

**IN THE COURT OF APPEAL OF TANZANIA  
TABORA**

**(CORAM: MWARIJA, J.A., MWANDAMBO, J.A, And MASHAKA, J.A.)**

**CRIMINAL APPEAL NO. 45 OF 2019**

**YEGE S/O GAWE.....APPELLANT**

**VERSUS**

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

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

**(Utamwa, J.)**

**dated the 22<sup>nd</sup> day of October, 2018**

**in**

**Criminal Application No. 9 of 2018**

**.....**

**JUDGMENT OF THE COURT**

16<sup>th</sup> & 23<sup>rd</sup> March, 2021

**MWANDAMBO, J.A.:**

Yege s/o Gawe, the appellant in this appeal faults the exercise of discretion of the High Court to extend time within which to appeal from the decision of the District Court of Nzega which convicted him of the offence of armed robbery followed by a custodial sentence of 30 years imprisonment in a judgment delivered on 27/10/2017.

In terms of section 361 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA), the appellant had a right of appeal against the conviction and sentence by lodging a notice of appeal within ten days from the date of the impugned decision and thereafter, lodge his appeal not later than 45 days from the date of the decision. Contrary to the

above legal requirements, the appellant did not lodge his notice of appeal. In the absence of the notice of appeal being lodged within the prescribed period, he could not file a petition of appeal as required by section 361(1) (b) of the CPA. Since he could do neither of the above after the expiry of the prescribed period, the appellant sought to move the High Court under section 361 (2) of the CPA for enlargement of time vide Misc. Criminal Application No. 9 of 2018 filed on 7/02/2018. However, the High Court found no good cause shown to exercise its discretion under the section as prayed. It dismissed the application and hence the instant appeal.

Before the High Court, the appellant advanced two reasons in a bid to explain the delay in lodging his appeal within the prescribed period. **One**, upon being admitted into prison, he immediately expressed to the prison officer his desire to appeal with a view to lodging a notice of intention to appeal to the High Court, Tabora District Registry. **Two**, he was unable to appeal because the trial District Court did not furnish him with a copy of judgment before the lapse of the requisite time for appeal. The respondent Republic resisted the application mainly because the appellant did not annex any documents to his affidavit in support of the application to prove the claim that he expressed his intention to appeal.

Apparently, the High Court (Utamwa, J.), found purchase in the respondent's arguments guided by several decided cases of this Court on what constitutes sufficient cause to extend time. As the appellant had not annexed any document to prove his averments on his desire to appeal and the fact that he did not secure an affidavit from a prison officer to back up his assertions, the High Court concluded that the application was too wanting to be sustained. It dismissed it.

The appellant has preferred three grounds of appeal faulting the High Court for failing to exercise its discretion in his favour. The first ground attacks the High Court for finding that the appellant did not adduce sufficient cause for the delay whereas in ground two, the High Court is faulted for not holding that the delay was ordinate considering that he prepared the application within three months from the date of the impugned judgment. Ground three is to the effect that the High Court erred in not extending time in view of the fact that the intended appeal involved illegality in the proceedings amounting to an unfair trial.

The appellant who was unrepresented, appeared in person at the hearing of the appeal. To nobody's surprise, he had nothing in addition to his grounds of appeal. Instead, he let Ms. Upendo Malulu, learned Senior State Attorney for the respondent Republic to reply to his grounds.

At the very outset, Ms. Malulu expressed her position supporting the appeal on ground three based on illegality. However, Ms. Malulu was emphatic that grounds one and two had no merit warranting their dismissal. Addressing the Court on ground three, the learned Senior State Attorney contended that the High Court should have extended time to appeal on account of illegality in the proceedings of the trial court, to wit, failure to remind the appellant of the charge against him immediately before the start of the prosecution case.

Even though Ms. Malulu conceded that reminding an accused of his charge is not a legal requirement under the CPA, she was adamant that the Court has pronounced itself on this in various decisions but she did not cite any of the said decisions. The learned Senior State Attorney conceded too that the complaint in ground three never featured before the High Court and determined as such but argued that the Court could still consider it in this appeal on the authority of its previous decision in **Robert Hilima v. R**, Criminal Appeal No. 42 of 2019 (unreported). Regardless of her concession that the claimed illegality was neither apparent on the face of the record nor of sufficient public importance, she urged us to allow the appeal on ground three.

When it was his turn to re-join, the appellant supported the respondent Republic's stand on ground three but urged the Court to find merit in the two grounds resisted by Ms. Malulu.

As alluded to earlier, the appeal revolves around the exercise of discretion by the High Court. The nagging question is whether in exercising its discretion the High Court made any error warranting interference by this Court in this appeal. Luckily, the parameters upon which superior courts are permitted to interfere with the exercise of discretion by the lower courts are now settled. We had occasion to refer to them in our recent decision in **Samo Ally Issack & Others v. R**, Criminal Appeal No. 136 of 2021(unreported) citing **Mbogo & Another v. Shah** [1968] E.A. 93 discussing parameters on which an appellate court can act in interfering with the exercise of discretion by a lower court or tribunal, that is to say; one, if the inferior court misdirected itself, or; two, it has acted on matters on which it should not have acted, or; three, it has failed to take into consideration matters which it should not have considered thereby arriving at a wrong conclusion. See also: **Credo Siwale v. R**. Criminal Appeal No. 417 of 2013, **The Commissioner General, Tanzania Revenue Authority v. New Musoma Textile Limited**, Civil Appeal No. 119 of 2019 and **Nyabazere Gora v. Charles Buya**, Civil Appeal No. 164 of 2016 (all

unreported). It may not entirely be irrelevant to draw inspiration from the Supreme Court of Colorado which has held that the improper exercise of jurisdiction is regarded as an abuse of it which occurs when the impugned decision is manifestly arbitrary, unreasonable or unfair. See: **Marcia Pinkstaff v. Black & Decker (US) Inc., And Baldwin Hardware Corporation** 211 P.3d 698 (2009).

Subjecting the tests in the decisions referred to above to the impugned decision, we are, with respect, unable to see any justification in any of the appellant's complaints in his grounds of appeal. To start with, as required by section 361(2) of the CPA, the High Court could only admit the appeal beyond the prescribed time only if the appellant had shown good cause for the delay. Put it differently, the appellant had a duty to explain away the delay to the satisfaction of the High Court for it to exercise its discretion in his favour. The High Court rightly held that the appellant did not discharge his burden of proof on the cause of his delay in lodging his notice of intention to appeal within the prescribed period. It did so by taking into account all the factors it was required to consider in the context of the application before it. We equally find nothing to disturb the finding of the High Court on the appellant's failure to prove that he expressed his intention to appeal immediately upon entry into the prison. As no such proof was furnished by way of a copy

of a notice of intention to appeal or an affidavit from the prison officers, the High Court was right in dismissing the application. It is plain that apart from the appellant's general complaints in grounds one and two, we have seen nothing closer to proving that the High Court misdirected itself or acted on matters in which it should not have acted or failed to consider matters which it should have taken into account resulting in a decision which is manifestly arbitrary or unreasonable. Consistent with **Mbogo & Another v. Shah** (supra) and the subsequent decisions referred to above, the Court's hands are tied up. It cannot interfere with the lower court's exercise of its discretion. We are satisfied that the conclusion reached by the High Court in dismissing the application was based on fact, logic and reason on the basis of the material before it. Consequently, we see no merit in grounds one and two and dismiss them both. Next, we shall turn our attention to ground three.

Our starting point will be rule 72 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) which stipulates:

*"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law,*

*which are alleged to have been wrongly decided (emphasis added)*".

As seen earlier, Ms. Malulu conceded that the complaint in ground three did not feature before the High Court. Naturally and in all fairness, the High Court cannot be faulted for wrongly deciding on an issue which was not before it. That would have been sufficient to dismiss ground three but for the alleged illegality on the failure to remind the appellant (accused before the trial court) the charge immediately before PW1 started giving evidence. Again Ms. Malulu conceded that was not a legal requirement under the CPA but sought refuge from **Robert Hilima v. R** (supra). We think Ms. Malulu could not have conceded to ground three had she had full grip of our decisions on what constitutes an illegality warranting exercise of discretion to extend time to appeal expressed in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185, **Owner of the Vessel Sepideh and Pemba Island Tours and Safaris v. Yusuf Mohamed and Ahmad Abdullah**, Civil Application No. 91 of 2013 and **Lyamuya Construction Co. Ltd v. Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (both unreported). We have reiterated in the above cases and others that for an illegality to be sufficient to warrant extending time, it must not only be apparent but also of sufficient public importance. In other



words, unlike Ms. Malulu, not any claimed illegality will warrant the Court's exercise of its discretion if it does not meet the threshold.

Apart from the concession that failure to remind an accused person of the charge after taking his plea of not guilty, such an illegality is not apparent but above all, it has no sufficient public importance. Adverting to **Mbogo & Another v. Shah** (supra), there is no suggestion in this appeal that the High Court failed to consider anything which it should have considered in dismissing the application before it thereby warranting interference of its discretion by this Court. Be it as it may, it is clear from **Robert Hilima v. R** (supra), that the Court had regard to its previous decisions on the illegality which would warrant extending time, amongst others, **Principal Secretary, Ministry of Defence and National Service** (supra). It is evident too that the Court was satisfied that the alleged illegality was apparent touching on the validity of the charge in a case involving armed robbery in which the charge cited improper provisions of the law which featured for the first time in this Court. It is from that understanding the Court considered that ground due to its peculiarity as an exception to the position discussed above. That decision is thus distinguishable because, unlike in the instant appeal, the alleged illegality appeared to be apparent touching on the validity of the trial, conviction and sentence against the

appellant which is not the case here. It is thus irrelevant and inapplicable.

The above said, without any disrespect to Ms. Malulu supporting the appeal in ground three, we are constrained to disagree with her. In conclusion we find no merit in any of the grounds and dismiss the appeal as we hereby do.

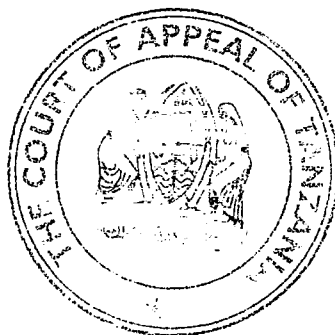
**DATED at TABORA** this 22<sup>nd</sup> day of March, 2022.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

The Judgment delivered this 23<sup>rd</sup> day of March, 2022 in the presence of the Appellant in person and Mr. Miraji Kajiru, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



  
F.A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**