IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A, WAMBALI, J.A And SEHEL, J.A)

CRIMINAL APPEALS NO. 432 & 433 OF 2017

1. MATHEW CHRISTOPHER
2. JUMA MAZABILA .....**APPELLANTS**

VERSUS

REPUBLIC.....**RESPONDENT**

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

(Utamwa, J.)

dated the 14th day of September, 2016
in
Criminal Application Nos. 83 & 84 of 2016

JUDGMENT OF THE COURT

29th November & 10th December, 2019

LILA, J.A.:

The appellants' quest to appeal to the High Court against the decision of the District Court of Nzega in Criminal Case No. 38 of 2015 was thwarted following their applications for extension of time to file both the notice of intention to appeal and the petition of appeal being refused by the High Court in Criminal Application No. 84 of 2016. Aggrieved, they preferred the present appeal.

Admittedly, the grounds of appeal raised by both appellants are difficult to comprehend, but upon our reading into them, we were able to single out at least one crucial point of complaint that:-

> *The Honourable Judge erred to dismiss their application without considering that being prisoners and under restraint, they prepared their notices of appeal and handled them to the prison authority for onward transmission to the High Court but could not press the prison authority to make sure that the same reached the High Court and on time.*

A brief background to this appeal is simple and straight forward. The appellants were arraigned before the District Court of Nzega where they faced a charge constituting two counts, namely; **1st Count**: being in unlawful possession of fire arm contrary to section 4(1) of the Arms and Ammunition Act, Cap. 223 R. E. 2002 (the Act) and **2nd Count**: Being in unlawful possession of ammunition contrary to section 4(1) of the Act. They were convicted as charged and were each sentenced to pay TZS. 3,000,000/= or serve fifteen (15) years imprisonment. Much as the omnibus sentence meted out left a lot to be desired in that having found the appellants guilty with both counts but imposed only one sentence for each appellant, we shall not disturb it now but leave it

to be dealt with by the appropriate first appellate court. However, they were aggrieved but found themselves late to lodge both notices of appeal and petitions of appeal. They, accordingly, in terms of section 361(2) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA), lodged separate applications for enlargement of time; the 1st appellant's application was (HC) Misc. Criminal Application No. 84 of 2016 and that of the 2nd appellant was (HC) Misc. Criminal Application No. 83 of 2016. In both applications, the applicants raised two common reasons as a cause of delay. For purposes of discussion in this appeal, therefore, we shall recite those reasons as contained in only one of the two applications without any alteration. They state:-

> *"3. That, the reasons attributed to my appeal delayment (sic) may be summarized as following Inter-alia;-*
>
> *a)* ***After being convicted by the trial District court of Nzega at Nzega and entered in to the prison at the same day I expressed my desire on appeal and I filed notice of intention to appeal and handed it over to the prison officer for being forwarding it to the high court of Tanzania at Tabora to show my intention on***

appeal *in further conformity I would like to attach the copy of the said notice of intention to appeal I humbly submit.*

b) After one stage of filing notice of intention to appeal I wrote a letter requesting copy of judgment for purpose of preparation of my petition of appeal but up to day no copy of judgment was issued to me and the time prescribed to lodge petition of appeal have been lapsed hence this application before your honorable court.

4. That, the cause of delay in lodging petition of appeal was due to the District court magistrate for failure to issue out my copy of Judgment as provided under section 313(1) of the criminal procedure Act Cap.20 R.E 2002. Hence cause of this unnecessary delay." (Emphasis added)

The two applications were consolidated, heard and determined in Misc. Criminal Application No. 83 of 2016.

In its final verdict, the High Court, found no merit in both applications and dismissed them. The learned Judge reasoned that the

appellants did not attach the notices of appeal to their respective affidavits as they had indicated in their respective affidavits, they did not indicate the date they were convicted and sentensed and the date they applied for copies of judgment from the trial court, and lastly, as they had blamed the prison authority for not forwarding their notices and petitions of appeal to the trial court which convicted them then, relying on the Court's decision in the case of **Mary Lugomola vs Rene Pointe**, Civil application No. 2 of 1992 (unreported), to substantiate their assertions, the appellants ought to have secured an affidavit from the responsible prison officer who was pivotal to that inaction.

Before us, as was the case in both courts below, the appellants appeared in persons and were unrepresented. The respondent Republic enjoyed the services of Ms. Mercy Ngowi, the learned State Attorney.

When they were invited to elaborate on their grounds of grievances after they had adopted them, both appellants deferred that right to a later stage after they have heard the learned State Attorney argue the appeal. In that accord, Ms. Ngowi took the floor first.

Ms. Ngowi opted to argue the appeal generally. After she had a glance on the appellants' chamber summonses and the supporting affidavits, she was, as opposed to the learned State Attorney who

appeared before the High Court, satisfied that the appellants had shown that they prepared their respective notices of appeal and presented them to the prison officers for transmitting them to court and as prisoners they could do no more to ensure that the same were sent to court. Looking at the chamber summonses, she argued, it is clear that the appellants were applying for extension of time to lodge both the notices of appeal and the petitions of appeal hence they had nothing to annex to their affidavits in support of their applications. For her, considering that they were under restraint, that amounted to good cause for the delay that would have had warranted the High Court exercise its discretion to grant the appellants' applications for extension of time.

The encouraging words by the learned State Attorney pre-empted the appellants who simply fully agreed with her without more.

In order to appreciate the quintessence of the appellants' applications before the High Court, we find it apposite that we should reproduce the grounds of their applications as reflected in their respective chamber summonses, which were identical in all aspects:-

> "*"3. That this honorable* ***High Court be pleased to grant an extension of time to lodge notice***

of intension to appeal together with petition of appeal out of time on reasons stated in the attached affidavit.

4. *That any other legal remedy that the court may deem fit just to grant and equitable be provable."*

It is discernable from the contents of the chamber summons that the appellants' application was anchored on seeking enlargement of time to file both notices of appeal and petitions of appeal. It needs no overemphasis that the contents in the affidavits are intended to provide facts elaborating on the grounds of an application. They contain deposed facts supporting the chamber application. With that in mind, a chamber summons and a supporting affidavit must be read conjunctively and not disjunctively. In the circumstances, we have no flicker of doubts that had the learned Judge properly directed himself he would have not failed to realize that the appellants were faced with the problem of expressing themselves properly. Most probably, language barrier dragged them into bringing into the affidavits not only irrelevant facts but also some facts which seemed to defeat the purpose of their applications. In situations where it is plain that the intending appellant is unrepresented by a lawyer, is faced with a problem of language barrier and is incarcerated in prison such that he is unable to freely seek and

get any assistance, as is the case herein, the interest of justice, in our view, demands that the minds of the intending appellant be interpreted by reading contextually the contents of the documents he has presented to the court. Treating him otherwise is tantamount to allowing issues such as language barrier to impede the course of justice. That will be perverse. In line with that, we agree with the learned State Attorney that, reading into the appellants' chamber summonses and the supporting affidavits, it is deducible therefrom that the appellants were late in lodging both notices of appeal and petitions of appeal and they were seeking for extension of time to lodge them. In all fairness, we think that understanding should be taken as the right expressions and intention of the appellants. It therefore goes without saying, as hinted above, that the major reason advanced by the appellants for the delay that stems out from the appellants' applications is that, as prisoners and under restraint, their mandate is limited to preparing necessary documents for appeal and hand them over to the prison officers for onward transmission to the relevant court.

Turning to the present appeal, the crucial issue for our consideration and deliberation is whether the appellants had shown

good cause warranting the High Court to exercise its discretion to extend time to give notices of appeal and lodge petitions of appeal.

In terms of the provisions of section 361(1)(a)(b) and (2) of the CPA, a person who is aggrieved by the decision of the District Court or Resident Magistrates Court, is required to give his notice of intention to appeal within ten (10) days from the date of the finding, sentence or order and has to lodge a petition of appeal within forty-five days (45) from the date of the finding, sentence or order. In addition, the High Court is, in terms of section 361(2) of the CPA, vested with discretionary powers to admit an appeal outside the above prescribed periods of time upon good cause being shown. Although that section is not express enough as to what should be done by the aggrieved party who is late to lodge both a notice of appeal and a petition of appeal, in the case of **Renatus Muhanje vs Republic**, Criminal Appeal No. 417 of 2016, the Court observed that:-

> *"Although that provision does not talk of extension of time, we are of the view that the words "The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed," certainly, means it has powers, upon good cause being shown, to extend time within*

which to give notice of intention to appeal and lodge an appeal."

Admittedly, the term "good cause" sometimes referred to as "sufficient reason" is not defined, but in **Shanti vs Hindochie & 11 Others** (1973) EA 207, the defunct Eastern African Court of Appeal attempted to consider the term "sufficient reason" and said:

"The more persuasive reason ... that he can show is that the delay has not been caused or contributed by dilatory conduct on his part. But that is not the only reason".

(See also **Veronica Fubile vs The National Insurance Corporation & 2 Others,** Civil Application No. 168 of 2008 (unreported).

The court's power to grant extension of time is discretionary which should, however, be exercised judiciously. The circumstances of each case take precedent in gauging whether or not the reason(s) for the delay advanced amounts to good cause. We find that guidance in the case of **African Airlines International Ltd vs Eastern and Southern African Trade Development Bank** [2003] 1 EA 1 (CAK) where the defunct East African Court of Appeal held that :

"In an application for extension of time, the discretion which falls to be exercised is

unfettered, and should be exercised flexibly with regard to the facts of the particular case."

With the above exposition of the law on extension of time, we now revert to consider the merits of the appeal. Without any hesitation, we must at the outset state that we entirely agree with the learned State Attorney that the High Court was not justified to refuse the grant of extension of time to the appellants.

In refusing extension of time, the learned Judge held that there was need for the appellants to prove that they prepared their notices and presented them to the prison authority for onward transmission to the court. According to him, an affidavit by the responsible Prison Officer would be sufficient. With respect to the learned Judge and the learned State Attorney who resisted the applications in the High Court, the circumstances under which the prisoners are placed have consistently been a subject of the Court' special consideration in applications for extension of time and the Court has always cautiously treated such applications. We shall demonstrate.

In the case of **Sospeter Lulenga vs Republic,** Criminal Appeal No. 108 of 2006 (unreported), the appellant raised as a ground for the delay that the Officer Incharge of Mpwapwa prison delayed in

transmitting to the Registrar of the High Court. That reason was found not appealing by the High Court (Mjasiri, J. as she then was). One of reason for the refusal was that there ought to have been a supplementary affidavit by the Prison Officer Incharge to that effect. On appeal, the Court held that that reason amounted to good cause for the delay and went further to say that it was not possible for the appellant to obtain a supplementary affidavit from the responsible officer which could expose his inefficiency hence adversely affect his prospect.

In yet another decision, in the case of **Nduruwe Hassan vs Republic**, Criminal Appeal No. 70 of 2004 (unreported), the impeding circumstances obtaining in the prison in lodgement of notices of appeal and petitions of appeal in court was raised as constituting good cause of delay. This time around was the breakdown of a typewriter in the prison for typing prisoners' documents. The High Court (Kaganda, J. as she then was) refused to grant extension of time. In reversing that decision, the Court observed that, in the absence of evidence to the contrary, it was unfair for the High Court to reject the explanation given by the applicant and it found that reason to be good cause for the delay.

We think the two scenarios, to a large extent, resembled the situation which obtained in the appellants' applications for extension of time before the High Court. They attributed the delay to the prison

authority's failure to transmit their notices of appeal documents to the High Court. Like in the case of **Sospeter Lulenga vs Republic** (supra), in the ordinary course of things, no single officer from the prison would be ready to depose an affidavit seeming to implicate him with the inaction as the learned Judge suggested. Adopting the reasoning of the Court in the case of **Nduruwe Hassan vs Republic** (supra) and given that apart from the general objection by the respondent in the counter affidavit, there was no evidence contradicting what the appellants had stated, we find that there was no justification for the High Court to refuse the applicants' prayer for extension of time. The reason advanced by the appellants amounted to good cause of delay.

In the result, we allow the appeal, set aside the High Court decision refusing grant of extension of time. We hereby proceed to extend time to lodge both notices of appeal and petitions of appeal from the trial court to the High Court as was requested by the appellants. They are each given ten (10) days from the date of this order within which to lodge a notice of appeal and thereafter lodge a petition of appeal within forty five (45) days from the date of service to them of the proceedings and judgment of the trial court. We direct, in the event the appellants comply with the above order, the hearing of the appeal

should be expedited due to the time the appellants have spent in prison struggling to access the High Court by way of an appeal.

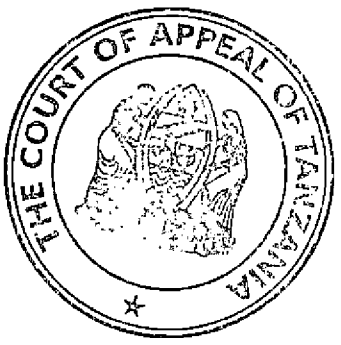
DATED at **TABORA** this 6th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2019 in the presence of the appellants in person and Mr. John Mkony, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL