IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., KOROSSO, J.A., and SEHEL, J.A.)

CRIMINAL APPEAL NO. 73 OF 2017

CLETUS MOKIROBA @ NYAGITA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(De-Mello, J.)

Dated the 20th day of February, 2017
in
Criminal Application No. 75 of 2016

....

JUDGMENT OF THE COURT

5th & 15th June, 2020

KOROSSO, J.A.:

Cletus Mokiroba @ Nyagita, the appellant, was charged and convicted of the offence of Corrupt Transactions, contrary to section 15(1)(a) of the Prevention and Combating of Corruption Act, No. 11 of 2007 (the PCCA). After a full trial he was sentenced to pay a fine of Tanzanian shillings (Tshs.) five hundred thousand (500,000/-) or to serve a sentence of two (2) years imprisonment.

The particulars of the charge laid against the appellant at the District Court of Serengeti at Mugumu were that the appellant on the 28th of June, 2013 at Maburi Village within Serengeti District in Mara Region being a Head Teacher of Moburi Primary School did obtain Tshs. fifty thousands (50,000/-) from Marko Kituma as inducement in order to use construction materials obtained from Maburi villagers contribution which is in relation to his principal's affairs. When invited to plea, the appellant denied the charge against him.

Subsequently, to prove its case the prosecution side fronted six witnesses, Marco Jumapili Kituma (PW1); Ladislaus Ibrahim (PW2); Thobias James (PW3); George Bashiru (PW4); Nyahiti Machapa (PW5) and Emmanuel Lighuda (PW6). Three exhibits were also tendered and admitted, namely, the trap money form (exhibit P1), money in cash Tshs. fifty thousand shillings (50,000/) in ten thousands notes (exhibit P2) and the appellant's cautioned statement (exhibit P3).

In order to appreciate what led to the apprehension, arraignment and conviction of the appellant, we find it pertinent to state the background of the matter albeit in brief. What is gathered from the prosecution evidence is that the appellant was a Head

Teacher at Moburi Primary School as of July 2012 and an employee of the Serengeti District Council. Between May and June, 2013, the Serengeti District Council spearheaded a project for construction of houses for school teachers in the District. Moburi Primary School was part of the project and PW1 was the appointed project contractor. PW1 was introduced to the appellant by the Ward Education Coordinator (WEC). The villagers brought some construction materials to the project site as part of their contribution to the construction work and PW1 was expected to use the said materials in the construction work there.

It was alleged that when PW1 went to the construction site with intention to start his work, the appellant, who had not participated in the contract signing, solicited a bribe of Tshs. One Hundred Thousand (100,000/-) so that he can allow PW1 to use the building materials at the site. This led PW1 to report the solicitation for bribe from the appellant to the office of the Prevention and Combating Corruption Bureau (PCCB). At the PCCB offices, a plan was hatched that PW1 negotiate with PW1 to give the appellant Tshs. fifty thousands (50,000/-) in advance. PCCB officers provided PW1 with trap money amounting to Tshs. fifty thousands (50,000/-)

in five (5) ten thousands notes and recorded the serial numbers of the respective notes. On the 28th June, 2013 upon receiving the said trap money, PW1 went to the appellant as agreed, and handed him the said cash while he was playing at a pool table. Soon thereafter, PW2, a PCCB officer, arrested the appellant. PW3 and PW4 witnessed the appellant's arrest and the trap money was seized from the appellant. The arrest of the appellant led to his arraignment, trial and conviction.

In his defence, the appellant denied involvement in the alleged corrupt transactions. To support his own sworn testimony he called two other witnesses, Antony Makemba (DW2) and William Makongera (DW3). The appellant conceded to the fact that he was given money by PW1 when he was playing pool with PW4, but that the said money was he was given to purchase paddy rice for his mother in law and some as a re-payment of money that PW1 owed him.

The trial court believed the prosecution account that the case against the appellant was proven and convicted the appellant. Aggrieved by the trial court's decision, the appellant initiated the process of appeal to the High Court of Tanzania Mwanza by applying

for proceedings and judgment though no notice of intention to appeal was filed. The appellant alleges that he fell sick a few days after the judgment was delivered and was hospitalized at KMT Nyerere Designated Hospital, that is, from 15th December, 2015 up to 3rd March, 2016. He stated further that by the time, he came out of hospital the time for filing the notice of intention to appeal has elapsed, and consequently, he filed an application to the High Court to seek for extension of time to lodge notice of intention to appeal out of time and also extension of time to file Petition of Appeal.

The High Court (De-Mello J.) ordered for the hearing of the application to be by way of written submissions within a designated schedule and thereafter in her Ruling, she dismissed the application by finding that it lacked merit.

The decision of the High Court judge displeased the appellant hence, the current appeal. The appellant through his counsel lodged a memorandum of appeal that comprise two grounds of grievance as follows:

1. *That, the Hon. Judge of the High Court erred in law for her failure to determine the 2nd ground of the application which was independent of the 1st ground*

and the same was touching the jurisdiction of the trial court.

2. *That, the Hon. High Court Judge erred in law by deciding the application on extraneous matters rather than facts which were deponed in the affidavit and counter affidavit filed by parties.*

At the hearing of this appeal, Mr. Deya Paul Outa, learned counsel represented the appellant whereas the respondent Republic enjoyed the services of Mr. Emmanuel Luvinga, learned Senior State Attorney.

Mr. Outa, commenced his submissions by stating that the grounds of appeal will be amplified seriatim. Expounding on the first ground of appeal, the learned counsel contended that despite the fact that the appellant had presented in the High Court two reasons for the delay in filing the notice of intention to appeal, the High Court judge had erroneously considered only one reason and refrained from considering the second reason. He argued that the prayers sought by the appellant in the High Court were twofold; **first**, to be extended time to file notice of intention to appeal to the High Court and **second**, that upon grant of the first prayer, time to file a petition of appeal be enlarged.

The learned counsel for the appellant maintained that the High Court judge failed to consider the second ground which related to irregularity and illegality in the conduct of proceedings of the trial court. He contended that this second reason, if it would have been considered, was enough to grant the prayers sought. That this ground was independent from the first ground and encompassed a point of law related to the jurisdiction of the court. He fortified this contention by citing two cases, that is; **Principal Secretary, Ministry of Defence and National Service vs Duram P. Valambhia** [1992] TLR 387 and **Marwa Michael vs Republic**, Criminal Appeal No. 120 of 2014 (unreported). Both cases addressed the fact that where there is a point of law raised it should constitute sufficient reasons to grant extension of time.

Mr. Outa argued further that, despite the fact that the parties were ordered to file written submissions, the High Court judge failed to properly scrutinize them especially those related to the second reason for the prayers sought. He averred that had the High Court judge properly analyzed the written submissions the fact that the second reason addressed the court's jurisdiction should have led the High Court to find that, this reason warranted consideration and then

granted the prayers for extension of time. The counsel for the appellant also faulted the High Court judge for stating that there was no need to proceed to address the second ground without assigning any cogent reason for discarding it. He argued that there is no doubt that the High Court judge misdirected herself and he thus prayed that the Court should step into the shoes of the High Court and determine the second reason advanced in the High Court and proceed to extend time for the appellant to file an appeal to the High Court.

With regard to the second ground of appeal, the learned counsel stated that upon further reflection there was no need to proceed arguing it and he thus prayed to withdraw the second ground of appeal. The learned counsel for the appellant concluded by urging the Court to find that the appellant did expound sufficient reasons to warrant his prayers for extension of time to be granted and grant the same and at the same time quash the High Court decision.

On the part of the respondent Republic, the learned Senior State Attorney commenced his submissions by extending his support to the appeal. Despite this stance, he somewhat qualified the

appellant's counsel contention that the High Court judge did not discuss the second reason for the delay found in the affidavit supporting the chamber summons, stating that she did consider this reason, but only in passing. He also conceded that the High Court judge failed to properly analyze the appellant's written submissions before her and only made a sweeping statement that the second reason had no legs to stand on, and that this was done when she was concluding her analysis and findings with respect to the first reason.

The learned State Attorney contended further that although the second reason before the High Court judge was not considered as expected, the ground has substance since it asserts on apparent illegalities in the proceedings of the trial court. That is, **one**, non-compliance with the procedure under section 214 (1) of the Criminal Procedure Act, Cap 20 Revised Edition 2002 (the CPA). This emanates from the fact that there was a succession of three presiding magistrates in the trial court at various stages without any reasons having been relayed on why either of the two predecessor magistrates failed to proceed with the case. His argument was that, non-compliance of section 214(1) of the CPA is an apparent

irregularity in the proceedings of the trial court, bolstering this contention by citing the decision of a single justice of this Court in **Finca (T) Limited and Another vs Boniface Mwalukisa**, Civil Application No. 589/12 of 2018. The learned Senior State Attorney argued further that failure of the High Court judge to properly consider this issue was a fatal error and should lead the Court to invoke its revisional jurisdiction and step into the shoes of the High Court and extend time to the appellant as prayed.

In rejoinder, the appellant's counsel had nothing to add.

From the foregoing submissions of counsel for the appellant and the respondent Republic, and the second ground of appeal having been marked withdrawn, what remained before the Court was the first ground of appeal only. The counsel for the parties were in cohort that the High Court judge consideration of the appellant's application did not fully determine the second reason that grounded the application for extension of time, and that such failure was a fatal error that warrants interference of this Court.

Our perusal of the record of appeal illustrates that the appellant, on the 31st May, 2016 filed an application by way of chambers summons supported by an affidavit sworn by himself which

sought, **first**, for extension of time to lodge a notice of intention to appeal and **second**, subject to the first prayer, that time be enlarged for filing a petition of appeal out of time and **third**, any other relief that may be deemed fit to order by the High Court. In their written submissions, the appellant (the applicant then) expounded two reasons grounding that caused the delay to file the relevant documents to initiate the appeal on time and this are found in the affidavit supporting the chamber summons in paragraphs 3-14.

The first reason was that after the High Court judge delivered the Ruling on the 10th December, 2015 the appellant fell sick a few days later. The appellant averred that on the 15th December, 2015 he was admitted in the Hospital mentioned hereinbefore and discharged on the 3rd of March, 2016. The second reason pointed out irregularity or illegality of the proceedings, averring that there was a change of three presiding magistrates in the hearing of the trial facing the appellant until conviction and that the successor presiding magistrates failed to inform the appellant on his rights and to record reasons that led to the take-over of the case.

In deliberating on the points raised by the appellant in his application, as rightly pointed out by the counsel for the parties, the

High Court judge analysis of what was before her concentrate on the first reason only as seen at page 89 of the record of appeal. Where it is clearly exposed that when summarizing the reasons behind the application before her she focuses on the first reason stating that:

> "*The application through chamber summons made under section 361 (2) of the Criminal Procedure Act, Cap 20 R.E 2002 is supported by the Applicant's own sworn affidavit and on record, apportioning the blame to his 'ailing health condition" which lead him to be admitted to hospital from the 15th of December, 2015 soon after delivery of judgment on the 10th of December 2015.*"

From the above excerpt, undoubtedly the High Court judge enfolded the first reason only as the one supporting the application and prayers and from the start she seemed not to find the need to take account of the second reason. This is further amplified by the fact that the High Court judge only pondered on the second reason as a byway as seen at page 93 of the record of appeal, by discarding this reason and finding that it lacked merit. We find it pertinent to reproduce the whole segment for ease of reference. She stated:

> "*With all due respect to the Applicant and, mindful of powers bestoyed (sic) on the Court on documentary evidence under the Evidence Act Cap. 6 this is*

*wanting, more so section 67. The letter is nothing else than a '**forgery**' I believe. It neither requires magic nor research to ascertain that the letter is coupled and tainted with illegalities leading to fraud both in Criminal and Civil nature. Why am I saying so? A photocopy it is and contrary to section 67, un-stamped as vividly evident on record and, worse even before a 'purported' Medical Doctor who ought to know what it requires for such official communication of same rather similar nature for proof. I am even in tandem with **Counsel Mtoi** that, it is not only invalid but worse even illegal. I would expect for a person admitted for that long to have in place and, '**Admission record sheet**' which entails amongst others dates for proof, treatment provided on each day as alleged. The first and, horribly lie this is! On the original copy of judgment, my perusal have (sic) established it to be delivered on the **10th of December, 2015** certified and, endorsed on the **19th of February 2016**. Both Parties were in attendance then it is also evident. What this translates to is that it was ready for collection right after certification on the **19th of February 2016** and, not on the **14th of June 2016**, and collected on the **15th of July 2016**. A second horrible lie!*

And to discuss the second reason she went on and stated:

*"From the foregoing ugly observations the second limb for the prayers for filing "**Appeal Out of Time'** does not even have legs to stand upon based on the above position".*

Our analysis of the above excerpts outlines the fact that, as rightly observed by the counsel for both parties, the Ruling of the High Court was in essence deliberation of the first reason for delay only, and that the High Court judge's consideration of the second reason was in passing, and undoubtedly this finding was a spillover when pondering on the first reason. Substantially, as rightly advanced by the appellant's learned counsel and conceded by the learned Senior State Attorney, there was no reflection done by the High Court judge of the second reason, a point of law that expounded on irregularity and illegality in the proceedings of the trial court. This in effect flawed the findings of the High Court.

It is well settled that there are no hard and fast rules on what is a good cause to warrant the High Court to exercise its discretion to grant extension of time. The record of appeal at page 70 reveals that the chamber summons seeking prayers for extension of time in the case relevant to the current appeal was filed pursuant to section 361 (2) of the CPA which in effect reads:

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

As spelled out by this Court in **Hassan Islam @Zulu vs Republic**, Criminal Appeal No. 205 of 2004 (unreported) that under section 361 (2) of CPA:

"...the underlying factors for consideration in an application for extension of time is good cause for the delay. What the High Court had to consider in determining the application was whether the affidavit filed by the appellant to support his application gave good cause for the delay. The section does not elaborate on what constitutes good cause but normally, it is the circumstances which led to the delay which the court has to look into and satisfy itself whether or not they constitute good cause."

Various decisions have stated that there is no one definition of what constitutes good cause, similarly to the position in the Court of Appeal under Rule 10 of the Tanzania Court of Appeal Rules, 2019 on what constitutes sufficient reasons to warrant extension of time. The courts have in a number of cases considered various factors to establish good cause or sufficient reason while understanding that

extension of time under the relevant provisions is discretionary. A discretion which has to be exercised judiciously.

It is important to understand that this Court cannot interfere with the discretion of the High Court unless the decision concerned was made on a wrong principle or by not taking into account important factors (See **Maneno Muyombe and Another vs Republic**, Criminal Appeal No. 235 of 2016 (unreported)). Suffice to say, a court has a duty to consider all the factors related to the delay when determining whether or not a good cause has been displayed so as to properly exercise its discretion. It is also well established that even after a court feels that reasons shown by an applicant do not explain the delay, of where the court feels that there are other reasons such as the existence of a point of law of ample importance such as an illegality of the decision sought to be challenged, it has to resolve that this is also a good cause to grant extension of time.

This Court in several cases, has had occasions to observe that the illegality claimed must be apparent on the face of the record (See **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 and **Ngao Godwin**

Losero vs Julius Mwarabu, Civil Application No. 10 of 2015 (Both unreported)).

Importing the above guidelines to the current case, it is clear that the foregoing principle implores courts when considering allegations of illegality, to ensure that the alleged illegality is of sufficient importance and must be apparent on the face of the record and should not be such that the illegality alleged would need to be sought from a long drawn argument or process.

In the present case, the ground of illegality and irregularity in the proceedings of the trial court, was imbedded on contravention of section 214(1) of the CPA. That is change of magistrates in the trial/hearing without reasons being advanced on the said change. A review of the record of appeal discloses that three magistrates presided over the case from the start until delivery of judgment (Honorable F. S. Kiswaga RM; Honorable A. Kahimba, RM and Hon. I.E. Ngaile-DRM).

The High Court having been informed on this situation in the second reason of the application for extension of time, was expected to fully examine whether or not the allegations warranted further scrutiny of an appellate court to ponder whether or not the provisions

of section 214(1) of the CPA were complied with by the successor presiding magistrates. Considering a litany of cases by this Court when addressing non-compliance of section 214(1) of the CPA, it is evident that where there are such allegations, the court should accord an opportunity for to the party who claims to be aggrieved to be heard expansively on the issue.

Under the circumstances, we are of the view that failure by the High Court judge to fully deliberate and determine allegations of irregularity advanced by the appellant in his application for extension of time without assigning any reasons was not proper. With respect, we are satisfied that the present appeal is one of the cases that invites us without hesitation to intervene in the discretion exercised by the High Court Judge in refusing prayers for extension of time. This is because had she fully deliberated on the alleged illegality raised before her and considered the appellant's prayers for extension of time within the said framework she would have found that the appellant did expound a good cause and granted the prayers sought.

In the end, under the circumstances we proceed *suo motu* to invoke the revisional powers vested in this Court under section 4(2)

of the Appellate Jurisdiction Act, Cap 141, Revised Edition 2019 (the AJA) and thus; **one,** grant extension of time for the appellant to file a notice of intention to appeal from the District Court of Serengeti to the High Court within ten (10) days of this Order. **Two**, grant extension of time to file an appeal to the High Court, to be filed within forty five (45) days from the date of this order.

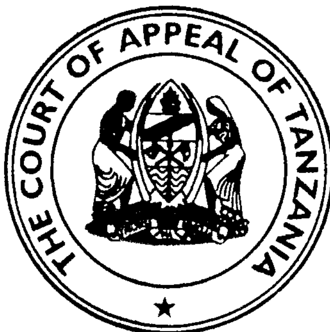
DATED at **MWANZA** this 12th day of June, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 15th day of June, 2020 in the presence of Mr. Elias Hezron, counsel for the appellant and Mr. Emmanuel Luvinga, counsel for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL