

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO.246 OF 2018

(CORAM: KWARIKO, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

SHIJA S/O MARKO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania, Mwanza District
Registry at Mwanza)**

(De-Mello,J)

dated the 25th day of June, 2018

in

Misc. Criminal Application No. 23 of 2017

.....

JUDGMENT OF THE COURT

11th & 18th July, 2022

MWAMPASHI, J.A.:

This is an appeal against the decision of the High Court of Tanzania at Mwanza (De-Mello, J) in Misc. Criminal Application No. 23 of 2017 wherein the appellant's application for extension of time within which to lodge a notice of intention to appeal and a petition of appeal to the High Court, was refused. The appellant who was charged with rape was, on 19.11.2012, convicted and sentenced to life imprisonment on his own plea of guilty by the Bukombe District Court at Bukombe in Criminal Case No. 225 of 2012. He sought to appeal to the High Court

but he was out of time and when he applied for extension of time for that purpose, his application was refused by the High Court hence the instant appeal.

The appellant's grounds for extension of time before the High Court, can be discerned from the appellant's affidavit filed in support of the application. After being convicted on 19.11.2012, the appellant was sent to Kahama Prison. On 21.11.2012 he expressed his intention to appeal by presenting his notice to that effect to the Officer In-charge of Kahama Prison for the same to be transmitted to the District Court. A copy of the said notice was attached to the supporting affidavit.

On 15.03.2013, the appellant received a copy of the proceedings and judgment for appeal purpose and after preparing his petition of appeal he again handed the same to the Officer In-charge of Kahama Prison who transmitted it to the High Court of Tanzania at Tabora Registry. While he was waiting to be summoned by the High Court for his appeal, he was transferred to Shinyanga Prison and later to Butimba Central Prison in Mwanza. It was further averred by the appellant in his supporting affidavit that, while at Butimba Prison he realized that being a prisoner, he could make no follow ups on the appeal he had filed at Tabora. He also learnt that Bukombe District Court which was by then in

Shinyanga Region and therefore within the High Court of Tanzania Tabora Registry, where he had filed his appeal, was now in the new Region of Geita which is within Mwanza High Court Registry. It was at that point when he found himself with no other option but to file a new appeal before the High Court at Mwanza. However, as time was not on his side, he had to firstly apply for extension of time within which to lodge not only a petition of appeal but also a notice of intention to appeal. He then so applied to the High Court but as we have intimated to above, the application was dismissed hence the instant appeal.

It is also worth noting at this very stage that in the application for extension of time before the High Court, the respondent did not file a counter-affidavit to counter the appellant's affidavit. The appellant's deposition before the High Court was therefore not controverted or challenged hence true. It is however in record that at one point the hearing of the application had to be halted to allow the learned State Attorney who represented the respondent to go and cross-check whether the appellant's averment in his supporting affidavit were true. At the resume of the hearing, the learned State Attorney reported that her perusal of record had revealed that there was no evidence to support the appellant's position. She thus prayed for the dismissal of the application as the appellant had failed to show good cause for the delay.

Upon hearing the parties, the High Court Judge agreed with the learned State Attorney and refused to grant the application. In doing so, she did, however, not confine herself within the boundaries and guideline principles applicable in applications for extension of time, but she overstepped the boundaries and ventured into the merits of the appellant's intended appeal. She is on record observing that:

"Lay as it is apparent, I cannot wait to join hands with Counsel Leii that nothing substantial in terms of 'good and sufficient reasons' has been advanced by the Applicant for his hopeless case. My perusal from what transpired in Bukombe District Court in 2012 and rightly before Hon. Ushindi Swalo, Magistrate, has on pages 1 & 2 of the proceedings, the [Applicant's] own admission of the Rape charge that was [levelled] against him. PF3 as exhibit 'P1' as well as his caution statement exhibit P2 were tendered and not objected, admitted as evidence".

Aggrieved, the appellant has filed the instant appeal on five grounds of appeal which we have taken liberty to condense and paraphrase them in the following three grounds:

- 1. That, the learned High Court Judge erred in law by joining hand with the respondent and by intimating that the intended appeal would not succeed.*

- 2. That, the learned High Court Judge erred in law by not considering the reasons for the delay in the supporting affidavit.*
- 3. That, the learned High Court Judge erred in law by failing to appreciate that the appellant had been in custody as a prisoner under the control of prison officers.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas on the other hand, the respondent Republic, had the services of Ms. Ghati Mathayo, learned State Attorney.

When invited to argue his appeal, the appellant reiterated what he had averred in his affidavit in support of his application before the High Court. He insisted that having been incarcerated in prison and after he had handed his notice of intention to appeal and a petition of appeal to the officer in charge of the prison, there was nothing more he could have done in as far as the follow ups of the progress of his intended appeal was concerned. The appellant argued that the High Court erred in dismissing his application on grounds that he had shown no good cause and also that he had pleaded guilty to the charge. He therefore prayed for his appeal to be allowed by granting him time to file a notice of intention to appeal and a petition of appeal to the High Court against the decision of the District Court which convicted and sentenced him.

At the very outset, Ms. Mathayo intimated to us that she was supporting the appeal. She argued that there was evidence in abundance showing that immediately after being convicted and sent to prison, the appellant handed his notice of intention to appeal to the officer in charge of the Prison. She went on submitting that, though it is not in the record, the appellant did also hand his petition of appeal to the officer in charge of the prison. Under these circumstances and since no counter-affidavit was filed to challenge the affidavit filed by the appellant, and also as it was the duty of the prison officers to assist the appellant, then, it was argued by Ms. Mathayo that good cause for the delay was shown and the High Court did therefore err in dismissing the appellant's application. In addition, she submitted that the High Court ought to have considered the fact that the appellant had been transferred from one prison to another. To buttress her argument Ms. Mathayo referred us to our previous decision in **Ngolo s/o Mgagaja v. Republic**, Criminal Appeal No. 331 of 2017 (unreported).

Ms. Mathayo did also agree with the appellant that the High Court erred in pre-maturely deciding the merits of the appellant's intended appeal which was not before it. She therefore urged us to allow the appeal and extend time within which the appellant will file his notice of intention to appeal and a petition of appeal.

Having considered the submissions by the parties and after examining the record of appeal, we are of a settled mind that the only issue calling for our determination is, whether the appellant had managed to show sufficient cause warranting the extension of time he had sought.

We find it apposite to begin our deliberation of the above posed issue by restating that the High Court derived its power to admit an appeal even where the period of limitation prescribed to do so has elapsed from section 361 (2) of the Criminal Procedure Act [Cap. 20 R.E. 2022] under which it is provided that:

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

It is clear from the above quoted provisions that the power given to the High Court under that provision is discretionary. The law is also settled that discretion should always be exercised judiciously and flexibly with due regard to the relevant facts of the particular case. See- **Ntiga Gwisu v. Republic**, Criminal Appeal No. 428 of 2015 (unreported). We are also mindful that an exercise of discretion cannot be interfered with by a higher court unless it is satisfied that in exercising its discretion and making a decision sought to be impugned, the lower court applied a

wrong principle or that certain factors were not taken into consideration.

See- **Mbogo and Another v. Shah** [1968] 1 EA 93.

We will be guided by the above settled positions of the law in determining the instant appeal.

Beginning with the first ground wherein it is being complained that the High Court pre-maturely determined the appellant's intended appeal, it goes without saying that indeed, it was an error for the High Court to have ventured into the merits of the appellant's intended appeal which, as correctly argued by Ms. Mathayo, was even not before it. We think, the act of the High Court of pre-determining the merits of the appellant's intended appeal prejudiced the appellant. It is also our considered view that the decision to dismiss the appellant's application was influenced by, among other things, the High Court pre-determination of the appellant's intended appeal. At any rate, the outcome of pre-determination of the intended appeal does not constitute sufficient cause to justify refusal for extension of time leave alone the fact that such pre-determination is legally wrong. The High Court ought to have confined itself within the parameters and principles governing extension of time. The first ground of appeal is therefore granted.

Regarding the second and third grounds of appeal, we agree with the parties that under the circumstances of this case, sufficient reasons for the delay was shown and the High Court ought to have extended time within which the appellant could have filed his notice of intention to appeal and a petition of appeal. As we have alluded to earlier, the averment and reasons for the delay given in the appellant's affidavit in support of his application before the High Court that he had handed his notice of intention to appeal and a petition of appeal to the officer in charge of the prison and also that he was being transferred from one prison to another were not controverted by a counter-affidavit from the respondent Republic. The averments therefore, remained to be true account of what transpired and thus constituted sufficient reasons for extension of time. In the case of **Sospeter Lunenga v. Republic**, Criminal Appeal No. 108 of 2006 (unreported), the Court considered the value and weight of depositions in an affidavit of a prisoner filed in an application for extension of time which are not supported by an affidavit of a prison officer but which are not countered by the respondent Republic and held that, such depositions constituted good cause because they were not countered by the respondent Republic and also that it was not possible to secure a supplementary affidavit from the responsible officer which could adversely affect his prospect.

It is also our considered view that the High Court ought to have considered the fact that being in prison, the appellant was not a free agent and thus could not have been expected to do anything more than what he did. As rightly argued by Ms. Mathayo, the appellant depended on the assistance of prison officers and the negligence or inaction of the prison officers cannot be resolved to the detriment of the appellant. In the case of **Kabisa Sabiro and Two Others v. Republic**, Criminal Appeal No. 191 of 2010 (unreported) in which the Court was faced with a similar scenario, it was stated that:

"The appellants being in prison it is to be expected that every action they take has to be through those under whose authority they are".

Transfer of a prisoner from one prison to another has been considered by the Court to be a reason constituting good cause for extension of time. In the case of **Renatus Muhanje v. Republic**, Criminal Appeal No. 417 of 2016 (unreported), wherein the appellant had advanced the same reasons as it is for the appellant in the instant appeal, the Court subscribed to its earlier decision in **Mwita Mataluma Ibaso v. Republic**, Criminal Appeal No. 06 of 2013 (unreported) and stated that:

"We fully subscribe ourselves to the above position. Like in the above case, in the present case the appellant was imprisoned at Songea Prison where he prepared and submitted his notice of intention to appeal to the Prison Authority for onward transmission to the court but before he could process its appeal to its completion, he was transferred to Ukonga Prison in Dar es Salaam. By analogy, we are accordingly inclined to agree with the learned State Attorney that the reasons for delay that were advanced by the appellant before the High Court constituted good cause. The High Court was therefore not justified to refuse the applicant's application for extension of time".

See also **Sospeter Lunenga v. Republic**, (supra) and **Nduruwe Hassan v. Republic**, Criminal Appeal No. 10 of 2004 (unreported).

For the above given reasons, we are satisfied that the reasons for the delay as put forward by the appellant in support of his application before the High Court constituted sufficient reasons and the High Court was therefore not justified to dismiss the application.

We therefore allow the appeal and grant the appellant ten (10) days within which to lodge his notice of intention to appeal from the date of delivery of this judgment and thereafter lodge a petition of

appeal within forty five (45) days from the date he receives the necessary documents for appeal purposes from the District Court of Bukombe.

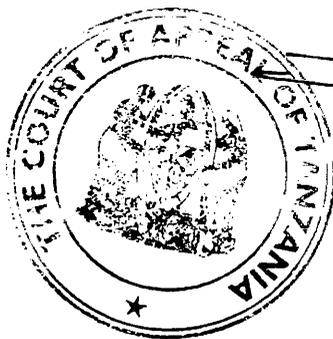
DATED at **MWANZA** this 18th day of July, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 18th day of July, 2022 in the presence of the appellant in person, and Mr. Deogratius Richard Rumanyika, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL