IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MISC. CRIMINAL APPLICATION No. 45 OF 2020

(Originating from the Decision of the District Court of Geita, at Geita in Criminal Case No. 212 of 2015 dated 25/5/2016, before S. H. Simfukwe - SRM)

ANGELINA RAPHAEL MHANDO ----------APPLICANT

VERSUS

THE REPUBLIC ----------RESPONDENT

RULING

07th June & 13th July 2021

TIGANGA, J

In this application the applicant applies for two substantive orders, namely extension of time to lodge the notice of appeal and to file an appeal out of time against the decision of the District Court of Geita in Criminal Case No. 212 of 2015. Initially, the applicant stood charged with six counts, two being under the Prevention and Combating of Corruption Act, No.11 of 2007 while the rest three counts being under the Penal Code [Cap. 16 R.E.2002]

The application was filed under section 361(2) of the Criminal Procedure Act, [Cap 20 R.E 2019] and any other enabling provision of the law. It was filed through chamber summons which was supported by the

affidavit of the applicant. In the affidavit filed in support of the application, it is deposed that the applicant was convicted and sentenced in a judgment which was delivered on 25 May 2016, but he was supplied with the copies of judgment and proceedings of Criminal Case No. 212 of 2015 on 21/06/2020 and 05/08/2016 (sic) respectively. It was also deposed in the affidavit that, she was prevented to file an appeal in time by the sicknesses she was suffering. Together with the applicant's affidavit, she supported it by the affidavit of Jafael Masanja Lufungija, a ward councilor of Ilege Ward in Kaliuwa District, who is a traditional herbalist capable of treating people on various disease ranging from paralysis, malaria, abnormal menstrual disorder and infertility, who deposed that from 29/03/2017 he started to treat one Selemani Malesa who happened to be a husband of the applicant who had a paralysis problem and who was being accompanied by his wife, the applicant.

The application was objected by the counter affidavit filed by Mr. Augustino Eninath Mtaki, a public prosecutor, from the office of the Prevention and Combating of Corruption Bureau, at Geita. In that counter affidavit, he deposed that the certified copy of the judgment was issued on

21st May 2016 while the certified copy of the proceedings was issued on 5th August, 2016.

He in the end asked the court to put the applicant to strictest proof thereof and, but he generally deposed that the applicant has shown no good cause which would entitle the applicant the extension of time. Instead he said the applicant is intending to delay the manifestation of justice.

Together with the counter affidavit, the applicant raised a Notice of preliminary objection, on a point of law in *limine* with three points all questioning the competence of the application. However, in the ruling of this court dated 23rd April, 2021 the same were overruled for being not meritorious thereby directing the application at hand to be heard on merits.

Hearing of this application was oral, whereby the applicant was represented by Mr. John Rwabuhanga, learned Advocate, while the respondent was represented by Mr. Mulusuri, State Attorney from the PCCB.

Submitting in support of the Application, Mr. John Rwabuhanga reminded the court that, the application is made under section 361(2) of Criminal Procedure Act [Cap 20 R.E. 2019] asking for the court to extend

time so that the applicant can appeal out of time. He submitted that the affidavit filed in support of the application raised two grounds to be based on which are;

i. That, the applicant has been sick for so long and that she has been pursing her husband Selemani Masesa who is in paralysised up to now.

ii. That, the whole proceedings in Criminal Case No. 212/2015 before Hon. S. H. Simfukwe - RM (as she than was), are tainted with irregularities.

He started by adopting the affidavit of the applicant and referred this court to the decision of the Court of Appeal in the case of **Registered Trustees of Archdiocese of Dar Es Salaam vrs The Chairman of Bunju village government and others**, Civil Appeal No. 147/2006, at pages 7, 8 and 9 of the judgment, that for extension of time to be granted, there must be good and sufficient cause. In his opinion, the reasons of sickness is a valid and sound ground, the phrase of good cause encompasses sickness.

He submitted that, since the year 2015, the applicant Angelina Raphael has been sick suffering from kidney up to now as indicated in

paragraph 7 of her affidavit. Following her sickness she has been receiving treatment at SARCAM hospital in Geita as proved by the attached form from hospital showing that she has been receiving treatment up to July 2017, and a letter dated on 06/07/2017 attached to the affidavit which was asking for leave to go for further treatment. Besides her sickness, she alleged to have also been nursing her husband Seleman Malesa, who was seriously sick as indicated in paragraphs 9, 10, and 11 as well as 12, of the affidavit that she has been engaged to nurse her husband since the years 2016 who was receiving treatment from a traditional healer one Jafael Lufungija who swore an affidavit to support that fact, which is attached with the affidavit filed in support of the application.

In the affidavit of Lufungija it has been deposed that up to September 2020, he has been treating the husband of the applicant.

He submitted that, basically, the reason of sickness which prevented the applicant from appealing was out of her control, therefore, she should be given extra time so that she can appeal out of time.

Submitting on the second ground, that is irregularities or illegality in other word, he said, it is now the valid and good cause for extension of

time. He cited the case of **Mathias Said Mfumya and Others vs Christoper Nyirabu and Others,** Civil Application No. 520/2016, at page 4 and 5 of the judgment in which it has been stated that irregularities is one of the grounds for extension of time. Together with this case, he cited another decision of the Court of Appeal in **Ntwiga Grison vs The Republic**, Criminal Appeal, No.428 of 2015 in which at page 9 and 10, in which it was held that, irregularities in court proceedings is sufficient cause for extension of time.

Further more he by way of insistence cited the case of **Wambura Waryuba vs Principal Secretary Ministry of Finance and Attorney General**, Civil Application No. 225/2019, which held that for the illegality to be good cause, the same must be on a face of record.

Citing the irregularities, he submitted that they pertain with the admission of exhibits. He complained that important exhibits in the case were admitted without being read. He referred this court at page 11, 13, 14, 18, 24 and 25, of the proceedings. The said exhibits were admitted with objection and there is no indication that they were being read.

He submitted that in law, failure to read exhibits after admission is prejudicial to the applicant because she failed to know the contents of the exhibits and that gave her hard time to prepare her defence. He cited the decision of the Court of Appeal at Iringa, in the case of **Eneo Kidilo and Another vs the Republic**, Criminal Appeal No. 206/2017 at page 8 - 9 of the judgment, where three steps are mentioned that is **clearing, admitting** and **reading out**, failure to read the exhibit is an irregularity. This is also the position in the decision of the Court of Appeal sitting at Bukoba in the case of **Sabato Thabit and Another vs The Republic,** Criminal Appeal No. 441/2018, at page 12 - 13 of the judgment where it was held that a document must be read after clearance and admission.

According to him, this court is superior to the District Court of Geita, therefore it has a supervisory role, in the case of **Adelina Koku Anifa vs Byarugaba Alex,** Civil Appeal No. 49/2019, Court of Appeal at Bukoba, in which it was held to the effect that, failure to observe the compliance of the law by subordinate court, the superior court has a duty of correcting the non compliance. He prayed that the noncompliance with the law, In this case this court to finds that these are illegalities which are apparent for these reasons, he prayed this court to allow extension of time.

In his reply to the submission in chief, Mr. Kelvin Murusuli, SA informed the court that, the judgment was delivered on 25/05/2016, and the copy of judgment was available on 25/05/2016, the present application was filed on 10/09/2020. He reminded the court that, any person aggrieved by the decision of the court has a duty to make follow up of the copy decision and take necessary steps.

He started by challenging the competence of the notice of appeal, and that the same is incompetent as it has not been stamped. He submitted further that, there is no evidence to prove that the applicant was totally hospitalized, as the attachment shows that she had blood pressure and abdominal pain which did not cause her totally bed rest.

According to him, what is seen is various exemptions from duty for 3, 4, and 7 days. Further to that, even the hospital she was attending is a mere dispensary not even a referral hospital and it is in few occasions when she attended at the District Hospital, where she was attending since 2012 – 2016, which means, she was attending even when she was coming to court to defend her case.

Mr. Kelvin further submitted that, the annexture that has been relied upon, was a letter which was requesting a leave for further treatment in the year 2017, that means she was attending work in the whole period since the year 2016 when the judgment was delivered up to 2017 when leave of the employer was sought to allow her to go for further treatment.

In his opinion, the allegation that the applicant was in Tabora isdoubtful as there is no exhibit showing that the applicant travelled to Tabora to nurse her husband, further to that there is no practicing license of the local medicine man who allegedly treated her husband to show that he was actually a certified traditional healer.

He reminded the court of the principle of law that whoever asks for extension of time, must account for each and every day delayed. To buttress that argument, he cited the decision of the Court of Appeal in **Mohamed Suleiman Ghona vs Mohamoud Mwehusi Chotikungu**, Civil Application No. 179 of 2020, delivered on 21/03/2021, where it was held that the applicant should account for all days delayed. He also cited the case of **Iddi Nyange vs Manna Said,** Criminal Appeal No. 113/01 of 2017.

He submitted that, in this case the delayed days are almost 1500. In his view, this is a long time and the court has not been told the reasons for the said delay. According to him, the case of **Mohamed Seleman Gona vs Mohamoud Mwehusi Chotikungu (supra)** the following four criteria were set, (a) Cause of delay involved if any, (b)The length of delay, (c)The conduct of the parties and (d) Degree of prejudicial if any.

In his opinion these have not been cleared by the applicant, therefore the applicant deserve no such extension.

Submitting on the second ground of illegality, he submitted that not every illegality can amount to a good cause for extension of time, it depend on the circumstances of the case. He submitted that the counsel for the applicant did not tell the court, the documents which were not read, and whether the said documents touched the applicant. He submitted that, in essence the said exhibits related to the other accused person who did not appeal.

He said the contents of the said exhibits as reflected at page 26 of the proceedings were explained by the witness who tendered the same. Further to that, he submitted that, it has not been said that the said failure to read prejudiced the applicant.

In his insistence, he said that, not every illegality can stand to be good cause for extension of time, he backed up his that argument by citing the case of **Jonas Ntaliligwa vs Fazia Nyayagala**, Misc. Land Application No. 20 of 2021, the decision of April, 2021, High Court Kigoma, registry, in which it was held that,

> *"not every illegality can be reason for extension of time, but it must be of public importance or jurisdictional matter."*

According to him, as the record shows that, there was no any objection when the said exhibits were being admitted the counsel prayed the court to find that, the applicant was not prejudiced by the admission of the said exhibit he also asked the court to find that the applicant was not diligent and did not utilise her right of appeal. He in the end prayed for the court to find that, the applicant was not serious, and he prays the court to find that, no good cause for extension of time has been shown, therefore the application be dismissed.

In rejoinder, the counsel for the applicant started with the point of illegality. He submitted that, since the exhibit did not touch the applicant, they were not supposed to be read, is not correct, it is that exhibits which were not read, which made base of the conviction of the applicant.

He insisted that, failure to read the exhibit is prejudicial, as the document should not be explained, it must be read out after admission. He insisted that, illegality will not be a good cause for extension of time if the same will not be clear on the face of record. In his opinion, these omissions are clearly shown on the face of the record, failure to read deprived the applicant to know the contents of the documents and she was not in a good position to prepare and present his defence. In his opinion, this is a serious irregularity which should not be ignored. According to the counsel for the applicant, it is immaterial as to whether the exhibits were objected or not, it must be read out after admission. He submitted that it is the law that, where there is any illegality there is no need for accounting the days delayed.

Regarding the reason of sickness, the counsel submitted that, regardless the short comings in the evidence proving her sickness, he submitted that, the respondent does not dispute that the applicant was sick and she was also nursing her sick husband. Treatment in referral hospital or dispensary does not matter. He generally prayed for the court basing on the reason he has given to allow extension of time for the applicant to file

his appeal so that the High Court can rectify the irregularities committed by the subordinate court.

That marked the submission by the counsel for the parties, hence this ruling. Now, in resolving the matter at hand, I will start pointing out the provision upon which the application has been preferred. As earlier on pointed out, the application was preferred under section 361(1) of the Criminal Procedure Act, [Cap 20 R.E 2019], this provision provides as follows;

> *"(2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed."*

The period of limitation within which a person aggrieved by the decision of the District Court who wants to appeal to the High Court is provided under section 361(1), whereby the aggrieved person should first give notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, to give notice of such intention within three days of the date of such sentence in terms of section 361(1)(a) if the Criminal Procedure Act, [Cap. 20 R.E 2019] . After giving such notice, the second step is, by lodging the petition

of appeal within forty-five days from the date of the finding, sentence or order. Provided that, in computing the period of forty-five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded.

In this case, the impugned judgment of the District Court was ready for collection on the same day it was delivered. Therefore the appellant was facilitated by the court, but for other reasons delayed to appeal. It is because he delayed and so realized that is why he came to court asking for extension of time.

However in terms of section 361(2) of the same law, if a person fails to do what is directed in section 361(1)(a) and (b) he may upon good cause provided by the intended appellant be given more time to appeal out of time. However, this court's power to extend or refuse to extend time for appeal is discretional, but that discretion must be exercised judiciously basing on good cause for delay given by the applicant.

In determining as to whether the applicant has given good cause or not, there are factors to consider, these factors have been a subject of the discussion by the Court of Appeal in a number of cases some of which

were cited by the parties and will be considered in this ruling. In the case of **Mohamed Suleiman Ghona vs Mahmoud Mwemus Chotikungu**, Civil Application No. 179/01 of 2020, it was held in respect of that issue that;

> *"In determining if "good cause" has been disclosed, the Court has consistently taken into account considerations such as* ***the cause for the delay involved; the length of the delay; the conduct of the parties; the degree of prejudice****, if any,* ***that each party stands to suffer depending on how the Court exercises its discretion; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged."***

In so holding the court also relied on its unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani,** Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda,** Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014, **Principal**

Secretary, Ministry of Defence and National Service v. Devram Valambhia [1992] TLR 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

From these arguments only one main issue can be framed for determination, this is whether the applicant has managed to show good cause to entitle her extension of time.

From the summary above, it is noteworthy that, the impugned judgment was delivered on 25/05/2016 and the current application was filed on 11/09/2020, reckoning from the date when the judgment was delivered, to when this application was filed, one can find that the applicant delayed for about four years, and about four months. In my considered view the period of delay is not only so long, but extraordinarily and exceptionally inordinate which needs concrete reasons to be condoned.

In this case the applicant has advanced two sets of reasons which in her opinion constitute good cause to entitle her extension of time. First, she advanced the reasons of sickness, being her sickness and the sickness

of her husband, and secondly, she relied on illegality of the proceedings and decision sought to be appealed against.

Starting with the evidence advanced on the ground of sickness, the applicant told the court through the affidavit and submission in support of the application that, since the year 2015, the applicant has been suffering from kidney up to now, and that she has been receiving treatment at SAKAMU limited Dispensary at Geita up to July 2017. This is according to the attachment form. In the letter dated on 06/07/2017 attached to the affidavit which was asking for leave from the employer to go for further treatment.

Besides her sickness, she has also been nursing her husband, one Seleman Malesa, who is in paralysis and has been receiving treatment since the years 2016 from a traditional healer one Jafael Lufungija (who swore an affidavit to support that fact), that since 2017 up to September 2020, he has been treating the husband of the applicant.

Replying on that ground of sickness the counsel for the respondent reminded the court that, the applicant delayed for about 1500 days and that there is no evidence to prove that the applicant was totally

hospitalized during all these days. His argument based on the attachment which shows that she had blood pressure and abdominal pain which did not cause her total bed rest. What is seen on record is various exemptions from duty of 3, 4, and 7 days, and the hospital she was attending is a mere dispensary not even a referral hospital and in few occasions when he attended at the District Hospital, that the alleged sickness did not prevent her appeal.

Regarding the sickness of her husband, he contended that there is no proof that the applicant travelled to Tabora to nurse her husband, no proof of sickness of her husband and last it has not been proved that the said Lufungija was holding a local medicine practicing license to prove that really he was treating the husband of the applicant.

While winding up, he reminded the court of the principle of law that whoever asks for extension of time, must account for each and every day delayed, to buttress that position, he cited the decision of the Court of Appeal in **Mohamed Suleiman Ghona vs Mohamoud Mwehusi Chotikungu**, (supra) and **Iddi Nyange vs Manna Said**, (supra). He submitted that, in this case the delayed days are almost 1500 and that the applicant did not account them.

As correctly submitted by the learned State Attorney, applicant has not accounted all the days delayed, the only exhibits purportedly proving that she was sick, was of 2012, 2013, 2014, 2015, 2016 and 2017, that means that from 2017 on wards the applicant probably got better, therefore even if we take the medical chits attached to the application to be proving her sickness, which is not the case in this application, then the rest of the days from 2017 to September 2020 when the application at hand was filed, remained un accounted.

Regarding the days when she was nursing her sick husband, the only evidence to prove that is the affidavit of one Jafael Masanja Lufungija, who introduced himself as a local medicine man of Kaliuwa in Tabora Region, but did not prove that he is really a local medicine man by attaching the certificate of registration and that of practice. Even the affidavit indicates that he started to treat him from 29th March, 2017 but did not state when he treated the said patient for the last time. The affidavit also states that the applicant and her husband travelled to his local dispensary at Ilege where they **stayed for months**, the use of the words months presupposes that the period of stay at Lufungija's place was less than a year. The period which is less than a year reckoned from 29th

March 2017 would end at not more than, February 2018, thereby leaving the whole period of March 2018 to September 2020 unaccounted. From this reasoning therefore, it goes without saying that the conduct of the applicant prove that, she was not diligent to prosecute the action of appealing against the judgment of the trial court passed against her. She therefore failed to account the period delayed to entitle her the extension of time.

Regarding the issue of illegality, it is a principle of law that the presence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged, amounts to good cause for extension of time. However, as correctly reasoned by my senior brother Hon. Mgeta, J in the case of **Jonas Ntaliligwa vs Fedia Nyayagara** (supra) when he was faced with a similar situation, he relied on the case of **Principal Secretary Ministry of Defence and National Service vs Devram Valambhia** [1992] T.L.R 185, his Lordship held *inter alia* that, in his view

> *"...the principle that illegality constitutes sufficient cause, is not absolute, as it is not a question of alleging and pointing out the purported illegalities. The alleged illegality* ***must be capable of being held****, therefore there are instances where the illegality principle do not work and in some cases besides*

illegality being the point of law at issue ***the length of the delay is a relevant factor too.***"

In his further endeavor, his Lordship relied on the case of **Cosmas Faustine vs The Republic**, Criminal Application, No. 76/04 of 2019 Court of Appeal – Bukoba (unreported) where he cited the decision of a Single Justice of Appeal.

> *"... the court can only grant an application for extension of time subject to the applicant meeting the following conditions namely; reason and length of the delay, accounting for each day of the delay, absence of diligent negligence or sloppiness in preferring the application and* ***in fitting cases****, existence of an issue of illegality of sufficient public importance, in the impugned decision..."*

His lordship held that in his view, the word "**in fitting cases**" includes consideration of other factors like how diligent the applicant has been in pursuit of his/ her rights and consequently held that;

> *"a party who fails to exercise diligence in observance of court rules of procedure like filing an appeal in time is not protected by the illegality principle unless the court decides that the points raised is of public importance. The illegality in* ***Valambhias case*** *as envisaged in* ***Lyamuya Construction***

Co. Ltd vrs The Board of Trustees of Young Women's Christian Association of Tanzania, Civil Appeal No.2/2010, *Court of Appeal, (Unreported)* ***was to cover errors on jurisdiction and I would add time limitations which are pure points of law.*** *....*

.....to that effect, I would say that unless the point of law presented ***involves jurisdiction or time limitation matters, for a case to succeed on all other alleged illegalities, the applicant must prove diligence in pursuing his rights and accounting for each day of the delay."*** [Emphasis mine]

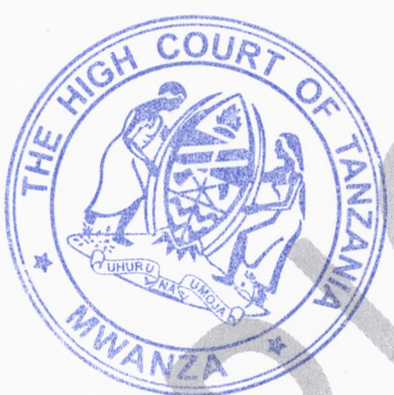
In this case the alleged illegality is not on jurisdiction or time limitation matters; it is on the courts failure to read the exhibits tendered in support of the prosecution case. The applicant has not been diligent in her pursuing the rights to appeal. The applicant has not told the court when she became aware of the said illegalities. I am thinking aloud that, if she noted the said shortcomings earlier and kept quiet to take shield of the principle of illegality; then she can not be protected by the principle as I believe the principle was not propounded to accommodate this kind of inactiveness. And if after receiving the judgment and proceedings did not bother to check and note the shortcoming/ illegality in the proceedings and

came to note after more that four years, there is no way she can escape the blame of being negligent and in diligent, which conduct can not be blessed.

That said, I find the application to have no merits, it is dismissed for want of merits.

It is so ordered

DATED at **MWANZA,** this 13th day of July, 2021



J. C. TIGANGA

JUDGE

13/07/2021