

IN THE COURT OF APPEAL OF TANZANIA
AT TABORA
(CORAM: KOROSSO, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)
CRIMINAL APPEAL NO. 104 OF 2019
SHIMBA NG'WANDUAPPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Tabora)
(Utamwa, J.)
dated the 13th day of March, 2019
in
Criminal Application No. 190 of 2018
.....

JUDGMENT OF THE COURT

26th October & 7th November, 2022

KOROSSO, J.A.:

In the appeal before the Court, the appellant, Shimba Ng'wandu is challenging the decision of the High Court of Tanzania, at Tabora that dismissed Criminal Application No. 190 of 2018. In the said application, the applicant had applied for an extension of time to file a notice of intention to appeal and a petition of appeal against the impugned judgment of the District Court of Igunga District at Igunga (the trial Court), in Criminal Case No. 9 of 2018.

The appellant (the 3rd accused then) along with two others namely, Kulwa Kashinje and Hamisi Juma (then, 1st and 2nd accused persons) who

are not parties to this appeal were jointly charged with three counts of Armed Robbery contrary to section 287A of the Penal Code [Cap 16 R.E. 2002, now R.E 2022]. The prosecution alleged, in the first count, that the appellant and his two colleagues on 30/10/2017 at or about 19.30 hours at Ibologero Village, Igunga District within Tabora Region, did steal cash amounting to Tshs. 1,200,000/=, the property of one Mwandu Masanja @ Mwandu and immediately before, during, and after such stealing using a gun, did threaten him in order to obtain the said amount of money. In the second count, it was alleged that the appellant and 2 others as stated in the first count, at or about 19.50 hours, on the same date as in the first count, same village, District, and Region, did steal Tshs. 600,000/=, prepaid vouchers valued at Tshs. 50,000/=, 12 packets of cigarettes valued at Tshs. 30,000/= and one mobile phone valued at Tshs. 50,000/=, all with a total value of Tshs. 730,000/=, the property of Mashuleano Peter, and immediately before, during, and after the stealing did threaten him with a gun to obtain the said properties. In the third count, the particulars were that on the same date as in the first two counts, at about 19.50 hours at the same Village, District, and Region, the appellant and two others expounded in the first count, did steal cash money Tshs. 50,000/= and one mobile phone make Techno, valued at Tshs. 30,000/=, total value of Tshs. 80,000/= the property of one Salum

Rashid and immediately before, during, and after such stealing did threaten him by using a gun to obtain the said properties.

When the charge was read over to the appellant and his two co-accused persons, each one denied the charges. The trial ensued and after a full trial, the first and second accused persons were acquitted, whilst the appellant was convicted on all counts as charged. Upon conviction, he was sentenced to serve thirty-years imprisonment on each count, with an order for the sentences to run concurrently. The trial court's judgment was delivered on 19/4/2018. Dissatisfied with the conviction and sentence, the appellant filed a notice of intention to appeal on the same date the judgment was delivered, that is, 19/4/2018. Unfortunately, nothing else was filed to process an appeal thereafter. Later, the appellant, on becoming aware he had delayed processing his appeal further and having found himself out of time, on 24/10/2018, lodged Misc. Criminal Application No. 190 of 2018 in the High Court seeking an extension of time to file a notice of appeal and petition of appeal.

In the High Court, his application was heard and dismissed (Utamwa, J.) for lack of merit. Dissatisfied the appellant on 21/3/2019 filed a notice of appeal to this Court and on 4/6/2019 lodged a memorandum of appeal to this Court with four grounds of appeal that fault the decision of the High Court in dismissing his application that

essentially address the following grievances: **one**, failure to consider that the appellant had been diligent in pursuing his right to appeal shown by his act of having lodged the notice of appeal in time in terms of section 361(1)(a) of the Criminal Procedure Act [Cap 20 R.E 2002, now R.E 2022] (the CPA). **Two**, failure to consider that the delay of four months to appeal was reasonable and not inordinate under the circumstances. **Three**, failure of the High Court to consider that the appellant after the expiry of the forty-five days and without appeal requisite documents from the trial court could not appeal upon obtaining leave of the High Court which he sought. **Four**, failure to consider the point of law of sufficient importance raised against the impugned decision, that, the appellant was not accorded a fair trial in view of failure to allow him to plead before the prosecution case commenced in contravention of section 228(1), (3) and 229(1) of the CPA.

When the appeal was placed before us for hearing, the appellant appeared in person, unrepresented, whereas Ms. Lucy Enock Kyusa assisted by Ms. Alice Thomas, both learned State Attorneys appeared for the respondent Republic.

When called upon to amplify his grounds of appeal, the appellant prayed to adopt the grounds of appeal filed and for the learned State

Attorney to respond to the grounds of appeal first while he retained the right to rejoin thereafter.

Ms. Kyusa commenced by stating the respondent Republic's objection to the appeal, subscribing to the High Court's dismissal of the appellant's application for an extension of time to file the notice of intention to appeal and petition of appeal against the decision of the trial court in Criminal Case No. 9 of 2018. Responding to the first grievance, she submitted that the appellant failed to show reasons for the delay to process his appeal on time to fault the High Court Judge's dismissal of the application. It was her contention that the appellant had delayed processing his appeal on time as prescribed by section 361(1) of the CPA. Whilst acknowledging the fact that the appellant had timely filed the notice of appeal against the impugned decision of the District Court of Igunga, that is, on 19/4/2018, the same day the impugned judgment was delivered and within the ten days prescribed by section 361(1) of the CPA, Ms. Kyusa argued that unfortunately, the appellant failed to file the relevant appeal documents within the legally prescribed time.

The learned State Attorney submitted that upon filing the notice of intention to appeal on time, the appellant failed to fulfill his duty to file a petition of appeal within 45 days thereafter. Moreover, on 24/10/2018 the appellant lodged an application for an extension of time to file a notice of

intention to appeal and a petition of appeal subject to the instant appeal. According to the learned State Attorney, it was unfortunate that the said application was faulty because the affidavit supporting it lacked averments that revealed sufficient reasons that caused him to delay processing his appeal on time to prompt the High Court to exercise its discretion to grant his prayers.

Ms. Kyusa was adamant that even on the day of the hearing of the application before the High Court, when the appellant was prompted by the High Court to submit reasons for the delay, he had nothing to say apart from praying that the contents of his application be considered. The learned State Attorney contended that undoubtedly, the appellant failed to provide sufficient reasons for the delay. She asserted that under the circumstances, it was thus proper for the High Court to dismiss the application as it did. She cited the decision of the Court in the case of **Yege Gawe v. Republic**, Criminal Appeal No. 45 of 2019 (unreported) to augment her contention and urged the Court to find the grievance unmeritorious.

Confronting the second grievance, Ms. Kyusa challenged the appellant's contention that the delay was for a short period, only for four months arguing that this did not further his application and prayers since it was not an explanation of why he failed to file the appeal on time within

the confines of section 361(1) of the CPA. She urged us to also find this grievance to be devoid of substance. With respect to the third grievance, she implored us to find it misconceived, there being no legal stipulation that an appeal can be filed in the absence of the impugned judgment. She also expounded the fact that the appellant did not further assist her application upon failing to disclose the date he was served with the impugned judgment of the trial court, which would have assisted him to explain the cause of the delay and strengthen his case.

In tackling ground four, the learned State Attorney asserted that since the High Court sought to be provided with sufficient reasons for the delay which the appellant failed to do, then the dismissal was justified. Nevertheless, according to Ms. Kyusa, the appellant failed to show the apparent illegality as claimed and if the High Court was to consider the complaint as it is, it would have to search the alleged illegality from the evidence on record. Thus, according to the learned State Attorney, the High Court properly directed itself and held that the appellant's claims were unsubstantiated. Her conclusion was that the appellant failed to provide sufficient reasons to enable the High Court to exercise its discretion to grant an extension of time to appeal as prayed. She implored the Court to dismiss the appeal to the High Court.

In rejoinder, the appellant beseeched the Court to consider his grounds of appeal and the fact that the delay to file the appeal was because he was supplied with the impugned judgment of the trial court after four months despite having applied for it and filed a notice of intention to appeal. He prayed for the Court to do justice under the circumstances and grant his prayers so that he can process his appeal to the High Court.

Having heard the submissions from both sides on the grounds of the appeal filed before us, perused through the cited decisions and the record of the appeal, we are of the view that it will be efficacious to address the appellant's grievances number two and three conjointly and grievance number four separately. This is because the first three grievances invariably fault the High Court's finding that the appellant failed to expound being diligent in pursuing his appeal. As alluded to by Ms. Kyusa, the fact that the appellant promptly filed the notice of intention to appeal against the impugned decision in compliance with section 361(1) of the CPA cannot be faulted or doubted as revealed by the record of appeal at page 47.

Certainly, the appellant after having duly filed the notice of appeal on 19/4/2018 failed to file anything thereafter to process his appeal. It was until 24/10/2018 that he filed in the High Court the application for an

extension of time to file a notice of appeal and petition of appeal in Misc. Criminal Application No. 190 of 2018, which is the subject of the present appeal. It is worth noting that, the chamber summons found on page 44 of the record of appeal shows that the application was signed by the appellant on 6/8/2018.

Indeed, the High Court did not grant the reliefs sought by the appellant. While recognizing the fact that the respondent Republic did not object to the application, the High Court Judge stated that his stance will not in any way sway his decision in his deliberations on the merits of the application. The High Court Ruling speaks for itself when he stated:

"... the applicant's affidavit left important material facts concealed. As demonstrated earlier, the applicant's only reason for delay in appealing is that, the trial court delayed to supply him with the copy of the impugned judgment. However, as it was indisputably submitted by the parties before, the applicant did not mention (in the affidavit) the fact that he had applied to the trial court for the copy. He did not disclose the date for doing so. Furthermore, he did not attach the letter through which he requested for the copy. The applicant's affidavit did not reveal as to when he received the copy of the impugned judgment. Owing to the omission by the

applicant from stating the above important and material facts in the affidavit, the court cannot assess the applicant's diligence in following his rights."

The High Court Judge then proceeded to find that the appellant (then the applicant) did not disclose sufficient reasons for his application to be granted and dismissed it.

Flowing from the above, we are of the view that the thrust of contention for our determination is whether the appellant did expound good cause to warrant the High Court to grant an extension of time to file a petition of appeal as prayed.

We are alive to the fact that the decision to extend time or not is the discretion of the court where the matter is determined. An appellate court may only interfere with the discretion of the said court where it is satisfied that the impugned decision was made on a wrong principle or that certain factors were not taken into consideration. This position was stated in the decision of the defunct Court of Appeal for Eastern Africa in **Mbogo and Another v. Shah** [1968] 1 EA 93, which held:

"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."

An appeal from a District Court to the High Court in criminal matters is guided by the provisions of section 361 of the CPA, which states:

"361.- (1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant-

(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and

(b) has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order, save that in computing the period of forty-five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded.

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

The thrust of section 361(2) of the CPA has been addressed by the Court in cases such as **Hamis Ismail @Zulu v. Republic**, Criminal Appeal No. 2015 of 2014 and **Hamisi Mahona v. Republic**, Criminal Appeal No. 141 of 2017 (both unreported). In **Hamisi Mahona** (supra), the Court observed:

"The catch phrase in that section is 'the High Court may, for good cause, admit an appeal'. That means, for the court to determine whether it should grant extension of time to file appeal or not, the sole determinant factor is whether the applicant has established good cause explaining the delay."

In the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court considered what amounts to good cause for extension of time and stated thus: (i) the applicant must account for all the period of delay; (ii) the delay should not be inordinate; (iii) the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of

the action that he intends to take; and (iv) if the Court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

Therefore, applying the above-restated positions of the Court to the instant appeal, without doubt the High Court was expected to be guided by the position restated above in determining whether there was good cause established on the part of the appellant's application for extension of time to process his appeal. We are alive to the fact that, the High Court Judge expounded his consideration of various principles including those stated in the above-cited cases, on matters to ponder in such applications. Having perused the impugned Ruling we are convinced that he did not fully apply them in his deliberation of the application before him.

The High Court Judge failed to consider that the appellant had shown diligence when he filed the notice of intention of appeal against the impugned decision on time, that is, on the same date as the judgment he was challenging, as averred in paragraph 3 of the affidavit supporting his application. This was effected notwithstanding being imprisoned and thus dependent on the Prison officers to facilitate his applications as also alluded to by the provision of section 363 of the CPA. Under paragraph 4 of his affidavit, he averred reasons for the delay which include failure to

be supplied with the impugned judgment on time and receiving it after four months as alluded to herein above.

We also find that the finding by the High Court that the appellant lacked diligence and his actions inordinate based on failure to attach the letter requesting copies of proceedings and impugned judgment in the affidavit supporting the application was not warranted since it is not a requirement of the law.

Our perusal of the record of appeal shows that in the notice of motion and affidavit supporting the notice of motion before the High Court, what was clear was that the notice of appeal was filed within the time and thus revealing the diligence on the part of the appellant in pursuit of his rights.

Additionally, worth noting is the fact that the four months delay in getting the requested impugned judgment augurs with the period between the time the appellant filed the notice of intention to appeal on 19/4/2018 and the date the applicant signed the chamber application to seek an extension of time to file a notice of intention to appeal and petition of appeal, that is, on 6/8/2018. This can be discerned on perusal of pages 47 and 44 of the record of appeal. We are thus of the view that the appellant demonstrated good cause to merit being granted enlargement of time to process his appeal as prayed.

For the foregoing, we find the first, second, and third grievances to have merit since the materials presented before the High Court provided good cause for delay and thus entitled the appellant to an extension of time as prayed. Therefore, there is no urgent need to consider the fourth grievance.

In the final analysis, the appeal is allowed. We grant an extension of time for the appellant to lodge a notice of intention to appeal within ten (10) days of this Order and to file a petition of appeal within forty-five (45) days of filing the notice of intention to appeal.

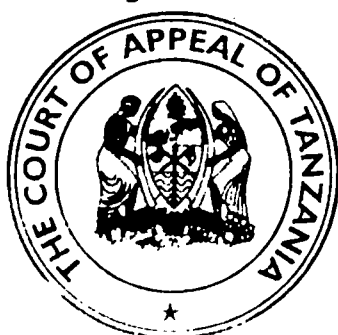
DATED at TABORA this 4th day of November, 2022.

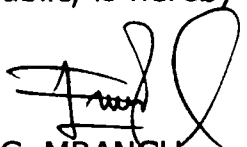
W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of November, 2022 in the presence of the appellant in person and Ms. Veronica Moshi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL