THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

PC CRIMINAL APPEAL NO.194 OF 2022

(From Misc. Criminal Application No. 15 of 2022 Arising from Criminal Appeal No. 32 of 2022 in the District Court of Mbeya at Mbeya. Originating from Criminal Case No. 30 of 2022 in the Primary Court of Mbeya District at Iyunga.)

PAULO DANIEL MAZUKI.....APPELLANT

VERSUS

GODSON BUBERWA KAMARA .....RESPONDENT

JUDGEMENT

Date of Last Order : 27.06.2023
Date of Judgement: 13.11.2023

MONGELLA, J.

This appeal arises from Misc. Criminal Application No. 15 of 2022 before the district court of Mbeya at Mbeya in which the appellant sought for restoration of Criminal Appeal No. 32 of 2022, which was dismissed for want of prosecution by the same court.

Briefly, the respondent was the complainant in Criminal Case No. 30 of 2022 before the primary court of Mbeya District at Iyunga (trial court). In the said case, the appellant was charged for obtaining money under false pretenses contrary to section 302 of the Penal Code, Cap 16 R.E. 2019. It was averred that he obtained T.shs. 7,940,000/- from the respondent by selling him a property that did not belong to him. Having denied the charge, the case proceeded to trial and he was convicted

and sentenced for the said offence. Aggrieved, the appellant filed Criminal Appeal No. 32 of 2022 in the district court of Mbeya at Mbeya (the appellate court). However, when the appeal came for hearing on 13.07.2022, the appellant did not enter appearance, hence the appeal was dismissed for want of prosecution.

The appellant then filed Misc. Criminal Application No. 15 of 2022 in the same court seeking for restoration of the appeal. The application was denied and he thus appealed on the following grounds:

1. *That, the District Magistrate Court erred in law and in fact when decided [sic] in favour of the respondent without considering the evidence adduced by the appellant.*

2. *That, the District Magistrate Court erred in law and in facts when denied the applicant his right to be heard.*

3. *That, the District Magistrate Court erred in Law and in facts when ignoring [Sic] the facts that the appeal had important point of law to be determined.*

This appeal was argued by written submissions whereby the appellant was unrepresented while the respondent was represented by Mr. Mathayo Iredi Mbilinyi, learned advocate.

After providing the brief history of the case, the appellant jointly submitted on the 1st and 2nd grounds of appeal. He contended that the appellate court magistrate did not consider his affidavit which was well elaborated by his advocate during oral submissions. He challenged the

trial court for relying on what he considered weak and unfounded arguments of the respondent. He saw that being improper leading to a wrong decision. Arguing further, he complained that his rejoinder submissions were not considered. It appears he raised an argument that he was on traditional medication, as he was convinced that his argument that he took traditional medicine still held water as a reason behind his lack of medical certificate to prove his alleged illness. That, he sought to save his life and, in the circumstances, he had no time to seek for other means to resolve his situation.

As to the injustice allegedly committed upon him by the appellate district court, the appellant contended that the trial court's dismissal of his application amounted to denying him the right to be heard. He contended that the decision shall cause him to suffer irreparable loss as the decision of the primary court is tainted with illegality for there exists a variation between the amount of money stated in the charge sheet and one mentioned in the evidence adduced by the respondent and exhibit P2. He argued so stating that the sum of the purchase money in the charge sheet was T.shs. 7,940,000/- while the sum mentioned in evidence was T.shs. 7,000,000/-. The appellant urged this court to find his grounds of appeal having merit and to nullify the proceedings and Ruling of the district court arguing that the findings of facts and conclusion of the court ought to be based on the court record. In support of his argument, he referred the case of **Elias Stephen vs. Republic** [1982] TLR 313.

Addressing the 3rd ground, the appellant argued that the appellate district court erred in law and fact when it ignored that Criminal Appeal No. 32 of 2022 had important point of law to be determined. He averred that the criteria applied in applications for extension of time on ground

of illegality is the same as in application for restoration. He added that since the decision of the primary court is tainted with illegalities on the variation of amount of money mentioned in the charge and in evidence, the intervention of the district court is required for correction of the court record and justice to be done for both parties.

Contending that he has demonstrated a good cause for this court to allow the appeal, he prayed for the appeal to be allowed and Criminal Appeal No. 32 of 2022 be restored.

The respondent opposed the appeal through his legal counsel, Mr. Mbilinyi. The learned counsel first submitted that the matter to be considered is on whether the trial court made any error warranting the interference of this court in this appeal. He averred that the parameters upon which superior courts are permitted to interfere with the exercise of discretional powers of the lower court were set in the case of **Samo Ally Issack & Others vs. Republic** (Criminal Appeal 136 of 2021) [2021] TZCA 649 TANZLII, which are: **one**, if the inferior court misdirected itself; **two**, if it has acted on matters on which it should not have acted; **three**, if it has failed to take into consideration matters which it should have considered thereby arriving at a wrong conclusion. In that respect, he was of the view that the applicant failed to disclose how the trial court failed to consider any factor thus warranting the interference of the discretion of this court unnecessary. However, he went on to address the grounds of appeal.

On the 1st ground, Mr. Mbilinyi averred that the appellant's claim that his evidence was not considered is not true because he did not submit any evidence before the trial court. He made bare assertions and it is why

the trial court rejected this application for restoration. His claim that he failed to appear to prosecute his case because of illness failed as it was not supported by any evidence.

As to trial court's failure to consider his affidavit, Mr. Mbilinyi averred that there was no affidavit filed by the appellant at the trial court, but his submissions were considered and found without merit. Commenting on the appellant's counsel's rejoinder submissions by his counsel to the effect that he was using traditional medicine, he had the view that the same could not hold water as it was a new issue raised in rejoinder. He averred that the trial court sustained the objection and that matter was advanced as an afterthought.

On the 2nd ground, Mr. Mbilinyi denied the assertion that the appellant was denied the right to be heard, he contended that it was the appellant himself who did not enter appearance before the court on the material day set for hearing. He referred the lower court record averring that the record shows that the appellant did not appear in two consecutive times to prosecute his appeal. He argued further that rights go hand in hand with responsibilities. That, while it is true that the appellant had the right to be heard, he also had the responsibility to appear before the court on the material day, failure of which shows that he waived his right to be heard.

Mr. Mbilinyi challenged the appellant's argument that there was an illegality in the trial court's decision of which the same ought to have been considered in the application for restoration of the case in the district court. He contended that the point of illegality was never raised before the district court and so it would be unfair to fault the district court

on an issue that was never raised before it. He further challenged the appellant's argument on the ground that illegality is not a panacea for all applications as the same ought to be apparent on the face of the record and must be of most public importance. He cited the case of **Sabena Technics Dar Limited vs. Michael J. Luwunzu** (Civil Application 451/18 of 2020) [2021] TZCA 108 TANZLII.

In conclusion, he submitted that the appellant had failed to demonstrate good cause for his non-appearance. That, his main reason was sickness but he failed to submit proof to justify the same. In the premises, he asked this court to dismiss the appeal for lack of merit.

I have considered the submissions of both parties on the grounds of appeal and gone through the lower court record. The appellant herein seeks for this court to allow his appeal on his three grounds and for an order for restoration of Criminal Appeal No. 32 of 2022, which was before the appellate district court.

Upon observing the record, I find it evident that Criminal Appeal No. 32 of 2022 was dismissed for want of prosecution on 13.07.2022. On 11.08.2022, the appellant filed Misc. Criminal Application No. 15 of 2022 seeking for restoration. This application appears to have been filed through a single document titled "Application for Restoration of Criminal Appeal" and not through a chamber summons and supporting affidavit. The said document appears to have been drafted by a law firm, "Epic Attorneys Advocates" and duly signed by the applicant's advocate, one Loth Joseph Mwampagama. The advocate's name is only indicated in his stamp attached at the end of the document. The document bears paragraphs presented in a rather odd mode, but

somewhat in a form of an affidavit. Therein the document discloses at paragraphs 5 and 7 that the appellant was faced by sudden illness on the morning of 13.07.2022, which caused him to fail to appear before the court; and that his appeal had great chances of succeeding.

Neither was there any objection to the manner in which the application was filed nor did the court raise any issues on the same. It is during his submissions that the counsel for the respondent averred that the relevant law governing the application for restoration was the **Judicature and Application of Laws (Criminal Appeal and Revision in Proceedings Originating from Primary Court) Regulations GN No. 390 of 2021** (the Regulations). **Regulation 17 (2)** of the Regulations provides for dismissal for non- appearance of the appellant. The same states:

> "(2) Subject to the provisions of subrule (1), the appellate court may, where on the date fixed for hearing of the appeal or any day to which it may be adjourned, the sole appellant or any of the appellants where there are multiple appellants does not appear in person or by agent, dismiss the appeal against the sole appellant or any of the defaulting appellants."

Restoration of an appeal is covered under **Regulation 18** which provides:

> "18(1) The appellant or his agent may, where an appeal has been dismissed under rule 17(2) in default of his appearance, apply to the appellate court concerned for the re-admission of the appeal.
>
> (2) The court may, upon being satisfied that the appellant was prevented by good

> cause from appearing either personally or by an agent when the appeal was called for hearing, re-admit the appeal."

The most important requirement in an application for restoration of a criminal appeal originating from the primary court is for one to provide good reasons for failing to appear. This is provided under **Regulation 18 (2) of the Regulations** as cited above and **Regulation 20** of the Regulations, which states:

> "20. An application under rules 18 and 19 shall set out the reasons why the applicant did not attend the hearing."

Now coming to the grounds of appeal; on the first ground, the appellant faulted the appellate court for failing to consider the evidence he adduced in his affidavit. I find the argument unfounded on the grounds that: **one**, there was no affidavit dully sworn by the appellant as claimed; **two**, while indeed in the purported affidavit the issue of illness was raised as the reason for non-appearance on the material day, the assertion in the alleged application was that the applicant suddenly fell sick on the morning of the material day which caused him to fail to attend the court on that day. I will reproduce the paragraph for ease of reference:

> "5. That, on the date of hearing, the applicant suddenly fell sick on the morning of the day the case was scheduled to be heard and thus led to his inability to come before this Honorable court."

Further, under the 6th paragraph, it was stated:

"6. That, due to the applicant's sudden illness and failure to appear in court, the Honorable magistrate dismissed his criminal appeal for want of prosecution, thus led to this application.

As it is, the claim of sickness with diabetes appears to be a new fact not pleaded in the supporting affidavit. Further, while making his submission in chief, the appellant's counsel reasoned that the applicant was in the court premises, but left the same due to suddenly falling sick whereby he had to rush home for his diabetes medication. This appears to be a new fact as well, brought up during submission in chief. The claim does not feature in the purported supporting affidavit. The same applies to the argument brought up in the rejoinder submission by the appellant's counsel to the effect that the appellant could not have any medical evidence as he was treated by traditional herbs. As righty found by the Hon. Magistrate, the argument came in rejoinder submission as an afterthought and not pleaded anywhere.

It is trite law that parties are bound by their own pleadings and that matters not pleaded cannot be argued. See: **Barclays Bank T Ltd. vs. Jacob Muro** (Civil Appeal No. 357 of 2019) [2020] TZCA 1875 TANZLII, in which while referring to its previous decisions in **James Funke Gwagilo vs. Attorney General** [2004] TLR 161; **Lawrence Surumbu Tara vs. The Attorney General & 2 Others**, Civil Appeal No. 56 of 2012; and **Charles Richard Kombe t/a Building vs. Evarani Mtungi & 3 Others**, Civil Appeal No. 38 of 2012, held:

"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced

by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."

As to the question of proof of sickness, it is the position of the law that sickness can amount to sufficient cause, but upon being substantiated by thorough explanation and genuine medical report. See: ***Shembilu Shefaya vs. Omary Ally*** [1992] TLR 245; and ***Richard Mgala & 9 Others vs. Aikael Minja & 4 Others***, Civil Application No. 160 of 2015 (unreported). Apart from the fact that the appellant's counsel advanced the un-pleaded fact that the appellant suddenly fell sick while at the court precincts and was treated by traditional herbs, he failed to provide before the district court any proof that he was indeed in the court precincts. This is because, it is an administrative practice at the High Court-Mbeya Sub-Registry, for all person who enter the court premises, to sign an attendance register at the court's entrance. Usually, when parties advance claim of being within the court precincts on the date of hearing, the attendance register is always presented as proof of the claim. See for example: **Anyabwile Ijande vs. Enelesi Kaliku** (Misc. Land Application No. 60 of 2019) [2020] TZHC 1191. However, this was not the case on the appellant's part. In the premises, I agree with the findings of the Hon. District Magistrate that the reason of sickness advanced by the appellant was not substantiated in any way. It lacks merit.

On the 2nd ground the appellant averred that the district appellate court's denial of his application amounted to denying him his right to be heard. He added that he stood to suffer irreparable loss because the decision of the trial court was tainted with illegalities. Mr. Mbilinyi challenged these allegations on the reason that the appellant himself had failed to attend the court session on date fixed for hearing. As to the

issue of illegality, he averred that such issue was not raised in the district appellate court on the application for restoration of the appeal and that the issue of illegality could not be used in every application.

In my considered view the appellant was accorded his right to be heard by the district appellate court through the application for restoration. Despite the defective form in which his application was presented in court, he was awarded the opportunity to show that he had a good cause for his appeal to be restored, but he failed to convince the court. As such, the claim of denial of the right to be heard has no place. It cannot be used as a ground of appeal where the application for restoration of a case in court has been found to lack merit.

As to the question of illegality in the decision of the trial court, which seems intertwined with the 3rd ground of appeal, which is on point of law; I find the appellant's counsel's argument that just like in extension of time, in an application for restoration of a dismissed case, the issue of illegality is equally considered, being misconceived. In fact, the issue of illegality has no place in an application for restoration of a dismissed suit. This is because what is needed of the applicant is demonstration of a good cause as to why he or she failed to appear before the court on the date fixed for hearing to warrant the court allow the dismissed case to be resumed. Facing a circumstance where illegality was raised as aground for restoration of a suit, the Court of Appeal, in **Finca Tanzania Ltd. vs. Dotto Mdawalo Luseko** (Civil Application 582 of 2021) [2023] TZCA 236 TANZLII stated:

> "... an applicant who wants the Court to restore the application which had been dismissed in terms of sub-rule (1) is saddled with a duty to show,

> on a balance of probabilities that, on account of a sufficient cause, he was prevented from entering appearance on the day when the application was called on for hearing. The above observation is made advisedly because of the applicant's misplaced contention in the written submissions that, the High Court judgment which is sought to be challenged on appeal is tainted with some material illegalities as if this was an application for extension of time."

Clearly, in the foregoing reasoning, it is apparent that the appellant failed to demonstrate a good cause as to why he failed to attend the court session on 13.07.2022. Further, I have also found that he failed to demonstrate any act of diligence throughout. Even after failing to attend the court session or assigning his agent to do so, it appears he only filed for restoration of the appeal a month later, that is, on 11.08.2022. It is the intention of the law that litigation must come to an end. If such circumstances of negligence are left to mature, this goal would never be achieved. In **Anyambilile Mwakisale vs. Abdallah Katoto** (Civil Application 553 of 2017) [2022] TZCA 534 TANZLII, while determining an application for restoration, the Court of Appeal reasoned:

> "Timely justice would be a nightmare if the parties to a case appear in court only when they feel like. Consistently on different occasions we have directed that in the interest of justice, like human lives, every litigation has to come to an end."

The Court further stated:

> "... in considering to restore, or refuse restoration of a matter previously dismissed for want of prosecution or non-appearance of the applicant for that matter, the judicial officer's duty to

discourage possible endless litigations should be number one priority."

The appellant clearly failed to enunciate good reasons to warrant the district appellate court to restore his appeal and that is simply because evidently, there were no good reasons for him to miss the court session on the date the appeal was fixed for hearing. In that respect, the appeal at hand is found without merit and hereby dismissed.

Dated and delivered at Mbeya on this 13th day of November 2023.

THE HIGH COURT OF TANZANIA

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA