IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

CRIMINAL APPLICATION NO. 39/05 OF 2020

1. **SAMWELI GITAU SAITOTI @ SAIMOO @ JOSE**
2. **MICHAEL KIMANI PETER @ KIMU @ MIKE** .....**APPLICANTS**
3. **CALIST JOSEPH KAMILI KISAMBU KANJE**

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Application for Extension of time to file an application for review of the decision of the Court of Appeal of Tanzania at Arusha)

(Mbarouk, J.A., Luanda, J.A And Mussa, J.A.)

Dated 1st day of March, 2016 in

Criminal Appeal No. 275 of 2015

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RULING OF THE COURT

16th & 23rd July, 2020

LILA, J.A.:

In this application which is predicated under Rule 10 and 48(1) of the Tanzania Court of Appeal Rules, 2019 (the Rules), the applicants are seeking for extension of time to enable them lodge an application for review of the Court's decision in Criminal Appeal No. 275 of 2015 which nullified the trial High Court proceedings in Criminal Sessions Case No. 6 of 2011 without determining the fate of the judgment and sentences meted

on the applicants. The application is supported by an affidavit jointly sworn by all the applicants.

According to the scanty information contained in the notice of motion and the supporting affidavit which was heavily and solely relied on by the applicants as forming the substance of their arguments in support of the application, the pertinent facts leading to the present application may be recapitulated thus; The applicants, Samwel Gitau Saitoti @ Samoo @ Jose, Michael Kimani Peter and Calist joseph Kamili Kisambu Kanje (henceforth the 1st, 2nd and 3rd applicants), were the appellants in Criminal Appeal No. 275 of 2015 before this Court. The said appeal emanated from the decision of the High Court (Sambo, J.) in Criminal Sessions Case No. 6 of 2011 in which the 1st and 2nd applicants were convicted of the offence of murder and were sentenced to suffer death by hanging and the 3rd applicant was convicted of the offence of accessory after the fact of murder and was sentenced to serve five (5) years imprisonment. That was way back on 11/6/2014. In its judgment rendered on 1/3/2016, the Court (Mbarouk, J.A, Luanda J.A and Mussa, J.A, as they were) was satisfied that the trial was tainted with material infractions in that the assessors were not given opportunity to put questions to the witnesses and also the vital points of

law involved in the case were not drawn to the attention of the gentlemen assessors during summing up in terms of sections 177 of the Evidence Act, Cap. 6 and 298(1) of the Criminal Procedure Act, Cap. 20, both of the Revised Edition, 2002. The omission was found to be fatal hence vitiated the whole trial. Consequently, the Court gave the following order:-

> *"The trial cannot be said to have been conducted with the aid of assessors as envisaged under section 265 of the CPA. We entirely agree with both learned counsel that the omissions explained above are fatal and went to the root of trial. We declare the proceedings a nullity."*

The Court, having realized that a human life was lost, found it just to order a retrial. It therefore ordered the matter be retried. This is what it stated:-

> *"We order the appellants and the one who withdrew his appeal be tried afresh as expeditiously as possible before another judge and a new set of assessors."*

In compliance with the two orders of the Court, the trail court record was returned to the High Court and the matter was placed before Mgetta J. However, retrial was a non-starter when the matter was scheduled for

hearing on 30/10/2017 because the prosecution questioned the mandate (jurisdiction) of that court to try the matter again on account of the judgment and sentences meted on the applicants not having been quashed and set aside, respectively, by the Court. The learned judge invited the parties to address him on the issue and at the end, in his ruling, he dismissed the objection and ordered hearing of the case to proceed. That was on 3/11/2017. That order aggrieved the prosecution and, according to the applicants' joint affidavit in support of the application, preferred an appeal to the Court, which is Criminal Appeal No.119/2018 which was however withdrawn on 17/3/2020 upon realizing that they had to go for an application for review instead of an appeal.

According to the applicants, it is the withdrawal of the appeal by the respondent which prompted them to think about preferring an application for review. But they were late since the period of sixty (60) days from the date of the decision of the Court provided under Rule 66(3) of the Rules within which to lodge an application for review had already lapsed. They therefore preferred the present application for extension of time to lodge an application for review of the Court's decision in Criminal Appeal No. 275 of 2015. In the intended application for review, the applicants are

intending to ask the Court to review the apparent errors in its orders in respect of the judgment and sentences meted by the trial court as well as the order that the 3rd applicant who had withdrawn his appeal and has already completed serving the sentence be joined in the retrial of the case and correct them.

At the hearing of the application, the applicants who were linked with the Court from the prison through video facilities, appeared in persons and were unrepresented. The respondent Director of Public Prosecutions (the DPP) was represented by Mr. Tumaini Kweka, learned Principal State Attorney who was assisted by Ms. Mwahija Ahmed, learned Senior State Attorney. They did not resist the application.

The applicants, as demonstrated above, adopted the notice of motion and the supporting affidavit as part of their submissions and urged the Court to grant the application. The substance of their arguments has been summarized above hence I need not repeat them.

In supporting the application, Mr. Kweka was forthcoming that they had also filed a similar application to the Court between the same parties (Criminal Application No. 47/05/2020) seeking for the same orders the

applicants are seeking in the present application which they opted to withdraw early on the 16/7/2020 so as to pave way for this application to be heard and determined expecting that the order to be given by the Court will facilitate lodgment of an application for review as they had also sought in the withdrawn application. He intimated to the Court that they had no objection to the application alleging that the errors complained by the applicants are apparent on the Court's record in Criminal Appeal No. 275 of 2015. He insisted that once the errors are corrected, the hearing *de novo* of Criminal Sessions Case No. 6 of 2011 before the High Court will proceed swiftly.

In terms of Rule 66(3) of the Rules it is imperative that an application for review be filed within sixty (60) days from the date of the judgment sought to be reviewed. In the present case, the judgment of the Court was delivered on 1st March 2016, as already stated above. This means that the intended application for review ought to have been filed within a period of sixty days from that date. The crucial issue before me in this application is therefore whether the applicants have jointly exhibited good cause or reason for the delay to file the application for review within time to warrant

the exercise of this Court's discretionary power under Rule 10 in their favour.

I have dispassionately considered the application and the concurring arguments of the parties. This being an application for extension of time, the law is clear. Grant of extension of time is governed by Rule 10 of the Rules. That Rule states as follows:-

> *"The court may for sufficient reason extend the time limited by these Rules or by any decision of the Court or of the High Court for doing of any act authorized or required by these Rules, whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to that time so extended."*

From the above exposition of the law, it is clear that the discretion of the Court to extend time under Rule 10 is unfettered. The Court is empowered to grant extension of time where an applicant leads circumstances for the delay that will amount to a sufficient or reasonable cause to warrant the Court's exercise of its discretion to grant extension of time. The Court has also held in numerous cases that, in considering an application under the rule, the Courts may take into consideration, such

factors as, the length of the delay, the reason for the delay, and the degree of prejudice that the respondent may suffer if the application is granted. (See **Tanzania Revenue Authority vs Tango Transport Co Ltd, Tango Transport Co Ltd vs Tanzania Revenue Authority**, Consolidated Civil Applications No. 4 of 2009 and 9 of 2008 (unreported).

In the present case the applicants, who are laymen on legal matters have raised an illegality as a reason for the delay. They are contending that the Court committed an illegality by not giving appropriate orders in respect of the judgment, sentence and the 3rd applicant who had not only withdrawn his appeal but had also completed serving his term of imprisonment after it had nullified the proceedings. The Court has, in a number of cases, reiterated the legal position that where illegality is raised as ground of delay the Court should extend time to allow opportunity for the Court to correct the anomaly. For instance, while discussing the import of the then Rule 8 of the Rules which is *parimateria* with our present Rule 10 of the Rules, in the **Principal Secretary Ministry of Defence and National Service vs Devram Valambia** [1992] TLR 185, specifically at page 188, the Court stated that:-

"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute "sufficient reason", within the meaning of rule 8 of the Rules for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand."

The Court went further at page 189 to state that:-

"In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and record straight."

Alleging illegality alone has been taken by the Court not to be sufficient unless the alleged illegality in the impugned decision is manifest on the face of the record (See **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015 and **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (both unreported). In the latter case the Court stated that:-

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Valambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises point of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that, it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

I am also alive of the principle that in applications of this nature, that is application for extension of time to lodge an application for review, the law demands that the applicant, apart from accounting for the delay or alleging an illegality in the decision, he has also to demonstrate that the review application to be lodged is founded on any one of the grounds for review as outlined in Rule 66(1) of the Rules (See **Mwita Mhere vs Republic**, MZA Criminal Application No. 7 of 2011 (unreported). Rule 66(1) provides: -

66(1). The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds –

(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice, or,

(b) a party was wrongly deprived of an opportunity to be heard,

(c) the Court's decision is a nullity,

(d) the Court had no jurisdiction to entertain the case or

(e) the judgment was procured illegally, or by fraud or perjury.

In the event the applicant fails to disclose any of the above grounds, the Court has in a number of cases deemed that no good cause for the delay has been shown to warrant the Court exercise its discretion to grant extension of time to lodge an application for review. That position was made clear in **Juma Swalehe vs Republic**, Criminal Application No. 4 of 2010 (unreported), where the Court stated that:-

"With respect, I am in agreement with Ms. Javelin Rugaihuruza. To start with, it is true that the applicant has not indicated whether the intended

application has chances of success. On this, I go along with my sister Kimaro, J.A. in ***Azania Furaha and Another vs Republic,*** *Criminal Application No. 5 of 2009 (unreported) whereby she cited with approval this Court's decision in* ***Royal Insurance Tanzania Ltd vs Kiwengwa Strand Hotel Limited,*** *Civil Application No. 111 of 2009 (unreported) that in an application of this nature an applicant is expected to show that what he intends to challenge by way of a review has a likelihood of success. In this sense, it is expected that an applicant will show that one or more of the grounds stipulated under Rule 66(1) of the Rules was or were violated or exist in the judgment intended to be reviewed."*

I have demonstrated above that in the present case, the respondent raised an issue of jurisdiction of the High Court to entertain the case afresh on account of the Court nullifying the proceedings only and without making orders in respect of the judgment and sentences meted on the applicants in Criminal Sessions No. 6 of 2011. In addition the 3rd respondent complains about his being joined in the retrial while he had already withdrawn his appeal and also completed serving his sentence in respect of

the offence of accessory after the fact for which he was convicted. These legal issues, as recited above, are apparent on the face of the record and they pose crucial issues for the Court's consideration in an intended application for review of its decision in Criminal Appeal No. 275 of 2015. In their joint affidavit, the applicants, have clearly demonstrated that their intended Review Application is founded on the allegation under Rule 66(1)(a) of the Rules. In paragraphs 11, 12 and 13 they stated that:-

> *"11. That, the purpose of the review is to correct manifest errors on the face of the records which may result to the miscarriage of justice on the point that nullifying only proceedings of the trial court does affect the judgment and sentence and whether it was proper to order retrial to 3rd applicant who already withdrew his appeal.*
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> *12. That, it's the applicants' understanding that time to file review has already lapsed, hence this application for extension of time to file Application for Review, since the error was known when the retrial of the case at the High Court commenced on 13st October, 2017, and thereafter went to Court of Appeal in Criminal Appeal No. 119/2018 an appeal which finalized on 17th March, 2020.*

13. That the delay was due to the appeal by the Republic on the ruling delivered by Mgetta, J in the High Court, in retrial Criminal session Case No. 06/2011. (31st October 2017) whereby both parties were waiting for outcomes of the Appeal in the Court of Appeal (Criminal appeal No. 119 of 2018) where the Republic withdrew its appeal on 17th March 2020.

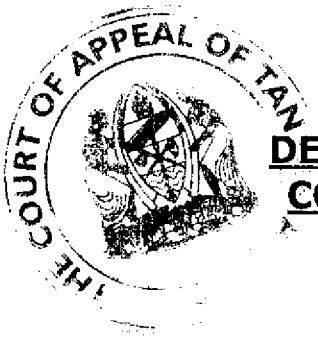
The general impression one gathers from the parties' arguments is that the applicants kept waiting for the outcome of the appeal lodged by the respondent (DPP) hopping that the anomalies would be remedied. Unfortunately though, the respondent withdrew the appeal. This was the cause of the delay in filing an application for review. The application was not resisted by way of an affidavit in reply and fortunately the respondent, before us, readily conceded to the application hence they will not be prejudiced if the application is granted. Definitely there would be no need to lodge an application for review when there was already an appeal by the respondent on the same issue. I am therefore satisfied that the applicants have advanced sufficient reasons warranting the Court to exercise its discretion to extend time so as lodge an application for review.

That said, the application is hereby granted. The applicants are granted thirty (30) days from the date of this order within which to lodge an application for review of the Court's decision in Criminal Appeal No. 275 of 2015.

DATED at **DAR ES SALAAM** this 23rd day of July, 2020.

S. A. LILA
JUSTICE OF APPEAL

The Ruling delivered this 24th day of July, 2020 in the presence of the applicants who are linked through video conference from Karanga Prison – Moshi and in the presence of Ms. Estazia Wilson, learned State Attorney for the Republic/respondent is hereby certified as a true copy of the original.



S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL