

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No. 74 OF 2021

(Arising from Misc. Cr. Application No. 10/2020 of Ukerewe District Court, Originating
in Criminal Case No. 103 of 2020 of Nansio Primary Court of Ukerewe District)

ABEID HUSSEIN.....1ST APPELLANT

SHUKRAN PANDE.....2ND APPELLANT

VERSUS

MATHEW S/O MAKOBA.....RESPONDENT

JUDGMENT

04th & 26 August, 2021

TIGANGA, J.

This judgment is in respect of the appeal filed by the appellants, challenging the decision of Ukerewe District Court in Misc. Criminal Application No. 10 of 2020 in which the current appellants were applicants asking for extension of time to file an appeal to challenge the decision of the Primary Court of Nansio in Criminal Case No. 103 of 2020, in which the current respondent, Mathew Makoba was the complainant against the appellant at hand, with two counts of office breaking with intent to commit

an offence contrary to section 293 and 296 (1)(a) of the Penal Code, [Cap 16 RE 2019] in the first count, and theft contrary to section 258 (1) and 265 of the same law. The offences were allegedly committed on 05/06/2020 at Nakatunguru village in Ukerewe District, and the properties involved were "mabondo" weighing 25kg valued at Tshs 1,643,000/= the property of Mathew Makoba, the respondent.

After full trial, the trial Primary Court found both accused persons, now the appellants, guilty as charged and consequently sentenced them to five years which sentence was to be confirmed by the District Court.

The judgment of the trial Primary Court was delivered on 10/06/2020 in which the right of appeal was explained. On 18/11/2020 the appellant filed an application for extension of time to appeal against the decision of the Primary Court. That application was however dismissed for failure to give good cause for delay as the reasons given were not legally sound to convince the Court.

Aggrieved by the decision of the District Court in Criminal Application No. 10 of 2020, the appellant filed five grounds of appeal which read as follows;

1. That the learned District Court Magistrate erred for dismissing the appellant application instead of striking it out.
2. That the application was wrongly dismissed without informing the applicant alternative namely to re-file the same application, within the same Court, and that the involvement of Mr. Innocent Michael Counsel for the respondent was illegal.
3. That the court below erred in law when it shifted the onus of negligence to the appellants who procedurally exercised their legal right regarding their District Court Misc. Criminal Application No. 10 of 2020.
4. That the court failure to note that the grounds filed by the appellant in their Misc. Criminal Application No. 10 of 2020 were strong enough for the District Court to allow the appellant's appeal to be determined on merit.
5. As to the above circumstances the appellants invites your Honourable Court to exercise its provisional powers conferred upon it and interfere with the decision/Ruling of the lower courts vide the District Court Misc. Criminal Application No. 10 of 2020.

At the hearing of the Appeal, the appellant appeared in person, unrepresented, while the respondent was represented by Mr. Lucas Bundala - Advocate.

When called upon to argue his appeal, the 1st appellant had nothing to add, he just adopted his grounds of appeal to be his arguments in support of the application and asked the court to base on those grounds and compose the judgment deciding the appeal.

In his argument, the 2nd appellant submitted that before the District Court, the appeal was filed within time but the Magistrate rejected it on the grounds that the same was not submitted on legal papers. He submitted that as they were in prison custody, they could not find legal papers as directed. Therefore they filed their appeal after they had managed to get the legal paper, which was also rejected on the ground that it was out of time. Following that second rejection, they filed an application for extension of time which subject of this appeal, as it was consequently dismissed for want of good cause.

In reply, the counsel for the respondent argued one ground of appeal after the other. Starting with the first ground of appeal, he submitted that the court was correct to dismiss the application rather than striking it out,

on the reason that the said application was heard on merit, so dismissal was an appropriate order.

Regarding the second ground of appeal, that their case was dismissed without being told the alternative remedies, he submitted that the right which the appellants deserved to be informed was the right of appeal which the court informed them.

Regarding the legality of Mr. Innocent Michael, he said the Innocent Michael is an Advocate with Roll No. 5276 and during the case he was permitted to practice, therefore he was a competent person to represent them as Advocate.

Regarding the third ground of appeal, he submitted that the appellants were duty bound to state to the court that they had good cause for delay, which they did not do, failure to do so meant they were negligent.

On the fourth ground of appeal he submitted that, the appellants were given or afforded an opportunity to be heard, the court was not satisfied by the reasons given; therefore they did not convince the court to grant the application.

Regarding the fifth ground of appeal he submitted that, the court can use its discretion to extend time but such discretion should be exercised judiciously, since there was no reason given, then the application could not be granted.

Regarding the complaint that, the appeal was filed in time but was rejected on the ground that it was not filed in legal paper, he submitted that, the appellants were supposed to file what they filed in legal papers failure of which cannot be tolerated. He in the end submitted that, the application before the District Court and the subsequent appeal have no merits.

In rejoinder the 1st appellant said nothing, but the 2nd appellant insisted that they were in remand custody therefore they had no means of getting the legal paper to use in filing their appeal. He prayed their application to be allowed.

That being a summary of the records, the grounds of appeal and the arguments made in support and against the appeal, in dealing with this appeal I will adopt the mode used by the counsel for the respondent in his submission in reply by dealing with one ground of appeal after the other.

Starting with the first ground of appeal, I entirely agree with the counsel for the respondent that where the matter has been heard on merit, and the court find in its decision that, the matter before it has not been proved to the required standard to entitle the court to grant the same then the court must dismiss the matter, as strike out is an order given where the matter has not been heard on merits.

For that reason, since the application for extension of time was heard on merits and the court found the applicant to have failed to prove important principle which, if proved would have entitled the applicant to the grant of the application, the proper order to make was to dismiss the application for want of merit as it did. This ground therefore lacks merits, it is thus disallowed.

Regarding the second ground of appeal, that the appellant's application was dismissed without them being told the alternative remedy, I entirely agree with the counsel for the respondent, that as the matter was dismissed, that meant it was heard conclusively at that particular level of the court, the only right which they deserved to be informed was a right of appeal, which was explained to them at page 3 of the Ruling which

dismissed the application before the District Court. This ground also is devoid of merits, it is disallowed.

Regarding the legality of Mr. Innocent Michael to represent the respondent, there is no elaboration as how Mr. Innocent Michael lacked the capacity to represent the parties before the District Court. The counsel for the respondent has said it all, that Innocent Michael he is an Advocate, I would add, of the High Court and courts subordinate thereto save the Primary Court, with Role No. 5276 with a practicing permit or certificate. In the circumstance and without any other evidence to the contrary, he was entitled to represent the respondent, the ground lacks merit and stand to fail.

Regarding the third ground of appeal, I entirely agree with the counsel for respondent that the applicant in application for extension of time needs to show good cause for delay. The term good cause, as put forward in the case of **Mohamed Selemani Ghona Vs. Mahmoud Mwemus Choti Kungu**, Civil Application No. 179/01 of 2020 CAT - DSM in which the factors to consider in ascertaining whether or not there is good cause or not were laid out as follows:-

"In determining if "good cause" has been disclosed the court has consistently taken into account considerations such as:-

- i) The cause for the delay involved,*
- ii) The length of the delay,*
- iii) The conduct of the parties,*
- iv) The degree of prejudice if any that each party stands to suffer pending on how the court exercises its discretion,*
- v) The need to balance the interest of a party who has a decision in his or her favour against the interest of the party who has a constitutionally under pinned right of appeal,*
- vi) Whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged."*

In this appeal, the cause of delay as alleged by the 2nd appellant, which allegation has not been disputed by the respondent, is that, they delayed to file an because they had no legal paper on which they could type and print the grounds of appeal as they presented the grounds of appeal in time but the same was rejected simply because they were not presented on legal paper. That they had to wait up to when the prison authority under which they were serving their sentence would secure the legal papers. When they managed to get the legal papers, the time had already lapsed. Therefore it was rejected for being presented out of time. This as earlier on pointed out, was not disputed by the counsel for the

respondent what he said is that the appellant was supposed to be aware of the requirement to file an appeal in legal papers.

This means the cause of delay is the fact that the appellant had no legal papers to file the appeal. The length of delay can not be ascertained, as it is evident that the appellants presented the ground of appeal in time, but the same were rejected for being not in legal papers, therefore the length of delay is almost none. The delay which followed after the appeal had been rejected was beyond the control of the appellants who were in prison for them to manage to get legal papers.

It is common grounds that prisoners depend on the prisons authority in which they are serving sentence not only for the facilities for filing appeal but also the expertise for purposes of preparation of petition of appeal where there was a requirement to file in legal papers and there is no such facility then, it can be safely held that the appellants were determined to file their appeal in time but they were prevented to do so by things which were beyond their control.

Regarding their conduct, it goes without saying that, given a series of actions they took first by presenting the appeal in time without legal papers, and later presenting the same late after securing the legal paper,

and lastly filing the application for extension of time, it goes without saying that the appellant did not sleep on their right to appeal, they have been struggling to prosecute their right of appeal.

Looking at the degree of prejudice to the parties if this court refuses to exercise its discretion, it goes without saying that the appellants stand to be prejudiced. This is because by looking at the balance of interest, and taking into account that appeal is not only a statutory but also a constitutional right which a party should not be deprived save for concrete reasons, it can be safely concluded that, the appellant was prejudiced by the refusal to grant extension of time compared to the respondent, if the application was granted.

That said, it goes without saying and looking at the materials before her, the trial magistrate in an application for extension of time would have granted the application for extension of time had she objectively analysed the grounds and arguments before her.

That leads to the conclusion that the appeal has merit. It is allowed on the basis of the reason I have given herein above. The appellants are hereby given 21 (twenty one days) within which to file their appeal before the District Court.

It is accordingly ordered.

DATED at **MWANZA**, this 26th day of August, 2021.



J. C. TIGANGA

JUDGE

26/08/2021

ORIGINAL