

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 396 OF 2019

MSELEMU KANDILI.....APPELLANT

VERSUS

WAZIRI THABITI..... RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania
at Dar es Salaam)**

(Masabo, J.)

**Dated the 28th day of August, 2019
in**

Miscellaneous Criminal Application No. 191 of 2018

JUDGMENT OF THE COURT

9th July & 16th August, 2021

WAMBALI, J.A.:

The Primary Court of Masanze in Kilosa District convicted Mselemu Kandili, the appellant of the offence of malicious damage to property contrary to section 326 of the Penal Code Cap. 16 R.E. 2002 (now R.E. 2019). Consequently, he was sentenced to pay a fine of TZS. 50,000.00 or to six (6) months' imprisonment in default. He was also ordered to pay the respondent, Waziri Thabiti a compensation of TZS. 4,400,000.00. His appeal to the District Court of Kilosa was unsuccessful as the trial court decision was upheld. Unfortunately, his desire to appeal further to the High Court met an obstacle as on 30th May, 2018, PC Criminal Appeal No.15 of 2017 was dismissed by that court for being preferred out of time.

The appellant did not give up as through Miscellaneous Criminal Application No. 191 of 2018, he approached the High Court seeking extension of time within which to appeal against the decision of the District Court of Kilosa which confirmed his conviction, sentence and an order for compensation by the Masanze Primary Court. The High Court (Masabo, J.) heard the parties and in the end, it was not satisfied that the appellant had demonstrated sufficient reasons to justify the extension of time. It thus dismissed the application, hence the present appeal. The memorandum of appeal lodged in Court earlier on contain only one ground as hereunder: -

"1. That the High Court erred in law and fact by failing to take into consideration the fact that the applicant was not timely availed a copy of the judgment to enable him appeal on time hence his delay."

At the hearing of the appeal, the appellant appeared in person, with no legal representation. In his brief oral submission, he adopted his ground of appeal and emphasized that the High Court did not exercise its discretion judiciously to find that he deserved extension of time to appeal against the decision of the District Court of Kilosa. In his submission, the appellant strongly and spiritedly contended that he demonstrated sufficiently that the delay in lodging the appeal was caused by the failure

of the District Court of Kilosa to supply him with a certified copy of proceedings and judgment within a reasonable time before the limitation period of thirty days expired.

In the circumstances, he implored the Court to allow the appeal to enable him to contest the first appellate court's decision before the High Court.

The respondent, who similarly appeared in person and unrepresented, forcefully resisted the appeal. In essence, he categorically supported the ruling of the High Court on the contention that the appellant completely failed to demonstrate sufficient reasons for the delay to convince that court to exercise its discretion to grant him the requisite extension of time. He added that the reason for the delay advanced by the appellant was thoroughly considered by the High Court but rejected for lacking merit.

Ultimately, he implored the Court to dismiss the appeal for lacking merit since in his view the High Court properly exercised its discretion to refuse the appellant extension of time.

Having gone through the record of appeal, it is not doubted that the major reason for the delay in lodging an appeal at the High Court was premised in paragraph 5 of the appellant's affidavit which the learned High

Court judge reproduced in her ruling as reflected at page 64 of the record of appeal. For the sake of clarity, we reproduce it hereunder: -

"That the lateness of the applicant was mainly caused by the delay of the officers of the Kilosa District Court who delayed the copy of judgment hence made the applicant to file his appeal outside the prescribed time, all that time the appellant was not represented. Also the Appellant was legally advised by the trial magistrate at Kilosa who told the Appellant that his appeal can be lodged at the High Court within thirty days from the date he was collecting the copy of the judgment that is on 8th May, 2017."

On the other hand, it is worth noting that though the learned High Court judge observed in passing that the respondent strongly contested the application for failure of the appellant to parade evidence in support of the delay, our close reading of paragraph 4 of his counter affidavit indicates that paragraph 5 was generally contested. Nonetheless, it was the duty of the High Court to consider and determine the parties' contending arguments with regard to the reason for the delay before it applied its discretion to grant or refuse the application for extension of time.

Be that as it may, we have no hesitation to state that in terms of section 25(1) (b) of the Magistrate Court Act, Cap.11 R.E. 2019 (the MCA),

the High Court has discretion to grant an applicant extension of time for lodging an appeal either before or after the expiration of thirty days. That discretion however, we hasten to add, must be exercised judiciously upon sufficient reasons being demonstrated by the applicant. More importantly, the court has power under the law to grant an extension of time if sufficient cause has been shown for doing so (see **Michael Lessani Kweka v. John Eliafye** (1997) TLR 152).

The crucial issue for determination in this appeal, therefore, is whether the High Court properly exercised its discretion in refusing to grant the appellant extension of time based on the explanation of the delay in lodging the appeal.

From the record of appeal, we note that initially the learned High Court judge gave the appellant a benefit of doubt concerning the reason for the delay on a consideration that normally copies of proceedings from lower courts are often not availed to the parties instantly after the delivery of the decision. Specifically, she stated as follows in the ruling: -

"...The Applicant's ground of delay on this period is that he was not timely availed the copy of judgment to enable him to file his appeal on time. Although he has not produced any evidence to that effect, considering that the duration of delay was only one month and a half and that judgments and copies of proceedings are most often not vailed to

parties instantly, I will give him the benefit of doubt."

However, as it turned out, immediately after that statement, in refusing extension of time the learned High Court judge reasoned as follows: -

"I have however, noted that the Applicant has [sic] provided any account for the duration of one year and 4 months covering the period between 30th May, 2017 when his appeal was dismissed for being filed out of time and 24th September, 2018 when he lodged the application. Having learnt from the decision of the court that he was time barred, the Applicant ought to have taken necessary action to rectify the anomaly with immediate effect but he did not do so until after one year and 4 months lapsed. For this court to exercise its discretion in the above provision, the Applicant in this case ought not to have solely accounted for the one month delay. He ought as well to have accounted for the one year and four months' delay. By failing to account for this period, the applicant failed to demonstrate a good reason for exercise of my discretion."

From the reproduced part of the ruling of the High Court, we are of settled view that the learned judge misapprehended the facts on the proper period within which the appellant had to account for the delay and

as a result she came to a wrong conclusion that the period of delay to be taken into account in exercising her discretion was one year and four months.

From the record of appeal, we entertain no doubt that PC Criminal Appeal No. 15 of 2017 before the High Court (Mruke, J.) was lodged on 19th May, 2017 and dismissed for being time barred on 30th May, 2018. Noteworthy, the application, the subject of the current appeal was lodged on 24th September, 2018. It follows that the appellant had to initially account for the period of delay from 8th March, 2017 when the decision of the District Court of Kilosa was delivered to 19th May, 2017 when the appellant lodged PC Criminal Appeal No. 15 of 2017 before the High Court, almost two months and eleven days. Moreover, according to the record of the application, we harbor no doubt that the period between 19th May, 2017 to 30th May, 2018 was amply explained by the fact that the proceedings in PC Criminal Appeal No. 15 of 2017 were actively in the High Court. Finally, the appellant had to account for the period of five (5) months between 30th May, 2018 to 24th September, 2018 when Miscellaneous Civil Application No. 191 of 2018 the subject of the present appeal was lodged.

Having regard to the uncontested facts we have exposed above, we are settled that the learned High Court judge could not have come to the

conclusion that the appellant had to account for a period of delay covering one year and four months. With respect, we think it was not correct for the learned judge to have concluded that the appeal before the High Court was dismissed on 30th May, 2017 in which she based her calculation of the period of delay. We think that was unfortunate as it cannot be taken as a typing error since she had already correctly observed at the preceding paragraph of her ruling we have reproduced above that the appeal at the High Court was lodged on 19th May, 2017.

In the circumstances, we are of the considered view that as initially in her ruling the learned judge had given the benefit of doubt to the appellant's explanation on the cause of delay in lodging the appeal at the High Court as alluded to above, she was enjoined to exercise the discretion judiciously to extend the time as prayed. This is so because we think the period between the dismissal of the appeal and lodging the application, the subject of this appeal, was not inordinate.

In the circumstances of this case, therefore, we are satisfied that as the appellant had given adequate and satisfactory explanation for the cause of delay, the learned Judge ought to have granted him the requisite extension of time to appeal against the decision of the Kilosa District Court.

We must reiterate that where in an application under section 25 (1) (b) of the MCA the applicant has sufficiently explained the reason for delay, extension of time ought to be granted as a matter of right (see **Kassana Shabani and Another v. The Republic**, Criminal Appeal No. 476 of 2007- unreported).

On the other hand, we are mindful of the settled position of the law that the Court will not lightly interfere with the discretion bestowed upon the lower court unless it is satisfied that the decision is clearly wrong because it has misdirected itself on the real matters before it (see **Mbogo and Another v. Shah** [1968] EA 93). It is in this regard that the Court in **Mwita Mhere v. The Republic** [2005] TLR 107 stated as follows with regard to judicial discretion: -

"Judicial discretion is the exercise of judgment by a judge or court based on what is fair, under the circumstances and guided by the rules and principles of law and the court has to demonstrate however briefly how the discretion has been exercised to reach the decision it takes."

In view of our deliberation above, we are satisfied that this is a fit case in which we should interfere with the discretion of the High Court as the decision was arrived at based on misapprehension of the facts on the correct period of delay to be accounted for by the appellant. Indeed, we

are settled that in the circumstances of this appeal, granting extension of time would be for the purpose of better meeting the ends of justice.

In the event, we allow the appeal. Consequently, we grant thirty days extension of time to the appellant within which to appeal to the High Court against the decision of the District Court of Kilosa in Criminal Appeal No.7 of 2017. The requisite period of limitation shall run from the date of delivery of this judgment.

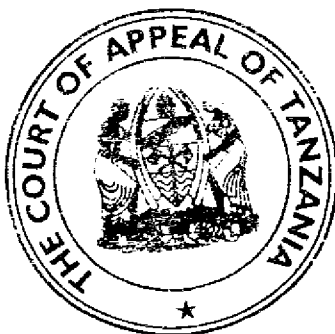
DATED at DAR ES SALAAM this 2nd day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgement delivered this 16th day of August, 2021 in the presence of the appellant in person and the respondent in person is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL