IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 330 OF 2018

MATHEW T. KITAMBALA ..... APPELLANT

VERSUS

RABSON GRAYSON.....1ST RESPONDENT

REPUBLIC ..... 2ND RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mbeya)

(Levira, J.)

dated the 4th day of September, 2018
in
Criminal Appeal No. 3 of 2017

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JUDGMENT OF THE COURT

19th & 23rd September, 2022

MWAMBEGELE, J.A.:

The genesis of this appeal is the decision of the Primary Court of Mbeya at Mwanjelwa in Criminal Case No. 586 of 2014 in which the appellant was the accused person and the first respondent was the complainant. In that case, on a complaint by the first respondent, the appellant was arraigned for the offence of cheating contrary to section 304 of the Penal Code, Cap. 16 of the Revised Edition, 2002 (the Penal Code.)

On 24.09.2014, he was convicted and sentenced to pay a fine of Tshs. 200,000/= in default of which he was to serve a twenty-four-month jail term. In addition, the appellant was ordered to compensate the first respondent Tshs. 13,000,000/=. Aggrieved, he unsuccessfully appealed to the District Court on account of a time bar to file the appeal. His second appeal to the High Court also proved futile for the same reason.

Undeterred in his quest for justice, the appellant retreated to reorganize; he went back to the District Court to seek an enlargement of time within which to challenge the decision of the Primary Court in the District Court in terms of section 20 (4) (a) of the Magistrates' Courts Act, Cap. 11 of the Revised Edition, 2002 (the Magistrates' Courts Act). The District Court (Mlingi, RM) refused the prayer on account that the appellant did not show sufficient cause to be granted the extension of time sought. His first appeal to the High Court was barren of fruit, for Levira, J. (as she then was) upheld the decision of the District Court refusing to extend time, hence this appeal. The appeal to the Court has been predicated on five grounds of complaint; that is:

1. That the trial judge erred in law in not taking into account that the appellant's petition of appeal filed on the 24th day of October, 2014 was in time;
2. That the trial judge erred in law and in fact in holding that there was no sufficient cause stated by the appellant to justify the extension of time to file the appeal;
3. That the trial judge erred in law to hold that the patent illegality in the decision of the trial court is not a sufficient reason for extension of time;
4. That the trial judge erred in law by failure to uphold the overriding objective principle and disregard minor irregularities and unnecessary technicalities so as to abide with the need to achieve substantive justice; and
5. That the trial judge erred in law and fact in denying extension of time without regard to the time spent by the appellant in prosecuting previous appeals .

The appeal was argued before us on 19.09.2022 during which both the appellant and first respondent were present and represented by learned advocates. While the appellant had the representation of Mr. Khalfani Msumi,

learned advocate, the first respondent was advocated for by Mr. Chapa Alfredy, also learned advocate. The second respondent who was joined in the proceedings at the stage of the application for extension of time to file an appeal to the District Court, had the services of Ms. Rosemary Mgenyi, learned State Attorney.

In arguing the appeal, Mr. Msumi consolidated grounds two and three because they were intertwined and argued the remaining grounds separately.

On the first ground, Mr. Msumi argued that the petition of appeal to the District Court against the decision of the Primary Court which convicted the appellant was filed timeously. He argued that the Primary Court rendered its judgment on 27.08.2014 and the sentence was pronounced to the appellant on 24.09.2014. The appeal was lodged in the District Court on 24.10.2014 which was well within the prescribed time. He contended that to prove that the appeal was lodged on 24.10.2014, the District Court impressed the rubber stamp on the Petition of Appeal, as appearing at p. 19 of the record of appeal, and indicated the date 24.10.2014. The learned counsel added that even at the end of the said Petition of Appeal (at p. 20

of the record of appeal), the date is shown as 24.10.2014 but the clerk of the District Court had erroneously indicated the date as 27.10.2014 and rectified it to show 24.10.2014 by overwriting the date 24th on the erroneously written 27th. On this premise, Mr. Msumi argued that the two courts below erred in holding that the appeal was filed on 27.10.2014 and hence erroneously arrived at the conclusion that the appeal was lodged out of time by three days.

On rebuttal, Mr. Alfredy submitted that the appeal was filed in the District Court out of time in that the 27.10.2014 indicated in the Petition of Appeal at p. 20 was tampered with to purport the appeal was lodged on 24.10.2014. He submitted further that the District Court discussed the issue at p. 98 of the record of appeal that the case assignment register together with the Criminal Admission file, both showed that the appeal was filed on 27.10.2014 and not 24.10.2014.

Ms. Mgenyi supported all what was submitted by Mr. Alfredy in all grounds of appeal and had nothing to add.

We have considered the rival arguments by the learned advocates for the parties. The issue we are called upon to determine in the first ground

of appeal is whether the appeal was timely filed. An answer to this issue is highly dependent upon the question whether the appeal was lodged in the District Court on 24.10.2014 or 27.10.2014. This issue exercised the minds of both courts below greatly. We demonstrate hereunder to appreciate the essence of the verdict we are going to reach on this ground.

At p. 45 of the record of appeal, Ndeoruo, SRM, who presided over the appeal from the Primary Court, refrained from entertaining and hearing the appeal on its merits because he was of the view that the District Court lacked jurisdiction for it being time barred. He made the following observation as appearing at p. 45 of the record of appeal:

> *"Unfortunately, I cannot go into the merits of the appeal seeing, as I do, the appeal was filed out of time. The petition of appeal of this case was filed on the 27th day of October, 2014. The Registry Officer indicated the same in the petition of appeal but later he tampered with the same by trying to overwrite on top of 27th by writing 24th. He also placed the rubber stamp dated 24/10/2014 on top of the petition of Appeal. After I discovered the discrepancy, I decided to inspect the Register where the petitions are registered after being filed. In the register, I*

discovered that the petition was filed on the 27th October, 2014 and it was placed before the Magistrate in Charge on 28th October, 2014 for admission and assignment."

When the decision of the District Court (Ndeoruo, SRM) came before the High Court on appeal, Levira J. (as she then was), made the following observation at p. 73 of the record of appeal:

"It is evident from the record that the judgment of the trial court was delivered on 24/09/2014 and the petition of appeal was filed before the District Court of Mbeya on 27/10/2014. With that respect and for easy computation, I have seen no reason to depart from the first appellate court that the appeal before it was filed after the expiry of 30 days."

In the application for extension of time before the District Court, Mlingi, RM, as appearing at p. 98 of the record of appeal, observed:

"This was also observed by the High Court in the judgment of Dr. Levira, J. in PC Criminal Appeal No. 5 of 2015 between Mathew T. Kitambala and Rabson Grayson in which the High Court observed also that the said petition of appeal was filed to this court on 27/10/2014.

I had an opportunity also to go through the case assignment registry of this court together with the criminal Admission file of this court specifically minute No. 271 dated 27.10.2014, and I am of the same observation that the petition of appeal was filed on 27.10.2014...."

And when the impugned decision for extension of time came before Levira J. (as she then was) on first appeal, she observed at p. 130 of the record of appeal as follows:

"As Mr. Chapa contended, I suppose blaming the Court registry officers does not look as a healthier ground. According to the observation of Honorable Ndeoruo, Senior Resident Magistrate in his judgment dated 16th day of March, 2015, the petition of appeal was lodged on 27th day of October, 2014 but the court registry officer tampered with the same by writing on top of 27th as 24th. There has not been any other evidence to prove otherwise. And if Mr. Mwakolo was sure of what he was contending, I suppose he ought to have obtained the sworn evidence from the court registry officer to prove as to which of the two dates was correct. Following the circumstances, the mere complaint to the registry

officer which in fact has lacked proof thereof cannot in any stretch of imagination be a sufficient cause to extend time to appeal."

A close look of the foregoing excerpts, makes it apparent that the two courts below were inundated with a discussion on the issue that the petition of appeal lodged in the District Court was tampered with. Also apparent is the finding of fact by the two courts below that the correct date of lodgment of the same was 27.10.2014 and not 24.10.2014.

Flowing from the above, we think it was sufficiently established in the two courts below that the appeal before the District Court was lodged on 27.10.2014 and not 24.10.2014. What was done by the unscrupulous court officer, as per the concurrent findings of fact by the two courts below, was to overwrite 24th on 27th so as it looked as if the appeal was lodged on 24.10.2014 and not 27.10.2014. That is a finding of fact by the two courts below with which we are reluctant to interfere.

For the avoidance of doubt, as an extension to the discussion above, we are alive to the fact that Mr. Msumi relied on the rubber stamp impressed on top of the Petition of Appeal at p. 19 of the record of appeal indicating 24.10.2014 as the date of its receipt as his trump card. However, we are

afraid, this argument does not help the appellant either as both Mr. Ndeoruo, SRM and Mr. Mlingi, RM, at different occasions, went an extra mile to observe the case assignment register and the Criminal Admission fFle and discovered that the rubber stamp impression was a sorry state of affairs made by the unprincipled court registry officer in his endeavour to mislead the court that the same was lodged on 24.10.2014 while in the actual fact it was lodged on 27.10.2014.

In view of the foregoing discussion, we find nowhere to fault the finding of the High Court on this ground and, as a result, we dismiss the first ground of appeal.

The second and third grounds of appeal seek to assail the decision of the High Court for not extending the time sought on the ground of illegality of the decision of the Primary Court. Mr. Msumi argued that the decision of the Primary Court was tainted with a lot of irregularities such as; **one**, the case was instituted by the respondent instead of the Republic as dictated by law and; **two**, the charge sheet was defective as the proper section for obtaining money by false pretences ought to have been section 302 of the Penal Code and not section 304 as was the case in the case the genesis of

this appeal. Prompted on whether the irregularities referred to were illegalities envisaged in applications for extension of time, Mr. Msumi respondent that many irregularities culminate into an illegality of a decision. To buttress the proposition for extending time on the ground of illegality of an impugned decision, Mr. Msumi cited to us our unreported decisions in **Aruben Chaggan Mistry v. Naushad Mohamed Hussein and 3 Others**, Criminal Application No. 6 of 2016 (at p. 12) and **Johan Harald Christer Abrahsson v. Exim Bank (T) Limited and 3 Others**, Criminal Application No. 224/16 of 2018. Mr. Msumi thus implored us to allow this ground and extend time on this ground of illegality of the decision of the Primary Court.

Responding to this consolidated ground, Mr. Alfredy submitted that the provisions of section 1 (2) of the third schedule to the Magistrates' Courts Act define who the complainant is. Under that definition, he submitted, a person who lays a complaint to the Primary Court for an offence is also a complainant. As such, no law was offended by the respondent in lodging a criminal complaint in the Primary Court which led to the arraignment of the appellant, he charged. The learned counsel argued that for an illegality to

be a ground for extending time, it must be apparent on the face of the record and should not involve a long drawn process to discover it. He cited to us our previous decision in **Fatma Hussein Shariff v. Alikhan Adbdallah and 3 Ohers**, Civil Appeal No. 536/17 of 2017 (unreported) to buttress this proposition. In the case at hand, he argued, there was no illegality as there in none on the face of the record. He submitted that this ground was devoid of merit.

We agree with Mr. Msumi that an illegality of an impugned decision may be a ground to extend time even where an applicant has not shown good cause for the delay – see: **The Principal Secretary Ministry of Defence and Notional Service Vs. Devram Valambia** [1991] T.L.R. 387. However, such illegality, as rightly put by Mr. Alfredy, must be apparent on the face of the record. That is the position the Court stated in **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). In that case, a single justice of the Court made the following pertinent remark:

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasised that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

Applying the foregoing statement of principle to the case at hand, we have serious doubts if the alleged illegality is clearly apparent on the face of the record of the decision sought to be challenged if the extension sought is granted. If anything, as rightly put by Mr. Alfredy, it will take a long drawn process to unveil the illegality, if any. In addition, it was not established how the appellant was prejudiced by being charged under the provisions of section 304, and not section 302 of the Penal Code. The appellant has thus also failed to demonstrate that there was any illegality in the impugned

decision of the Primary Court to move us exercise the discretion to grant the extension of time sought. This ground as well has not merit and dismissed.

The fourth ground of complaint is that the High Court should have used the overriding objective to grant the extension sought. Mr. Msumi implored us to follow the position we took in **Yusuf Nyabunya Nyaturunya v. Mega Speed Liner Ltd and Sepideh in Rem**, Civil Appeal No. 85 of 2019 (unreported) and grant the extension sought. For his part, Mr. Alfredy submitted that the overriding objective principle was not applicable to the case at hand. He referred us to our decision in **Bernard Gindo and 27 Others v. TOL Gases Limited**, Civil Appeal No 128 of 2016 (unreported) in which we held the true import of the overriding objective principle that it was not meant to disregard the rules of procedure couched in mandatory terms.

We have subjected the contending arguments of the learned counsel for the appellant and that of the first respondent supported by the learned State Attorney. Having so done, we find ourselves not prepared to go along with the arguments of Mr. Msumi. As rightly put by Mr. Alfredy, the Court has pronounced itself more often than not, that the overriding objective

principle should not be applied blindly to the extent of rendering the mandatory rules of procedure redundant. That is the standpoint of the law we have taken in a number of our decisions, one of them being **Bernard Gindo** (supra) cited to us by Mr. Alfredy. Others are **Mondorosi Village Council and Two Others v. Tanzania Breweries Limited and Four Others**, Civil Appeal No. 66 of 2017, **Njake Enterprises Limited v. Blue Rock Limited and Another**, Civil Appeal No. 69 of 2017 and **Martin D. Kumalija & 117 Others v. Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (all unreported) cited therein. We are guided by those decisions and hold the same view in the instant appeal.

The case of **Yusuf Nyabunya Nyaturunya** (supra) relied upon by Mr. Msumi to implore us to grant the extension sought is distinguishable from the case at hand. There, unlike here, a preliminary objection was raised to the effect that the appeal was incompetent for want of proper and duly signed judgment. We invoked the principle of overriding objective to order the appellant to rectify the ailment by filing a supplementary record of appeal. This is not the case here. We thus are increasingly of the view that the High Court did not err in not invoking the overriding objective principle

to fault the District Court. This ground of complaint is also arid of merit. It is dismissed.

In the last ground of grievance, the appellant's counsel submitted that the High Court should have considered that the appellant delayed in filing the appeal because he was busy prosecuting his rights on the same matter, hence what he referred to as a technical delay. He cited to us the decision of the Court in **Diamond Motors Limited v. K-Group (T) Limited**, Civil Application No. 72/01 of 2019 (unreported) in which the Court extended time on the strength of a technical delay. For his part, Mr. Alfredy threw overboard the argument as a mere balderdash because the appellant was represented all along.

We agree with Mr. Msumi that a technical delay is excusable and the Court, in a string of its decisions, has overlooked it and extended time sought by an applicant. We did so in a number of our decisions including **Diamond Motors** (supra), cited by the learned counsel for the appellant. Other decisions are: **Fortunatus Masha v. William Shija** [1997] T.L.R. 154 and **Salvand A. K. Rwegasira v. China Henan International Group Co. Ltd**, Civil Reference No. 18 of 2006 (unreported) cited in **Diamond Motors**

(supra) and **Bharya Engineering & Contracting Co. Ltd v. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 (unreported). However, we do not think Mr. Msumi has succeeded in expounding this principle as well. What he has brought to the fore is a mere allegation that the appellant has been busy in the court corridors in search for his rights on the same matter. He has not accounted for each day of the delay during which he was busy in such endeavours. We expected him to tell us the time frames in which he delayed to file the intended appeal. He did not do that and the Court cannot do it on his behalf. It should suffice to state here that the delay under discussion which he should have accounted for is essentially the delay of three days after the expiry of thirty days reckoned from the date when the Primary Court delivered the judgment intended to be challenged. It will be appreciated that during those three days, he was not in any court prosecuting any matter connected to the present. The explanation made by the applicant for the delay of the three days is the argument that the appellant filed the petition of appeal on 24.10.2014 and not 27.10.2014 which explanation we have refused and was refused by the two courts below as well.

In the upshot of the above, we think the appellant did not demonstrate any good cause that would entitle him the extension of time sought. Neither could the principles of illegality, overriding objective nor technical delay apply in the circumstances of the application the subject of this appeal. We find nowhere to fault the High Court in the impugned decision and dismiss the appeal entirely.

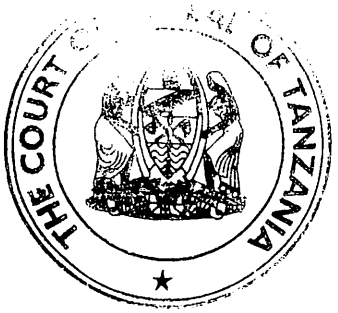
DATED at **MBEYA** this 22nd day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered on this 23rd day of September, 2022 in the absence of the second respondent duly served and in the presence of Ms. Pendo Lukumay learned advocate for first respondent who also holds brief for Mr. Khalifan Msumi learned advocate for the appellant is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL