

IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 141 OF 2017

HAMISI MAHONA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania at
Tabora)**

(Utamwa, J.)

dated the 25th day of April, 2016

in

Misc. Criminal Application No. 178 of 2015

.....

JUDGMENT OF THE COURT

21st & 30th April 2021

GALEBA, J.A.:

The appellant, Hamisi Mahona, was charged and convicted by the District Court of Nzega on two counts of armed robbery contrary to section 287A and rape contrary to sections 130 and 131 all of the Penal Code [Cap 16 R.E. 2002] (now R.E. 2019) (the Penal Code). The prosecution alleged that on 14th December, 2011 at 10.00 hours, at Kaselya Village within Nzega District in Tabora region, while armed with a knife, the appellant called at the house of ABC, a young woman of 22 years (the victim), and forcefully demanded TZS. 10,000.00

from her. Upon the victim's initial refusal to heed to the appellant's unjustifiable demand, he threatened to inflict bodily injury on her with the knife. For fear of the impending danger of injury, the victim gave her aggressor the said TZS. 10,000.00 and one NOKIA mobile phone worth TZS. 50,000.00. It was also alleged that, by using the same knife, the appellant further threatened to injure the victim unless she consented to have sex with him. Because of the threats, ABC succumbed to the illicit demand, and the appellant had sexual intercourse with her without her free consent.

According the record, when the appellant was arraigned before the District Court on 29.12.2011, he readily admitted to have committed the offences as charged, and on his own plea, he was convicted as indicated above and sentenced to thirty (30) years imprisonment on each count, and the sentences were ordered to run concurrently. Aggrieved by both conviction and sentence, the appellant filed a notice of appeal on 30.12.2011 and on the same day he applied for documents from the District Court which would enable him to appeal to the High Court. The documents were not supplied to him until about four (4) years later on 03.09.2015, when he filed Miscellaneous Criminal Application No. 178 of 2015, applying for extension of time within which he could file an appeal to the High

Court. The High Court (Utamwa, J.) heard the application but dismissed it on 25.04.2016.

The appellant being aggrieved, by that dismissal, he has preferred this appeal predicating it on 4 grounds which may be paraphrased as follows;

- 1. That the learned judge erred in law for dismissing his application for extension of time to appeal.*
- 2. That the learned judge erred in law for determining the substantive appeal instead of determining the application for extension of time to appeal.*
- 3. That the learned judge erred in law for not considering whether there were sufficient grounds for granting the application for extension of time rather than determining an appeal which was not before him.*
- 4. That the learned judge totally violated a right of fair hearing provided by article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977.*

When this appeal was called on for hearing, the appellant appeared in person without legal representation while the respondent

Republic was represented by Mr. Miraji Kajiru, learned Senior State Attorney. The appellant moved the Court to adopt his grounds of appeal and indicated to us that he preferred Mr. Kajiru first to respond to them so that he could rejoin, if that would be necessary.

Mr. Kajiru started off by informing the Court that he was supporting the appeal and arguing the first ground, he contended that upon the appellant's conviction he filed a notice of appeal on 30.12.2011 but he did not receive documents necessary for filing his appeal in time. It was his submission that taking into consideration the contents of paragraph 3 of the appellant's affidavit in the High Court, the latter demonstrated good cause to justify granting the extension of time sought. He concluded that, in the circumstances, the High Court was wrong to dismiss the appellant's application for extension of time to appeal. To support his argument, counsel relied on this Court's decision in the case of **Joseph Sweet v. R**, Criminal Appeal No. 11 of 2017 (unreported).

In arguing the second, third and the fourth grounds, Mr. Kajiru faulted the learned High Court judge for discussing merits of the appeal instead of considering the application that was before him. He contended that, there was no fair hearing accorded to the appellant in

the High Court, because his application was not heard. He urged the Court to allow the appeal and grant the appellant extension of time to appeal to the High Court.

Being unrepresented and his appeal having been supported by the adverse party, the appellant had nothing in rejoinder, save for insisting that he be granted extension of time to file his appeal in the High Court.

A keen examination of the four 4 grounds of appeal before us, reveals that there is one complaint in this appeal, for which the issue for determination is whether the learned judge erred in failing to determine the application for extension of time but instead, proceeded to determine competence of '*an appeal*' which was not yet filed.

From the record, the learn judge considered the likely incompetence of the appeal, should he grant the application. He finally observed as follows at page 26 of the record of appeal;

"In my view, a convict who applies for extension of time to appeal against conviction and or sentence resulting from a plea of guilty must indicate the following facts in his affidavit; he must clearly show that he is challenging the plea of guilty and the

conviction and if he does not challenge it and intends to appeal against sentence only, he must state so. In other words, he must show that his intended appeal falls under the exception shown herein above since appeals of this nature are not so automatic like appeals resulting from full trials... For the statutory restrictions against appeals of this nature the application cannot succeed."

A closer scrutiny of the above statement in the High Court's ruling implies that the affidavit of the appellant did not specify whether he was appealing against a conviction, a sentence or both. However, we have carefully perused the record of appeal, and have noted that there was a notice of appeal which was attached to the affidavit of the appellant and the said notice indicates clearly that the appellant intended to appeal against both conviction and sentence. In other words, even the benchmark that was set by the High Court itself, in this matter, was met by the appellant. In our view, had the High Court carefully examined the record, it would not have reached to the same decision.

The other aspect for consideration is that the High Court predicated success or failure of the appellant's application on the success or failure of a future appeal. On this point, we are at one with

Mr. Kajiru and the appellant that the High Court acted erroneously by stepping out of the jurisdiction conferred upon it by section 361(2) of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA). By that section, the High Court is clothed with jurisdiction to grant applications for extension of time if there is good cause irrespective of the competence of the appeal to be filed after grant of the order. Under that provision, the High Court has no jurisdiction to predetermine the competence or otherwise of the appeal to be filed, should the application be granted. In other words, determination of whether the appeal is competent or it is not, is the domain of the court at the stage of hearing the appeal. We find therefore that the learned judge erred in failing to consider the appellant's application by relying on the merits of the appeal which was not before the court.

That having been said, we now turn to consider what should be the proper move to take. As shown above, it was Mr. Kajiru's submission that from the contents of the appellant's affidavit, he had established sufficient cause for the delay and thus urged us to grant him extension of time. We think that in the particular circumstances of this case, we are entitled to resort to the powers conferred in the Court by section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA), and step into the shoes of the High Court to

determine whether or not the appellant was entitled to be granted the extension sought. In this respect, it was the common position of parties that indeed the application before the High Court was meritorious.

On our part, we propose to approach the issue by first revisiting the law setting out the criterion for extension of time to file criminal appeals in the High Court. In that pursuit, the applicant may move the High Court, and the said court has jurisdiction to grant the relevant orders under the provisions of section 361(2) of the CPA, which provides that;

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

The catch phrase in that section is '**the High Court may, for good cause, admit an appeal**'. That means, for the court to determine whether it should grant extension of time to file appeal or not, the sole determinant factor is whether or not the applicant has established good cause explaining the delay. The above provision has been construed on numerous occasions by this Court including in

Hamis Ismail @ Zulu v. R, Criminal Appeal No. 205 of 2014
(unreported) where the Court stated that;

*"under the above section 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.**"*

Similarly, in this matter, the High Court was duty bound to follow suit; it had to determine whether there was good cause, and it had to do so by examining the affidavit supporting the application, but as indicated above, it did not. In the circumstances, we will examine the affidavit, consider submission of parties and determine the application as required by the law.

The relevant paragraphs of the affidavit material to the application are paragraphs 3 and 4 of the affidavit supporting the application. They are to the following effect;

"3. That aggrieved by the said decision, on 30.12.2011 I filed a notice of intention to appeal to the High Court of (T) at Tabora together with a letter applying for copy of

*the judgment to the District Court of Nzega for appeal purposes but up to date the District Court of Nzega still has not supplied a copy of the judgement. **The photostat copy of the notice of appeal** and the photostat copy of the letter applying the copy of judgment are attached and marked 'A' respectively to show that I was not satisfied by the decision of the District Court of Nzega.*

4. *That following the delay of the District Court of Nzega not issuing me the copy of judgment almost 4 years now caused me to lodge this application so that I can get permission to appeal to the High Court of Tanzania out of time."*

Based on the substance of the above unchallenged paragraphs of the appellant's affidavit in the High Court, it is our finding that the appellant demonstrated good cause to merit grant of enlargement of time to file appeal.

To that end, the second, third and the fourth grounds of appeal are upheld and the appeal is allowed. We reverse the decision of the High Court and grant the appellant forty-five (45) days from the date

of this order within which to file the intended appeal to the High Court.

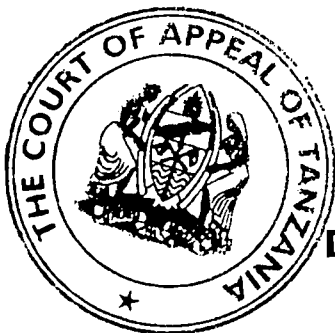
DATED at **TABORA**, this 29th day of April, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of April, 2021 in the presence of the Appellant in Person and Mr. Deusdedit Rwegira, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. Kainda

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DEPUTY REGISTRAR
COURT OF APPEAL