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29/9/2006

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MROSO, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 130 OF 2003

BETWEEN

AIDAN CHALE ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Songea)

(Manento, J.)

dated 12th day of June, 2002
in
Criminal Appeal No. 60 of 2000

JUDGMENT
(10 June 2004)

MROSO, J.A.:

This is an appeal against a ruling of the High Court at Songea, Manento, J., dated 12th June, 2002. That ruling related to an objection by the appellant against an appeal by the respondent Director of Public Prosecutions to the High Court, who had been dissatisfied by a decision of the District Court of Songea which was delivered on the 31st December, 1999. The present appellant's objection was that the appeal to the High Court by the Director of Public Prosecutions was time-barred and ought to have been

dismissed. In its ruling the High Court agreed that the Director of Public Prosecutions (DPP) was late to file his appeal in the High Court. Even so, the High Court, of its own motion, sought and found "good cause" within the meaning of section 379 (b) (ii) of the Criminal Procedure Act, 1985 to justify the admission of the DPP's appeal notwithstanding that the period of limitation prescribed by section 379 (b) of the Criminal Procedure Act, 1985 had elapsed. It was that decision which prompted the appellant to come to this Court, arguing that the High Court erred in law in extending the time to appeal *suo motu*.

At the hearing of the appeal Mr. Mbogoro, learned advocate, who appeared for the appellant in the High Court, also represented him in this Court. Similarly, Mr. Manyanda, learned State Attorney, also represented the respondent DPP both in the High Court and in this Court.

In the High Court the following facts were undisputed. It was common ground that the decision of the District Court was delivered on 31/12/1999. The Director of Public Prosecutions who was dissatisfied with the decision of the District Court filed a notice of

intention to appeal to the High Court within 30 days of the date of the decision of the District Court as required under section 379 (a) of the Criminal Procedure Act, 1985. Copies of judgment and proceedings for appeal purposes were ready for collection and were in fact collected by one Assistant Inspector of Police Lugome on 10th May, 2000. The petition of appeal was filed on 14th September, 2000.

Section 379 (b) of the Criminal Procedure Act, 1985 requires the DPP to lodge his petition of appeal within 45 days from the date of the acquittal, finding, sentence or order against which the appeal is intended. However, in reckoning the 45 days within which to lodge an appeal, the time requisite for obtaining a copy of the judgment and proceedings will be excluded. So, on the facts, the period between 31/12/1999 and 10th May, 2000 would be excluded. It would follow, therefore, that 45 days would be reckoned from 10th May, 2000, meaning that the DPP was expected to have filed his appeal by 24th of June, 2000.

Mr. Manyanda, however, argued before the High Court that although Assistant Inspector Lugome collected the document from

the District Court on 10th May, 2000, they were not taken to the Chambers of the Attorney General for the preparation of the petition of appeal until on 13th September, 2000. According to Mr. Manyanda, the 45 days would be reckoned from that date and when the petition of appeal was lodged on 14th September, 2000, it was in time.

The High Court quite rightly rejected that argument and found that there had been negligence on the part of the office of the DPP. Since the DPP's contention was that its appeal to the High Court had been lodged within the period of limitation he did not advance any reasons for delay and did not seek extension of time within which to lodge his appeal. It was in those circumstances that the High Court took it upon itself to look for and find reasons for admitting the appeal, even though the period of limitation had elapsed, by purporting to act under s. 379 (b) (ii) of the Criminal Procedure Act, 1985.

In trying to find justification to extend, *suo motu*, the period for lodging the appeal by the DPP the High Court said –

> "(U)nder section 379 (b) (ii) of the Criminal Procedure Act, 1985, the High Court may, for good cause admit an appeal notwithstanding that the periods of limitation prescribed in this section have elapsed. I am afraid that the learned State Attorney did not make any submissions as to whether, in the alternative, without prejudice to his earlier submission, were good cause to admit the appeal out of time. On reading the petition of appeal, I see two grounds which I consider good cause. That is the non failure (sic) by the subordinate court to make an order in regard to Shs. 160,000/= produced as exhibit. To whom should the money be given or it should stay in court's (sic) indefinitely. Its owner must be known. Secondly, there was an issue of the sentence imposed, if the court was entitled to impose the sentence it imposed, or it was to impose any other sentence provided by the law. Those two reasons are really good cause to admit the appeal out of time in order that those legal issues are cleared by this court."

Mr. Mbogoro has argued strongly before us that the learned High Court judge erred in so construing the meaning of the phrase

"good cause" as it appears in section 379 (b) (ii) of the Criminal Procedure Act, 1985. He contends that the phrase "good cause" as it appears in the section implies that the court has been presented by the intending appellant with reasons for their failure to lodge the appeal within the prescribed time and after hearing what the prospective respondent has to say about the reasons advanced by the intending appellant, finds that good, convincing excuse has been disclosed. Such good, convincing excuse is what is envisaged in section 379 (b) (ii) to be "good cause" for admitting the appeal out of time. Mr. Mbogoro continued to argue that since the respondent DPP had wrongly contended that his appeal was in time and, therefore, gave no excuse for the delay in lodging the appeal, it was not the business of the court to invent an application to it for extension of time and provide to itself reasons which it judged amounted to "good cause," and admit the appeal which was time barred.

Mr. Manyanda, on the other hand, defended the judge's approach and argued that the phrase "good cause" had a broader meaning than that which was suggested by Mr. Mbogoro. He argued that "good cause" within the context also includes the need for an appeal to be heard because, for example, the interests of justice

require that an appeal be admitted so as to correct certain legal anomalies. In such a situation an appellate court may take it upon itself to admit an appeal by the DPP where it was time-barred, even in the absence of an application for enlargement of time. He said that the question raised by the High Court regarding the disposal of the cash exhibit of Shs. 160,000/= was one of the DPP's grounds of appeal and, therefore, it was proper for the High Court to consider it as good reason (good cause) for admitting the appeal out of time even though there was no application for enlargement of time. He prayed that the Court dismiss the appeal.

Neither counsel was able to cite to us any case in which the phrase "good cause" was judicially considered. Our own research, however, brought us to a case outside the jurisdiction in which the phrase was considered as having a similar meaning to the words – "good and sufficient cause."

In **R. v. Central Criminal Court, *ex parte* Abu Wardeh** [1997] 1 All ER 159 an applicant was committed in custody for trial at the Central Criminal Court before a High Court Judge, together with three co-defendants, charged with conspiracy to cause explosions.

After an initial postponement, the trial date was eventually fixed for 1st October, 1996, the judge originally designated to try the case having withdrawn and the new judge assigned in his place being unable to start the trial then. Thereafter, the Recorder extended the custody time limit to a new trial date giving the following reasons:- that no other suitable judge would be available before then; that protection of the public might be at risk and that it was desirable that all the defendants should be tried together. The applicant applied for judicial review of the recorder's decision, contending that none of the reasons relied on by the recorder amounted to "good and sufficient cause" within the meaning in section 22 (3) of the Prosecution of Offences (Custody Time Limits) Regulations, 1987, regulation 5.

Regulation 5, so far as material, provided: "... the maximum period of custody between the preferment of the bill and the accused's arraignment shall be 112 days ... ." Section 22 (3), so far as material read:- "The appropriate court may, at any time before the expiry of a time limit imposed by the regulations, extend, or further extend, that limit if it is satisfied – (a) that there is good and sufficient cause for doing so ... ."

Auld, L.J. of the Queens Bench Division held that for purposes of s. 22 (3) of the 1985 Act, "good cause" consisted of some good reason for the sought postponement of the trial carrying with it the need to extend the custody limit time. Since the many defendants facing serious charges were remanded in custody for the protection of others, Parliament could not have intended that the original reason for custody could in itself be a good cause for extending the custody time limit. It followed that the protection of the public could not be good and sufficient cause for doing so. However, the unavailability of a judge or court to try a defendant in custody could in law amount to a "good and sufficient cause", as could also the interest of justice that jointly charged defendants be tried together. Accordingly as the recorder had taken into account all the relevant circumstances, his conclusion that there was "good and sufficient cause" to justify extending the custody limits could not be held to be perverse.

In the case cited the prosecution had applied to the recorder for the further extension beyond the custody time limit and the only issue before the recorder was whether there was "good and sufficient cause" for extending the time limit. There was no suggestion that the Prosecution had not acted with all due expedition. In his ruling

the recorder found there was good and sufficient cause for granting the prosecution's application, and the High Court upheld that decision.

As indicated above, the recorder in the case cited was able to find the existence of "good and sufficient cause" upon application by the prosecution for extension of custody time limit. In the case before us no application was made to the High Court by the DPP for extension of the time limit to appeal. We are constrained to agree with Mr. Mbogoro, therefore, that it was not proper for the High Court, in the absence of any application to it, to imagine the existence of an application, to create reasons for the application and then agree that those reasons amounted to "good cause" within the meaning of Section 379 (b) (ii) of the Criminal Procedure Act, 1985 for admitting the DPP's appeal out of time.

The next point we wish to consider is whether, assuming the High Court could act *suo motu* by resorting to section 379 (b) (ii), the reasons it gave amounted to "good cause" within the meaning of the section.

Section 379 reads –

"379. No appeal under section 370 (sic) (378?) shall be entertained unless the Director of Public Prosecutions –

(a) ... ...

(b) shall have lodged his petition of appeal within forty-five days from the date of such acquittal, finding, sentence or order; save that –

(i) ... ...

(ii) the High Court may for good cause admit an appeal notwithstanding that the periods of limitation prescribed in this section have elapsed."

In **R. v. Governor of Winchester Prison, *ex p* Roddie** [1991] 2 All ER 931, at page 934 Lloyd, L.J. said "good cause" will usually consist of some good reason why that which is sought should be granted. It does not have to be something exceptional. "To amount to "good cause" there must be some good reason for what is sought." It was considered that it was undesirable to define "good

cause" and that it should be left to the good sense of the tribunal which has to decide whether or not good cause has been disclosed. We would accept that reason as correct in law.

Would a ground or the grounds of the intended appeal constitute "good cause" for admitting an appeal out of time? Mr. Manyanda argued that it was possible, especially so if it would be in the public interest or in the interest of justice that the appeal should be admitted.

We think that there is nothing inherently wrong in a court to which an application has been made to consider all or any of those matters as "good cause" for admitting an appeal out of time. But we have to come back to the same point, that a court should not act *suo motu* in favour of a party by assuming the existence of a request to it to extend the period limited by statute for bringing an appeal to it. To do so could lead to a subversion of the very purpose for which a limitation period to appeal was statutorily fixed for both the private individual and the Director of Public Prosecutions.

We hold that the learned High Court judge erred in assuming the role of an applicant and in finding that "good cause" existed for admitting the appeal out of time. We allow the appeal.

DATED at DAR ES SALAAM this 10th day of June, 2004.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR