

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 192 OF 2021

SALUM RASHID KINGALANGALA..... APPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Bahati, J.)

dated the 8th day of March, 2021

in

Criminal Application Case No. 30 of 2020

JUDGMENT OF THE COURT

27th September & 3^d October, 2023

KITUSI, JA.:

The appellant was charged with and convicted of corrupt transaction contrary to section 15 (1) (a) of the Prevention and Combating of Corruption Act, No. 11 of 2007. The District Court of Igunga where he stood trial, sentenced him to a fine of TZS 1,000,000/= or to a 3-year jail term in default. That was on 10 March, 2016. In July, 2020, the appellant unsuccessfully applied for extension of time within which to appeal that

decision, the High Court taking the view that the appellant had not accounted for the delay nor had he established existence of any illegality to warrant extension of time. It was in Criminal Application No. 30 of 2020.

This is an appeal against that decision. It raises two points challenging the High Court for not appreciating that there existed a point of law of sufficient importance touching on illegality and for holding that the appellant did not show good cause for the delay.

Learned advocate Mwigamba Sosthenes argued the appeal on behalf of the appellant who was also in court. Ms. Alice Thomas assisted by Ms. Veronica Moshi, both learned State Attorneys, represented the respondent Republic, resisting the appeal. In addressing us, Mr. Sosthenes, submitted on aspects which he referred to as irregularities and also constituting denial of a right to be heard. With respect, it is not that the learned counsel was so elaborate on this in his address, so we had difficulties following his course. Below is what we could gather from his submission.

Here are examples of the learned advocate's areas of irregularities. He submitted that the trial court did not explain to the appellant his right to plead "guilty or not guilty" on the first reading of the charge, nor did the court indicate the date of the grant of bail to him. These, allegedly contravened sections 228 and 148 of the Criminal Procedure Act (CPA). He

complained that the appellant was denied the right to examine the contents of the documentary exhibits tendered and also that the right to make a submission of no case to answer was not explained to the appellant, in violation of section 231 of the CPA. For the right to be heard, the learned advocate cited **Melchiad Peter Kimaro v. Riziki. Samwel (as Administrator of the Estate of the Late Mama Hittas & 2 Others,** Civil Revision No. 5 of 2017 (unreported). He prayed that we allow the appeal, quash the Ruling of the High Court and set aside the resultant order.

On the adversary side Ms. Thomas submitted that the learned counsel for the appellant is faulting the proceedings instead of the judgment. She pointed out that the application before the High Court had been made under section 361 (2) of the CPA which enjoins the court to extend time upon good cause being shown. She went on to argue that the appellant did not explain away the period of close to four years from 2016 when the judgment of the District Court was delivered to 2020 when the application for extension of time was filed. She supported the judgment of the High Court in which the learned Judge of the High Court got satisfied that the appellant did not account for the delay. The learned State Attorney cited the case of **Moroga Mwita Moroga v. Republic,** Criminal Appeal No. 181 of 2020 (unreported), to support her arguments.

On the illegalities, Ms. Thomas submitted that the appellant's counsel has not demonstrated any. She submitted, for instance, that contradiction of witnesses is not an illegality. She prayed for the appeal to be dismissed because the appellant failed in both accounting for the delay and establishing existence of an illegality.

Mr. Sosthenes reiterated his earlier position that denial of the right to examine the contents of a documentary exhibits constituted an illegality.

In this case we will need to revisit the principles underlying extension of time despite the fact that we have done so in quite a good number of our previous decisions. Inevitably, we will address the apparent shift in the understanding of the concept of illegality as a factor in applications for extension of time. This is because, with respect, Mr. Sosthenes' idea of what illegality is, has stunned us.

As we have observed, there are many decisions on this area. We begin with the agreed guidelines to be considered in applications for extension of time. In the case of **Lyamuya Construction Company Limited v. The Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), we made the following statement: -

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated: -

- (a) The applicant must account for all the period of delay*
- (b) The delay should not be inordinate*
- (c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- (d) If the court feels that there is other sufficient reason such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged"*

In this we gather from the contents of the chamber summons and supporting affidavit which the appellant presented to the High Court to seek for extension of time, is that he did not even pretend to account for the delay. We will reproduce grounds 2 - 6 of the affidavit: -

"2. That on 10/3/2016 the trial court Hon. A. T.

Milanzi RM pronounced a judgment and sentence against the applicant.

3. *That, the said judgment and sentence appear to be tainted with serious illegalities on the face of its record.*
4. *That there was likelihood of biasness against the Applicant.*
5. *That the applicant was not accorded a fair trial during the hearing in the trial Court.*
6. *That, the applicant has chances to succeed on this appeal."*

Come the day of hearing. To do justice to Mr. Sosthenes we will also reproduce the salient parts of his submissions: -

"We pray for an extension of time under section 361 (2) of CPA. We have reasons which we have attached in the affidavit. We pray this affidavit to form an integral part of our submissions. We have failed to appeal because the judgment and proceedings of the lower court have illegalities.

There are illegalities that witnesses procured by the prosecution contradicted each other...

Other illegalities, there is nowhere the client was given the charge sheet or complaint's statement as required...

Following these illegalities, there was no fair hearing on the part of the accused...

The accused showed the intention of appeal which he filed, it was the court's duty to prepare all documents but there is nowhere shown..."

In response to the foregoing submissions by the learned counsel, Mr. Deusdedit Rwegira, learned State Attorney submitted as follows: -

"The applicant has to give reasons as to why he was late to file an appeal. He has to show a good cause. On his affidavit under paragraph 3 – 6 read in tandem with the oral submissions, the applicant is attacking the trial proceedings on irregularity."

The learned judge noting that grant of extension of time is discretionary upon her and aware of factors for consideration as discussed in the case of **Mbogo v. Shah** [1968] E.A, she concluded that the applicant had not accounted for the delay of four years, which she said was inordinate.

We agree with the learned judge and wish to emphasize that from the very nature of the proceedings of extension of time, the applicant's prime duty is to account for the period of the delay. Case law has gone so far as requiring the applicant to account for each day of the delay [**Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported)]. Going by the guidelines in **Lyamuya Construction Co. Ltd** (supra) the applicant did not account for the period of 4 years of the delay which was too inordinate to be condoned. We do not have before us

any material that would justify us faulting the decision of the learned judge on this.

What appears to us to be a matter of serious concern is the apparent shift from those cornerstone considerations in prosecuting applications for extension of time to now pursuing allegations of illegality even where none can be said to exist. We need to trace the essence of the concept of illegality from **The Principal Secretary, Ministry of Defence and National Service v. Duran P. Valambhia** [1992] TLR 387. The essence of that case was an unsuccessful suit by Transport Equipment Limited against D.P. Valambhia whose counter claim succeeded. Consequently, in executing that decree, the High Court issued against the government, which was not a party in the suit therefore not heard, a garnishee order for USD 39,823,543.25 to be paid into Valambhia's overseas bank account. Subsequently, the Principal Secretary, Ministry of Defence and National Service was ordered to comply with the garnishee order within three weeks. An attempt by the Principal Secretary Ministry of Defence and National Service to appeal was objected to on the ground that the appeal was time barred, for the appellant's failure to timely serve the respondent with a copy of the letter to the Registrar. In deciding the application for extension of time sitting on a reference, the Court stated: -

"In the case before us however, the point at issue in effect is the illegality or otherwise of the garnishee order as a means of executing the Court order against the Government. For, should it turn out that the garnishee order is within the ambit of section 1 of the Government Proceedings Act, 1967 as argued by counsel for the Principal Secretary Ministry of Defence and National Service, then the order is illegal hence a nullity."

That was the background before the Court stated: -

"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason" within the meaning of rule 8 of the Rules for extending time."

Back to the decision of the learned judge on the question of illegality. She referred to the case of **Principal Secretary** (supra) that the alleged illegalities were explained and only when the Court was satisfied that there was likelihood of denial of the right to be heard, that it extended time. The learned judge also referred to the decision of the single justice in **Lyamuya Construction** (supra) which qualified the point of illegality.

We agree with the qualification that was made in the case of **Lyamuya Construction** (supra) that not every point of law qualifies to be

a ground for extension of time. It should be of sufficient importance such as the question of jurisdiction, and should be one that is easy to spot. Recently more qualifications were made in **Kabula Azaria Ng'ondi & 2 Others v. Maria Francis Zumba & Another**, Civil Appeal No. 174 of 2020 citing another decision of **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (both unreported) differentiating between decisional errors made by a judge in exercise of his jurisdiction which would not constitute illegality and those which go to the powers of the judge in the case.

We have sufficiently demonstrated how the principle of illegality has evolved and how it has been qualified over the years. We agree with Ms. Thomas that Mr. Sosthenes' nibbling of the proceedings cannot constitute illegalities. There could be decisional errors here and there but they are so small and insignificant that in comparison they are nowhere close to the illegality in the **Principal Secretary case** (supra). Allegations such as contradictions among witnesses, or the reading of the charge or grant of bail are as surprising as they are feeble and out of context. To pass such allegations off as constituting illegalities will lead to a very absurd situation which we must avoid.

As we are about to take leave, we wish to observe that parties in many applications for extension of time are increasingly drifting away from the peculiar circumstances which prevailed in the **Principal Secretary case** (supra). We need to remind the qualification made in **Lyamuya Construction** (supra) that in the former case, the court did not intend to form a principle of general application.

Heaving said so, this appeal has no merit. It is dismissed in its entirety.

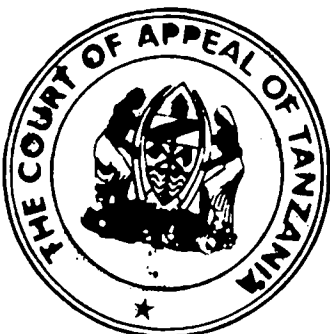
DATED at TABORA this 2nd day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 3rd day of October, 2023 in the presence of the Appellant in person and Mr. Steven Mnzava, learned State Attorney for the Respondent is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL