IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

MZA CRIMINAL APPLICATION NO. 1 OF 2006

DEOGRATIUS KAPELA ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for leave to lodge Notice of Appeal out of time from the Ruling of the High Court of Tanzania at Mwanza)

(Nchalla, J.)

dated the 27th day of February, 2002

in

Misc. Criminal Application No. 27 of 2001

R U L I N G

16 & 23 February, 2007

MROSO, J.A.:

The applicant was tried, convicted and sentenced to a prison sentence of 30 years for armed robbery. Aggrieved by the conviction and sentence he appealed to the High Court but lost the appeal. He intended to appeal to this Court but did not lodge a notice of appeal in time. He made application to the High Court for leave to lodge both the notice of appeal and the memorandum of appeal out of time. The application was dismissed. He has now come to this Court, making a similar application as he did in the High Court. In

this application he is represented by Mr. Kabonde, learned advocate, and the respondent Republic is represented by Mr. Feleshi, learned Senior State Attorney.

In his affidavit in support of his Notice of Motion he gives three main reasons why he should be granted extension of time to file a notice of intention to appeal and to lodge his memorandum of appeal. He says that on 19th July, 1999 when the High Court dismissed his appeal he was not present in court but his former advocate, Mr. Rugaimukamu, was present. The advocate did not inform him of the results of his appeal and he only came to know of it on 23rd March, 2000 through the District Registrar of the High Court. By then, of course, the period of fourteen days within which to lodge a notice of appeal as stipulated in Rule 61 (1) of the Court of Appeal Rules, 1979 (the Rules) had expired.

The second ground given is that he did not receive any assistance from the Prison authorities, presumably to enable him take remedial action. Eventually, however, his son engaged the services of the present advocates, Kabonde and Magoiga Law Firm (Advocates).

The third ground is that he has been advised by his current advocates that his intended appeal stands great chances of success.

In arguing the application on behalf of the applicant Mr. Kabonde expounded on the three grounds summarised above. He said that although, indeed, the applicant's former advocate was in court when the decision of the High Court was given, he neither communicated the result to the applicant nor took action by filing a notice of appeal in time. The Court, therefore, should take a lenient view because the applicant was not personally to blame. The fact that the applicant is a prisoner under confinement aggravated his position because he could not take any action on his own without the involvement of prison officers who at any rate did not give required assistance.

Mr. Kabonde said from the bar that the applicant's co-accused who was also convicted for the same offence and was also late to lodge a notice of appeal was allowed by the High Court to lodge the notice out of time and that his appeal was heard and he succeeded in the appeal. Since the applicant would raise the same grounds of appeal if he were to be allowed to appeal out of time it is very

probable his appeal would succeed as well. He therefore prayed that for all those reasons, the application should be allowed.

Mr. Feleshi opposed the application. He argued that the applicant had not said anything which would make this Court take a different stand from that which was taken by the High Court when it dismissed the applicant's application. He said that the credibility of the applicant was, after all, questionable and, so, he does not deserve any leniency from this Court. To illustrate the point, he produced to the Court an affidavit of the applicant which was presented to the High Court in support of his application there for extension of time to lodge his notice of appeal. According to Mr. Feleshi, there are factual differences between the affidavit which was presented to the High Court and the one before me, suggesting that the applicant is not truthful. For example, he said, whereas in paragraph four of his current affidavit the applicant said the results of his appeal to the High Court were not communicated to him until on 23rd March, 2000, in his affidavit to the High Court he said in paragraph six thereof that his erstwhile advocate lodged a notice of appeal on 10th August, 1999, which was already too late. Furthermore, that the applicant did not produce proof that prison

authorities who normally assist prisoners to prepare and forward to court documents refused to assist the applicant.

As correctly pointed out by Mr. Kabonde, the respondent Republic did not file any counter-affidavit. It would not be appropriate, therefore, for the respondent, through the learned Senior State Attorney, to challenge from the bar the factual statements in the applicant's affidavit. Mr. Feleshi could only properly advance counter-legal arguments against the application. If he thought the facts contained in the applicant's affidavit were incorrect, the correct course to take was to file a counter-affidavit. Even the affidavit of the applicant to the High Court to which Mr. Feleshi referred should properly have been an annexture to a counter-affidavit, had it been filed. Be it as it may. The question, however, is whether the applicant has advanced sufficient reasons, as required by Rule 8 of the Court Rules, which would persuade this Court to grant extension of time as prayed.

It cannot be gainsaid that at the time the appellant's appeal was dismissed by the High Court his advocate was present in court. The appellant claims that the advocate did not inform him of the

dismissal. Is it sufficient for the applicant to make that bald claim? The point that the advocate did not tell him of the dismissal of the appeal and did not lodge a notice of appeal in time is the most important ground in the application. It was necessary therefore that it should be effectively presented. In that connection one would have expected that Mr. Rugaimukamu would have been asked to file an affidavit explaining why, if true, he kept the applicant in the dark and did not advise him on what action to take if he was dissatisfied with the appeal result. But it appears no attempt was made to get an affidavit from the learned advocate. It cannot be assumed that the advocate was negligent in the absence of a hearing from him. It must now be said that since the applicant was duly represented by his advocate when the High Court judgment was delivered, the applicant is deemed to have been aware that he had lost his appeal and no acceptable reason has been given why a notice of appeal was not lodged within the stipulated period of 14 days after the date of the High Court decision.

But even if the applicant were to demonstrate sufficiently that his failure to comply with Rule 61 (1) of the Rules resulted from the

negligence of his advocate it is doubtful if that would constitute a sufficient reason under Rule 8 of the Rules.

In **Umoja Garage v. National Bank of Commerce,** [1997] TLR, 109, in an application for extension of time to file a notice of appeal to this Court one of the reasons for delay as advanced by the applicant was the negligence of his counsel to obtain the Registrar's certificate. This Court (Kisanga, JA) said in that connection:-

> "I am quite clear in my mind that the state of affairs in this case was brought about by the failure of the applicant's counsel to act diligently ... It seems plain to me lack of diligence on the part of counsel or an oversight ... would be even more devoid of merit as a plea for extension of time. In the result, therefore, I am of the view that no sufficient cause has been disclosed for enlarging the time as prayed."

With respect the same reasoning would apply to this application so that even if it was shown, which was not done, that Mr. Rugaimukamu had been negligent, that would not avail the applicant.

The second ground that prison authorities were unhelpful cannot help the applicant in explaining his failure to lodge his notice of appeal in time. In the first place there is no proof that the prison authorities were approached to render assistance but refused. In the second place, if the applicant, as he claimed, did not know the result of his appeal to the High Court until it was too late, how would the prison authorities know of that result in order to render assistance to the applicant in time? As I understand it, prison authorities have to get a request from a prisoner that he intends to appeal and that notice of intention to appeal should be prepared and taken to court. The applicant does not say that he informed the prison authorities soon after the High Court decision in his appeal was pronounced and that he intended to appeal to this Court but they took no action. It will not be fair, therefore, in the circumstances to blame the prison authorities for the appellant's late lodging of a notice of appeal to this Court.

Finally, there is the claim that the applicant's intended appeal has great chances of success. But there was nothing before me to enable me to assess the chances of the intended appeal succeeding if it were filed and heard by this Court. As mentioned earlier in this

ruling, Mr. Kabonde claimed from the bar that the applicant's co-accused who obtained extension of time to appeal to this Court eventually succeeded in his appeal. He further claimed that the appellant would raise the same grounds of appeal and that since the facts which led to their being convicted by the trial court were the same, the chances were overwhelming that his appeal too would succeed.

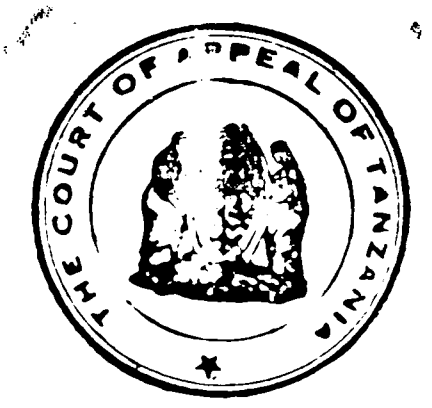
I have neither been shown the intended grounds of appeal of the applicant nor those of his former co-accused. Also, I have not been shown the judgment relating to the co-accused. There is, therefore, no basis for me to hazard an opinion on the chances of any intended appeal by the applicant.

For all the above reasons, I am constrained to say that no sufficient reason has been shown for extending the time to lodge a notice of appeal and the memorandum of appeal by the applicant. The application is dismissed.

GIVEN AT MWANZA this 23rd day of February, 2007.

J. A. MROSO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(S. M. RUMANYIKA)
DEPUTY REGISTRAR