



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, OMOLO & PALL, JJ.A.)

CRIMINAL APPLICATION NO. NAI 8 OF 1996

BETWEEN

REPUBLIC.....APPELLANT

AND

PETER KALELI MULWA.....RESPONDENT

(Application for extension of time to file a Notice of Appeal in an intended Appeal from a judgment and order of the High Court at Nairobi (Oguk, J.) dated 24th June, 1996

in

Criminal Appeal No. 920 of 1995)

RULING OF THE COURT:

The respondent in this reference had been convicted by the Senior Resident Magistrate's Court at Nairobi on six counts of the offence of fraudulent false accounting contrary to **section 330(b) of the Penal Code** and on three other counts of the offence of stealing by servant contrary to **section 281** of the same Code. He was sentenced to 7 years imprisonment on each of the nine counts with the sentences in respect thereof being ordered to run concurrently. From the material before us, it would appear that the money which seems to have been connected with the charges for which the respondent and another were tried in the court of first instance had been obtained from the purchase and sale of foreign currencies by the respondent. On his conviction and sentence therefore, the trial Magistrate ordered the forfeiture of that money to the Central Bank of Kenya.

The respondent's first appeal to the superior court against his conviction and sentence was on 24th June, 1996 allowed with the result that his conviction on each of the nine counts referred to above was quashed and the sentence of 7 years imprisonment on each one of them was set aside. Further and without any reference to the Central Bank of Kenya the superior court set aside the order of forfeiture referred to above and ordered that all the money forfeited to the said Bank be released forthwith to the respondent and his coaccused in the court of first instance. On 9th July, 1996 the Central Bank of Kenya brought to the attention of the Attorney-General's Office a letter of demand of the money referred to above which no doubt was pursuant to the order of the superior court to release the same. It was then that the applicant was roused to seek extension of time to lodge a Notice of Appeal in particular against the order of the superior court directing the release of the money forfeited to the Central Bank of Kenya.

When the applicant's application for the extension of time which had been filed in this Court on 22nd October, 1996 came up for hearing before the single judge of this Court, Bosire, Ag. J.A., on 5th November, 1996, counsel for the applicant endeavoured to explain the delay between 9th July, 1996 when the Office of the Attorney-General learnt of the demand letter of release of the money forfeited to the Central Bank of Kenya and 22nd October, 1996, such explanation being the non-receipt of copies of the proceedings and judgment of the superior court and the mix-up in the registry of the Attorney-General's Office. That explanation notwithstanding, however, counsel contended that the applicant's intended appeal to this Court would not affect the liberty of the respondent as it will be confined to the issue of setting aside the forfeiture order by the superior court which he thought raised a point of law for submission in this Court and a decision given on it. Counsel for the respondent before the single judge of this Court, however, was of the view that the delay referred to above was inadequately explained by the applicant and for that reason, the latter was disentitled to the extension of time it sought.

In his ruling dated 8th November, 1996 the single judge of this Court held that the delay between 9th July, 1996 and 22nd October, 1996 as is referred to above had not been explained. Moreover, according to him, having considered all the circumstances of the matter before him, he was unable to find any special circumstances or proper basis upon which he could have exercised his discretion in favour of the applicant. He therefore dismissed the applicant's application. It is that dismissal that is now the subject of the reference before us.

At the hearing of this reference on 18th December, 1996, Mr. Bwonwong'a for the applicant submitted that the single judge of this Court in his ruling did not consider the issue of forfeiture to the Central Bank of Kenya of the money that was connected with the charges against the respondent and his co-accused in the court of first instance. That money, according to counsel, somehow related to foreign currencies and the Central Bank of Kenya was at the material time the only authority that owned such currencies. Adequate consideration of this aspect of the matter by the single judge of this Court was necessary to avoid condemnation of the Central Bank of Kenya without being heard in regard to the order of forfeiture in question.

The response of Mr. Opiyo for the respondent was that the single judge of this Court found no basis upon which to exercise his discretion in favour of the applicant. He, however, had no answer to the inadequate or non-consideration of the issue of the forfeiture of the money to the Central Bank that related to foreign currencies in connection with which the charges against the respondent and his co-accused in the court of first instance had arisen.

Although the explanation for the delay between 9th July, 1996 and 22nd October, 1996 as is mentioned above may have been inadequate, the legality or otherwise of the forfeiture order in respect of all the money that was connected with the charges against the respondent and his co-accused in the court of first instance is a serious matter for submission in the applicant's intended appeal. The almost casual manner in which that order was set aside by the superior court may or may not confer upon the beneficiaries of the money in question enormous wealth that may in law not belong to them. Had the learned single judge of this Court adequately addressed this issue, no doubt, notwithstanding the insufficient explanation of the delay referred to in this ruling, he may have nevertheless exercised his discretion under **rule 4** of the Rules of this Court in favour of the applicant on account of some possible offence to the law of this land in regard to the subject-matter of the applicant's intended appeal. It is in this respect that we think that the learned single judge of this Court fell into error. In the result, we allow this reference, set aside the order of the single judge of this Court dismissing the applicant's application for extension of time to lodge a Notice of Appeal and to deem its Notice of Appeal lodged in the superior court on 22nd October, 1996 to have been duly lodged within the extended time and substitute therefor an order granting the applicant's said application and extend time for lodging its Notice of Appeal in the superior court to 22nd October, 1996 so that its Notice of Appeal already lodged in the superior court on 22nd October, 1996 be deemed to have been lodged within the extended time. The Notice of Appeal must be served within 7 days from the date hereof.

Dated and delivered at Nairobi this 23rd day of December, 1996.

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL