

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT TABORA (CORAM: MSOFFE, J.A., KIMARO, J.A., And MJASIRI, I.A.) CRIMINAL APPEAL NO. 139 OF 2009 PAUL S/O MAVAI APPELLANT VERSUS THE REPUBLICRESPONDENT {Appeal from the Ruling of the High Court of Tanzania at Tabora} ' {Mujulizi, J.) dated 30th day of March, 2009 in Miscellaneous Criminal Application No. 1 of 2003 .•. JUDGMENT OF THE COURT 26th & 28th February, 2014. MSOFFE, I.A. The District Court of Maswa convicted the appellant of armed robbery and sentenced him to the statutory thirty years term of imprisonment. Aggrieved, he appealed to the High Court of Tanzania at Tabora where his appeal was summarily rejected. Realizing that he was late in appealing within time to this Court against the summary rejection Order he filed an application before the High Court seeking enlargement of time to file a notice of appeal. Needless to say, the application to that effect was taken or grounded under the provisions of section 11 of the Appellate Jurisdiction Act (CAP 141 R.E.2002) (the Act) which may, be read together with Rule 47 of the Tanzania Court of Appeal Rules, 2009 (the Rules). Anyhow, the High Court (Mujulizi, J.) in a Ruling dated 30/3/2009 declined the request hence this appeal. Before us the appellant appeared in person, unrepresented, whereas the respondent Republic had the services of Ms. Juliana Maka, learned State Attorney. At first, Ms. Juliana Maka had sought, to object to the appeal. On reflection however, she changed her mind and argued in support of the appeal. For reasons that will emerge hereunder she was justified in supporting the appeal. Before we address the merits or otherwise of the appeal we wish to point out that Mujulizi, J. canvassed a number of aspects which had no relevance to the application before him. We say so because, in citing the case of Shanti Hindoga and Others (1973) E.A. 2007 that in an application of the nature that was before him the main consideration is whether or not an applicant has shown sufficient reason to explain the delay in appealing within time, shows that the learned judge was well aware of the main factor that has to be taken into account in an application 21 of the said nature. Yet, he went on to raise and consider other matters

- , i i which were not the issues of the moment. Indeed, to say the least, in the process he raised and discussed certain matters which were not within his jurisdiction to address. Two examples, aJ under, will help to demonstrate. I I illustrate and elaborate this point. I One, in answer to the appellant's assertion that he could not appeal /' ; within time due to lack of stationeries in the prison office, the learned J. I I , judge cited Rules 61 (1), 65, 66, 67 and 68

(1) of the Rules. We think in the justice of this matter it was not necessary to cite these Rules in the application before him where, as stated earlier, the main consideration ought to have been whether or not sufficient reason had been disclosed to grant the said application. Two, in refusing the application the learned judge cited the provisions of section 6 (7) (a) of the Act, to the effect that an appeal could only lie on a matter of law (not including severity of sentence) but not on a matter of fact. To this end, he went on to conclude thus:- "Consequently, therefore since the order is not appealable it would be for nothing to grant the applicant extension of 3 months, 1 month, 11 days to file a notice of appeal when he has no right of appeal." With respect, the learned judge erred. Whether or not the appellant had a right of appeal was not the issue of the moment before him. Worse still, we think it was not quite in order for him to cite section 6(7) (a) given the nature of the application before him. Admittedly, under paragraph (b) thereof the High Court has power to certify a point of law for consideration and decision by this Court. However, under paragraph (a) thereto it is not explicit that only the High Court has power to grant leave to appeal. In practice, in a fit case this Court too has power to grant leave under paragraph (a). At any rate, all this is academic because the application before Mujulizi, J. had nothing to do with leave under paragraph (a) or a certificate under paragraph (b). Back to the application. The main reasons given by the appellant in his application for enlargement of time are best captured, under paragraphs 3, 4 and 5 of his affidavit in support of the application to the High Court. He deposed that the order for summary rejection was given on 5/7/2001 in his absence and was communicated to him on 26/6/2002 when there was an acute shortage of stationeries in the prison. He was not contradicted by anyone in his averments to the above effect. On the contrary, on 23/2/2009 Ms. Kitali, learned State Attorney appearing on behalf of the respondent Republic, told Mujulizi J. in support of the appellant's assertion, thus:- 'My lord, after going through the affidavit I am satisfied that they are a reasonable explanation for the delay. I therefore have no objection to the grant of the prayer. In the absence of evidence to the contrary we think that it was not open to the learned judge to refuse the appellant's application in the manner he did. If anything, in our considered view, the appellant exhibited sufficient reason to explain the delay in appealing within time. We appreciate that in trying to explain away the issue of stationeries the learned judge had this to say:- ...So in this case a correct rendering of the events, for instance as to when the applicant first obtained the necessary stationery was and is critical to an application of this nature. As it is, both the applicant, and the prison authority avoided committing themselves on paper by failing to give specific dates. (Emphasis added.) With respect, we think that this statement was, and indeed still is, speculative and not supported by the record. In the absence of evidence that both the appellant and the prison authority "avoided committing themselves on paper by failing to give specific dates," we think the judge's reasoning on this point was not only speculative as already alluded to but in effect it amounted to condemning them unheard because he had no basis or good and sufficient material before him upon which he could back up or substantiate this serious assertion that they "avoided committing themselves." For the foregoing reasons, this appeal has merit. We accordingly allow it. We grant the appellant a period of thirty days from the date of this

I . . I Ruling to file a notice of appeal against i the Order of ~wita, J. dated j 5/7/2001. : ! I
DATED at TABORA this 2ih day of February, 2014. ' I ! . ' J. H. MSOFFE JUSTICE OF APPEAL I j
I N. P. KIMARO JUSTICE OF APPEAL j I S. MJASIRI JUSTICE OF APPEAL I I I certify that this
is a true copy of the original. I ' I ! ~ P:v(·BAR~PIKYA . SENIOR DEPUTY REGISTRAR COURT
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