

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPLICATION No. 21 OF 2023

(Arising from conviction and sentence in Criminal Case No. 85 of 2021 Babati District Court, Hon. J. M Mwambago-SRM 27/9/2022)

MOHAMED SWED.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

15/8/2023 & 23/8/2023

BATHY, J

The above-named applicant, was arraigned before the District Court of Babati (the trial court) charged with one count of rape contrary to sections 130(1), (2)(a) and 131 (1) of the Penal Code [CAP 16 RE 2022]. It was alleged before the trial court that, on 28/4/2021 at Hangoni area within Babati District, the applicant had a sexual intercourse with XY without her consent.

After a full trial, the applicant was convicted and sentenced to thirty years imprisonment.

The applicant intended to challenge the said decision, but he was unable to do so timely. Hence, he preferred the instant application under



section 361 (1) (2) of the Criminal Procedure Act [CAP 20 R.E 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 while the respondent was represented by Ms. Mwanaidi Chuma, learned state attorney. The application was disposed of orally.

Submitting in support of his application, the applicant stated that he did not have anyone to make follow up of his case, since he was transferred to a prison camp for three months and when he returned, he found that time for lodging appeal had expired. He therefore urged the court to grant the prayers sought.



On reply submission Ms. Chuma adopted the counter affidavit to form part of her submission. She further contended that, on paragraphs 2 and 3 of the applicant's affidavit, the applicant deposes that he was supplied with copies of judgment and proceedings on 19/12/2022.

Then he engaged advocate Kimaro of Dar es Salaam to prepare and lodge his appeal, but he did not have funds to pay the advocate and there was no good communication between them.

Ms. Chuma maintained that, counting from the date the applicant was supplied with copies of judgment and proceedings to 9/5/2023 the date this application was lodged, the instant application was lodged almost five months later.

She submitted further that, in terms of section 361 (2) of the CPA, it empowers the court to grant the extension of time to appeal, upon the applicant advance good cause.

The reference was made to the decision of **Benjamin Amon v. Republic**, Criminal Application No. 106 of 2018 Court of Appeal of Tanzania at Dar es Salaam (unreported), whereby the court held that in determining whether good cause has been shown, the factors to be considered are;

- i. *The applicant must account for each day of the delay.*
- ii. *The delay must not be inordinate.*



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

She further counter argued that, the applicant has delayed for about 5 months without giving sufficient cause for his delay. She emphasized that, even a single day delay has to be accounted for as pointed out on cited case above. Ms. Chuma was firm that, the applicant has not shown diligence in his action to make follow up of his appeal to be lodged within time.

Ms. Chuma was of the view that, the applicant has not advanced any sufficient reason and prayed the application be dismissed.

On a brief rejoinder the applicant maintained his arguments he made on his submission in chief and prayed for this court to consider his application.

Having gone through parties' rival submission, the sole issue for determination is whether the applicant has advanced sufficient reason for the court to grant him an extension of time.



This application has been preferred under Section 361 (1) and (2) of CPA. The said provision requires an appeal from the trial court be lodged within 45 days, preceded by notice which is required to be lodged within 10 days from the decision sought to be challenged by way of an appeal.

This court has discretion to grant an extension of time to file the appeal as provided for under section 361 (2) of the CPA. 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].

From the foregoing provision of the law, for the court to exercise its discretion for extension of time, the applicant must demonstrate good cause. Despite the fact that the law did not define what constitutes good cause, in the case of **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (unreported) the Court of Appeal stated 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”

Therefore, 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 advanced sufficient good cause.

These factors were pointed in the case of **Benjamin Amon v. Republic** (supra) cited by Ms. Chuma. 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).

According to the records available, the impugned decision was delivered on 27/9/2022. The applicant has also admitted in his affidavit that, he was supplied with the certified copies of proceedings and judgment on 19/12/2022. He was therefore required to lodge his appeal within 45 days from the date he was supplied with copies of the judgment and proceedings.

Thus, the appeal ought to have been lodged on or before 3/2/2023. However, this application was filed before this court on 11/5/2023, after



the lapse of more than three months counting from the last day the appeal was required to be filed.

The period of three months is an inordinate delay. The applicant was therefore required to account for each day of delay. Going through the affidavit in support of the application, the applicant has not discharged that burden.

As he had averred that, he engaged an advocate to prepare his appeal, but there was no communication and payments. Therefore, his appeal was not lodged. The applicant should have stated as to when he engaged the advocate and when he realized that the appeal was not lodged.

The need to account on each of the delay was emphasized in the case of **Bushiri Hassan v. Latifa Lukio Mashayo**, (supra) where the Court of Court of Appeal held 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].

In the present matter, the applicant blames his advocate namely Kimaro for failure to lodge his appeal within time. I must point out here,



with regard to that claim there is no affidavit from the mentioned advocate to confirm if at all he/she was ever engaged by the applicant to prepare and file the intended appeal. The importance of doing so was stressed in the case of **Dianarose Spareparts Ltd v. Commissioner General Tanzania Revenue Authority**, Civil Application No. 245/20 of 2021 [CAT] at Dar es Salaam (unreported), at page 9 where it was held that;

"The stance of the law is that, where an affidavit mentions another person on a material point, that other person on a material point, that other person should also take an affidavit"

The applicant is also casting a blame to the advocate for that delay, after all a mistake or negligence of an advocate has never been considered to be 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 - see also Exim Bank (Tanzania) Limited (supra)."



I have also taken into account the applicant's arguments that; he was transferred to another prison for three months and failed to lodge his appeal timely. Such averment was not contained in the affidavit in support of the application.


Hence, I find his argument wanting in merits because the applicant never stated when and where he was transferred to and when he returned. Those factors were necessary to be deposed for this court to be able to gauge on the extent of delay caused by his transfer.

Consequently, I find that 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 lack of merits.

It is so ordered.

Dated at Babati this 23rd August 2023.




G. N. BARTHY,
JUDGE

Delivered in the presence of the applicant in person and Ms. Viosena the learned state attorney.