IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MUGASHA, J.A., LILA, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 428 OF 2015

NTIGA GWISU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Tabora)
(Mruma, J.)

dated the 8th day of July, 2015
in
Miscellaneous Criminal Application No. 106 of 2015

.....

JUDGMENT OF THE COURT

1st & 6th November, 2019

NDIKA, J.A.:

The appellant, Ntiga Gwisu, was charged with rape contrary to sections 130 and 131 of the Penal Code, Cap. 16 RE 2002 in Criminal Case No. 49 of 2001 in the District Court of Meatu at Mwanhuzi. On 4th September, 2001, he was convicted as charged and sentenced to a thirty years' term of imprisonment. Being unhappy with the said conviction and sentence, he sought to appeal to the High Court of Tanzania but he was out of time. It is not clear what exactly happened in the aftermath of his conviction and sentence but the record bears it out that he approached the High Court at

Tabora in 2015 applying for extension of time to lodge an appeal vide Miscellaneous Criminal Application No. 106 of 2015 under section 361 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2002. The High Court (Mruma, J.) was unimpressed by his application, which, then, it dismissed for want of good cause. Still unsatisfied, the appellant now seeks the reversal of the High Court's decision on a two-point Memorandum of Appeal. We take the liberty to paraphrase his two points of complaint thus:

1. *That the learned High Court Judge erred in law by failing to consider the apparent illegality of sentence imposed on the appellant without having been properly convicted.*
2. *That the learned High Court Judge erred in law by failing to consider that the appellant was convicted on an incurably defective charge.*

At the hearing of the appeal before us, the appellant appeared in person fending for himself. He basically adopted his two grounds of appeal and urged us to reverse the dismissal by the High Court of his quest for extension of time to appeal against the conviction and sentence imposed on him by the trial court.

For the respondent Republic, Ms. Mercy Ngowi, learned State Attorney, opposed the appeal as she supported the High Court's refusal of extension of

time for want of good cause. She did not, however, specifically address the appellant's grounds of complaint, which, in essence, allege that the trial proceedings and the decision thereon were tainted with an apparent illegality.

In response to our questioning on the propriety of the trial proceedings right after the prosecution case was closed at page 16 of the record of appeal, Ms. Ngowi conceded that it was apparent on the face of the trial proceedings that they were bedeviled by a fatal irregularity in that the presiding Senior District Magistrate abrogated the mandatory requirements of sections 230 and 231 of the Criminal Procedure Act, Cap. 20 RE 2002 (CPA). She elaborated that, at first, the trial court failed to enter a ruling whether or not a case to answer had been made out against the appellant in terms of section 230 of the CPA. She went on to submit that the appellant was put on defence without his rights under section 231 of the CPA having been explained to him. In view of these infractions, the learned State Attorney submitted that the appellant's trial was arguably unfair. For the purpose of giving an opportunity to the High Court to investigate the matter and take an appropriate remedial action, she urged us to grant the appellant an extension of time to lodge his notice of appeal to the High Court and ultimately to institute his intended appeal by lodging a petition of appeal.

The appellant declined the opportunity of a rejoinder, which was understandable, in view of the apparently promising stance taken by the learned State Attorney.

Having considered the submissions of the parties and examined the record of appeal, we think we should first deal with the issue whether there is any justification for this Court to interfere with the High Court's exercise of its discretion under section 361 (2) of the CPA. The said provision vests in the High Court the discretion in the following terms:

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

It is settled that extension of time under the above provision is a matter of discretion on the part of the High Court but such discretion must be exercised judiciously and flexibly with due regard to the relevant facts of the particular case. To stress this point, we wish to recall what we stated in **Kassana Shabani and Another v. Republic**, Criminal Appeal No. 476 of 2007 (unreported) that:

> *"Since there appears to be a recurring or perennial problem, we would like to take this opportunity to*

make it clear that once an applicant under section 361 of the Act has satisfactorily accounted for the delay in giving notice of appeal or filing a petition of appeal, extension of time ought to be granted as a matter of right."

In addition, it is trite that this Court cannot interfere with the High Court's exercise of its discretion unless it is satisfied that the decision concerned was made on a wrong principle or that certain factors were not taken into account. To hammer home that point, we wish to refer to **Mbogo and Another v. Shah** [1968] 1 EA 93, a decision of the erstwhile Court of Appeal for East Africa, which has been cited and applied in numerous decisions of this Court. The relevant passage is as per Sir Clement de Lestang VP at page 94 thus:

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision ***is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in***

doing so arrived at a wrong conclusion."

[Emphasis added]

See also the statement of the above principle in the same case of **Mbogo** (supra) as per Sir Charles Newbold, President, at page 96.

We are fully guided by the above standpoint, which we think is equally applicable to the instant appeal questioning a High Court Judge's exercise of his discretion in a criminal matter.

Before we apply the above exposition of the law to the instant case, we think it is imperative to state that our adjudication of the matter was limited to the scrutiny of the learned High Court Judge's ruling as we could not lay our hands on the chamber summons and its accompanying affidavit that constituted appellant's chamber application to the High Court. Those documents were missing from the record of appeal. At page 35 of the record, we saw an affidavit deposed by Beda Robert Nyaki, the Deputy Registrar of the High Court at Tabora, averring that the chamber summons and its accompanying affidavit were untraceable and that efforts to reconstruct the record of that application bore no fruit after a considerable period of time.

Be that as it may, having carefully gone through the learned Judge's ruling, we noted the following: first, that the learned Judge established that there was no evidence that the appellant ever expressed orally to the prison functionaries any intention to appeal and that his cause was further thwarted by failing to produce any substantiating proof from the Officer-in-Charge of his prison. Secondly, that apart from his bare averments in Paragraphs 2 and 3 of the accompanying affidavit, the appellant produced no documentary proof on whether he ever applied for a copy of the judgment of the trial court. Crucially, the learned Judge took into account that the application was made fourteen years after his conviction implying that the delay involved was clearly inordinate and that, overall, the appellant's attempt at explaining the delay was palpably deficient.

In our considered view, the learned Judge properly directed himself to the relevant facts of the case and applied correct principles of the law in arriving at his decision that good cause was not shown to justify the enlargement of time that had been prayed for. The appellant's explanation of the fourteen years' delay was simply inadequate and unsatisfactory. Recently, in the case of **Robert Madololyo v. Republic,** Criminal Appeal No. 486 of 2015 (unreported), the Court emphasized that when an accused person fails to file his appeal within the time prescribed by the law, the duty

shall be on him if he wants to file his appeal out of time to give an adequate and satisfactory explanation for the delay. In this regard, the Court referred to a decision of the Supreme Court of South Africa in **Uitenhage Transitional Local Council v. South African Revenue Service**, 2004 (1) SA 292 (SCA) thus:

> *"Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and its effects must be furnished to as to enable the Court to understand clearly the reasons and to assess the responsibility."*

We thus do not find any fault in the learned High Court Judge's finding that the appellant's explanation for the delay was inadequate and unsatisfactory.

We are aware that the appellant's two grounds of complaint in this appeal do not in any way attack the learned High Court Judge's exercise of his discretion but that they, in effect, raise a new legal point for seeking enlargement of time. The thrust of the two points, as hinted earlier, is that the trial proceedings and the judgment thereon are illegal in that the appellant was tried, convicted and sentenced on an incurably defective charge and that he was sentenced without having been properly convicted. Besides those two points, we raised the issue whether there was full

compliance with the mandatory provisions of sections 230 and 231 of the CPA. Depending on the circumstances of the case, non-compliance with the said provisions could be fatal in the manner stated by the learned State Attorney – see, for example, **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006.

Certainly, it is settled that illegality of the decision sought to be challenged can warrant extension of time as the Court held in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185 at page 89 thus:

> *"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 the record straight."*

To be fair to the learned High Court Judge, he did not take these three points into consideration as they were not brought to his attention. But, without delving into the merits of the three points above, we are satisfied that, on the face of the record, they raise allegations of illegalities in the trial proceedings and the decision thereon warranting enlargement of time to the

appellant so as to provide an opportunity to the High Court to investigate the allegations and remedy the alleged illegalities, if established. We think if these illegalities had been brought to the attention of the learned Judge, he would have found the enlargement of time prayed for justifiable.

We find it imperative to remark that we are aware that in terms of Rule 47 of the Tanzania Court of Appeal Rules, 2009 this Court is vested with the discretion in any criminal matter, on application by a party or on its own motion, to grant an extension of time for the doing of a particular act even where no such application has been made to the High Court. Certainly, this discretion being exercisable in respect of an intended appeal from the High Court to this Court is not applicable in the circumstances of this case as it involves an intended appeal from the decision of a subordinate court to the High Court. Nonetheless, the provisions of Rule 47 inspire us to step into the shoes of the High Court for the purpose of facilitating just determination and timely disposal of the appellant's intended appeal.

In sum, even though based on the foregoing analysis we found no substance in the appeal, which we would have ordinarily dismissed, we desist from taking that course. Instead, in the interests of justice, as explained above, we substitute the High Court's refusal of extension of time with an

order extending time to the appellant for him to lodge his appeal. Accordingly, we order the appellant to file his notice of intention to appeal to the High Court against the decision of the District Court of Meatu at Mwanhuzi in Criminal Case No. 49 of 2001 within ten days from the date of delivery of this judgment. Thereafter, he shall, within forty-five days, lodge his petition of appeal.

Ordered accordingly.

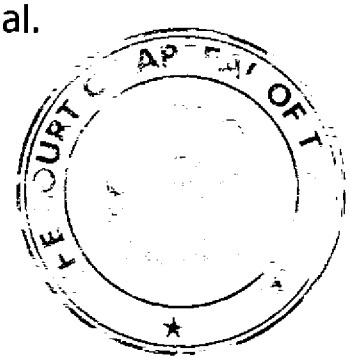
DATED at **TABORA** this 6th day of November, 2019

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of November, 2019 in the presence of Mr. Tumaini Pius learned State Attorney for the respondent/Republic and Appellant appeared in person, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL