IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And KITUSI, J.A.)

CONSOLIDATED CRIMINAL APPEAL NOS. 469 and 472 OF 2019

1. SAID THOMAS MHOMBE .....1st APPELLANT
2. MAJUTO KIKULA.....2nd APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from decisions of the High Court of Tanzania at Mbeya and Iringa)

(Mrema, J. and Jundu, J.)

Dated 29th day of March, 2003 and 3rd day of March, 2009
in
Criminal Applications Nos. 09 of 2003 and 41 of 2008

JUDGMENT OF THE COURT

26th August, & 30th September, 2019

MKUYE, J.A.:

Criminal Appeal Cases Nos. 469 of 2016 and 472 of 2016, were cause listed to come for hearing before us on 26/8/2019. The said appeals involve different appellants though they emanate from the same transaction.

The matter started when Said Thomas Mhombe (former 1st accused) and Majuto Kikula (former 2nd accused) were arraigned before the District Court of Iringa at Iringa on two separate counts of offences of rape

contrary to sections 130 (1), (2) (a) and 131(1) of the Penal Code, Cap 16 RE 2002. In the first count it was alleged that Said Thomas Mhombe on 5th day of December 1998 at about 20:00 hours at Lulanzi village within Iringa Rural District in Iringa Region did have carnal knowledge of Tanisa Kihale without her consent. In the second count, it was alleged that Majuto Kikula on 5th day of December 1998 at about 20:00 hours at Lulanzi village within Iringa Rural District in Iringa Region did have carnal knowledge of Nyegelisa Kahemele without her consent. Upon a full trial the appellants were each convicted and sentenced to thirty (30) years imprisonment, a corporal punishment of 12 strokes each; and to pay compensation to the victims of rape to the tune of Tshs 200, 000/= each.

Aggrieved by that decision, the appellants appealed to the High Court at Songea vide Criminal Appeal No. 26 of 2000 but on 12/11/2001, it was struck out (Mackanja, J. as he then was) for being time barred in terms of section 361(1)(a) of the Criminal Procedure Act, 1985.

It would appear that Majuto Kikula was more proactive as he filed an application for leave to appeal out of time vide Misc. Criminal Application No. 9 of 2003 to the High Court, Mbeya Registry but the same was on 29/3/2003 dismissed (Mrema, J. as he then was) on among other grounds,

that the appeal had no chances of success due to the watertight evidence that he committed the offence.

On 23/5/2008, Said Thomas Mhombe and Majuto Kikula lodged an application to the High Court, Iringa Registry through Misc. Criminal Application No. 41 of 2008 in which on 13/3/2009 the High Court, (Jundu, J.K. as he then was) declined to deal with the application relating to Majuto Kikula because his similar application had been already determined by Mrema, J. He then proceeded to dismiss the application relating to Said Thomas Mhombe. Like Mrema, J., he based on a similar reason of having no chances of success in the intended appeal.

Still aggrieved by the decisions of the High Court, (Mrema, J. as he then was and Jundu, J.K. as he then was) Said Thomas Mhombe and Majuto Kikula have lodged to this Court, their memoranda of appeal each with four grounds of appeal which, in our view, are similar save for their arrangement.

With this background, when the appeals were placed before us, we inquired the parties to address us on which would be the best option of

dealing with the two appeals as to whether to proceed with them separately or to consolidate them into one. Mr. Alex Mwita, learned State Attorney assisted by Ms. Hope Charles Massama who appeared for the respondent/Republic advised us to consolidate them on the account that they originate from the same transaction. Upon having no objection from the appellants who appeared in person and unrepresented, we accordingly acceded to the learned State Attorney's proposition and we consolidated the two appeals into one appeal in which Said Thomas Mhombe and Majuto Kikula appear as 1st and 2nd appellants respectively and the respondent Republic remains as the respondent.

Since the appellants' respective memoranda of appeal are similar and common or rather they contain identical grounds of appeal, we will reproduce the grounds of appeal in the first appellant's memorandum of appeal which, we think, will also cater for the 2nd appellant as follows:

(1) *That, honourable Judge wrongly dismissed he appellants' application on a mere reason that there was no chance of success of the intended appeal without taking into account that it is not only a legal reason for determination of such kind of application.*

(2) *That, the High Court wrongly dismissed the appellants' application without addressing its mind properly to the reasons raised in the appellants' affidavit.*

(3) *That, honourable court erred in law for heavily reliance on the trial court's record which was not the subject of the appellant's application.*

(4) *That, honourable Judge contradicted himself in dismissing the appellants application without taking into consideration that the right to appeal is not only a statutory right but also a Constitutional right in Tanzania.*

When the appellants were given the floor to amplify their grounds of appeal they each opted to let the learned State Attorney submit first and reserved their right of rejoinder, if need would arise.

On his part, Mr. Mwita prefaced by declaring their stance of supporting the appeal. He submitted that the High Court decisions (Mrema, J. and Jundu J.K as they then were) dismissing the appellants' applications for extension of time together with their appeals which were not before the court were wrong. This, he said, amounted to predetermining the appeals though they were not before the court. Further to that, the learned State

Attorney contented that, since the applicants had lodged applications for extension of time, the High Court was only required to direct its mind on whether or not the applicants have shown good cause for the delay.

Mr. Mwita argued further that dismissing their appeals was tantamount to condemning the appellants without being heard on the merit of their appeals. In support of his argument, he referred us to the case of **Damas Wella V. Republic,** Criminal Appeal No. 513 of 2015 (unreported) in which the Court discussed extensively the difference between "dismiss" and struck out" in support. In the end while citing the same case of **Dismas Wella** (supra), he urged the Court to invoke section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 (the AJA) and nullify the proceedings, quash the orders of the High Court and remit the files to the High Court with an order for expedited hearing having regard to the fact that the appellants have been in prison for almost twenty (20) years now.

In rejoinder both appellants did not have much to say except joining hands with what was submitted by the learned State Attorney.

On our part, after having examined the record of appeal, grounds of appeal and the submissions from both sides, we think, the issue for our determination is whether the High Court properly dismissed the respective applications for extension of time to file appeals out of time.

In the first place, we wish to take off by stating that before the High Court, the appellants had applied for extension of time in order to file their appeals out of time. It is evident from the record of appeal that the 2nd appellant had through Misc. Criminal Appeal No. 9 of 2003 applied for extension of time to appeal against decision of the District Court of Iringa in Criminal Case No.684 of 1998. That application was dismissed (Mrema, J. as he then was) on the ground that the intended appeal had no chances of success. In dismissing the said application, the leaned Judge stated as follows:

> *"...as rightly pointed out by Miss Kileo, the present application is a waste of time because evidence against the appellant is absolutely watertight. He was properly identified at the scene as one of the rapist not to mention the violent robbery against the*

victims of rape which took place in the same transaction by PW1 and PW2."

Also, the 1st appellant and 2nd appellant (who appeared to circumvent the order of the High Court (Mrema,J.)) lodged a joint application (Misc. Criminal Application No. 41 of 2008) seeking extension of time to file their appeal out of time but the same was equally dismissed (Jundu J.K as he then was) on 13/3/2019. While refraining from dealing with the 2nd appellant's application the High Court dismissed the 1st appellant's application for lack of chances of success in the intended appeal as follows:

"Though the Republic has no objection to this application, I have given carefully consideration to whether there is chance of success in the intended appeal which is on essential element to take into account in this type of application. Indeed, having read the evidence on record as well as the judgment of the lower court, I am persuaded that there was water tight evidence which shows that

the 1st applicant was well identified as one of the rapist who raped the PW1 Tanisa."

Basically, applications for extension of time in the High Court are governed by section 361 (2) of the CPA which provides as follows:

> *"361(2) The High Court may,* ***for good cause****, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed"*[Emphasis added].

Our construction of the above quoted section is that the High Court is empowered to admit an appeal out of time if good cause for the delay is shown by the applicant. In other words, what is required by the High Court is to satisfy itself that a good cause is given by the applicant for not appealing within time limitation set out in section 361(1)(b).

In the case of **Nyandwi Buduma v. Republic,** Criminal Appeal No. 294 0f 2010 (unreported), the Court emphasized that:

> *"Section 361(2) of the Criminal Procedure Act, Cap. 20 gives the High Court of Tanzania the discretion to extend the period for filing an appeal or a notice*

of intention to appeal upon the applicant showing good cause."

In this case, the main reason each appellant gave for failing to file the appeal within time was prisons authority's failure to process their appeals to the High Court. They said, they were surprised to note that their appeal they believed to have been filed within time was struck out for being time barred.

In this case as was alluded to earlier on, both in Misc. Criminal Applications Nos. 9 of 2003 and 41 of 2008, the respective judges did not consider whether or not the applicants had advanced good cause(s) for their delay in instituting their appeals within the prescribed period of time. They did not deal with the reasons averred by the appellants in their respective affidavits. In both applications the judges proceeded to dismiss them on the ground that there was watertight evidence showing that they committed the offence of rape though there were no appeals to that effect. We think, this was wrong. In the case of **Anoor Shariff Jamal v. Bahadur Ebrahim Shamji,** Civil Appeal No 25 of 2006 where

the court below dealt with a matter not before it, the Court stated as follows:

> "***One of the basic principles is the duty of the court to determine one way or another an issue brought before it.***"
>
> [Emphasis added]

Indeed, in the matter at hand, we need to emphasize that it was not proper for the respective judges to determine and dismiss the intended appeals which were not before them for lack of merit.

Likewise, as was rightly submitted by Mr. Mwita, dismissing of the appellants' applications had two effects which are **one,** predetermining the appeals which were not before the court. **Two,** denying the appellants their fundamental right to be heard as enshrined under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, Cap 2 RE 2002 which provides thus:-

> *"To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:-*

(a) When the rights and duties of any person are being determined by the court or any other agency, ***that person shall be entitled to a fair hearing*** *and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned".* [Emphasis is added].

This also means that, the omission amounted to breach of the principle of natural justice of the right to be heard, with the consequences of making the proceedings null and void – See the case of **Rukwa Auto Parts and Transport Ltd v. Jestina George Mwakyoma** [2003] T. L. R. 251 and **Hamisi Rajabu Dibagula v. Republic** [2004] T. L. R. 181**.**

At this juncture, we think, we need to go a step further and discuss the remedy attached to the matter which is dismissed. In discussing the difference between dismissal and striking out, the Court of Appeal for East African in the case of **Ngoni – Matengo Corporation Marketing Union Ltd v. Ali Mohamed Osman,** (1959) EA 577, took the position that an order of "dismissal" connotes that the appeal has been concluded whereas an order of "striking out" the appeal connotes that the appeal was not

properly before the court to be determined by the court. Yet in other authorities the Court went further to explain that the effect of "striking out" the matter is different from the effect of "dismissing" the matter. The reason for such difference is that in case the matter is struck out, the party may come back to the same court on the same matter whereas in case the matter is dismissed, the party cannot come back on the same matter to the same court. (See - **VIP Engineering and Marketing Ltd v SGS Generalle De Surveillance SA and Another,** Civil reference No. 32 of 2006; and **Cyprica Mamboleo Hizza v Eva Kioso and Another,** Civil Application No. 3 of 2010 (both unreported)).

In this case the appellants' applications were dismissed, meaning that they are taken to have been determined and they cannot go back to the same court on the same matters. We thus agree with the learned State Attorney that the two judges' option of dismissing the applications for extension of time because the intended appeals had no chances of success was an error as it amounted to predetermining their appeals not before them and they denied the appellants' right of being heard.

On the basis of the aforesaid, we allow the appeal. Thus, by virtue of the powers bestowed on us by section 4 (2) of the AJA, we nullify the

proceedings and rulings of the High Court in Misc. Criminal Application No. 9 of 2003 and Misc. Criminal Application No. 41 of 2008 and order that the appellants may file applications for extension of time to appeal against the decision of the District Court of Iringa in Criminal Case No. 684 of 1998. We further direct the Judge in-charge for the High Court at Iringa to expedite hearing of the applicationsfor extension of time should the appellants opt to do so andif such applications succeed,their appeals should be fast tracked for reason that the appellants have been in prison since 1999.

Order accordingly.

DATED at **DAR ES SALAAM** this 5th day of September, 2019.

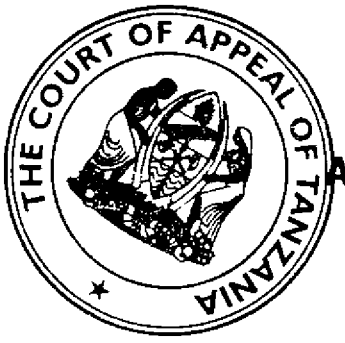
R.E.S. MZIRAY
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 30th day of September, 2019 in the presence of the Appellant in person and Mr. Alex Mwita learned State

Attorney, for Respondent/Republic, is hereby certified as a true copy of the original.



L. M. CHAMSHAMA
A.G: DEPUTY REGISTRAR
COURT OF APPEAL