IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 435 OF 2016

1. MANENO MUYOMBE
2. MASUMBUKO MUSA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Ruling of the High Court of Tanzania at Mbeya)
(Chocha, J.)

dated the 1st day of July, 2013
in
Misc. Criminal Application No. 54 of 2011
.....

JUDGMENT OF THE COURT

19th & 23rd August, 2019

NDIKA, J.A.:

When G.P.R. James famously remarked in his work, **Gowrie: Or, The King's Plot**, published on 27th June, 1848, London, UK, that the law's delay is proverbially "one of the banes of human existence even in the blessed land wherein we live," he might have not anticipated that his claim would still hold true almost two centuries later. While being a sobering illustration of how the wheels of justice turn slowly, this appeal brings to focus the apparent tribulations of Maneno Muyombe and Masumbuko Mussa, the appellants herein, who, for the past fifteen years, have been struggling to pursue an

appeal to the High Court, as the first appellate forum, against their respective convictions and sentences.

In essence, the appellants are now in this Court seeking the reversal of the decision of the High Court of Tanzania at Mbeya (Chocha, J.) dated 1st July, 2013 refusing them an extension of time to lodge their respective notices of intention to appeal to that court from the decision of Mbozi District Court at Vwawa (the trial court) in Criminal Case No. 35 of 2004.

The background to this appeal is briefly as follows: in the trial court the appellants were jointly charged, along with another person who is not a party to this appeal, with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 RE 2002. The trial ended with them being convicted on 12th May, 2004 as charged and sentenced to the mandatory term of thirty years' imprisonment. Although they were desirous of appealing to the High Court against the aforesaid conviction and sentence, they, in effect, filed no appeal. Neither did they give any notice of intention to appeal within ten days of the handing down of the impugned judgment in terms of section 361 (1) (a) of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) nor did they file their respective petitions of appeal within forty-five days prescribed by section 361 (1) (b) of the CPA.

Subsequently, the appellants sought to refresh their quest for appealing. Accordingly, they approached the High Court at Mbeya on 19th August, 2004 vide Miscellaneous Criminal Application No. 46 of 2004 seeking leave to appeal out of time but Mrema, J. refused that quest on 17th June, 2005. The said refusal was reversed by this Court, on appeal by the appellants (Criminal Appeal No. 101 of 2007), on 13th December, 2010, the Court having found that there was good cause for the delay warranting an extension of time pursuant to section 361 (2) of the CPA. Consequently, the Court granted the requested extension, thereby ordering the appellants to lodge their respective notices of appeal within ten days from the delivery of the judgment. Perhaps, we should pose and interject a remark that by this point six years had already passed by since the respective convictions against the appellants were entered by the trial court. Yet, they had not accessed the first appellate forum to challenge the conviction and sentence.

On the strength of the said judgment of this Court, the appellants went back to the High Court at Mbeya and each of them lodged an appeal, that is to say, Criminal Appeals No. 5 and 6 of 2011. Rather sadly, it turned out that the said appeals were lodged without the respective notices of appeal having been duly lodged. It is noteworthy that while the appellants were on 13th December, 2010 granted a ten days' extension by this Court to lodge their

respective notices of appeals, the record bears out that they had to wait until 28th January, 2011 to receive a copy of the Court's judgment and the corresponding extracted order. It was their contention that they lodged their respective notices on 3rd February, 2011, which was within ten days after being served with the Court's judgment and the order. Be that as it may, in the end the appellants had their appeals marked withdrawn by the High Court (Mmilla, J., as he then was) on account of the absence of notices of appeal.

Still undaunted, the appellants applied afresh to the High Court vide Miscellaneous Criminal Application No. 54 of 2011 under section 361 (2) of the CPA for enlargement of time to lodge their respective notices of appeal. In their accompanying affidavit, the appellants, in essence, blamed the delay on the prison authorities. They asserted that they duly expressed their intention to appeal to the Officer-in-Charge, Ruanda Central Prison, who then undertook to lodge their respective notices in time. The High Court was unimpressed; it dismissed the application on 1st July, 2013 on the reason that it was bereft of merit. We wish to excerpt the relevant part of Chocha, J.'s reasoning thus:

> *"The next issue is whether the applicants have shown sufficient reasons for this court to extend time. That was not possible to them. They do not seem to have forecasted the proper way forward. They came with confidence that they were in possession of the genuine*

documents (notices). They had no idea that the same would at all be disqualified. The applicants laboring under the erroneous confidence, came to court unprepared to show cause why they were late in filing the notices in the event the docs (sic) were unacceptable."

The appellants now challenge the said dismissal on several grounds of appeal whose thrust brings to question the learned Judge's refusal to enlarge time under section 361 (2) of the CPA.

At the hearing of the appeal before us, the appellants were self-represented while Mr. Ofmedy Mtenga, learned State Attorney, joined forces with Ms. Hanarose Kasambala, also learned State Attorney, to represent the respondent Republic.

When invited to address the Court on the appeal, the appellants basically bemoaned the High Court's refusal but expressed their belief that their application had met the threshold requirement of good cause.

On the other hand, Ms. Kasambala criticized the High Court for failing to consider and determine whether good cause for the delay existed in view of all circumstances of the case. She particularly attributed the delay in lodging the notices of appeal to the fact that the appellants were not served in good

time with the copies of the judgment of this Court and the extracted order allowing them to lodge the notices within ten days. She thus urged us to allow the appeal.

In view of the apparently promising stance taken by the learned State Attorney, the appellants declined the opportunity to rejoin.

Having considered the submissions of the parties and examined the record of appeal, we think that the sticking question in this appeal is whether there is any justification for this Court to interfere with the High Court's exercise of its discretion under section 361 (2) of the CPA. The said provision bestows the High Court with discretion in the following terms:

> *"The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed."*

It is trite that extension of time under the above provision is a matter of discretion on the part of the High Court but such discretion must be exercised judiciously and flexibly with due regard to the relevant facts of the particular case. By way of emphasis, we wish to recall what the Court stated in **Kassana Shabani & Another v. Republic**, Criminal Appeal No. 476 of 2007 (unreported) that:

"Since there appears to be a recurring or perennial problem, we would like to take this opportunity to make it clear that once an applicant under section 361 of the Act has satisfactorily accounted for the delay in giving notice of appeal or filing a petition of appeal, extension of time ought to be granted as a matter of right."

Furthermore, it is settled that this Court cannot interfere with the High Court's exercise of its discretion unless it is satisfied that the decision concerned was made on a wrong principle or that certain factors were not taken into account. We find it apt at this point to refer to **Mbogo and Another v. Shah** [1968] 1 EA 93, a decision of the erstwhile Court of Appeal for East Africa, which has been cited and applied in numerous decisions of this Court. The relevant passage is as per Sir Clement de Lestang VP at page 94 thus:

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision ***is clearly wrong, because it has misdirected itself or because it has acted on matters on whlch it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*** [Emphasis added]

We wholly subscribe to the above standpoint, which we think is equally applicable to the instant appeal questioning a High Court Judge's exercise of his discretion in a criminal matter.

Applying the above principles to the present appeal, we are satisfied that this is one of those cases where, with the greatest of respect, we have no hesitation in interfering with the exercise of the discretion of the learned Judge refusing the requested extension. In the first place, we find it startling that even though the learned Judge had clearly noted in his ruling that the failure by the appellants to utilise the ten days' extension of time granted by this Court for them to lodge their respective notices of appeal mainly arose from the delayed supply of the copies of the judgment of the Court and the corresponding extracted order, with respect, he ignored to take this crucial factor into account. That apart, we think the learned Judge should also have considered the particular circumstances of the appellants. Being inmates serving time in prison, the appellants invariably had no control over their affairs and that they were necessarily at the mercy of the Officer-in-Charge of their prison, as it were. In this regard, it was unfair to expect too much from them – see, for example, **Buchumi Oscar v. Republic**, Criminal Appeal No. 295 'B' of 2011; and **William Ndingu @ Ngoso v. Republic**, Criminal Application No. 3 of 2014 (both unreported).

Based on the foregoing analysis, we are of the clear opinion that if the learned High Court Judge had taken the two factors as discussed above he would have come to the conclusion that the appellants' pursuit for extension had exhibited good cause. In consequence, we allow the appeal and proceed to quash the assailed decision of the High Court. The appellants are granted leave to lodge their respective notices of appeal to the High Court against the decision of Mbozi District Court at Vwawa in Criminal Case No. 35 of 2004 within ten days from the date of delivery of this judgment and thereafter within forty-five days they shall lodge their respective petitions of appeal.

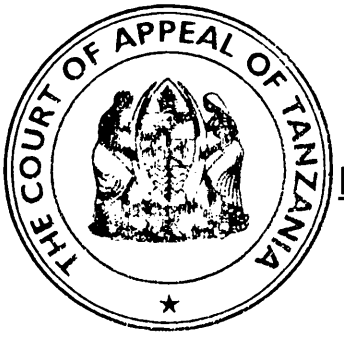
DATED at **MBEYA** this 22nd day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of August, 2019 in the presence of Mr. Ofmedy Mtenga, learned State Attorney for the respondent /Republic and the appellants in person is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL