IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 266 OF 2017

MAHEGA S/O SASI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mallaba, J.)

dated 22nd day of February, 2017
in
Criminal Application No. 249 of 2016

JUDGMENT OF THE COURT

3rd & 7th May, 2021

MWARIJA, J.A.:

In the District Court of Kahama sitting at Kahama, the appellant, Mahega Sasi was charged with and convicted for having raped a girl aged fourteen (14) years who, for the purpose of protecting her dignity, we shall refer to by her initials, 'SH' or the victim. Following his conviction, the appellant was sentenced to thirty (30) years imprisonment. The prosecution had alleged that on 19/7/2006 at Kagongwa/Kishima Village within Kahama District in Shinyanga Region, the appellant had carnal knowledge of the said 'SH'. He denied the charge. However, having heard the evidence of two

prosecution witnesses including the victim and the appellant's defence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt.

The appellant was aggrieved by the decision of the trial court and therefore, appealed to the High Court. His appeal was however, unsuccessful. The learned first appellate Judge (Kaduri, J.) dismissed it for want of merit.

Dissatisfied further, the appellant wished to prefer a second appeal to this Court. Since however, the time for lodging the intended appeal was not on his side, he filed an application before the High Court seeking an order granting him extension of time within which he could institute a notice of appeal. His application was predicated on s. 11 (1) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002, now R.E. 2019] (the AJA). That application was also unsuccessful. It was dismissed on 22/2/2017 by Mallaba, J,. In his decision, the learned High court Judge was of the view that the appellant had failed to establish sufficient cause for the delay in instituting a notice of appeal.

Undaunted, the appellant has now come to this Court by way of an appeal seeking to fault the High Court decision which denied him extension of time to lodge a notice of appeal. In his memorandum of appeal filed on

26/6/2018, he has raised three grounds of his dissatisfaction with the impugned decision.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Deusdedit Rwegira, learned Senior State Attorney. When he was called upon to argue his appeal, the appellant opted to let the learned Senior State Attorney submit in reply to the grounds of appeal and thereafter, make a rejoinder if the need to do so would arise.

Initially, Mr. Rwegira's stance was to resist the appeal but when his attention was drawn to the provisions of Rules 10 and 47 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) as well as s. 11 (1) of the AJA under which the application giving rise to the impugned decision was lodged in the High Court, he declined from opposing the appeal. He argued however, that the remedy taken by the appellant to challenge the impugned decision by way of an appeal, is misconceived. According to the learned Senior State Attorney, the proper avenue which the appellant should have resorted to was to come to this Court by filing a fresh application seeking extension of time to lodge a notice of appeal. That is to say, to come to the Court by way of a second bite.

Notwithstanding the fact that the appeal is misconceived, Mr. Rwegira implored us to invoke the provisions of Rules 10 and 47 of the Rules and

grant the appellant extension of time. This, he said is because, had the High Court considered the reasons which were advanced by the appellant for the delay, it would have found that they constituted sufficient cause warranting grant of the sought order.

In rejoinder, the appellant did not have any substantial point to bring forward. He supported the arguments made by Mr. Rwegira and prayed to be granted extension of time to institute a notice of appeal.

Having considered Mr. Rwegira's submission, which was supported by the appellant, we agree that, following the refusal by the High Court to grant the appellant's application, the available remedy for him was not to appeal to this Court. The proper course of action for him was to move the Court by filing a second bite application. The reason is that, both the High Court and this Court have concurrent jurisdiction to extend the time limited by the Rules for the doing of any act which is authorized by the Rules including extension of the prescribed time for lodging a notice of appeal. While the High Court derives that power under s. 11(1) of the AJA, the Court is vested the same under Rule 10 of the Rules.

In the case of **Martin Swai v. Republic**, Criminal Appeal No. 225 of 2008 (unreported), like in this case, the appellant preferred an appeal to the Court after his application for extension of time was refused by the High

Court. Having considered the competence or otherwise of that appeal, the Court observed as follows:

> *"In section 11 (1) of the Act, the High Court is given powers to "extend the time for giving notice of intention to appeal from a judgment of the High Court. This Court enjoyed concurrently with the High Court this power under Rule 8 (now Rule 10) of the Rules."*

On the proper avenue to be resorted to by a party who is refused an extension order, the Court went on to state that:

> *"In the light of the above, we are increasingly of the view that after the High Court had refused to grant the appellant an extension order, he had a right, to what has now become popularly known as a second bite to this Court under Rule 44 (now Rule 47) of the Rules.* ***Strictly speaking, he had no right of appeai and this has been made clear in a number of this Court's decisions on the issue. We have clearly pronounced ourselves on this that an intending appellant who fails to secure an extension order under section 11 (1) of the Act, 'cannot access the Court for such an order through the appellate process', but by way of a second bite under the Court Rules."***
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> [Emphasis added]

From the above stated position, there is no gainsaying that in the case at hand, the appellant did not have a right of appeal against the decision of Mallaba, J. which dismissed the application for extension of time. The purported appeal is therefore incompetent and thus ought to be struck out.

We should therefore, have struck out the appeal. However, having considered the time which the appellant has taken in seeking access to this Court after his conviction on 15/6/2007, about 14 years ago, we refrain from doing so. We feel constrained to take appropriate measures which will result into a speedy determination of the matter. For this reason, we retain the record so as to enable us exercise the revisional powers vested in the Court by s. 4 (2) of the AJA. We are doing so on the authority of this Court's decisions in the cases of **Chama cha Walimu Tanzania v. The Attorney General,** Civil Application No. 151 of 2008 and **Tanzania Heart Institute v. The Board of Trustees of NSSF,** Civil Application No. 109 of 2008 (both unreported) which were also cited in the case of **Martin Swai** (supra). In the latter case, after having found that the application for extension of time was incompetent because the High Court was not properly moved, the Court invoked s.4 (2) of the AJA and proceeded to nullify the proceedings and set aside the order which refused the application for extension of time.

Mr. Rwegira submitted that, in his affidavit, the appellant stated that the judgment in which the High Court upheld the decision of the trial court was delivered in his absence and did not become aware of it until in the year 2012 when he was informed of the same by a prison officer. He thereafter, filed an application for extension of time to lodge a notice of appeal. That application was heard and granted by the High Court sitting at Shinyanga but the Deputy Registrar of the High Court forwarded it for lodgement in the High Court of Tanzania (Tabora District Registry) at Tabora where the decision appealed against was given.

The appellant averred further that, in the process, the time for lodging the notice expired and thus applied for extension of time which was refused by the High Court. In his decision, the learned High Court Judge found that the reasons given by the appellant were not substantiated by any documentary evidence and therefore refused to grant the application.

From the record however, the contents of the appellant's affidavit were not disputed because the respondent did not file a counter affidavit. It means therefore, that the facts stated by the appellant as being the cause for the delay, remained unchallenged. With respect therefore, we find that the learned Judge erred in requiring the appellant to prove the facts which were not countered by the respondent by way of a counter affidavit.

In the light of the foregoing, we are of the settled mind that the appellant's application ought to have been granted. In the event, we reverse the decision of the High Court and find instead, that the reasons given by the appellant constituted sufficient cause for the delay. We thus grant the appellant extension of time to institute his notice of appeal. The same to be instituted within fourteen (14) day from the date of delivery of this judgment.

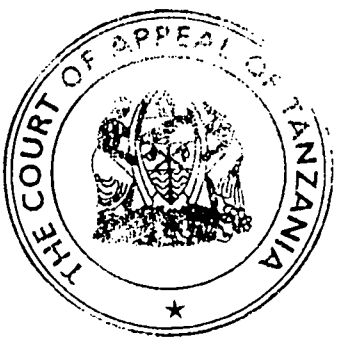
DATED at **TABORA** this 6th day of May, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 7th day of May, 2021 in the presence of the Appellant appeared in person and Ms. Upendo Malulu, learned Senior State Attorney for the Respondent Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL