IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

CRIMINAL APPLICATION NO. 01/04 OF 2023

JACKSON GODWIN ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Application for Extension of time to file Review against the Judgment of the Court of Appeal of Tanzania at Bukoba]

(Kileo, Mjasiri & Mmilla, JJA.)

dated the 17th day of February, 2016

in

Criminal Appeal No. 278 of 2015

.....

RULING

13th March & 9th April, 2024

KAIRO, J.A.:

By notice of motion filed on 26th September, 2022 the applicant, Jackson Godwin is seeking an extension of time to file review of the judgment of the Court of Appeal in Criminal Appeal No. 278 of 2015 delivered on 17th February, 2016. The application is made under rules 10 and 48 of the Tanzania Court of Appeal Rules, 2009, (the Rules), and is supported by an affidavit sworn by the Applicant.

Briefly the background of the application as can be discerned from the record before the Court was that; At Biharamulo District Court, the

applicant, was charged and convicted with two counts namely; armed robbery contrary to section 287A and rape contrary to section 130 (1) and 131 (1) of the Penal Code R.E 2002. After a full trial, he was convicted and sentenced to serve 30 years imprisonment on each count. The sentences were ordered to run concurrently. His appeal to the High Court was unsuccessful. Still adamant, he appealed to this Court, but again in vain. He was further aggrieved and sought to invoke the Court's power of review against the decision dismissing his appeal. However, the applicant was late to institute the said review. Hence, this application.

According to the notice of motion and the supporting affidavit, the applicant has fronted two grounds which, according to him, warrant the grant of the extension of time sought. The first is based on the reasons for delay wherein the applicant associated it with his shifting/ transfers to different prisons, coupled with dependency of legal services on prison officers. Regarding the transfers, the applicant stated that, he was shifted from Bukoba prison to Mwanza Prison, then to Ukonga Central Prisons in Dar es Salaam, the state which resulted into delay in getting a copy of the judgment intended to be reviewed. As such, the delay was not caused by any dilatory conduct on his part.

The second one canvassed the ground of the intended review whereby in the notice of motion, the applicant stated that, the decision was based on manifest error on the face of the record resulting to miscarriage of justice. Illustrating, he stated that, he was denied to submit his rejoinder submission on the matter that was opposed by the respondent. He therefore argued that, he was subjected to unfair hearing contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. Further to that, the applicant also complained that, the judgment subject to review did not determine the defectiveness of the charge sheet as the category of the offence of rape he was charged with, was not specified the offence was not proved to the hilt in those circumstance.

At the hearing of the application, the applicant appeared in person, unrepresented while the respondent Republic was represented by Mr. Noah Mwakisisile, learned State Attorney.

When invited to amplify his application, the applicant adopted his notice of motion together with the supporting affidavit and had nothing useful to add. He prayed that his application be granted.

Mr. Mwakisisile prayed to adopt the affidavit in reply filed in Court and categorically resisted the application. He submitted that, in an

application for extension of time to file an application for review like the one at hand, the applicant has to fulfil two conditions: **one,** exhibiting sufficient cause for delay under rule 10 of the Rules, **two,** showing under which para of rule 66 (1) of the Rules his application for the intended review will be hinged on. He fortified his submission by citing the case of **William Luhaga vs Republic**, Criminal Application No. 19/11 of 2017 (unreported).

Mr. Mwakisisile argued that, the stated conditions were not met in this application. For the first condition regarding the cause of delay, he contended that, the applicant in his affidavit stated that, being an inmate, he depended on the prison officers for legal assistance and further that he has been shifted to various prisons; from Bukoba to Mwanza and now he is in Ukonga Central Prisons in Dar es salaam which according to him, do not constitute sufficient cause. He amplified that, though it is true that the inmates are normally being transferred from one place to another, the applicant in this case did not explain the exact dates of the alleged transfers. As such, the applicant cannot be said to have fulfilled the legal requirement to account for each day of delay.

He went further to submit that, the applicant in paragraph 4 has also associated the delay to get a copy of the judgment intended to be

reviewed with the said shifting from one prison to another. On being probed as to when did he get the said copy, the applicant stated to have been availed with the copy in 2018. However, he argued that the applicant has not accounted the days from when he received the said copy to 26th August, 2022 when this application was filed.

As regards to dependence on prison officers for legal assistance, Mr. Mwakisisile contended that, there was neither affidavit sworn by the said prison officers stating their involvement in the said delay nor explanation of any effort done by the applicant to mitigate the situation so as to convince the Court to grant the prayer sought. He cited the case of **Jumapili Msyete vs Republic**, Criminal Application No. 4/06 of 2017 (unreported) to fortify his argument that an affidavit of the prison officers to explain the stated delay or support the applicant's affidavit was necessary. He therefore submitted that, no good cause was exhibited for the delay.

In his further submission, Mr. Mwakisisile argued that, even if the Court would rule out that the first condition as regards sufficient cause had been fulfilled, still the second condition under rule 66(1) would remain unfulfilled. Elaborating, he argued that, the applicant has not demonstrated in his affidavit any ground for review among those listed

in rule 66 (1) of the Rules which the intended review would base on. He went on arguing that, though in the notice of motion the applicant had mentioned manifest error on the face of record to be the ground of the intended review, but that was unprocedural. According to him, the applicant was to state the reason in the affidavit being evidence as opposed to the notice of motion which is not evidence. In rounding up, the learned State Attorney submitted that, stating the reason in the notice of motion as he did was as good as not stating it at all. He thus prayed the Court to dismiss the application for lack of merit.

When probed what would have been his stance if the reason would have been indicated in the affidavit, Mr. Mwakisisile stated that, in those circumstances, the Court would have been justified to grant the prayer sought.

In his rejoinder, the applicant reiterated what was deponed in his affidavit. When asked why the prison officers did not swear affidavit to support his assertions, the applicant conceded that to be an omission which according to him was caused by ignorance of law.

The main issue for the Court's determination is whether the application is meritorious.

Essentially, the applicant in such application is required to advance sufficient cause in order to convince the Court to exercise its discretion and grant an extension of time sought. As to what exactly constitute good cause, the discretion has been left to the Court as in essence there is no hard and fast rule in establishing the same. Nevertheless, the case of **Lyamuya Construction Company Ltd vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported) has laid down some principles as to what constitutes *"good cause"*. The principles are as follows: -

> *"(a) the applicant must account for all the period of delay*
>
> *(b) the delay should not be inordinate*
>
> *(c) the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and*
>
> *(d) if the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."*

(Also see **Godfrey Mahona vs Republic, Criminal Application No. 14/11 of 2020** (unreported).

In the instant matter, the applicant intends to lodge review which under rule 66 (3) of the Rules, the time within which to file it is 60 days from the date of the decision sought to be reviewed. According to record, the said decision was delivered on 17th February, 2016 and thus the 60 days lapsed on 16th April, 2016. However, this application was filed on 26th September, 2022, that is, after a lapse of six years and five months.

The question is whether the six years and five months lapse has been accounted for and the answer is readily in the negative. In trying to account for delay, the applicant stated that being an inmate, he has been shifted from one prison to another whereby he mentioned to have been shifted from Bukoba Prison to Mwanza and later, shifted to Ukonga Central prison. However, nowhere has he explained the exact dates when he was shifted for the purpose of accounting for the days of delay as rightly argued by Mr. Mwakisisile. As such, the contention remained unsubstantiated. It is the cherished principal of law that, he who alleges must prove. The principle is spelt out in Section 110 and 111 of the Law of Evidence Act, Cap 6 R.E. 2019.

The applicant further complained that, the shifting has resulted into delay in getting a copy of the judgment subject to review, yet there is no affidavit sworn by the prison officials to verify his assertion.

When probed by the Court as to when did he received the copy of the judgment, the applicant answered it was in 2018. Nevertheless, no reason was given as to why he had to wait for four years and five months for him to file this application. It is the Court's finding that, the inaction, despite being inordinate, it also depicts apathy and sloppiness on the part of the applicant in pursuing the intended action, thus contrary to the principles laid down in **Lyamuya's** case (supra). Considering the above stated situation, I am increasingly of the view that, the applicant has failed to advance 'good cause' to justify the exercise of the discretion conferred upon me under rule 10 of the Rules.

That apart, even if it is true that he received the judgment in 2018, still, the applicant has failed to account for the period of four years and five months. It is settled law that in an application for extension of time, the applicant has to account for each day of delay. Times without number the Court has consistently reiterated this position. In **Dar es salaam City Council vs. Group Security Co.**

Ltd, Civil Application No. 234 of 2015 (unreported), the Court observed as follows: -

> *"...the stance which this court has consistently taken is that in an application for extension of time, the applicant has to account for every day delay."*

I am aware that, the applicant has deponed to have been depending on the prison officers for legal assistance to which according to him, also resulted to delay in filing his application for review. But as earlier observed, no affidavit by the said officers was attached, which leaves the contention unverified.

Addressing the omission to attach a sworn affidavit of the prison officers for verification of his contention, the applicant stated that he did not know that an affidavit was needed. In other words, he pleaded ignorance of law. However, it is a settled law that ignorance of law does not constitute sufficient cause to warrant the grant of an extension of time and there is a plethora of authorities to that effect such as **Ally Kinanda and 2 Others vs The Republic,** Criminal Application No. 1 of 2016 and **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015 (both unreported) to mention, but a few.

Basing on the above analysis, there is no gain saying that, the principles enunciated in **Lyamuya's** case (supra) were not complied with in the instant application.

It is noteworthy that, failure by the applicant to exhibit sufficient cause for delay, entitles the Court to dismiss this application right away. However, I find it appropriate, though briefly, to address the second condition under rule 66 (1) of the rules.

It is now a settled law in an application of this nature that, the applicant has to do more than merely accounting for delay. The requirement entails the applicant to demonstrate under which ground his intended review will be based on, among those listed in rule 66 (1) of the Rules, in the circumstances the extension of time will be granted.

The provision has been interpreted in our various decisions. For example, in **Yusuph Simon vs Republic** Criminal Application No. 7 of 2013] (Unreported) we stated as follows: -

> *"Admittedly, the Court is strictly enjoined under Rule 66 (1) of the Rules, not to entertain an application for review except on the basis of the five grounds prescribed thereunder.* ***Indeed, law is settled that an applicant who filed an application under Rule 10 of the Rules***

for extension of time in which to file an application for review, should not only state in his notice of motion or in the affidavit filed in support thereof, the grounds for delay, but should also show that his application is predicated upon one or more grounds of review listed under rule 66 (1) of the Rules"

[Emphasis added].

As above stated, the applicant in the case at hand pleaded manifest error on the decision intended to be reviewed and pin-pointed two scenarios to that effect. Expounding on them, the applicant stated that, he was denied to submit his rejoinder submission on the matter that was opposed by the respondent resulting to what he called unfair hearing contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. Further to that, the applicant also complained that, the judgment subject to review did not determine the defectiveness of the charge sheet arguing that the category of the offence of rape he was charged with, was not specified and thus, the offence was not proved beyond reasonable doubt.

Mr. Mwakisisile in reply, ignored the contentions arguing that they were supposed to be stated in the affidavit and not in the notice of

motion. According to him, the swapping has the effect of making them non-existent. But with respect, I am not buying the argument. In my view, the grounds for the relief sought are supposed to be stated in the notice of motion as was done and not in the affidavit. [See: **Farida F. Mbarak and Another vs Domina Kagaruki and 4 Others,** Civil Reference No. 14 of 2019 (unreported) Further to that, the notice of motion and the accompanying affidavit complement each other and it is wrong to look at them in isolation. [See: **The Principal Secretary, Ministry of Defence and National Service vs Devram Valambia,** (1992) T.L.R. 387 quoted in **Lyamuya's case** (supra). As such, the argument in my view, is a misconception.

That notwithstanding, I do not want to be detained by the applicant's contentions. Suffice to state that, the canvassed scenarios by the applicant are required to be in the decision subject to review. However, the applicant's allegation in my view, touches the proceedings at the trial Court while this Court is not seized with its record. This is because, the proceedings are not subject to review by the Court. Entertaining such allegation would amount to re-opening of the hearing of the matter while the application for review is not another appeal. See **Efficient International Freight Ltd and Another vs Office Du**

Burundi, Civil Application No. 23 of 2005]. Thus, the complaints are misplaced in the circumstance of this application.

In the final analysis, I am constrained to find this application devoid of merit and I accordingly dismiss it.

DATED at **DAR ES SALAAM** this 8th day of April, 2024.

L. G. KAIRO
JUSTICE OF APPEAL

This Ruling delivered on 9th day of April, 2024 in the presence of the Applicant in person - linked through video facility from Bukoba and Mr. Jamal Issa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of original.

O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL