IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 42 OF 2019

ROBERT S/O HILIMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Tabora)

(Utamwa, J.)

dated the 10th day of December, 2018
in
Criminal Application No. 231 of 2017

.....

JUDGMENT OF THE COURT

27th October & 4th November, 2021

LILA, J.A.:

The appellant, Robert Hilima, was, in the District Court of Bariadi, charged and convicted of the offence of armed robbery which was predicated under sections 285 and 286 of the Penal Code, [Cap 16 R. E. 2002] and sentenced to the statutory minimum sentence of thirty (30) years imprisonment. He was aggrieved, but was late in lodging a notice of appeal and the appeal. He had to, first, seek for extension of time. Consequently, he lodged Miscellaneous Criminal Application No. 231 of 2017 in the High Court. The High Court of Tanzania sitting at Tabora

(Utamwa, J.) dismissed the application and thereby denied him extension of time to file both, a notice of appeal and the appeal itself. Still wishing to pursue his right of appeal, he has lodged the present appeal seeking the High Court decision to be overturned and he be granted extension of time.

The appellant's grounds for delay in appealing as were presented in the High Court are contained in his affidavit in support of his application. Under paragraph 3, he deposed that immediately after his incarceration in prison, he expressed his desire to appeal and lodged a notice of appeal with the Officer In-charge of Bariadi Prison. In paragraph 4, he deposed that he was transferred to Malya Prison and later to Uyui prison before he was availed with the copies of requisite documents for appeal purposes. He also deposed that while at Uyui Prison, he tirelessly continued to request to be supplied with the appeal documents from Bariadi District Court without success. After a long time had passed, he averred in paragraph 5, he received a copy of judgment and prepared and forwarded his petition of appeal to the High of Tanzania, Shinyanga District Registry vide a letter Ref. No. 112/TB/1/VOL/XXIV/264 of 9/9/2016 only to be informed later that his petition of appeal could not be traced at Shinyanga Registry, he stated

in paragraph 6 of his supporting affidavit. On these grounds, he beseeched upon the learned judge to grant him the extension sought.

Mr. Rwegira, learned State Attorney who represented the Republic respondent strongly resisted the application. Responding in respect of the appellant's averments in paragraphs 5 and 6, he argued that, **one**: if the appellant had directed his appeal to the High Court Shinyanga Registry, then he should wait for it to be heard to avoid conflicting decisions, **two**: there was no proof in the affidavit that he appealed and also, **three**: there was no proof from the Registrar that he directed his appeal to Shinyanga High Court Registry. Besides, the learned State Attorney reminded the learned judge that the application had been inordinately preferred as it had taken the appellant ten (10) years to make the application.

The learned judge, in his ruling, considered the appellant's grounds for the delay while guided by principles governing the grant of extension of time as set out by various Court's decisions in **Mumello v. Bank of Tanzania**, [2006] 1 EA 227 and **Administrator General vs Mwanaarabu Rajabu and Others and Others**, [1980] TLR 304 that grant of extension of time is at the court's discretion which should be exercised judiciously and in **Tanga Cement Company Ltd vs**

Jumanne D. Masangwa and Another, Civil Application No. 6 of 2001 (unreported) and **Mumello vs Bank of Tanzania** (supra) that the phrase sufficient cause has not been defined but from decided cases, there are certain factors which should be taken into account including promptness in lodging the application, absence of a valid explanation for the delay and lack of diligence on the part of the applicant. In the end, he was not moved to agree and find that the application was meritorious. He reasoned; **one**: that the appellant did not indicate when he lodged his alleged notice of appeal with the prison Officer In-charge of Bariadi Prison or annexed in the supporting affidavit a copy of the said notice of appeal; **two**: that he did not show when he applied to be supplied with the requisite documents for appeal or attach to the supporting affidavit a copy of a letter to that effect; **three**; even his contention that he was later served with a copy of the judgment was not substantiated as to when he was served with the same and did not annex to the application the letter forwarding his petition of appeal to Shinyanga High Court Registry; **four**: linked with the petition of appeal being sent to Shinyanga High Court Registry, there was no mention of who informed him that the same was missing and in the absence of that there was no need for him to lodge that application for extension of time in Tabora Registry as that may lead to conflicting decisions in event it

was granted. According to the learned judge, failure to adduce such information and attach copies of letters in the supporting affidavit caused him to disbelieve that the appellant was diligent enough in processing his appeal. He was, otherwise, convinced that his ten years inaction to lodge an application for extension of time was nothing but evidence that he was not diligent. He relied on the Court's decision in **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2010 (unreported).

The fact that the appellant was a prisoner was not left unconsidered by the learned judge. He appreciated the predicaments facing prisoners in processing and making follow-ups of their appeals as they mostly depend on the prison officers. The decisions of the Court in **Buchumi Osca vs Republic**, Criminal Appeal No. 295 "B" of 2011 and **Hamisi Mahandu vs Republic**, Misc. Criminal Application No. 113 of 2018 (HC- Tabora) (both unreported) were cited to bolster that stance of the law which is in line with the spirit embraced under section 363 of the Criminal Procedure Act, Cap. 2o. R. E. 2002 (now 2019) (the CPA). That notwithstanding, he was convinced that the appellant is not covered by such exception because of his failure to disclose crucial

information explained above. To hold otherwise, he held, would render nugatory the requirements under section 361(2) of the CPA to adduce sufficient reason so as to move the court to exercise its discretion to extend time to appeal. He therefore denied the appellant extension of time to file a notice of intention to appeal and a petition of appeal.

The desire to appeal was not halted by the dismissal of the application for extension of time as the appellant thought that the findings of the learned judge were unjustified. He preferred the present appeal seeking to reverse that decision.

For reasons soon to be disclosed, we are compelled to recite the appellant's grounds of appeal contained in his memorandum of appeal before this Court thus:-

1. *That the learned High Court Judge erred in fact and law for holding that the appellant did not adduce good cause for the delay.*
2. *That, the learned High Court Judge erred in law for failure to note that the appellant's efforts to pursue his rights were frustrated by the trial court's failure to furnish him with appeal materials in time and the change of geographical jurisdiction of the registry of the High Court from Tabora to Shinyanga.*
3. *That the learned High Court Judge erred in law for failure to consider that there is a point of law involved in the decision sought to be appealed against of sufficient importance, touching the*

legality of both the conviction and sentence in that the section of law against which the appellant was charged namely section 285 of the Penal Code, Cap 16 R:E 2002 (the Penal code), did not create the offence of Armed Robbery but section 287A of the Penal Code which was enacted already at the time and that, section 286 of the Penal Code does not provide for the punishment of thirty years imprisonment.

4. *That, the learned High Court Judge erred in law for failure to consider that the appellant after the expiry of the forty-five days and without appeal materials from the trial court, could only appeal upon obtaining leave of the High Court which he sought.*

As was before both courts below, the appellant was unrepresented when he appeared before us for hearing of the appeal and he fended himself. The respondent Republic was represented by Ms. Upendo Malulu, learned Senior State Attorney.

The appellant adopted the grounds of appeal without more and urged the Court to allow his appeal. He then left it for the learned Senior State Attorney to respond to the grounds of appeal.

At the outset, Ms. Malulu expressly made it clear that the appeal grounds are without merits. She opted to respond by, first, addressing herself to grounds 1 and 2 jointly. She contended that the learned judge's finding that no sufficient or good cause for delay was advanced was proper. She argued that the appellant's averments in the supporting

affidavit were not supported by annexing to the affidavit the various documents and letters allegedly written or lodged in court by the appellant either to prove that he lodged a notice of appeal or requested for requisite documents for appeal purposes. As a result, she insisted, the claim that he requested for documents from the trial court and also that he lodged a notice of appeal at Shinyanga High Court Registry remained to be unsubstantiated averments. While referring to the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra), she argued that the appellant failed to account for the delay of each and every day. To the contrary, she agreed with the learned judge that the appellant did not exercise due diligence but was negligent that is why it took him over ten (10) years to lodge the application for extension of time to lodge a notice and petition of appeal.

Submitting in respect of ground three (3) of appeal, Ms. Malulu was, initially, firm that although the charge laid at the appellant's door during trial was defective for citing section 285 and 286 of the Penal Code, Cap. 16 R:E 2002 (the Penal Code), which at the time the appellant was arraigned in court was inapplicable hence did not create the offence of Armed Robbery instead of section 287A of the Penal Code, but the defect is curable under section 388 of the CPA because

the particulars of the offence and evidence by prosecution witnesses made it clear to the appellant the nature and substance of the charge he was facing.

However, on our prompting whether her position was in line with the Court's guidance in **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra), she readily conceded that an allegation of existence of an apparent illegality in the decision sought to be impugned is, by itself, if the court is satisfied that it really exists, good cause for the delay and the court has to grant extension of time.

Upon our further prompting whether it is upon this court to determine the merits of the alleged illegality as she seemed to suggest in her submission that the alleged illegality is not fatal, she changed goal posts and argued that the duty of the court asked to grant extension of time is just to satisfy itself if such an illegality exists and is apparent requiring no long drawn exercise to realise it. As a result, she was ready for the Court to grant extension of time to the appellant as the illegality complained of is apparently clear in the charge laid against the appellant.

Consequent to her concession that there exists an illegality in the charge which entitles the appellant to be granted extension of time, Ms.

Malulu found no compelling reason to argue in respect of ground four (4) of appeal.

The learned Senior State Attorney's submission shade light on the chances of the appellant's appeal being successful. In that accord, the appellant had nothing substantial to argue in rejoinder. He just prayed the Court to permit him lodge his appeal in the High Court.

We have given due weight to the appellant's grounds of appeal and the learned Senior State Attorney's arguments. We are alive to the legal position that the mandate to grant extension of time to appeal from the District and Resident Magistrates Courts is vested in the High Court and it is discretional. That is in terms of 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 plain, in the present case, that the appellant attributed his delay in lodging both the notice of appeal and the petition of appeal to the trial court and the High Court inactions. The trial court is blamed for not supplying him with the requested documents for appeal purposes despite several letters to that effect while the High Court Shinyanga

Registry is blamed for losing his petition of appeal. No doubt, these were serious allegations against both courts below which could not be taken lightly particularly when such allegations are raised in an affidavit. In that accord, we think, the learned judge was absolutely right to demand such averments be backed up by cogent evidence, that is copies of letters requesting to be supplied with the said documents and notice of appeal allegedly wrongly lodged in Shinyanga High Court Registry or proof from the prison authorities through which such documents were channelled. Unfortunately, none was attached to the supporting affidavit. That said, there are no justifiable reasons to fault the learned judge for the finding he arrived at that no good cause was established by the appellant to warrant him exercise his discretion to grant extension of time. We accordingly agree with the learned Senior State Attorney that the learned judge's finding was proper.

In ground three (3) of appeal the appellant has, for the first time, raised an allegation of illegality as a ground for granting extension of time. Much as Ms. Malulu does not object to the appellant's prayer that he be afforded an opportunity to file his notice of appeal and petition of appeal, it should be acknowledged that the allegation of illegality of the charge was not brought to the attention of the learned judge as a ground or cause of delay for him to consider. In this ground the learned

judge is in way being blamed for not considering it. That is unjustified. He could not determine something which was not before him. There is therefore no finding by the learned judge on that ground of delay. Ordinarily, this Court would not consider such a ground of appeal. The reason is obvious that, in terms of sections 4(1) and 6(7)(a) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) read together with Rule 72(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Court is mandated to entertain matters which were decided by the High Court or a subordinate court exercising extended jurisdiction only. It is therefore such findings which are supposed to be challenged in this Court. The Court's mandate is, to such extent, limited. The Court made that pronouncement in the case of **Jafari Mohamed vs Republic**, Criminal Appeal No. 112 of 2006 (unreported) in these words:-

> *"We have found it convenient to begin our discussion by disposing of first the grounds of complaint listed (c) to (h) above. We have done so because these complaints are being improperly raised for the first time in this Court. For this reason, being issues of fact, their determination does not fall within our jurisdiction in an appeal of this nature – see Section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141.*

We take it to be settled law, which we are not inclined to depart from, that ***"this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal..."*** *per the Court in* ***Elias Msaki v. Yesaya Ntateu Matee,*** *Civil Application No. 2 of 1982 (ARS). See, also* ***Richard s/o Mgaya @ Sikubali Mgaya v R.,*** *Criminal Appeal No. 335 of 2008 (both unreported).* ***The logic behind this should be obvious. This Court is conferred with jurisdiction to hear appeals from or revise proceedings or decisions by the High Court in the exercise of its original, appellate or revisional and/or review jurisdictions. We cannot, therefore, competently render a decision on any issue which was never decided by the High Court."*** (Emphasis added).

A similar position was restated in **Galus Kitaya vs Republic,** Criminal Appeal No. 196 of 2015 where we made reference to our earlier decision in **Nurdin Mussa Wailu vs Republic**, Criminal Appeal No. 164 of 2004 (both unreported) in which we stated that:-

"...usually the Court will look into matters which came in the lower courts and were decided. It

will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."

Given such a solid stance of the law, the allegation of illegality which has been raised before this Court for the first time, in the ordinary course of buiness, deserved no consideration by this Court as there is no finding by either the High Court or a subordinate court on it.

However, the appellant has alleged that the charge was defective for citing improper provisions of law creating the offence of armed robbery by the time the appellant was arraigned. Ms. Malulu has readily conceded to the anomaly and, for the interest of justice, has shown positive response to the time being enlarged to allow the appellant opportunity to lodge both a notice of appeal and a petition of appeal.

We, in the first place, agree with the learned Senior State Attorney that the Court has consistently treated an allegation of illegality as good cause for granting extension of time. However, that is upon the court being satisfied that the alleged illegality is manifest on the face of the record (See **Ngao Godwin Losero vs Julius Mwarabu,** Civil Application No. 10 of 2015 (unreported) and **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young**

Women's Christian Association of Tanzania, (supra). In the latter case the Court stated that:-

> *"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 point of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized 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."*

The rationale for granting extension of time where there is an allegation of illegality was lucidly explained in the **Principal Secretary Ministry of Defence and National Service vs Devram Valambia** [1992] TLR 185, specifically at page 188, the Court stated that:-

> *"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason", within the meaning of rule 8 of the Rules for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand."*

The Court went further at page 189 to state that:-

> *"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 record straight"*

It may be discerned from the above exposition of the law that the bottom line in granting extension of time on allegation of illegality is to avail opportunity for an appellate court to correct an illegality manifest on the face of the record.

In the same spirit, the Court, inspired by discretional powers vested in it to grant extension of time on its own motion in criminal matters under Rule 47 of the Tanzania Court of Appeal Rules, 2009, has in certain circumstances, relaxed the requirement that such an allegation of illegality should be raised and first determined by either the High Court or a subordinate Court exercising extended jurisdiction and *suo motu* considered it and, in fit situations, stepped into the shoes of the High Court and granted extension of time. For instance, in the case of **Ntiga Gwisu v. The Republic**, Criminal Appeal No.428 of 2015 (unreported), the appellant was found to have failed to advance sufficient grounds for extension of time before the High Court. In his

appeal to the Court, the proceedings of the trial court were found by the Court wanting for contravening the provisions of sections 230 and 231 of the CPA for reasons that no ruling for case to answer was made on whether a case to answer was established and did not address the appellant his rights under section 231 of the CPA, respectively. Having realised that, the Court found it to be a fit case to grant extension of time so as to give an opportunity to the High Court to investigate the matter and take an appropriate remedial action. (See also our recent decision in the case of **Ngolo Mgagaja vs Republic**, Criminal Appeal No. 331 of 2017 (unreported).

In the instant appeal, the Court is faced with an akin situation whereby the appellant's appeal grounds are found unmerited. The appellant has, however, raised an allegation that there is a manifest illegality in the trial as the charge was defective for wrongly citing sections 285 and 286 of the Penal Code instead of section 287A of the Penal Code which creates the offence of armed robbery. As readily conceded by Ms. Malulu the infraction in the charge is vivid and does not require long drawn arguments to discover it. The charge being a foundation of all criminal trials, it is essential that its propriety is investigated by the High Court and in the event of any impropriety being discovered, the necessary remedial action be taken.

In the circumstances, like in the two cited cases, we find the circumstances in this case appropriate to *suo motu* grant extension of time to lodge both a notice of appeal and the petition of appeal in the High Court.

Before concluding, we find ourselves obligated to briefly address one crucial issue the answer of which seemed to be somehow uncertain when the learned Senior State Attorney was arguing the allegation of illegality as good cause for granting extension of time. In the course of her arguments, at a certain stage, she tried to move us to hold that although the alleged infraction which obtained in the charge, the illegality was not fatal hence could not be the basis of the appellant being granted extension of time by the Court *suo motu*. To be fair to her, it should be noted that, upon our further prompting whether the Court may make that finding when determining the application, she retreated. We think we should seize this opportunity to put the legal position clear. It is common understanding that matters subject of appeal ought to be considered and determined in the appeal and, when dealing with applications, courts are enjoined to confine themselves on matters brought before them only. In **The Regional Manager-TANROADS Lindi vs DB Shapriya and Company Ltd**, Civil

Application No. 29 of 2012 (unreported), the Court reminded the courts of their duty when dealing with applications thus:-

> *"It is settled that a court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..."*

(See also **Bulyanhulu Gold Mine Limited and Two Others vs Petrolube (T) Limited and Another**, Civil Application no. 364/16 of 2017, **Christian Orgenes Nkya vs The Republic**, Criminal Appeal No. 14/05 of 2019 and **Felix Pantaleo Msele and Eight Others vs Tanzania Commission of Science and Technology**, Civil Application No. 60/17 of 2018 (All unreported).

As will be appreciated from the cited decisions, the validity and consequences of the alleged illegality are matters to be determined by the High Court in the appeal to be lodged by the appellant after we have granted him extension of time to appeal. Unless this principle is observed, we would add, the Court's action will amount to predetermination of the merits of the intended appeal. For this reason, we refrain from considering the merits of the alleged illegality here in this application.

For the reasons above, time is hereby extended and the appellant is hereby ordered to lodge a notice of appeal within fourteen (14) days of this order and thereafter lodge a petition of appeal within forty five (45) days after service on him of the copy of the proceedings and judgment by the District Court of Bariadi.

DATED at **TABORA** this 4th day of November, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2021 in the presence of the Appellant in person and Mr. John Mkony, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL