

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

CRIMINAL APPEAL NO. 417 OF 2016

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

RENATUS MUHANJE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from order of the High Court of Tanzania at Songea)

(Manento, J.)

Dated the 31st day of March, 2003

in

Criminal Application No. 20 of 2016

JUDGMENT OF THE COURT

8th & 13 May, 2019

LILA, JA.:

The present appeal has caused us a lot of anxiety. It is about eighteen years now the appellant's efforts to have his first appeal heard by the High Court have not borne fruits. Way back to the 19/9/2000, the appellant was arraigned before the District Court of Songea with the offence of rape contrary to sections 130 and 131(1) of the Penal Code Cap. 16 R. E. 2002 (The Code). On 7/2/2001, he was found guilty of the offence, convicted and sentenced to serve a life imprisonment subject to confirmation by the High Court. It was further ordered that all the six

heads of cattle belonging to the appellant be attached and handed to the victim as compensation. Aggrieved, he wished to appeal to the High Court but, unfortunately, he found that he was late to give notice of appeal and to file an appeal. Consequently, on 09/05/2002 he unsuccessfully filed an application for leave to serve notice of appeal and to file an appeal out of time, for, apart from dismissing the application, the High Court (Manento, J. as he then was), invoking his powers to confirm the sentence meted out by the trial court, reduced the sentence to thirty (30) years imprisonment and also ordered the appellant to suffer twelve strokes of the cane.

Aggrieved by the refusal to enlarge time within which to lodge both the notice of appeal and the appeal out of time, the appellant has preferred the present appeal seeking to impugn the High Court decision on a memorandum of appeal constituting of six (6) grounds of grievances. Read closely, apart from giving the historical background of the case, those grounds boil down to only one ground that the High Court did not properly consider his two reasons for the delay in lodging both the notice of appeal and the appeal. The reasons he advanced were, **one**; that he being a prisoner had no control over the appeal process after he had indicated his desire to appeal and signed the

relevant documents and, **two**; he was transferred to Ukonga prison immediately after his incarceration.

Before us, when the appeal was called on for hearing, the appellant appeared in person and was unrepresented whereas the respondent Republic was represented by Ms. Hellen Chuma, learned State Attorney.

At the commencement of the hearing, the appellant adopted the grounds of appeal he had earlier on lodged without more and urged the court to allow the appeal so as to pave way for him to lodge his appeal before the High Court out of time.

On her part, Ms. Chuma, at first took the position that she was not supporting the appeal on the ground that there was no proof including an affidavit by the Prison Officer Incharge that the appellant was transferred from Songea Prison to Ukonga Prison. However, on reflection that the appellant's application for extension of time before the High Court was not resisted following the respondent Republic's failure to file a counter affidavit, she retreated and supported the appeal. She contended that the appellant's affidavit evidence was not controverted by a counter affidavit hence the facts as were averred by the appellant remained unchallenged hence true. She was of the view

that the reasons for the delay as were put forward by the appellant constituted good cause for the delay hence his appeal be allowed.

The issue before us for consideration is whether the appellant had shown good cause warranting the High Court to extend time to give notice of intention to appeal and file an appeal out of time.

The procedure of appealing from the District Court to the High Court is governed by the provisions of section 361(1)(a)(b) and (2) of the Criminal Procedure Act Cap. 20 R.E. 2002 (The CPA) which reads as follows;

"Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant—

(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and

(b) has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order,

save that in computing the period of forty-five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded.

(2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed”.

It is vivid that the appellant is required to give notice of intention to appeal within ten (10) days from the decision sought to be impugned and lodge a memorandum of appeal within forty-five days from the date of the impugned decision. However, the foregoing extract of subsection (2) of section 361 of the CPA vests the High Court with the mandate to admit an appeal notwithstanding that the period of limitation prescribed in that section has elapsed upon good cause for the delay being shown.

The record bears out clearly at page 12 that the impugned decision was delivered on 07/02/2001. The stipulated ten days within which the appellant was to give notice of intention to appeal and to lodge memorandum of appeal lapsed on 17/02/2001 and 24/03/2001, respectively.

As alluded to above, the appellant advanced two reasons in accounting for the delay. They are reflected under paragraphs 4, 5 and 6 of the affidavit in which he averred that he prepared a notice of appeal immediately after his incarceration and submitted it to the prison authority at Songea prison but before getting the copy of judgment he was transferred to Ukonga Prison in Dar es Salaam. He finally averred

that as he was a prisoner and under restraint the delay in submitting the notice of appeal was out of his control.

In his ruling, the High Court Judge was of the view that no good cause for the delay was shown. He reasoned that it could be inferred from the conducts of the appellant after being imprisoned that he had no interest to appeal, the appellant failed to disclose the dates when he was transferred from Songea Prison to Ukonga Prison so that the court could deduce as to whether the time was reasonable or not and that he stayed with the copy of judgment for ten months before lodging an application for extension of time.

Before we determine the merits of the appeal we find it imperative that we should address ourselves to the observation made by the Judge in his ruling that, we hereunder quote as follows:-

"Now, has the court any legal power to grant extension of period to give notice to appeal after expiration of the time prescribed under section 376 (a) of the Criminal Procedure Code, 1985, and appeal. There is no direct section of the law, talking of extension of period to give notice of intention to appeal. Even if there was one, then the question of good cause would have arisen."

While we are agreed with the Judge that in applications for extension of time the pertinent issue that arises is whether there is good cause for the delay to warrant the court exercise its discretionary powers to grant or otherwise the application, it does not occur to us why the judge made reference to section 376(a) of the Criminal Procedure Code bearing in mind that the application under his consideration was lodged on 9/5/2001 when the CPA was already in place and the application was predicated under section 361 of the CPA. And, as shown above, the High Court has, in terms of section 361(2) of the CPA, powers to extend the time to lodge a notice of intention to appeal. Although that provision does not expressly talk of extension of time, we are of the firm 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 the time within which to give notice of intention to appeal and lodge an appeal.

Now, reverting to the merits of the appeal, we are at one with the learned State Attorney that the High Court was not justified to refuse extension of time to the appellant. The situation under which the appellant found himself as reflected in the two reasons for the delay is not novel to our Court. The Court faced identical scenarios in the case of

Faraji Kitenge v. R, Criminal Application No. 9 of 2015 and **Mwita Mataluma Ibaso v. R**, Criminal Application No. 6 of 2013 (Both unreported). For instance, in **Mwita Mataluma Ibaso** case (supra) the applicant was convicted of the offence of manslaughter by the High Court (Mfalila, J. as he then was) sitting at Mwanza and was sentenced to a life imprisonment. He was imprisoned in Mwanza whereat he expressed his desire to appeal to Prison Officer Incharge. However, before being assured that his appeal process was initiated, he was transferred to Mtego wa Simba prison at Kinguluwira and later to Isanga Prison at Dodoma. The applicant raised, as one the reasons for the delay to file a notice of appeal to the Court, that he was transferred from one prison to another. After a careful consideration of the application, the Court stated that:-

*"Following the Court's observation in **Laurent Simon Magoso's Case** (supra), that good cause for delay should be considered bearing in mind the circumstances of each particular case, it is my view that, in the circumstances of this case, cross-country transfer of the applicant to two not only different Prisons but very far from the trial court made it difficult for the applicant to process appeal including lodging of notice of appeal. This reason therefore constitutes good cause for extension of time".*

We fully subscribe ourselves to the above position. Like in the above case, in the present case the appellant was imprisoned at Songea Prison where he prepared and submitted his notice of intention to appeal to the Prison Authority for onward transmission to the court but before he could process his appeal to its completion he was transferred to Ukonga Prison in Dar es Salaam. By analogy, we are accordingly inclined to agree with the learned State Attorney that the reasons for delay that were advanced by the appellant before the High Court constituted good cause. The High Court was therefore not justified to refuse the applicant's application for extension of time.

Ordinarily, we would have ended here, but we find ourselves obliged to state something on the view formerly held by the learned State Attorney that there was need for the appellant to prove that he was transferred from Songea Prison to Ukonga Prison. For her, an affidavit to that effect by the Prison Officer Incharge would be sufficient. With respect, the Court has occasionally treated with extreme care applications for enlargement of time within which to lodge notices of intention to appeal from inmates. To mention just two incidences in the case of **Sospeter Lunenga v. R**, Criminal Appeal No.108 of 2006 and **Nduruwe Hassan v. R**, Criminal Appeal No. 70 of 2004 (Both unreported).

In the case of **Sospeter Lulenga v. R** (Supra), the reason for delay raised by the applicant was that the Officer Incharge of Mpwapwa Prison delayed in submitting his notice of appeal to the Registrar of the High Court. The High Court (Mjasiri, J. as she then was) found it to be not good cause for the delay. The Court, on appeal, held that it was good cause because the applicant's allegation in the application was not countered by the respondent republic and that it was not possible to secure a supplementary affidavit from the responsible officer which could adversely affect his prospect.

In **Nduruwe Hassan v. R** (Supra), break down of the prison typewriter was relied by the applicant as a reason for the delay. The High Court (Kaganda, J. as she then was) refused extension of time to file an appeal. On appeal, the Court stated that in the absence of evidence to the contrary, it was not proper or fair for the High Court to reject the explanation given by the applicant and the Court found the applicant's reason to be good cause for the delay.

All said, the appeal is allowed with an order that the appellant should, through the prison authorities, give the notice of his intention to appeal within ten days from the date of the delivery of this judgment. Furthermore, again, through the prison officers the appellant should contemporaneously request for a copy of the proceedings and the

judgment sought to be impugned. Upon receipt of the proceedings and judgment, the appellant should thereafter lodge the appeal within forty five days from the date he received the documents. Considering the extremely long time the matter has taken in our courts, we direct that hearing of the appeal before the High Court be expedited.

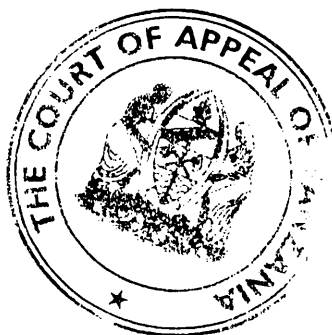
DATED at IRINGA this 10th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL