This was a misdirection on the part of the learned

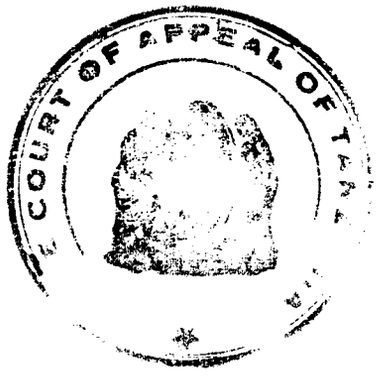
judge, because in the first place, the respondent did not file any counter affidavit to controvert the appellant's allegations. This Court, has severally held that whatever is stated on oath has to be challenged by another statement in the form of an affidavit. (See **ANDREA MTINDA v R**, Criminal Appeal No. 167 of 2008 (unreported). This means that the appellant's allegations remained unchallenged, notwithstanding the failure to secure the prison officer's affidavit (See **OTIENO OBUTE v R**, Criminal Application No. 1 of 2011 (unreported). If that is the position, and had the learned judge borne this in mind, he ought to have found that the appellant should have been taken to have done what the law required him to do and so section 363 of the CPA came into play to the benefit of the appellant. So, the learned judge, ought in terms of the decision of this Court in **DAVID LANGSON v R** (supra) to have considered the reasons for the delay. For the foregoing reasons, we are satisfied that in view of the serious misdirections made by the learned judge, he abused the discretion vested on him under section 361 (b) of the CPA, and we are therefore forced to interfere. Accordingly we quash and set aside the order of dismissal.

In the exercise of our revisional powers under section 4(2) of the Appellate Jurisdiction Act, we step into the shoes of the High Court and

having examined the reasons for delay advanced by the appellant and in the absence of a counter affidavit from the respondent we are satisfied that they disclose a good cause for the delay in launching his appeal; and so we allow the application for extension of time. He is to give his notice of appeal under section 361(1) (a) of the CPA within 10 (ten) days from the date of this judgment, and present a petition of appeal within 45 days after this date.

Order accordingly.

DATED at **MBEYA** this 19th day of August, 2015.



S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL