

IN THE COURT OF APPEAL OF TANZANIA

AT SONGEA

(CORAM: JUMA, C.J., NDIKA, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 476 OF 2023

ROBERT KADASO MAGENI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Songea)

(Madeha, J.)

dated the 31st day of March, 2023

in

DC Criminal Appeal No. 52 of 2023

JUDGMENT OF THE COURT

14th & 18th August, 2023

NDIKA, J.A.:

This is an appeal against the judgment of the High Court of Tanzania at Songea ("the High Court") dated 31st March, 2023 affirming the ruling of the District Court of Mbinga ("the trial court") by which a preliminary objection raised by Robert Kadaso Mageni, the appellant herein, challenging the competence of the charge sheet, was dismissed.

It is pertinent that we set forth the essential facts of the case to provide the context in which this appeal arises.

In the trial court, the appellant was arraigned on 24th March, 2022 on charges of abuse of position and occasioning loss to a specified authority

allegedly committed in January 2018 when he was serving as the Town Director for Mbinga Town Council. On 12th April, 2022 he appeared before the court, but before the scheduled preliminary hearing proceeded, he took a strong exception to the proceedings. He raised a preliminary objection to the effect that the charge sheet was bad in law for contravening section 4 (3) of the Criminal Procedure Act, Cap. 20 ("the CPA") as amended by section 23 of the Written Laws (Miscellaneous Amendments) Act, Act No. 1 of 2022. The aforesaid provision, as amended, creates a binding requirement for exhaustion of available civil and administrative remedies before any criminal process is invoked. It stipulates as follows:

"Notwithstanding subsection (2), where a matter is of civil, administrative or criminal nature, as the case may be, exhaustion of the remedies in civil or administrative domains shall be mandatory prior to the invocation of the criminal process in accordance with this Act."

After hearing the parties on the issue, the trial court was unimpressed. It dismissed the preliminary objection on 27th April, 2022 primarily on the reason that no administrative or other measures against him could be taken by his employer as he was no longer a public servant at the time of his

arraignment. The court, therefore, concluded that the dictates of section 4 (3) of the CPA had not been flouted.

The appellant was dissatisfied by the said outcome. To pursue his intended appeal, he had to comply with the terms of section 361 (1) (a) and (b) of the CPA. These provisions required him, first, to give notice of his intention to appeal within ten days from the date of the impugned ruling and, secondly, to lodge his petition of appeal within forty-five days from the same date of the ruling. It turned out that although he lodged a notice of intention to appeal as well as petition of appeal within the prescribed time, the appeal, registered as Criminal Appeal No. 32 of 2022, was ultimately struck out on the ground that the notice of appeal upon which it was anchored was irredeemably defective.

In further pursuit of justice, the appellant successfully applied vide Miscellaneous Criminal Application No. 35 of 2022 in the High Court under section 361 (1) and (2) of the CPA for extension of time for lodging a notice of intention to appeal as well as a petition of appeal. Upon such extension, he duly lodged a fresh appeal. Nonetheless, the effort went unrewarded; for the High Court dismissed the appeal as it upheld the trial court's decision. Still unrelenting, the appellant now appeals to this Court on two grounds.

Ahead of the hearing of the appeal on the merits, we queried the parties on the competence of the appellant's appeal to the High Court in view of the provisions of section 359 (3) of the CPA read together with section 43 (1) of the Magistrates' Courts Act, Cap. 11 barring appeals in respect of any preliminary or interlocutory decision or order of a subordinate court having no effect of determining the criminal charges to finality.

Addressing us on the above question, Mr. Dickson P. Ndunguru, learned counsel for the appellant, conceded, with notable forthrightness, that the dismissal of the preliminary objection by the trial court did not finally determine the criminal charges and that the appellant had no right of appeal against it. He acknowledged that the purported appeal to the High Court was inevitably incompetent for contravening section 359 (3) of the CPA. In consequence, he urged us to revise and nullify the High Court's proceedings as well as the judgment thereon pursuant to section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 ("the AJA").

Mr. Tumaini Kweka, learned Principal State Attorney, appearing for respondent Republic with the assistance of Mr. Kauli Makasi, learned Senior State Attorney, associated himself with Mr. Ndunguru's submission. Specifically on the way forward, he moved us to remit the matter to the trial court for it to proceed with the preliminary hearing.

It is imperative that we set out the provisions of section 359 of the CPA in full to facilitate clear understanding of their import:

"359.-(1) Save as hereinafter provided, any person aggrieved by any finding, sentence or order made or passed by a subordinate court other than a subordinate court exercising its extended powers by virtue of an order made under section 173 of this Act may appeal to the High Court and the subordinate court shall at the time when such finding, sentence or order is made or passed, inform that person of the period of time within which, if he wishes to appeal, he is required to give notice of his intention to appeal and to lodge his petition of appeal.

(2) Any appeal to the High Court may be on a matter of fact as well as on a matter of law.

*(3) Notwithstanding the provisions of subsections (1) and (2), **no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of a subordinate court unless such decision or order has the effect of finally determining the criminal charge.**"*[Emphasis added]

It is to be noted from the above provisions that while the combined effect of subsections (1) and (2) is to create a right of appeal to the High Court against any finding, sentence or order made by a subordinate court as a trial court upon any matter of fact or law, subsection (3) bars any appeal against a preliminary or interlocutory decision or order having no effect of finally determining the criminal charge.

The Court defined the phrase "*interlocutory order*" in **Seif Sharif Hamad v. S.M.Z.** [1992] T.L.R. 43 at p. 46 by quoting from Black's Law Dictionary, Revised 4th Edition, to mean "*An order which decides not the cause, but settles some intervening matter relating to it....*" See also, for example, **Murtaza Ally Mangungu v. The Returning Officer of Kilwa & 2 Others**, Civil Application No. 80 of 2016 (unreported); **Juma Robi v. Republic**, Criminal Appeal No. 128 of 2020 [2022] TZCA 458 [18 July 2022; TanzLII]; and **Tanzania Posts Corporation v. Jeremiah Mwandi**, Civil Appeal No. 474 of 2020 [2021] TZCA 311 [16 July 2021; TanzLII].

Following the Court's reasoning in **Seif Sharif Hamad** (*supra*), we hold, as we must, that the cause before the trial court is whether the appellant is guilty or not of the charges facing him, but not whether the charge sheet or the ensuing trial violated section 4 (3) of the CPA. It cannot, therefore, be negated that the impugned ruling of the trial court on the

propriety of the charges is interlocutory and that it is clearly caught in the web of the prohibition under section 359 (3) of the CPA. By assuming jurisdiction over the purported appeal, the High Court slipped into serious error. In consequence, we invoke our revisional jurisdiction under section 4 (2) of the AJA and nullify the proceedings before the High Court as well as the judgment thereon. We order that the matter be remitted to the trial court for resumption of the proceedings from where they were halted.

Before we take leave of the matter, we wish, in passing, to make a brief observation on a matter we consider to be quite essential.

As we hinted earlier, the appellant instituted his purported appeal to the High Court after he had sought and obtained an extension of time under section 361 (1) and (2) of the CPA. It is on record that at the hearing of the said application, the learned Senior State Attorney, who represented the respondent Republic, did not contest the motion. It panned out that the court concluded that it was "*in the interests of justice*" that the extension be granted to afford the appellant an opportunity to be heard on his intended appeal.

We are alert that it was within the discretion of the court concerned to grant or refuse the enlargement of time sought and that a superior court

would rarely interfere with the exercise of the discretion by an inferior court. Interference is justified on several grounds, but what is relevant for our present purposes is the failure by the court to take into consideration a matter which it should have taken into consideration and in doing so arrived at a wrong decision – see **Mbogo and Another v. Shah** [1968] EA 93, at page 94.

It is quite perturbing that High Court granted an extension of time to lodge an appeal that is expressly barred by statute. In our respectful view, the grant of extension was clearly an exercise in futility as the appellant had no right of appeal against the interlocutory decision in issue. We had expected the High Court to have directed its mind to that aspect, which, by any yardstick, ought to have been apparent on the record.

In **Robert Madololyo v. Republic**, Criminal Appeal No. 486 of 2015 [2018] TZCA 346 [14 February 2018; TanzLII], the Court, quoting with approval the decision of the Supreme Court of Appeal of South Africa in **Uitenhage Transitional Local Council v. South African Revenue Service**, 2004 (1) SA 292 (SCA), cautioned that condonation of delay is not to be had merely for the asking. The applicant must furnish a detailed and accurate explanation of the causes of the delay and the effects thereof to enable the court to understand the situation and assess the responsibility.

Nonetheless, in appropriate situations, even where the delay involved is fully explained, the court should decline the application if the intended appeal for which condonation is sought is expressly barred by law as is the case in the instant matter.

Ordered accordingly.

DATED at **SONGEA** this 17th day of August, 2023

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

This Judgment delivered this 18th day of August, 2023 in the presence of Mr. Dickson Ndunguru, learned counsel for the Appellant and Ms. Hellen Chuma, learned State Attorney for the respondents, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL