IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., LILA, J.A And NDIKA, J.A.)

CRIMINAL APPEAL NO. 398 & 400 OF 2016

1. MATHEO PAULO
2. MAIGE MABALA @ HUSSEIN .....APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mallaba, J.)

dated the 11th day of October, 2016
in
Criminal Application No. 145 of 2016

JUDGMENT OF THE COURT

30th October & 6th November, 2019

LILA, J.A.:

The appellants, Matheo Paulo and Maige Mabala @ Hussein (the 1st and 2nd appellants, respectively), were aggrieved by the dismissal of their applications by the High Court (Mallaba, J.) in Misc. Consolidated Criminal Application Nos. 145 and 144 of 2016. In that application they were seeking enlargement of time within which to file notices and petitions of appeal to the High Court against the decision of the Resident Magistrates Court of Tabora at Tabora in which they were convicted for the offence of

armed robbery and each sentenced to serve thirty (30) years imprisonment. They have preferred the present appeal to the Court.

Having been aggrieved by the High Court decision, they preferred the present appeal each bringing to the fore four grounds of appeal comprised of both points of law and facts. The two memoranda of appeal raise common points of grievance which can be paraphrased thus:-

1. That the learned Judge erred in law for holding that filing of a notice of appeal is a prerequisite condition for the grant of extension of time sought.

2. That the delay was not inordinate.

3. That there was an illegality in the judgment sought to be impugned which warranted the grant of extension of time as there was no conviction entered and there was misapprehension of the nature and quality of evidence.

4. The re-composition of the judgment was done after dismissal of the application for extension of time.

A brief background of the facts from which this matter arose is short and straight forward. It goes thus: The appellants together with four others, were arraigned before the Resident Magistrates Court of Tabora for the offence of armed robbery contrary to section 287A of the Penal Code

Cap. 16 R. E. 2002. They were accused of forcefully taking from one Adam Anyosisye an assortment of items comprised of cash TZS. 20,000/=, mobile phone make vinko valued at TZS. 80,000/= and a motorcycle make SANLG Registration No. T 131 CFK valued at TZS. 2,100,000/=. As earlier stated they were convicted and each sentenced to serve thirty (30) years imprisonment. Aggrieved, only the appellants wished to appeal against that decision but they found themselves late to lodge both the notices and petitions of appeal to the High Court. Consequently, by way of chamber summonses supported by their respective affidavits which were identical in both form, contents, they filed separate applications, in the High Court applying for extension of time to lodge both the notices of appeal and petitions of appeal. Satisfied that no good cause was shown, the learned Judge (Mallaba, J.), dismissed the application.

At the hearing of the appeal before us the appellants appeared in person and had no benefit of legal representation whereas the respondent Republic had the services of Mr. Miraji Kajiru, learned State Attorney.

After they had adopted their respective memoranda of appeal, the appellants let the learned State Attorney respond to their grounds appeal first before they could rejoin in case they find it necessary.

In no uncertain terms, Mr. Kajiru supported the High Court decision to refuse to grant extension of time to the appellants. Arguing on the grounds of appeal generally, he said that there was no reason for the delay that was advanced by the appellants in both their respective chamber summons and the supporting affidavits. Elaborating, he said lodging the notice of appeal did not require the appellants to be served with the proceedings and judgment of the trial Court. For that reason, he said the Judge properly refused them extension of time because no good cause was shown. He accordingly urged the Court to dismiss the appeal.

When we asked him to address us on the new developments that happened after the delivery of the Judge's ruling, that is the existence of a re-composed judgment by the trial magistrate after the former one on which the appellants were found guilty and sentenced as above, he was of the view that the Judge was not aware of it when he determined the application otherwise he would have not dismissed the application but granted it so that the apparent illegality could be addressed by the High Court. As a way forward, he urged the Court to grant the appellants time within which to lodge the notices of appeal and thereafter lodge the petitions of appeal. That course, he proposed, will avail the High Court with

an opportunity to rectify the otherwise apparent illegality obtaining in the record.

On their part, both appellants, that being a legal issue for which they are laypersons hence not conversant, had nothing material to say but simply fully agreed with the learned State Attorney and urged the Court to accord them with an opportunity for their appeal to be heard and determined by the High Court.

As reflected above, the record bears that the instant appeal emanates from the ruling of the High Court dated 11/7/2016 in a consolidated Misc. Criminal Application No. 145 and 144 of 2016 which was instituted by the appellants. In order to appreciate the essence of the refusal, we find it compelling to reproduce in detail the contents of the 1st appellant's chamber summons and a supporting affidavit which were lodged in the High Court as an illustration of the nature of the application preferred by the appellants.

Starting with the chamber summons:-

*"**CHAMBER SUMMONS***

(Made Under Section 361 (2) of The Criminal Procedure Cap. 20. R. E 2002)

Let all parties concerned appear before Hon. Judge in chambers on 4th day of July 2016 at 8:30 o'clock in the morning or soon thereafter when the applicants application shall be heard in order that:-

1. ***That, this Honourable High Court be pleased to grant an extension to which to lodge petition of appeal plus with Notice of intention to Appeal out of the mandatory period.***
2. *That, any other legal remedy that the court may deem fit just to grant and equitable be provable.*

This Chamber Summons is supported by an affidavit of the applicant sworn on APPELLANT the other argument to be add sic at the hearing in supporting thereof

Given under my hand and the seal of the Court this 30th day of June 2016.

.....

DEPUTY REGISTRAR
HIGH COURT (T) AT TABORA"

The affidavits filed by the appellants, as stated above were also identical in every aspect, stated that:-

"AFFIDAVIT

I, MATHEO PAULO, a Tanzania, male, adult 31 years old of Islamic faith. Do hereby takes oath and categorically state as following inter-alia:-

1. *That, I am applicant to this instant application and the intended appellant in the above mentioned criminal case. Hence conversant with what I am dully adducing here below.*
2. *That, I am dissatisfied with the decision of the trial District Court of Tabora at Tabora for conviction and sentence of thirty (30) years in goal imposed on me in the offence of Armed Robbery contrary to section 287 "A" of the penal code Cap. 16 R. E 2002. Having regard to the case weight and the law applicable,*
3. *That,* ***the reasons attributed to my appeal delayment was due to the District Court for failure to supply my copy of judgment within time hence caused this delay.***
4. *That, I humbly pray that this application be granted and allow me to lodge petition of appeal out of time since the cause of delay was out of my control my Lord."*

Two things are apparent from the quoted chamber summons and the supporting affidavit. **Firstly**; that the appellants were applying for

extension of time to lodge notices and petitions of appeal (appeal) out of time. **Secondly**; that the reason for the delay was failure by the trial court to avail them with copies of judgment within time.

When the application was called on for hearing before the High Court on 04/07/2016, both appellants were in attendance but with no legal representation while the respondent Republic was represented by Miss Gladness Senya, learned State Attorney.

In the exercise of their right to elaborate their grounds for the application first, both appellants intimated to the court that they had nothing to add to what they had averred in their respective chamber summons and the supporting affidavit. Miss Senya, on her part, did not resist the application. She, expressing her sympathy with the appellants, was not hesitant to state that the delay in filing both notice and petition of appeal was caused by the delay in being served with copy of judgment hence they are not to blame. Then, the learned Judge reserved the ruling to 11/7/2016. Came the 11/7/2016, the ruling was delivered and the appellants' application for extension of time was dismissed. In doing so the learned Judge reasoned thus:-

"According to the two affidavits, which are quite similar, the applicants were convicted and sentenced to thirty (30) years imprisonment for the offence of armed robbery c/s 287 A of the Penal Code. The affidavits are silent as to the date on which they were convicted and sentenced. They are also silent as to whether the two applicants filed their respective notices of appeal and if so, when. They are now applying for extension of time within which to file Notice of Appeal and also extension of time within which to lodge their Petition of Appeal.

The only reason given by both appellants for the delay in filing the appeal is because of the delay by the District Court of Tabora to supply the copy of judgment.

In order for this Court to come to a conclusion that indeed the applicants applied for copies of judgment and probably proceedings, the applicants ought to specifically indicate that they gave their notice of intention to appeal within time. As such, it would have been expected that the applicants should have indicated the date on which the judgment of the District Court was delivered and also the date on which they gave their notice of intention to appeal. In the present application, the applicants have not indicated those important dates.

Further, the applicants are applying for extension of time to fiie their respective notices of Appeal. This means that they did not lodge any notice of appeal within the time of 10 days as required by section 361 (1) (a) of the Criminal Procedure Act (Cap. 20 R. E. 2002). No reason whatsoever has been given for any way dependent on getting copy of the judgment, the applicants cannot be said to have taken all the steps in their Court cannot be said to have delayed providing the necessary copy of judgment.

In all, no sufficient grounds [have] been given for the applicant's delay in appealing. In the circumstances, the applicant's application is dismissed." (Emphasis added)

Once objectively and carefully examined, it will be clear that the reasoning and finding of the learned Judge was patently faulty. It is vivid that the Judge slipped into error to treat that the filing of a notice of appeal, as rightly complained by the appellants in ground one of appeal, is an imperative and a condition precedent to the filing of an application for extension of time to lodge a notice and a petition of appeal. Since the appellants (then applicants), as reflected by their chamber summons, were

seeking enlargement of time to file notices of appeal and the appeals (petitions of appeal) it meant that they had not filed the same, for, had they done so that application would be a misconceived one as well as an abuse of the court process. They were actually asking for court's permission to lodge them outside the prescribed time.

However, we find it not inexpedient, as a reminder to judges confronted with similar applications, to expound legal position as to what they should consider before exercising their discretion to grant or otherwise refuse to grant extension of time. We shall demonstrate. As we have indicated above, the appellants were seeking an order enlarging the time within which to appeal to the High Court against the decision of the Resident Magistrates' Court of Tabora in Criminal Case No.109 of 2015 delivered on 8/4/2016. As was rightly stated by the learned Judge the appellants were, in terms of section 361(1)(a) of the Criminal Procedure Act Cap 20 R.E. 2002 (the CPA), required to give notice of intention to appeal within ten (10) days from the date of finding, sentence or order and also, in terms of section 361(1)(b) of the CPA, to file an appeal (petition of appeal) within forty five (45) days from the date they are served with the proceedings, judgment or order sought to be impugned. It can be inferred

from those provisions, on the one hand, that it is the filing of an appeal (petition of appeal) which should be preceded by the intending appellant being served with a copy of the proceedings and judgment. That is for an obvious reason that grounds of appeal are extracted from those documents. On the other hand, it imposes a duty on the intended appellant to, immediately upon being convicted and sentenced, show his intention to challenge that decision by lodging a notice of intention to appeal not necessarily after going through the proceedings or judgment. Preparation and filing of a notice of appeal requires no document from the court. It can also be deduced there from that the intending appellant who could not lodge those documents within time is obliged to take some necessary steps of applying for extension of time before doing so. It is trite law that in doing so the applicant is only concerned with showing good cause or sometimes referred to as sufficient cause why he should be given such extension or that he should furnish the court with the reasons for the delay [section 361(2) of the CPA]. That position was well elaborated by the erstwhile Court of Appeal for East Africa in the case of **Shanti v Hindocha & Others** [1973] E.A. 207 that:-

" the most persuasive reason that he can show... is that the delay has not been contributed by dilatory conduct on his part. But there may be other reasons and these are all matters of degree."

In view of the above exposition of the law, an application for extension of time will not be meritorious unless the applicant has, either explicitly or implicitly, disclosed in the application by affidavital evidence good cause for the delay. Filing of a notice of appeal is therefore not one of the considerations in applications for extension of time to lodge such notice. That said and with respect, it is obvious that there was a misdirection on the part of the learned Judge on what was actually before him and the relevant considerations. We accordingly agree with the appellants' complaint and we hold that it is meritorious. For that misdirection, the Judge's decision cannot be left to stand. It is quashed and set aside.

Ordinarily we would have ended there but the foregoing finding, by itself, will not automatically entitle the appellants a grant of extension of time. In that respect, we found it appropriate to consider the appellants' complaint in ground 4 touching on the existence of a re-composed

judgment which, admittedly, raised the attention of the Court and therefore prompted us to carefully peruse and examine the record of appeal. We, indeed, realized that apart from the trial court judgment dated 8/4/2016 which culminated in the appellants' incarceration in prison for thirty (30) years, there is yet another judgment by the same magistrate termed "**RE-COMPOSED JUDGMENT**" dated 21/3/2018. As was the case with the former judgment, the appellants were in attendance when the re-composed judgment was rendered. In justifying the course he had taken, the learned trial magistrate indicated that:-

> *"Hon. Justice Utamwa, J. in passing through the proceedings of the trial court and judgment passed thereto, discovered that the trial court passed the sentence without convicting the accused persons."*

We had the opportunity of perusing the whole record which, unfortunately, we have found to belie the trial magistrate. Such serious implication of the Judge is not supported by the record for; we could not come across the judge's direction to that effect. That way we are able to see and appreciate the strength of the appellants' complaint. Suffice it to say, without deciding, that it is settled law that after a trial magistrate has

rendered his decision he becomes ***functus officio*** the record (see **Tanzania Telecommunications Co. Ltd and Two Others v TRI Telecommunications Tanzania Ltd,** Civil Revision No. 62 of 2006). Re-composing a judgment on the same matter which he had already rendered a judgment on and recalling the parties (then Republic and accused persons) after a period close to two years for the purpose of entering a conviction purportedly not contained in the former judgment in the absence of a judicial order by a superior court was a procedure the propriety (legality) of which was arguable.

It is for the above fundamental reason that we asked, the learned State Attorney to address us on whether had the above development or circumstances brought to the attention of the Judge prior to delivery of the impugned ruling, he would have still not granted extension of time. Mr. Kajiru irresistibly and unequivocally pointed out that, that was a serious illegality which would have warranted the grant of extension of time so as to pave way for the illegality to be addressed by the High Court. As a remedy, he proposed that we grant extension of time to the appellants.

We entirely agree with the learned State Attorney. We are alive that, in terms of Rule 47 of the Tanzania Court of Appeal Rules, 2009 (the

Rules), the Court and the High Court have concurrent powers to grant extension of time but that power is limited to applications for enlargement of time to appeal from the High Court or the subordinate court exercising extended powers to the Court only. The Court is also vested with discretionary powers, in criminal cases, to extend time even where no such application was made to the High Court. Much as we appreciate and cherish that stance, we are convinced that this being a Court of record is endowed with powers, in the rarest of cases and in exceptional and peculiar circumstances to grant extension of time so as to avail an opportunity to the appropriate appellate court to investigate and correct a manifest wrong or illegality apparent on the face of the record for the purpose of furthering the just determination of cases. In the present case, the appellants' application for extension of time was dismissed by the High Court to which their resort is therefore completely shut out. More so, even if afforded that opportunity their application is unmerited for, as demonstrated above, the chamber summons and the supporting affidavit revealed no good reason for the grant of extension of time. But, of significance, the procedure adopted by the trial magistrate the legality of which is questionable still obtains in the record which cannot be rectified

and remedied unless the appellants are given a chance to appear before the High Court. In Principle, illegalities should not be left unattended otherwise they are prone to not only mislead and misdirect readers but also may create bad precedents. We are reinforced in that view by the Court's observation in the case of **Elia Underson v Republic**, Criminal Application No. 2 of 2013 (unreported) that:-

> *"Among the "other reasons" contemplated in the **Shanti case** (supra) is the issue of "illegality of the decision being challenged". This, as held in the case of **Principal Secretary, Ministry of Defence and National Service v Devram Valambia** [1992] TLR. 185, can be another persuasive reason for granting an extension of time if well demonstrated by the applicant."*

With the above considerations in mind, we find the circumstances obtaining in this case to be peculiar hence a fit case in which we can step into the shoes of the High Court and do what it ought to have done had it been aware of the questionable procedure adopted by trial magistrate to extend time to the appellants within which to file both the notices and petitions of appeal. That said, the appellants are granted ten (10) days

within which to file notices of appeal and thereafter, in terms of section 361(1)(b) of the CPA, they have to lodge their appeal (petition of appeal) within forty five (45) days from the date of service to them of the trial court proceedings and judgment if not yet supplied.

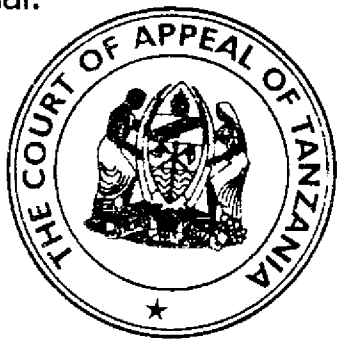
DATED at TABORA this 5th day of November, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of November, 2019 in the presence of Mr. Tumaini Pius, learned State Attorney for the respondent/Republic and Appellants appeared in person, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL