IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 159 OF 2018

HUSSEIN SAID ..... 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, 2018
in
Criminal Application No. 95 of 2017

JUDGMENT OF THE COURT

21st & 25th March, 2022

MWARIJA, J.A.:

The appellant, Hussein Said was charged in the District Court of Kigoma with two counts under the Penal Code [Cap. 16 R. E. 2002, now R.E. 2019] (the Penal Code). The two counts were preferred in Criminal Case No. 8 of 2008. In the 1st count, he was charged with the offence of abduction contrary to s. 133 and in the 2nd count, the offence of rape contrary to s. 130 (1) (2) (e) and 131 of the Penal Code. In the 1st count, it was alleged that on 15/5/2008 at about 07:00 hrs at Kazima area in Tabora Region, the appellant took a girl aged 13 years from Tabora to

Nguruka area in Kigoma Region without the consent of her parents. For the purpose of hiding her identity, the child shall be known as *"MS"* or the *"victim"*. In the 2nd count, it was alleged that on the same date at about 17:00 hrs at Kasisi, Nguruka area within the District and Region of Kigoma, the appellant had carnal knowledge of the victim.

The appellant denied both counts and as a result, the case proceeded to a full trial. At the trial, evidence was adduced by two prosecution witnesses, No. C. 6744 S/Sgt Seiph (PW1) and WP 5161 PC Gisango (PW2). On his part, the appellant (DW1) was the only witness for the defence.

Having considered the tendered evidence, the learned trial Principal Resident Magistrate found that the prosecution had proved the 2nd count beyond reasonable doubt. The appellant was consequently convicted of that count and sentenced to thirty (30) years imprisonment.

Aggrieved by the decision of the trial court, the appellant wished to appeal to the High Court. He could not however, lodge a notice of intention to appeal (the notice) within the period of ten days of the date of the decision sought to be challenged as stipulated under s. 361 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] (the CPA). He thus filed an application in the High Court of Tanzania at Tabora seeking extension of time to lodge the notice out of time. On 2/9/2015

his application was allowed by Rumanyika, J. (as he then was) who granted a period of ten days from the date of the ruling to file the notice.

Notwithstanding that successful outcome, on 22/5/2017 the appellant filed another application in the same court, Misc. Criminal Application No. 95 of 2017 (the application) seeking the same relief applied earlier in his previous application. According to his supporting affidavit, although he had prepared the notice and handed it to the officer in-charge of the prison on 7/9/2015 for him to transmit it to the High Court for filing, it turned out that the same was misplaced in the registry of the High Court. He surmised so following a letter written to him by the Deputy Registrar of the High Court informing him that no such notice was received by the registry of that court. For that reason, the appellant filed the application, the decision of which has given rise to this appeal.

In paragraphs 2, 3 and 5 of the affidavit filed in support of the application, the appellant states as follows: -

> "2. *That, on 2nd day of September 2015 my application was granted by Honourable S.M. Rumanyika and allowed me to file notice of intention to appeal within ten (10) days as indicating in the court order attached for further confirmation.*

3. *That, on 7th day of September, 2015 I filed my notice of intention to appeal i.e., form and forwarded it to the High Court through the prison officer in-charge's office with reference No. 112/TB/VOL.XX/43 dated 07/09/2015. In further conformity I would like to attach the said notice of intention to appeal.*

4. *. . . . N/A*

5. *That, after my application was granted by Honourable S.M. Rumanyika I took all the necessary steps well within time given by the High Court but my notice of intention to appeal and petition of appeal was misplaced at the High Court or otherwise hence this unnecessary delay occurred."*

Having heard the application, the learned High Court Judge (Utamwa, J.) was of the view that the appellant had failed to show that the delay was due to sufficient cause. He particularly found that the appellant had failed to account for the period between 21/3/2017 when he received the Deputy Registrar's letter notifying him (the appellant) that the notice, which he claimed to have been transmitted to the High Court, could not be traced in the registry and 8/6/2017 when he filed the application. On that finding, the learned High Court Judge dismissed the application for want of merit hence this appeal.

According to the memorandum of appeal, the appeal is based on three main grounds. In the first and second grounds, the appellant alleges existence of illegalities in the proceedings of the trial court; **first,** that he was not reminded of the charge before commencement of hearing and **secondly,** that by dismissing the application, the High Court denied him his constitutional right of being heard on the intended appeal. In the third ground, he contended that the learned High Court Judge erred in failing to take into account that, because the appellant was a prisoner and thus being dependant on the assistance of the prison authorities to lodge his notice, that factor constituted sufficient cause for the grant of extension of time.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Ms. Upendo Malulu, learned Senior State Attorney. When he was called upon to argue his grounds of appeal, the appellant opted to let the learned Senior State Attorney submit first in response to the grounds of appeal but reserved his right to make a rejoinder, should the need arise.

At first, Ms. Malulu expressed the stance that she was supporting the appeal on the basis of the 3rd ground of appeal. However, when probed by the Court whether in the absence of any material showing that the appellant had accounted for all the period of the delay, the learned

Senior State Attorney conceded that the High Court correctly found that the appellant did not account for the period between 21/3/2017 when he was informed by the Deputy Registrar of the High Court that his purported notice had not been received and 8/6/2017 when he filed the application.

Although in a criminal case, the fact that an applicant is a prisoner may constitute sufficient cause for grant of extension of time, the learned Senior State Attorney agreed that the mere contention by the appellant that he was incarcerated in prison without showing the efforts taken by him after he had received the Deputy Registrar's letter, does not constitute a sufficient cause. The situation under which a prison status of a person may constitute sufficient cause for grant of extension of time was stated in the case of **Sospeter Lulenga v. Republic**, Criminal Appeal No. 107 of 2006 (unreported). In that case, at the time of entering into the prison, the appellant expressed his intention to appeal. His notice of intention to appeal was however, not processed by the prison officer within the prescribed time. Considering that situation, the Court observed as follows:

> *". . . having so expressed his intention to appeal, the appellant left the matter in the hands of the prison officer who was duty bound to transmit the Notice of Appeal to the High Court. The default of the prison officer to forward the Notice of Appeal*

to the High Court is sufficient ground for extending the period of appeal."

As pointed out above, in the case at hand, there is nothing in the record which indicates that the appellant pursued the matter with the office of the officer in-charge of the prison after the Deputy Registrar's letter. The affidavit in support of the application is similarly silent on that aspect. We do not therefore, find merit in the 3rd ground of appeal. The same is accordingly dismissed.

With regard to the 1st and 2nd grounds of appeal, the learned Senior State Attorney opposed the contention by the appellant that the decision sought to be challenged is tainted with illegalities specified in the two grounds of appeal. She argued that the alleged illegalities are not apparent. We respectfully agree with the learned Senior State Attorney that the illegalities alleged in the two grounds of appeal do not constitute sufficient cause for extension of time. The reason is that, for an illegality to warrant the court's exercise of its discretion to grant extension of time, such an illegality must *inter alia*, be apparent on the face of the record. See for instance, the case of the **Owner of the Vessel Sepideh and Pemba Island Tours and Safaris v. Yusuph Mohamed and Ahmad Abdullah,** Civil Application No. 91 of 2013 (unreported). Since it is not, in law, a mandatory requirement that an accused person must be reminded of the charge before commencement of hearing, we do not find

merit in the allegation made in the 1st ground of appeal. The position applies to the 2nd ground of appeal. The contention that by dismissing the application, the learned High Court Judge denied the appellant his right to be heard in the intended appeal is not, in our view, an apparent illegality. The application was dismissed by operation of the law. The High Court found that the appellant had failed to establish sufficient cause for the delay in instituting the notice of intention to appeal. In our considered view, whether the decision had the effect of denying the appellant the right to be heard in the intended appeal or not requires a long drawn process to be determined.

Despite the illegalities relied upon by the appellant, we drew the attention of the learned Senior State Attorney to the proceedings of the trial court at page 13 of the record of appeal. As can be discerned from that page of the record, the medical report (exhibit P1) was not only tendered by the prosecutor but the appellant was not, in terms of s. 240 (3) of the CPA, informed of his right to require that the author of that document be called for cross-examination. Furthermore, the statement of the victim, who did not testify in court was admitted without any indication that the requirements stipulated under s. 34 B of the Evidence Act [Cap. 6 R.E. 2002, now R.E. 2019], were complied with; particularly under sub-section 2 (a) which requires, among other things, that all

reasonable steps be taken to procure the attendance of the witness before his statement is admitted and sub-section 2 (4) which requires the reading of the statement aloud in court after its admission.

Ms. Malulu readily conceded that those are apparent illegalities which, had the learned High Court Judge considered them, he would have granted the application so that the same are addressed in the intended appeal. We agree with the learned Senior State Attorney. It is trite law that where there are apparent illegalities in the decision sought to be challenged, the court hearing an application for extension of time should not hesitate to exercise its discretion to grant such an application. See for instance, the cases of the **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185 and **Lyamuya Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). In the first case above, the Court observed as follows:

> *"In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and record straight."*

Having found in this case, that there are apparent illegalities in the decision sought to be challenged, we are of the settled mind that the High Court ought to have granted the application. In that regard, in the exercise of the powers conferred in the Court by s. 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019], we hereby allow the appeal and reverse the decision of the High Court refusing the appellant's application. In the event, the appellant is granted extension of time to lodge his notice of intention to appeal within ten (10) days from the date of delivery of this judgment.

DATED at **TABORA** this 24th 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 25th day of March, 2022 in the presence of the Appellant in person and Ms. Jaines Kihwelo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL