

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPLICATION NO. 88 OF 2018

OMARY MAKUNJA APPLICANT

VERSUS

THE REPUBLIC REPUBLIC

**(Application for extension of time within which to apply for review from the
decision of the Court of Appeal of Tanzania at Dar es Salaam)**

(Kileo, Bwana & Mjasiri, JJA.)

dated the 19th day of August, 2014

in

Criminal Appeal No. 250 of 2013

RULING

10th & 18th July, 2019

KWARIKO, J.A.:

The applicant Omary Makunja was charged in the Resident Magistrate's Court of Kinondoni with the offence of armed robbery contrary to section 287 A of the Penal Code. He was convicted and was sentenced to thirty (30) years imprisonment. His appeal before the High Court was not successful. Undaunted, he appealed to this Court but again the appeal was dismissed on 25/8/2014.

The applicant still wants to challenge the decision of the Court by way of a review. He was however, late to file that application hence this application for extension of time to do so. This application is by way of a notice of motion taken under Rules 10 and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The notice of motion has been predicated upon the following summarized two grounds: -

- 1. That, the judgment of the Court was illegal because it was based on the case where the applicant was not given opportunity to be heard.*
- 2. That, the decision of the Court was based on a manifest error on the face of the record resulting in the miscarriage of justice.*

In the affidavit supporting the notice of motion, the applicant essentially states the reasons for his delay as summarized hereunder: -

- 1. That, the applicant's mother who was assisting the applicant in his case died and he received the news on 25/9/2017 when the period to apply for the review had elapsed.*

2. That, the applicant had also filed Criminal Application No. 63/01 of 2017 for extension of time to apply for review which was struck out on 17/7/2018 for being incompetent.

The respondent Republic did not file any affidavit in reply. When the application was called upon for hearing, the applicant appeared personally, unrepresented, whereas the respondent Republic was represented by Ms. Esther Kyara, learned Senior State Attorney.

In arguing the application, the applicant first adopted his notice of motion and the supporting affidavit to form part of his oral submission. His further explanation was repetition of the averments contained in his affidavit. He urged the Court to grant his application.

On her part, Ms. Kyara opposed the application for the following reasons. One, that the applicant has not shown the date he filed Criminal Application No. 63/01 of 2017. Two, the applicant has not proved the death of his mother as there is no any documentary evidence to that effect and thus, he has not shown good cause for the delay. To bolster her contention Ms. Kyara cited the Court's decisions in **Jackson Kihili Luhinda and Another v. R**, Criminal Application No. 1 of 2013 and **Dani**

Upesi and Two Others v. R, Criminal Application No. 21 of 2013 (both unreported). Three, Ms. Kyara argued that the grounds for the intended review are non-meritorious. Firstly, that the Court decided that the applicant was accorded sufficient opportunity of being heard by the lower court. Secondly, there is no any manifest error apparent on the face of the impugned judgment fit for review. For the foregoing Ms. Kyara implored the Court to dismiss the application.

In rejoinder, the applicant submitted that he could not lie about the death of his mother and if given opportunity he could present documentary proof to that effect. Further, the prison lawyers told him that they would properly expound the grounds for review once this application is granted.

I have gone through the notice of motion, its supporting affidavit and the submissions for and against the application. With regard to the issue of delay the law is settled that in an application for extension of time to do a certain act, the applicant is required to should show good cause for the delay as per Rule 10 of the Rules. Some of the pronouncements of this Court in that respect were made in the cases of; **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007; **Lyamuya**

Construction Company Ltd v. Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 and **Bariki Israel v. R**, Criminal Application No. 4 of 2011 (all unreported)]. In the case of **Hassan Bushiri** (supra), the Court said thus:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".

[See also **Jackson Kihili Luhinda** and **Dani Upesi** (supra)].

That being the legal position, the question to be asked now is whether the applicant has shown good cause for the delay to apply for review. Having considered the applicant's reasons for the delay, I am in full agreement with the learned Senior State Attorney that the applicant has not proved the death of his mother whom he said was assisting to push matters relating to his case. He could have filed affidavit of the person who informed him of the death and also, if not a death certificate, any proof from local area leaders where the applicant's mother lived to prove when she died. This is so because the impugned judgment was given on

25/8/2014 and the applicant alleges that the news of the death of his mother reached him on 25/9/2017. This is a very long delay which requires to be accounted for.

Further, although the applicant did not state the date on which he filed Criminal Application No. 63/01 of 2017, I have taken judicial notice from the court registry and found that it was filed on 11/12/2017. This was more than two months from the date the applicant purportedly received the news of the death of his mother. He has not explained this delay. The applicant has not even explained the delay from 17/7/2018 when the former application was struck out and 6/9/2018 the date of lodgment of this application. In the case of **Shanti v. Hindocha and Others** [1973] E.A 207, it was held thus: -

"The most persuasive reason an applicant for extension of time can show is that the delay had not been caused or contributed by dilatory conduct on his part."

Following that holding, it is clear from what I have explained above that, the applicant has not shown that the delay was caused by any other

factor apart from his inaction. He has therefore failed to account for the delay.

To conclude, it has been shown that the applicant has failed to account for the delay. The application thus lacks merit and it is hereby dismissed.


Order accordingly.

DATED at DAR ES SALAAM this 16th day of July, 2019.

M. A. KWARIKO
JUSTICE OF APPEAL

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




E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL