

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

MISC. CRIMINAL APPLICATION NO. 45 OF 2022

RAPHAEL MAJALISI KALEMBWE.....APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

RULING

Date of last order: 7/12/2022

Date of Ruling: 7/12/2022

MALATA, J.

The applicant, Raphael Majalisi Kalembwe, lodged chamber summons under section 361(2) of the Criminal Procedure Act seeking for orders that;

1. This honourable court be pleased to extend time within which the applicant may file the petition of appeal out of time against the Judgment of Resident Magistrate Court of Morogoro dated 02/06/2021.
2. Any other order this court think just and fit to grant.

The application was accompanied by the affidavit of the applicant who deposed that he was charged, convicted and sentenced with the offence of Incest by Male contrary to section 158(1) of the Penal Code Cap 16, R.E 2019, currently serving thirty (30) years imprisonment.

Aggrieved by both conviction and sentence the applicant through Prison Authorities filed the notice of intention to appeal on the same day he entered the prison at Morogoro, that is 03/06/2021 which was within the prescribed time 10 days as provided by the law.

The applicant submitted that, few days thereafter he was transferred to Kilosa District Prison and he was unable to do follow up on copy of judgment and proceedings as his movements is limited to prison vicinity. The court records were transmitted to him through Prison Authorities late in October 2021, he was already out of time to file an appeal to the High Court.

When this matter came for hearing the applicant prayed his application for extension of time be granted.

Responding to the applicant prayer, Mr. Emmanuel Kahigi, State Attorney submitted that they have gone through the applicant's application and noted that, the same contain genuine reasons for his failure to file appeal within time. This reflected under paragraphs 5 and 6 of the affidavits and taking into account the appellant was sentenced to serve 30 years

imprisonment, the respondent side has no objection to the application. As

such, the applicant's prayer be granted to enable him be heard on

merit.

This court has considered the submission by the parties which inter alia

canvass to respondent's no objection to the application. The point for

determination is whether the applicant has advanced sufficient reason for

extension of time.

The applicant through his submission, in particular, paragraphs 5 and 6

of the affidavit advanced grounds for the delay that he was transferred to

Kilosa Prison and the copy of the proceedings and judgment were

delivered late, and upon filing his appeal he was already out of time

prescribed by the law.

It is settled principle in our jurisdiction that, extension of time is court's

discretion. This principle is well settled in the case of **Lyamuya**

Construction Company Limited vs. Board of Registered Trustees

of Young Womens Christian Association of Tanzania, Civil

Application no. 2 of 2010, Court of Appeal (unreported), the court stated;

"As a matter of general principle, it is in the discretion of the

Court to grant extension of time. But that discretion is judicial,

and so it must be exercised according to the rules of reason and

justice, and not according to private opinion or arbitrarily."

Further, in the case of **Regional Manager Tanroads Kagera vs.**

Ruaha Concrete Co. Ltd, Civil Appeal no96 Of 2007 (unreported), the

Court of Appeal decision had these to say;

"The test for determining an application for extension of time is

whether the applicant has established some material amounting

*to sufficient cause or **good cause** as to why the sought application*

is to be granted."

This means that in granting the prayer for application of extension of time

the court has to consider if the applicant has advanced good cause or

sufficient cause as to why the sought application is to be granted, that is

to say the court need to take into account factors such as the reason for

the delay

Section 361(2) of the Criminal Procedure Act provides that,

*"the high court may for **good cause**, admit an appeal*

notwithstanding the period of limitation prescribed in this section

has elapsed."

What amount to good cause was stated in the case of **National Bank of**

Commerce vs. Sailego Holdings Limited and one another, Civil

Application no 661 of 2021, Court of appeal (unreported) where the court

stated that

"Now, if the phrase **"good cause"** is to be construed in its ordinary sense, it seems to me very simple and indeed very fair to hold as I hereby do that, after being given leave to appeal, the applicant was precluded from doing so on account of the reasons and circumstances which were beyond her control."

In the application before this court, the applicant has through affidavit advance reasons for delay in paragraphs 5 and 6 of the affidavit that, **one**, he being a prisoner was transferred to Kilosa prison immediately thereafter, thus incapable of making proper follow up to get the trial court records for his appeal, therefore the delay was contributed by circumstances beyond his control **two**, the applicant is serving 30 years imprisonment which is a long sentence, it is in the interest of justice that the applicant be on merits, **three**, there is no prejudicial to the respondent if the applicant's prayer is granted.

In the circumstances, I find the application has merit and it is accordingly granted. The applicant is given twenty-one (21) days file an appeal with effect from the date of this ruling.

It is so ordered.


Hon. G.P. MALATA

JUDGE

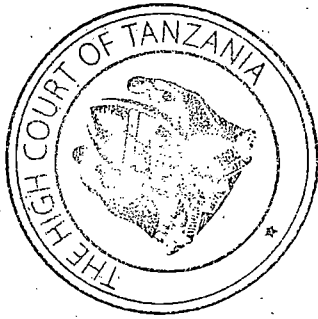
7th December 2022

Court

Ruling delivered on 7th December, 2022 in chamber in the presence of Mr.

Emmanuel Kahigi, State Attorney for Respondent and the Applicant in

person.



~~Hon. G.P. MALATA~~

JUDGE

7th December 2022