IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KHAMIS, J.A, And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 498 OF 2022

HARRY MSAMIRE KITILYA ..... 1ST APPELLANT

SHOSE MORI SINARE ..... 2ND APPELLANT

SIOI GRAHAM SOLOMON ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania, Corruption and Economic Crimes Division)

(Banzi, J.)

Dated 19th of August, 2022

in

Economic Application No. 02 of 2022

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RULING OF THE COURT

3rd & 23rd May 2024

MGEYEKWA, J.A.:

The appellants, Harry Msamire Kitilya, Shose Mori Sinare, and Sioi Graham Solomon are appealing against the decision of the High Court (Corruption and Economic Crimes Division) at Dar es Salaam, dated 19th August, 2022, in Economic Application No. 02 of 2022 in which the High Court refused to grant extension of time to file an application to set aside

the conviction, sentence and orders made against them on 25th August, 2020 obtained from plea bargaining process.

For better appreciation of the sequence of events leading to this appeal, we propose to set out briefly the background obtained from the record of the appeal. The appellants and two other persons were arraigned before the High Court Corruption and Economic Crimes Division in Economic Case No. 4 of 2019 jointly and severally charged with 58 counts of leading organized crime, forgery, uttering false documents, use of documents intended to mislead principal, obtaining money by false pretense, money laundering and occasioning loss to a specified authority.

On 25th August, 2020, the appellants filed an application requesting for plea bargaining. The High Court examined their voluntariness and competence to enter into such an agreement under oath. Subsequently, it accepted and registered their plea bargaining agreement. The record shows that, pursuant to the plea agreement, the prosecution substituted the information by dropping 57 counts and remained with one count of occasioning loss to a specified authority on which each pleaded guilty.

Following the plea of guilty, the facts constituting the offence were read over to them and they admitted the same. Consequently, they were ail convicted on their own plea of guilty as charged and each one was

sentenced to pay a fine of Tshs. 1,000,000/= or imprisonment for six months in default. In addition, they were ordered to pay Tshs. 1,500,000,000/= to the Government of the United Republic of Tanzania as compensation for the loss occasioned according to Clause 3, Part B of the plea agreement.

Dissatisfied, on 30th March, 2022, the appellants applied for extension of time within which to file an application to set aside the conviction, sentence and orders made against them. The ground for the delay was an inaction by the court to supply them with a copy of the proceedings within time. The High Court found that the appellants had failed to establish sufficient cause for granting an extension of time as prayed. Undaunted, the appellants have approached the Court by way of appeal against the decision of the High Court. They have preferred six grounds of appeal. However, for reasons that will be apparent shortly, we deem it not appropriate to reproduce them herein.

When the appeal was placed before us for hearing, the appellants had the services of Mr. Zaharan Sinare, learned counsel whereas the respondents were represented by Mr. Zakaria Ndaskoi, learned Principal State Attorney who was assisted by Ms. Flora Massawe, learned Principal State Attorney, Mr.

Edgar Evarist Bantulaki, Ms. Estazia Wilson and Mr. Job Mrema, all learned Senior State Attorneys.

Before he could start to argue the grounds of appeal, Mr. Sinare prayed for leave of the Court to raise an additional ground of appeal as indicated in the document filed on 6th February, 2024. He also prayed to abandon all grounds of appeal, the prayer which was granted. He thus remained with the additional ground of appeal only which is based on the provision of section 43 (a) of the Law of Limitation Act, Cap. 89 (the LLA). In that ground, the appellants contend that: the trial court erred in law and fact in applying the provisions of the LLA in the matter before it.

Submitting in support of the ground of appeal, Mr. Sinare asserted that, according to the record of appeal, the High Court had based its decision on the LLA which was an error because it was dealing with a criminal application. Elaborating further, the learned counsel contended that, in determining whether or not to extend time, the High Court referred to section 14 of the LLA. He submitted that, in contrast, the provision of section 43 (a) of the LLA excludes application of the LLA in criminal proceedings. To reinforce his stance, Mr. Sinare placed reliance on the decision of the Court in **Said Shaibu Mwigambo v. The Republic**, Criminal Appeal No. 420 of 2021, where the Court dismissed an appeal for being filed out of time. The Court

further noted that section 43 (a) of the LLA excludes its applicability in criminal proceedings.

In conclusion, the learned counsel for the appellants urged us to set aside the High Court decision since it was erroneously based on the law which is inapplicable.

Responding to the argument raised by Mr. Sinare, Mr. Ndaskoi forcefully opposed the application and stated that there is no error in the impugned ruling. On the sole grounds of appeal, while acknowledging that, in accordance with section 43 (a) of the LLA, the Act does not apply in criminal proceedings, Mr. Ndaskoi took a diverse swipe in addressing this issue. He contended that, it is improper to conclude that the court was not clothed with jurisdiction to determine the application for extension of time simply because the appellants cited a wrong provision of the law. He clarified that, the appellants' complaints are on plea - bargaining proceedings, and as per section 194G of the Criminal Procedure Act (the CPA), there is no specific time limit to lodge such an application. It was his further argument that, since the application was lodged in a court with competent jurisdiction to grant the order sought; it was in the position to determine it.

On the issue that the appellants are the one who moved the trial court to determine the application for an extension of time under a wrong provision

of the law, Mr. Ndaskoi spiritedly argued that the appellants cannot benefit from their own wrong. He contended that going through the impugned ruling, there is nowhere shown that the judge of the High Court applied and considered section 14 of the LLA. Thus, it cannot be faulted.

He did not end there. He contended that the appellants were supposed to file their application within a reasonable time instead of shifting the blames to the court. He referred the Court to section 62 of the Interpretation of Laws Act Cap. 1 (the ILA) and argued that, where time is not fixed within which an act shall be done, such act shall be done with all convenient speed. He agreed with the High Court decision as being sound and reasoned, stating that, it determined the issue whether the appellants had established sufficient cause to warrant the court to grant the prayer sought. Instead it found that, the appellants had failed to assign sufficient cause to warrant the court to grant extension of time. In that respect, he moved us to dismiss the appeal for being devoid of merit.

In his rejoinder, Mr. Sinare reiterated his submission in chief and stressed that, it is an undisputable fact that the impugned ruling was made under section 14 of the LLA. He asserted that since Mr. Ndaskoi conceded that the LLA does not apply in criminal proceedings, it was wrong for the High Court to rely on the said provision in determining the application before

it. The learned counsel for the appellants further argued that, section 194G (2) of the CPA does not set any time limit or empowers the High Court to extend time. He added that, section 62 of the ILA cited by Mr. Ndaskoi does not apply in an application for extension of time. He concluded by urging the Court to be pleased to set aside the impugned ruling because it was erroneously based on a wrong provision of the law.

Having considered the submissions made by the parties on the sole ground of appeal, we find that, the issue in controversy that calls for our consideration in this appeal centers on the jurisdiction of the High Court as opposed to the nature of the claim presented before it. This is echoed in the argued ground of appeal and the issue leading us to determine is whether or not the trial court was clothed with jurisdiction to determine the application for extension of time to set aside the conviction and sentence.

As a starting point, we observe that the ground of appeal based on section 14 (1) of the LLA, that is where the issue of jurisdiction arose. It is an undisputable fact that the applicability of section 14 (1) of the LLA is limited. This is clearly stated under section 43 (a) of the LLA. For ease of reference, we quote it below:

> *"43. **This Act shall not apply to***
> *(a) **criminal proceedings;***

(b) *applications and appeals to the Court of Appeal;*

(c) *proceedings by the Government to recover possession of any public land or to recover any tax or the interest on any tax or any penalty for non-payment or late payment of any tax or any costs or expense in connection with any such recovery; [Cap. 403 and 147];*

(d) *forfeiture proceedings under the Customs (Management and Tariff) Act or the Excise (Management and Tariff) Act; proceedings in respect of the forfeiture of a ship or an aircraft; any proceeding for which a period of limitation is prescribed by any other written law, save to the extent provided for in section 46. [Emphasis added]*

As it can be observed from the above provision, an application for an extension of time in criminal proceedings cannot legally be preferred under rule 14 (1) of the LLA.

To convince the Court that the application was proper before the High Court, Mr. Ndaskoi referred us to section 194G (2) of the CPA and argued that the High Court could have relied on it in determining the application for extension of time to set aside the conviction and sentence. For ease of reference, we reproduce it hereunder. It reads:

"194G (2) An accused person who is a party to a plea agreement may apply to the court which passed the

sentence to have the conviction and sentence procured involuntarily or by misrepresentation pursuant to a plea agreement be set aside."

The above provision of the law deals with plea bargaining proceedings and suggest that an aggrieved person who was a party to the plea agreement may apply to set aside the conviction and sentence procured involuntarily or by misrepresentation pursuant to a plea agreement. We are however at one with Mr. Sinare that the respective provision does not set out the time limit for applying to set aside a conviction and sentence. In his submission, Mr. Ndaskoi submitted that, the time limit in filing such kind of application is provided for under section 62 of the ILA. We find that, as rightly submitted by Mr. Sinare, section 62 of the ILA does not apply squarely in the matter at hand. Although it is provided that an application should be filed within a reasonable time, what is a reasonable time is not defined therein. According to the case laws, however, where a period for filing an application being it a criminal or civil, is not provided by any specific provision, is sixty (60) days. This period of limitation was fixed by the Court in respect of the applications for revision and review at the time when there were no specific provisions in the then Court of Appeal Rules, 1977. See for example, the

case of **Director of Public Prosecution v. Prosper Mwalukasa** [2003] T.L.R 34 in that case, the Court held that:

> *"This Court is not subject to the Law of Limitation Act, 1971 and the Rules of the Court are silent on the period of limitation for review; to fill the lacuna, the Court ruled, by analogy, that the period of limitation for applications for review was to be sixty days."*

In our considered view, from that jurisprudence, the period of limitation fixed by the Court for an application of criminal nature for which the limitation period is not provided, should also apply to the applications before the High Court. We find therefore that, notwithstanding the fact the learned High Court judge had based his decision under the LLA, she was not precluded from entertaining the appellants' application for extension of time.

Going by the time limitation of 60 days, it is obvious that the appellants were out of time to file the said application. Now, the question that came to our mind is whether the wrong citation of the provision of law renders the application incompetent. As alluded to above, the High Court was moved to determine the application on a wrong provision of the law. We find however, that the irregularities over citations of inapplicable provision cannot render an application incompetent, instead it is curable by virtue of the overriding objectives principle under section 3A of the Appellate Jurisdiction Act, Cap.

141 (the AJA), which was brough by the Written Laws (Miscellaneous Amendments) (No. 3) Act [Act No. 8 of 2018].

On the way forward, having in mind that the appellants' counsel has abandoned other grounds of appeal and, for the sake of completeness, in the exercise of the Courts revisional power under section 4 (2) of the AJA, we find it apposite to consider whether through their application, the appellants disclosed a good cause for the delay to warrant them to be granted extension of time. It is trite law that an application for extension of time is entirely at the discretion of the court to grant or refuse it. However, this unfettered discretion, has to be exercised judicially upon good cause being shown whether in criminal or civil application.

After a cursory perusal of the impugned ruling, in particular in page 129 of the record of appeal, the main ground for extension of time raised by the appellants was inaction of the court to supply the appellants with a copy of the proceedings. Mr. Sinare expounded that it was necessary for the appellants to have a record of the entire proceedings of the case in order to determine misrepresentation as a ground for setting aside the conviction arising out of the plea agreement.

Upon our reading of the High Court's decision, specifically in page 129 of the record of appeal, we noted that, in determining the application for extension of time, the learned High Court judge admitted that a delay in supplying the appellants with relevant documents is one of the factors upon which courts are enjoined to take into account. Though the factor is not absolute, it depends on the prevailing circumstances of each case.

It also appears that on page 129 of the record of appeal in particular the second paragraph, 11th and 12th lines, the High Court acknowledged that the negligence was caused by the court for failure to avail the copies of proceedings to the appellants within time. The excerpt from the decision in the said application reads:

> *"In the present matter, looking closely at the affidavit of the learned counsel for the applicants, it is apparent that the alleged delay was caused by inaction of the court to supply them with a copy of the proceedings."*

From the above excerpt, it is clear that the High Court rejected the sole ground for extension of time for not constituting a good cause for the delay. However, as alluded to above, we are of the considered view that, after a perusal of the impugned ruling, it does. By merely looking at the impugned

ruling, we note that the appellants have established good cause for extension on time. That being so, we find that the appellant's ground for extension of time has merit.

In the upshot, we think, this finding suffices to dispose of this appeal. We therefore, exercise our revisional powers under section 4 (2) of the AJA, revise and quash the decision of the High Court in Economic Application No. 02 of 2022 and allow the appellants' appeal. The appellants are given 30 days to file the intended application.

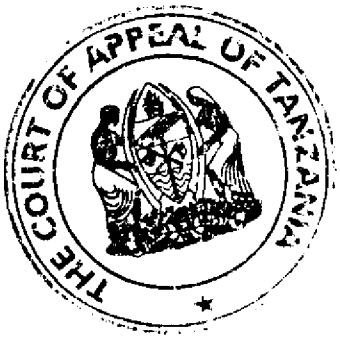
DATED at **DAR ES SALAAM** this 21st day of May, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 23th day of May, 2024 in the presence of Ms. Nora Maro, learned counsel for the Appellants and Mr. Job Mrema, learned Senior State Attorney assisted by Mr. Donacian Chuwa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL