

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPLICATION No. 18 OF 2023

(Arising from conviction and sentence in Criminal Case No. 102 of 2021 Babati

District Court, Hon. V. Kimario-SRM dated 30/3/2022)

GIDAJULI SHAURI.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

10/7/2023 & 15/8/2023

BATHY, J.

The above-named applicant was arraigned before the District Court of Babati (hereinafter referred as the trial court) and charged with the count of incest by males contrary to sections 158(1), (a) of the Penal Code [CAP 16 RE 2022].

It was alleged by the prosecution that, on 7/8/2020 at Ayamango village within Babati District, the applicant had carnal knowledge with a girl aged 7 years, who to his knowledge was his daughter.

It is on record that, after a full trial the applicant was convicted and sentenced to life imprisonment. The applicant intended to challenge



the said decision but unable to do so timely, hence he preferred the instant application under section 361 (1) (2) of the Criminal Procedure Act [CAP 20 RE 2022], (the CPA) seeking for the following reliefs;

- 1. That, this honourable court be pleased to extend time of filling my petition of appeal (out of time) in the High Court of United Republic of Tanzania.*
- 2. That, this Honourable Court be pleased to make any other orders or relief(s) as it deems fit and just to grant in this application.*

The application is supported by an affidavit sworn by the applicant himself. On the other hand, the respondent lodged a counter affidavit to contest the application.

When the application was called on for hearing, the applicant appeared in person unrepresented, while the respondent was represented by Ms. Benadetha Mushi, learned state attorney. The application was disposed of oral submissions.

The applicant in his submission in support of the application, he urged the court to grant the prayer sought. He claimed to have not supplied timely with the judgment of the trial court. Since he was in prison, he could not make follow up.



He added that, he was transferred to another prison and when he got back, he found the copy of judgment was already supplied.

On reply submission made by Ms. Mushi she adopted the counter affidavit to form part of her submission. She further submitted that, the court can exercise its discretion to grant extension of time under Section 361 of the CPA, upon sufficient cause shown being shown.

She went on arguing that, going through the applicant's affidavit on paragraph 2 he admitted to have been supplied with the copy of the proceedings and judgment on 12/12/2021. However, the applicant filed the instant application on 19/5/2023 more than a year later.

Ms. Mushi further contended that, the record shows that the copies of the proceedings and judgment were available from 18/7/2022. She thus wondered as to how the applicant was able to obtain them on 12/12/2021.

On the other hand, she was also of the view that, even if the applicant was supplied with the said copies on 18/7/2022, still the instant application was lodged after the expiry of more than 155 days.

For this court to consider granting the applicant the extension of time, Ms. Mushi referred to the case of **Benjamin Amon v. Republic**, Criminal Application No. 106 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported) in which the court advanced factors for



consideration before the court can exercise its discretion of extension of time;

- i) The applicant must account for the period of delay.*
- ii) The delay should not be inordinate.*
- iii) The applicant must show diligence and not apathy, negligence or sloppiness of the action that he intends to take.*
- iv) If the court feels that there are other sufficient reasons such as the existence of the point of law of sufficient importance such as illegality of the decision sought to be challenged.*

Ms. Mushi was settled that, the applicant has not accounted for the whole period of delay. She further pointed out that, the applicant had not even filed the notice of intention to appeal which did not require any fee.

To fortify her arguments, Ms. Mushi cited the case of **Benjamin Amon v. Republic** (supra) in which the court referred to the decision of **Bashiri Hassan v. Latifa L. Mashayo**, Civil Application No. 3 of 20027 (unreported) where the court held that, even a single day delay must be accounted for.



Ms. Mushi further contended that, in the applicant's affidavit, he stated he had engaged an advocate from Arusha, but there is no affidavit from the said advocate to establish the applicant's claims. She therefore urged the court to dismiss the application as the applicant could not account for each day of the delay.

The applicant rejoined that, the delay was due to his illiteracy and being a layperson. He thus reiterated his prayer to be granted the extension of time to allow him file his appeal out of time.

Having this court heard the parties' rival submission and going through the records related to this application, the sole issue for my determination is whether the applicant has advanced sufficient reason for the court to grant him an extension of time.

The present application has been preferred under section 361 (1) and (2) of CPA. The said provision requires an aggrieved party to lodge an appeal within 45 days which has to be preceded with the notice which is required to be lodged within 10 days from the decision sought to be appealed against.

In case one fails to lodge the appeal within the prescribed period, the remedy is to apply for extension of time under section 361 (2) of the CPA, where the said provision reads;



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

It follows therefore that, in order to succeed in an application for extension of time, the applicant must demonstrate good cause. However, the quoted provision of the law does not state what constitutes good cause. Thus, in the case of **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (unreported) the Court of Appeal among other things held that;

"What constitutes good cause cannot be laid down by any hard and fast rules. The term 'good cause' is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion"

Thus, what constitutes good cause depends on the circumstance of each case. However, from decided cases, certain factors provide guidance on whether or not the applicant has shown good cause to warrant court grant the extension of time.

As in the case of **Benjamin Amon v. Republic** (supra) cited by Ms. Mushi, the Court of Appeal expounded some factors to be taken into

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consideration in determining whether the applicant has advanced sufficient cause.

See also the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported).

In the present matter, it is not in dispute that the impugned decision by the trial court was delivered on 30/3/2022. Despite the fact that the applicant had deposed in his affidavit that he was supplied with the certified copies of proceedings and judgment on 12/12/2021.

However, Ms. Mushi had argued that the records of the trial court show that, the copies of the impugned decision and proceedings ^{were} not ready as they were certified on 18/7/2022. On rejoinder the applicant could not say anything as to when he was supplied with the certified copies of judgment and proceedings.

Having in mind that the instant application was lodged in court on 11/5/2023, about 300 days from the date the judgment and proceedings were certified. If I were to count from 12/12/2022 the date on which the applicant was supplied with the said documents, he was required to lodge his appeal within 45 days from the date he was



supplied with the certified copies. Therefore, the appeal ought to have been lodged on or before 26/1/2023.

The applicant was required to account on each of the delay from the day he was supplied with relevant copies. I have considered the arguments by the applicant that, he was transferred from one prison to another and when he returned, that is when he was availed with the copies of the proceedings and judgment.

Although such argument does not feature anywhere in the affidavit. I find his contention wanting in substance, since the applicant could not state which prison he was transferred to and when he returned back to the current prison. This was necessary for the court to gauge the extent of the delay.

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It [^]for that reason I hold that the applicant's delay was inordinate and he could not account on each day of his delay. The importance of this requirement was emphasized in the case of **Bushiri Hassan v. Latifa Lukio Mashayo**, (supra) where the Court of Court of Appeal stressed that;

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



On the other hand, the applicant blames his advocate namely Mahagi to have failed to lodge his appeal timely. Rightly as argued by Ms. Mushi, there ought to be an affidavit from the advocate to substantiate the applicant's claim.

To this argument I may draw the emphasis made in the case of **Lilia Sifael v. Cocacola Kwanza Limited**, High Court Labour Revision No. 8 of 2019 [2020] TZHC quoting with approval the case of **Tanzania Milling Co. Ltd v. Zacharia Amani t/a All Gold Co. & Another**, Civil Application No. 415 of 2018 (unreported) when the Court of Appeal held that;

"if an affidavit mentions another person, then that other person has to swear an affidavit. However, the information of that other person is material evidence because without the other affidavit it would be hearsay."

It is a settled principle that, mistake or negligence of an advocate is not an excuse. This position of the law was amplified by the court of Appeal, in the case of **Tanzania Rent A Car Limited v. Peter Kimuhu**, Civil Reference No. 28 of 2019 (unreported) in which the Court stated that;



... that failure by the advocate to act within the dictates of the law does not constitute a good cause for enlargement of the time.

Consequently, I find the applicant has not advanced any sufficient reason for the court to exercise its discretion for extension of time. It is for that reason I proceed to dismiss this application for want of merits. It is so ordered.

Dated at Babati this 15th August 2023.



A handwritten signature in blue ink, appearing to read 'G. N. Barthly'.

G. N. BARTHY
JUDGE

Delivered in the presence of Ms. Benadetha Mushi learned state attorney for the respondent and in the absence of the applicant who was not brought from the prison custody. The applicant to be supplied with copy of his ruling.