

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CRIMINAL APPLICATION NO. 20/15/2019

RASHID OTHMAN RAMADHAN APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

**(Application from the Judgment of the High Court of Zanzibar
at Vuga)**

(Issa, J.)

dated the 16th day of March, 2017

in

Criminal Case No. 6 of 2015

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RULING OF THE COURT

25th & 29th November, 2019

NDIKA, J.A.:

By a notice of motion made under Rule 72 (5) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant, Rashid Othman Ramadhan, seeks the restoration of his appeal to this Court from the judgment of the High Court of Zanzibar sitting at Vuga (Issa, J.) in Criminal Case No. 6 of 2015 dated 16th March, 2017. The application is founded upon the applicant's affidavit dated 21st December, 2018. Resisting the application, the Director of Public Prosecutions, the

respondent herein, lodged an affidavit in reply made by Ali Rajab Ali, a State Attorney.

Briefly, this matter arises as follows: the applicant was convicted on 16th March, 2017 along with four other persons by the High Court of Zanzibar of attempting unlawfully to cause death contrary to section 210 (a) of the Penal Act No. 6 of 2004. In consequence, he was sentenced to ten years' imprisonment as was the case with his four confederates. Being aggrieved by the aforesaid conviction and sentence, they all duly lodged separate notices of appeal and then appeared before this Court on 5th December, 2017 for hearing of their joint appeal – Criminal Appeal No. 305 of 2017.

At the commencement of the aforesaid hearing of the appeal, it was noted that the applicant herein, being the first appellant in the appeal, and one Ramadhan Hassan Shaaban, the third appellant, had not filed any memorandum of appeal. That omission was plainly a non-compliance with Rule 72 (1) of the Rules, which requires an appellant to lodge his memorandum of appeal within twenty-one days after being served with the record of appeal. Mr. Rajab Abdallah Rajab, learned counsel appearing at the hearing for all the five

appellants including the applicant herein, conceded to the aforesaid omission and then moved the Court to make an appropriate order in terms of Rule 72 (5) of the Rules. The said provisions stipulate thus:

"Where no memorandum of appeal is lodged within the prescribed time, the Court may dismiss the appeal or may direct that it be set down for hearing, but where an appeal is dismissed under this sub-rule, the appellant, if he shows sufficient cause, may apply to the Court to restore it for hearing." [Emphasis added]

For the respondent, Mr. Ali Rajab Ali, learned Senior State Attorney, who was assisted by Ms. Simmy Mohamed Naim and Mr. Juma Ali Juma, learned State Attorneys, urged the Court to adjourn the hearing to another date so as to accord the two appellants an opportunity to lodge their memoranda of appeal. In exercise of its discretion, the Court ordered the said appellants to lodge their respective memoranda of appeal within twenty-one days thereof and adjourned the hearing to the next sessions. Yet, the applicant herein and his co-appellant dawdled and no memorandum of appeal was filed at the expiry of the extended period.

When the appeal came up for hearing almost a year later, that is on 27th November, 2018 to be exact, Mr. Rajab, who again appeared for the appellants including the applicant herein, conceded yet again to the omission by the applicant to lodge his memorandum of appeal. He thus resigned to the applicant's appeal being dismissed in terms of Rule 72 (5) of the Rules. Mr. Ali, who appeared again for the respondent Director of Public Prosecutions, supported his learned friend's submission. In view of that, the Court went ahead and dismissed the appeal by the applicant and his co-appellant. Ordinarily the Court would then have proceeded to hear and determine the remaining joint appeal by the other three appellants. However, after hearing further submissions of the learned counsel including Mr. Rajab's indication that the applicant was desirous of applying for restoration of the appeal under Rule 72 (5) of the Rules, the Court deferred the hearing of the remaining joint appeal to a date to be fixed by the Registrar so as to allow the applicant to pursue his intended quest for restoration of his appeal.

In the instant application, the applicant justifies his prayer for restoration of the appeal mainly on his averment in Paragraph 8 of

the supporting affidavit that after he had been granted a twenty-one days' extension on 5th December, 2017 to lodge his memorandum of appeal, he lost communication with Mr. Rajab, actually his court-appointed advocate, who had to assist him to draw up and lodge that document. It is further asserted that the appeal sought to be restored has an overwhelming chance of success as the proceedings before the High Court and the judgment thereon are riddled with illegalities and irregularities in that the learned trial judge did not properly sum up the case to the assessors that he sat with at the trial and that he departed from their opinions without giving any reasons. To be sure, these averments are generally denied by the respondent through the affidavit in reply.

At the hearing of this application before us, Mr. Rajab appeared for the applicant. Having adopted the contents of the notice of motion and the accompanying affidavit as part of his oral argument, he contended that the application was on the whole uncontested because the affidavit in reply lodged for the respondent mostly contains admissions of the applicant's averments and that the only denials revealed by Paragraphs 11 and 12 thereof are general and evasive.

He submitted that Paragraphs 7 through 12 of the supporting affidavit, in effect, disclose sufficient cause for the appeal to be restored. Elaborating, he submitted that initially the applicant was hesitant to pursue his appeal as he was apprehensive that it would be futile and expose him to an enhanced sentence. At that time, he had no legal guidance on the matter having lost communication with his advocate. Then, the applicant finally, but belatedly, received legal advice on the prospects of his appeal and decided quite firmly that he would pursue the matter. Thus, Mr. Rajab beseeched us to restore the appeal as prayed.

Conversely, Mr. Ali, who was accompanied by Mr. Seif Mohamed Khamis, learned Senior State Attorney to represent the respondent, valiantly resisted the application contending that no sufficient cause had been established to warrant the Court to exercise its discretion in favour of the applicant. Having recalled that the applicant failed to utilize the two opportunities availed to him to lodge his memorandum of appeal, he contended that there was no guarantee that he will do so next time in the event his appeal is restored. The learned Senior State Attorney was thus wary that the restoration of the applicant's

appeal would result in further delay in the hearing and the disposal of the pending appeal scheduled to come up for hearing on 11th December, 2019. Mr. Ali added that it was irrelevant that the appeal sought to be restored has an overwhelming chance of success. In the premises, he urged us to dismiss the application.

In a brief rejoinder, Mr. Rajab allayed the fears of his learned friend that the restoration of the applicant's appeal would lead to further delay in the disposal of the pending appeal. He undertook to file on behalf of the applicant a memorandum of appeal in good time in readiness for the hearing of the pending appeal on the scheduled date. He then reiterated his submission that sufficient cause has been shown warranting the grant of the application.

We have examined the record before us and taken account of the contending submissions of the learned counsel. The sticking issue is whether the application discloses sufficient cause in terms of the provisions of Rule 72 (5) of the Rules to warrant restoration of the applicant's appeal.

Certainly, Rule 72 (5) vests in the Court broad discretion to restore an appeal that was dismissed on account of an appellant's failure to lodge a memorandum of appeal within the prescribed time. It is noteworthy that while the aforesaid discretion is exercisable upon "sufficient cause" being established by the applicant, Rule 72 (5) does not define what that phrase entails. We are enthused to borrow a leaf from the interpretation of that phrase in **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported) where Nsekela, J.A., a single Justice of the Court, observed, as regards the provisions of Rule 8 of the repealed Tanzania Court of Appeal Rules, 1979, now replicated in Rule 10 of the Rules, that:

*"What constitutes 'sufficient cause' **cannot be laid down by hard and fast rules. This must be determined by reference to all the circumstances of each particular case.** This means that the applicant must place before the Court material which will move the Court to exercise its discretion in order to extend time limited by the rules."*
[Emphasis added]

In the context of an application as this one, we think that in order to constitute 'sufficient cause' there must be reasons which convincingly explain away the applicant's failure to lodge his memorandum of appeal within the time either prescribed by Rule 72 (1) of the Rules or by the Court under Rule 72 (5). In every case, the Court will be guided by the dictates of justice and the special circumstances involved.

We have subjected the applicant's explanation to the above test. As indicated earlier, his explanation is mainly that he was unable to lodge his memorandum of appeal within the first period of twenty-one days of receipt of the record of appeal as well as within the twenty-one days' period extended by the Court because being apprehensive that the appeal would be futile and consequently expose him to an enhanced sentence, he became quite indecisive to pursue his appeal. That at both critical times, he had no legal guidance on the matter as he had no communication with his advocate. And that he finally, but belatedly, received legal advice on the prospects of his appeal and decided quite firmly to pursue the appeal.

To begin with, we would acknowledge that Mr. Ali's censure of the application is understandable in the sense that it is undisputed that the applicant apparently dragged his feet and failed to lodge his memorandum in time on two occasions. However, we think this matter is an unusual case in the sense that according to the applicant he was unable to make an informed decision at the critical times whether to lodge a memorandum of appeal or not so as to pursue his appeal as he was unable to communicate with his co-appointed advocate. That averment was not disputed by the respondent. We are thus persuaded that he needed legal guidance and assistance to make an informed decision on the pursuit of the appeal as well as drawing up a proper memorandum of appeal. Such guidance was particularly crucial as what was at stake was his personal liberty.

In view of the foregoing, we think it is in the interests of justice that the applicant's appeal be restored so that it can be heard along with the pending appeal of his three co-appellants. That course will not prejudice the respondent or any of his co-appellants.

In sum, we grant the application and order that the applicant's appeal be restored for hearing on 11th December, 2019 as part of

Criminal Appeal No. 305 of 2017. In consequence, we order the applicant to file his memorandum of appeal within seven days from the date of the delivery of this ruling.

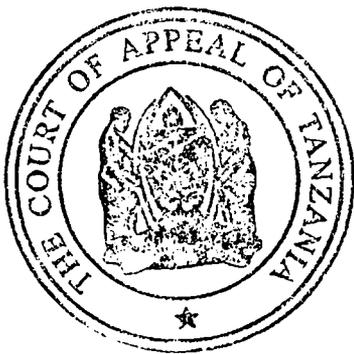
DATED at **ZANZIBAR** this 28th day of November, 2019

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling of the Court delivered this 29th day of November, 2019 in the presence of Mr. Rajab Abdalla Rajab, counsel for the Applicant and Mr. Seif Mohamed Khamis, Principal/Senior/State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.




A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL