IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 331 OF 2017

NGOLO S/O MGAGAJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mallaba, J.)

dated the 2nd day of August, 2017
in
Misc. Criminal Application No. 72 of 2017

.....

JUDGMENT OF THE COURT

18th October & 1st November, 2021

LILA, J.A.:

Sometime on 30/4/2003, Ngolo Mgagaja, the appellant, and one Njile Sayi were each sentenced to life imprisonment. That was upon being charged before the District Court of Nzega at Nzega and convicted of the offence of gang rape. They were, in addition, each ordered to pay the victim compensation at the tune of TZS. 200,000.00. The charged offence was predicated under section 131(3), (1) and (2) of the Penal Code, Cap. 16 R. E. 2002 (now R. E. 2019) as amended by section 7 of the Sexual Offences Special Provisions Act No. 4 of 1998 (the SOSPA). It was until 2/5/2017 when the appellant emerged. He preferred, at the

High Court, Misc. Criminal Application No. 72 of 2017 seeking for extension of time under section 361 (2) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA), within which to file a notice of appeal and petition of appeal out of time against the decision of the District Court. The record is dead silent on steps, if any, taken by Njile Sayi after he was convicted and sentenced on 30/4/2003.

As it can be discerned from the appellant's affidavit in support of his application for extension of time before the High Court, in addition to claiming that he expressed his desire to appeal by filling a notice of appeal on 2/5/2003, the appellant attributed the delay to the inaction by the district court in that it; **one**, supplied Njile Sayi who was at Uyui Central Prison with the copy of judgment while he was admitted in hospital which he used to process his own appeal without reserving a copy for him and **two**; that his request to be availed by the district court with another copy of judgment proved futile. He also raised two other grounds; **one**, that due to a long time that had passed of almost fourteen (14) years, his documents proving request for a copy of judgment from the district court got lost and **two**; that his appeal stood overwhelming chances of success. The application was stoutly resisted by the respondent Republic contending that the grounds raised were

nothing but a proof that there was inaction, recklessness and negligence on the part of the appellant to pursue his right of appeal timeously.

Upon hearing the parties, the learned judge did not find purchase from any of the grounds fronted by the appellant as being sufficient cause for the delay hence warranting his exercise of his discretion to grant extension of time. He found the claim that the appellant lodged a notice of appeal unsubstantiated for want of a copy of it being annexed to the affidavit in support of the application or an affidavit by prison officials to that effect or its being lost. As for being admitted in hospital, the learned judge found the allegation unfounded for failure to tell the dates as well as failure to attach medical proof to that effect which would explain away the delay during the period of his admission. Similarly, the contention that the appellant made efforts to request for copies of judgment was found baseless following his failure to either annex the copies of the letters or attach an affidavit by prison officials in support of his contention. Otherwise, the learned judge found the delay of over fourteen years unexplained hence no sufficient cause for the delay was established. He accordingly dismissed the application.

Aggrieved, on 11/8/2017, the appellant lodged a notice of appeal to challenge the dismissal order (Mallaba, J.) and, on 26/06/2018, he

lodged a memorandum of appeal consisting of two grounds of appeal to wit:-

> *"1. That the learned High Court judge erred for not considering that there was a point of law involved of sufficient importance, touching the legality of the judgment sought to be appealed against in that the trial court misapprehended the nature and quality of the evidence adduced leading to injustice*
> 2. *That there is an arguable case in it highly anticipated appeal which is actually in my favour with overwhelming chances of success as the trial court did not consider at all the defence of the appellant when composing the judgment."*

Still thinking that the above grounds of appeal were inadequate, the appellant subsequently lodged another ground of appeal. It was couched thus:

> *"1. That the learned High Court judge erred in law for failure to consider, having been seized with the record of the case at the time of determining the application, that the case against the appellant was marred with both procedural and substantive irregularities whose decision cannot be left to stand."*

At the hearing of the appeal before us, the applicant did not have the assistance of a legal counsel and appeared in person, while the respondent Republic had the services of Mr. Rwegira Deusdedit, learned Senior State Attorney.

Seized of the opportunity to amplify his grounds of appeal, the appellant adopted his grounds of appeal, prayed that his appeal be granted and time be extended for him to lodge a notice of appeal and the petition of appeal in the High Court.

Mr. Deusdedit, on the other hand, was not moved an inch to agree that the appeal could have any merit at all. Briefly but focused, he submitted that the appellant's appeal is grounded on matters not canvassed and determined by the learned judge. Elaborating, he argued that the learned judge determined the application based on the grounds placed before him. It is his findings on those grounds only which could be challenged by the appellant before this Court, he insisted. To the contrary, Mr. Deusdedit submitted, the appellant has, in his grounds of appeal before this Court, raised matters which were not placed before the judge and there is no decision on them. As a way forward, Mr. Deusdedit, urged the Court to find the appeal grounds unmerited and, instead of dismissing the appeal, the Court should invoke its powers

under Rule 4(a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and look at the grounds raised with a second eye and grant the appellant extension of time which he sought before the High Court.

Elaborating and while referring to the grounds of appeal raised before this Court which basically raise allegations of illegalities in the conduct of the trial and deficiency in the trial court's judgment for not considering the defence evidence which have been consistently accepted by the Court as good cause for delay, Mr. Deusdedit proposed that the Court may, at its discretion, step into the shoes of the High Court and grant extension so as to allow opportunity to the appellant to appeal to the High Court so that the record may be put in order. Other examples of the illegalities he pointed out are that the victim's witness statement was improperly tendered in court under section 34B of the Evidence Act, Cap. 6 R. E. 2002 (now 2019) as there is no indication that the appellant was accorded an opportunity to raise any objection and that the charge was defective. He beseeched the Court to take that course for the interest of justice.

The appellant had nothing in rejoinder other than urging the Court to take the course proposed by the learned Senior State Attorney so as to enable him to lodge his appeal before the High Court.

We have given due consideration to the grounds of appeal and the responses thereof by the learned Senior State Attorney. We would wish to be clear that our recitation of the appellant's grounds upon which his application for extension of time was based before the High Court and the grounds of appeal he fronted before us is not without a purpose. The learned Senior State Attorney's arguments tell it all why we did so. We shall explain.

The record of appeal is vivid that the appellant preferred an appeal to this Court against the learned judge's refusal to grant him extension of time to lodge a notice of appeal and a petition of appeal. As hinted above, in that application he was seeking for extension of time to appeal to the High Court against a judgment of Nzega District Court in Criminal Case No. 307 of 2002. Before the High Court, his grounds for the delay as were reflected in paragraphs 4, 5 and 6 of the supporting affidavit were that:-

"4. That, the cause of delay in lodging petition of appeal may be summarized as following inter – alia:-

a. That, in case I am a second accused person the first accused he was one person called Njile Sayi, when the copy of judgment was supplied at Uyui Central Prison was received by Njile Sayi while I was admitted at Kitete Hospital, the first

accused Njile Sayi he prepared the appeal alone and forwarded it to the High Court plus with copy judgment without being remain copy of judgment, because I was admitted for two months.

b. *That, after being gain (sic) I pray a great role to find another copy of judgment in order to prepared my appeal but no response.*
c. *That, the trial district court of Nzega at Nzega is the one person who caused this delay for failure to issue me another copy of judgment up to day almost fourteen (14) years now my lord judge following the long period the all my document which I wrote to the district magistrate requesting another copy of judgment was disappeared, but only Notice of intention to appeal was remained.*
5. *That, it will be the interest of justice for this Honourable court to grant an extension of time to lodge notice of intention to appeal and allow me to lodge petition of appeal pending copy judgment on a reasons herein above.*
6. *That, my intended appeal has overwhelming chances of success as there is no watertight evidence against me."*

Upon hearing the parties, the learned judge did not find purchase from any of the grounds fronted by the appellant as being sufficient cause for the delay hence warranting grant of extension of time. He found the claim that the appellant lodged a notice of appeal unsubstantiated for want of a copy of it being annexed to the affidavit in

support of the application or an affidavit by prison officials to that effect or its being lost. As for being admitted in hospital, the learned judge found the allegation unfounded for failure to tell the dates as well as failure to attach medical proof to that effect which would explain away the delay during the period of his admission. Similarly, the contention that the appellant made efforts to request for copies of judgment was found baseless following his failure to either annex the copies of the letters or attach an affidavit by prison officials in support of his contention. Otherwise, the learned judge found the delay of over fourteen years unexplained hence no sufficient cause for the delay was established. He accordingly dismissed the application.

Closely examined, in the grounds of appeal, the appellant has made no reference, not even a side hint, to the findings of the learned judge on the grounds upon which his application for extension of time based and was determined which aggrieved him. Conversely, he has raised completely new grounds for seeking extension of time which were allegedly not considered by the learned judge. This not being a *second bite*, the appellant could not raise new grounds for seeking enlargement of time. The course taken by the appellant's does not therefore accord with the provisions of section 4(1) of the Appellate Jurisdiction Act, Cap.

141 R. E 2002 (now 2019) which mandate the Court to determine appeals from the High Court and subordinate courts with extended jurisdiction. In terms of those provisions, this Court is empowered to deal with matters which were deliberated by the High Court and it is such findings which may be challenged before the Court. The Court was confronted with a similar issue in the case of **Jafari Mohamed vs Republic**, Criminal Appeal No. 112 of 2006 (unreported) and the Court seized the opportunity to expound in details its mandate 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).

Upon our serious and objective examination of the grounds of appeal, we have not the slightest doubt, that the matters fronted in the grounds of appeal before us by the appellant were not brought out at the hearing before the judge and in those circumstances we think, this is one of those cases the judge would unjustifiably be faulted. The learned judge heard and determined the application based on the grounds raised in the application for extension of time. He could not, therefore, act on grounds not raised in the application.

The question that arises is what are the consequences of such an omission to raise grounds of grievance in respect of the refusal order.

The resolve to the issue is not hard to find. As the Court pronounced itself in **Jafari Mohamed vs Republic** (supra), we cannot render a decision on the grounds of appeal raised. In a word, it is as good as no grounds of appeal were raised. The appeal grounds have no merit.

We would have ordinarily dismissed the appeal but it has occurred to us that the appellant could properly have brought the above grounds of appeal before the High Court for consideration as grounds for his delay in lodging both the notice of appeal and petition of appeal. The Court's position where the ground of illegality of the impugned decision is raised is clear and well settled. In the case of **VIP Engineering and Marketing Limited and Two Others vs Citibank Tanzania limited,** Consolidated Civil Reference No.6, 7 and 8 of 2006, it was held:

> *"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule* 8 *(now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay."*

The purpose for which extension of time should be granted is to avail chance for the appellate court to correct the anomaly. The Court lucidly explained that position in the case of **Tanesco vs Mufungo**

Leornard Majura and 15 Others, Civil Application No. 94 of 2016 (unreported), where it was stated that:-

> *"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that there is a complaint of illegality in the decision intended to be impugned .. suffices to move the Court to grant extension of time so that, the alleged illegality can be addressed by the Court."*

(See also **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185).

Most unfortunately, the appellant did not advance allegations of illegalities as a ground for seeking extension of time before the High Court. Now, for the interest of justice, the learned Senior State Attorney has invited us to step into the shoes of the High Court, consider the grounds and grant the appellant extension of time to lodge the notice of appeal and petition of appeal.

Adjudging from the arguments by the learned Senior State Attorney, it seems clear to us that the High Court has powers to grant extension of time to lodge both a notice and petition of appeal to the

High Court from the decision of the District Court out of time. We entirely agree with him. The provisions of section 361(2) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (now 2019) are clear on this. The more so, it has for so long and occasionally treated existence of illegality on the decision sought to be impugned as good cause for the delay. For instance, in **R. v. Hamood Nassoro** [1972] HCD no. 30, the Republic applied for extension of time to appeal against the decision of the magistrate who had ruled out that the prosecution had not established a prima facie case against the accused. The ground they raised was that they were delayed in being supplied with a copy of the ruling. The High Court granted leave to appeal out of time after realizing that there existed an important legal issue in the decision sought to be impugned.

In the present case, it is undeniably clear that the illegalities in the decision subject of the intended appeal were not brought to the attention of the learned judge as a result of which he did not act on them. It is, however, as rightly argued by Mr. Deusdedit, a fact that the learned judge was seized of the record of the district court. It does appear that had he taken trouble to appraise himself with the true facts of the case he would have noted the apparent infractions brought to the fore by the appellant in this appeal and would have, *suo motu*, exercised

his discretion to grant the application for extension of time. Failure to do so has not only denied the appellant his right of appeal but also denied the High Court the opportunity to address and correct the alleged legal infractions, if sufficiently established.

Much as we appreciate that the power to grant extension of time, in the present case, is vested in the High Court, under certain circumstances, this Court has stepped into the shoes of the High Court and done what ought to have been done by the High Court. We did so recently in the case of **Ntiga Gwisu vs Republic**, Criminal Appeal No. 428 of 2015 the facts of which are in all fours with the present case. We find it still good law hence we have no reason to depart from it. And, in addition to the reasons stated therein that the course taken will expedite dispensation of justice, we are also inspired by the provisions of Rule 47 of the Rules which vests the Court with discretionary powers to extend time *suo motu* for doing an act. Vivid as they are, the illegalities outlined in this appeal call for the need to grant the appellant extension of time to lodge the notice and petition of appeal so as to avail the High Court opportunity to address the infractions complained of.

In view of the above circumstances, we refrain from dismissing the appeal. To the contrary, we grant the appellant fourteen (14) days from

the date of this order within which to lodge a notice of appeal and thereafter lodge a petition of appeal within forty five (45) days from the date of service upon him of the proceedings and judgment in Criminal Case No. 307 of 2002 of the District Court of Nzega.

DATED at **TABORA** this 29th day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 1st 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.

THE COURT OF APPEAL OF TANZANIA

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL