IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEALS NO. 429 & 430 OF 2016

BUNDALA S/O ABDALLAH @ JUMA .....1ST APPELLANT

NTINGINYA S/O MASANJA.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mallaba, J.)

Dated the 14th September, 2016
in
Miscellaneous Criminal Applications No. 188 Cf 189 of 2016

JUDGMENT OF THE COURT

6th & 12th December, 2019

WAMBALI, J.A.:

The appellants, Bundala s/o Abdallah @ Juma, and Ntinginya s/o Masanja were convicted on 29th November, 2007 by the District Court of Nzega in Criminal Case No. 187 of 2006 of the offences of Armed Robbery, Burglary and Theft which were preferred in five counts. Consequently, they were sentenced to imprisonment for thirty years, ten years, five years, ten

years and five years for the first, second, third, fourth and fifth counts respectively. The trial District Court directed that the sentences should run concurrently.

It is noted that despite being aggrieved by both the convictions and sentences, the desire of the appellants to appeal to the High Court against the findings of the District Court could not be realized within the prescribed period of limitation in terms of Section 361(1)(a) of the Criminal Procedure Act, Cap. 20 R.E.2002 (the CPA). However, as they were still minded to have their grievances heard by the High Court, they lodged two separate applications (Nos. 188 and 189 of 2016) seeking extension of time within which to lodge the notice of appeal out of time.

As the said applications emanated from the same criminal case and the affidavits were similar, the High Court (Mallaba, J.) consolidated them and heard the submissions of the parties in support and against the prayer for extension of time. In the end, the learned High Court judge dismissed the appellants' applications for lacking merit. It is noteworthy to state that in reaching that decision, the learned High Court judge reasoned as follows:

"The applicants were convicted and sentenced on 29/11/2007. They claim to have given their Notices of Appeal on 30/11/2007, which they claim they gave to their prison authorities. It is now closer to 9 years since they gave their Notices of Intention to appeal. There are no follow up letters or complaints attached to the supporting affidavit. There is no Affidavit by the Prison authorities to indicate that, indeed, the applicants filled their Notices of Intention to appeal and what happened to those Notices of Appeal. All these put together, make it unlikely that the applicants gave their Notices of Intention to appeal. It is highly probable in these circumstances that the applicants' intentions to appeal has come as a mere afterthought."

The appellants were seriously aggrieved by that decision, hence the present appeal before the Court.

The appellants' dissatisfaction with the decision of the High Court is expressed in two separate memoranda of appeal, each comprising of four grounds of appeal, which are almost similar.

During the hearing of the appeal, the appellants did not have the services of learned advocates and therefore, they appeared in person. On the

other hand, Mr. Tumaini Pius learned State Attorney entered appearance for the respondent Republic.

When the appellants were invited to argue their appeal, they respectively urged us to let the learned State Attorney respond to their grounds of appeal, but reserved the right to rejoin if need would rise.

On his part, Mr. Pius, at the very outset, supported the appeal of the appellants. The learned State Attorney submitted that his support for the appeal is based on the sole ground that, it was too demanding in the circumstances of the application which was before the High Court for the learned judge to have insisted that, in order to explain the delay in lodging the notices of appeal and petitions of appeal, the appellants were required to have secured the affidavit from the responsible prison officer, whom they claimed to have given the said documents for transmission to the court.

It is noteworthy that the learned State Attorney was essentially responding to the first ground of appeal in the first appellant's memorandum of appeal which can be paraphrased thus:

> The learned judge of the High Court wrongly dismissed the appellants' application because there was no affidavit of the prison authority to support the application.

Mr. Pius differed with the reasoning of the learned judge, which we have reproduced above, and maintained that, it would have been impracticable for a prison officer to have accepted the request of the appellants to lodge the requisite affidavit explaining his failure to transmit the notices of appeal, as that could have brought him into trouble. In the circumstances, he argued that since the appellants attached the copies of the notices of appeal which they duly signed, but were not transmitted to the High Court by the prison officer in charge as required under section 363 of the CPA, they had performed their part. He added that in essence, the appellants could not have gone further to press the responsible prison officer to depose an affidavit who they are under his control.

In this regard, the learned State Attorney implored the Court to allow the appeal and grant the appellants extension of time within which to lodge the respective notices of appeal and petitions of appeal.

Having heard the submissions and prayer of the learned State Attorney in support of their appeal, both appellants agreed with his explanation in their favour that, what they stated in their affidavits amounted to good cause for extension of time.

On our part, considering the affidavits of the applicants which were placed before the High Court in support of their application for extension of time, we entirely agree with the learned State Attorney that, had the learned judge considered what was expressed by the appellants therein, concerning their earlier futile efforts to lodge the respective notices of appeal before the same court despite being in custody, he would have found that their applications had merit.

As we have acknowledged earlier, since the appellants' affidavits before the High Court were similar, we deem it appropriate to reproduce paragraph 9 of the second appellant's affidavit to demonstrate what was stated in support of the application:

> *"That, on 4.6.2016 I filed petition of appeal to this court, but the same was returned back on the same day for lack of Notice of Appeal i.e. my Notice of*

Appeal was not received by the court, hence this application for extension of time within which to file both notices of appeal and petition of appeal to this court out of time. The copy of Notice of Appeal which I was filed earlier was attached to this application and marked as annexure "A".

Admittedly, according to the record of appeal, the respondent Republic did not lodge any counter affidavit to challenge that accession of the appellants in respect of that averment. However, the learned State Attorney who appeared at the hearing of the application before the learned judge simply argued orally disputing the contents of paragraph 9 of the said affidavits. Indeed, it was the learned State Attorney who argued that even though the appellants were under custody, they were supposed to have advanced sound reasons which should have been accompanied with the affidavit of a prison officer.

It is most unfortunate that, although the learned judge applied that reasoning of the learned State Attorney concerning the requirement of lodging the affidavit of the prison officer to explain and support the delay of the appellants in lodging the notices of appeal, nonetheless, in his three pages ruling, there is no mention at all of what the respondent Republic's side stated

in court at the hearing. Indeed, in respect of the application as a whole there is no indication in the ruling whether the appellants' consolidated applications were contested by the respondent Republic or otherwise. On the contrary, what is indicated is that on the date of delivery of the ruling parties were represented by one Miss Senya, learned State Attorney for the respondent Republic and the appellants who appeared in person. More importantly, on a thorough perusal of the ruling, it is not shown that the learned High Court judge discussed at length on whether what the appellants deposed in their respective affidavits amounted to good cause to deserve extension of time or otherwise. This was important given the fact that, the respondent Republic's arguments did not feature at all in the ruling, serve for the proceedings. In this regard, we have no hesitation to state that it was imperative for the learned judge to have discussed and considered the arguments of both sides to the applications before he came to the conclusion whether to dismiss or allow the applications.

We wish to stress that since the duty of the intending appellant who is in prison is to present his respective notice of appeal duly signed by him to the prison officer in charge for onward transmission to the respective court in

terms of Section 361(1)(a) of the CPA, it follows that, once it is established that he duly signed and presented it, he must be deemed to have performed his part. The other part must be performed by the responsible prison officer as required by law.

It is in this regard that even the petition of appeal is supposed to be presented to the prison officer in charge in terms of Section 363 of the CPA which states as follows:

> *"If the appellant is in prison, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison, who shall thereupon forward the petition and copies to the Registrar of the High Court."*

Therefore, while it is the duty of the intending appellant who is in prison custody to hand in the respective notice of appeal and petition of appeal to the prison officer in charge, it is equally the duty of the responsible prison officer to ensure that the requisite documents are transmitted to the respective court.

In the circumstances, once the respective intending appellant establishes that he duly signed the notice of appeal and gave it to the prison officer in

charge, to demand him to secure an affidavit from the respective prison officer whose role is provided by law, is to place a greater burden on the appellant. It is therefore not surprising that in **Buchumi Oscar v. The Republic**, Criminal Appeal No. 295 "B" of 2011 (unreported), the Court observed as follows:

> *"In essence, therefore, an intending appellant faced with that situation is at the mercy of the prison officer, so to speak. In this regard, it may sometimes be unfair to expect too much from the intending appellant operating under those circumstances. In fact, it may not also be that easy to expect a prison officer to swear an affidavit deposing that he/she was responsible for delay..."*

Yet, in **Alfred Chunga v. Republic**, Criminal Appeal No. 73 of 2008 (unreported) the Court stated thus:

> *"...It would, we think, be expecting too much to demand a prisoner/appellant to obtain and file an affidavit sworn by a prison officer, hanging his own neck that he was responsible for the delay..."*

Similarly, in **Sospeter Lulenga v. Republic**, Criminal Appeal No 108 of 2006 (unreported), the Court allowed the appellant's appeal in which the High Court had refused to extend time based on more less similar facts. In that case, the reason for delay which was advanced by the appellant before the High Court was that, the officer in charge of Mpwapwa Prison had delayed in submitting his notice of appeal to the Registrar of the High Court. On appeal, the Court observed that the appellant demonstrated good cause since his allegation in the application was not countered by the respondent Republic through the affidavit. Besides, the Court stated that it was not possible to secure a supplementary affidavit from the responsible officer which could adversely affect his prospect. [See also **Nduruwe Hassan v. Republic**, Criminal Appeal No 70 of 2004 (unreported)]

Therefore, in the present appeal, we are of the settled opinion that, in the absence of any evidence from the respondent Republic to contradict the appellants' averment in paragraph 9 of their respective affidavits, the learned judge was not justified to dismiss their applications on the reason that no affidavit from the prison officer was attached thereto. In the circumstances, we are of the view that, the learned judge was not required to interpret the

meaning of 'good cause' narrowly but widely to encompass a situation where the applicant's delay is caused by the person in control of his affairs or movement.

At this juncture, it is instructive to make reference to the decision of the Court in **Yusufu Same and Hawa Dada v. Hadija Yusufu**, Civil Appeal No 1 of 2002(unreported) where it was observed that:

> *"the term 'sufficient cause' should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power of control or influence resulting in delay in taking any necessary step".*

In the event, we think that had the learned judge examined the affidavits which were before him in the context of what we have stated above, and taken into consideration the guiding factors in granting an application for extension of time, he would have properly and judiciously exercised his discretion to grant the appellants extension of time within which to lodge the notices of appeal and petitions of appeal.

From the foregoing deliberation, we allow the appeal. In the result, we accordingly order that the appellants should lodge their requisite notices of

appeal within ten days from the date of the delivery of the ruling followed by the petitions of appeals within forty five days upon being supplied by the trial court with the record of proceedings and judgment. It is so ordered.

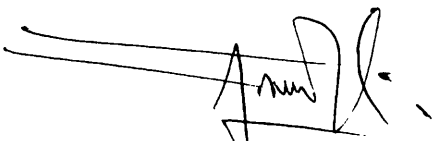
DATED at **TABORA** this 12th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2019 in the presence of the appellants in person and Mr. Tumaini Pius, 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