

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA

MISC. CRIMINAL APPLICATION NO. 37 OF 2023

(Arising from Criminal Case No. 23 of 2022 in the District Court of Magu)

EDWARD PIUS APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

30th October & 17th November, 2023.

MUSOKWA, J.

The applicant herein was charged under section 296 (a) and (b); and section 312(1) and (2) of the Penal Code, Cap.16, R.E. 2019 (Penal Code) for the offences of breaking into building and committing an offence therein, and being found in unlawful possession of goods suspected to have been stolen. The District Court of Magu found the applicant guilty as charged and pronounced a custodial sentence of six (6) years. In this application, the applicant seeks an extension of time to enable him to appeal against the decision of the trial court in Criminal Case No. 23 of 2022.

The application has been preferred under section 361 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (CPA) and is supported by the affidavit of Edward Pius, the applicant herein. The affidavit under

paragraphs 3 and 4, sets out grounds on which prayers sought in the application are based. The applicant's main assertion is that the delay was caused by failure to find expert assistance in the drafting of the grounds of appeal, in consideration of the fact that he was in prison serving his sentence.

The application is vehemently opposed in a counter-affidavit deponed by the counsel for the respondent, Ms. Neema Kibodya. The respondent contends that the appeal does not stand any overwhelming chances of success. The respondent has further averred that the applicant has neither attached any proof of his effort to appeal nor supplementary affidavit of a prison officer in charge to support the same in order to move the court to grant the application.

At the hearing of the matter, the applicant was unrepresented. When invited to make his submission, he had nothing to add or clarify on the grounds of his application and allowed the respondent to respond accordingly.

Ms. Kibodya contended that the applicant failed to elaborate how he executed the said intention to appeal. Furthermore, she submitted that no attempt had been made by the applicant to account for each day of the delay, from the date of the judgment to the date of filing this

application. Observing that the judgment was issued on 4/11/2022, she stated that the instant application was lodged approximately nine (9) months later without justifiable reasons. Ms. Kibodya, in support of her position, cited the decision of the Court of Appeal in **Elius Mwakalinga Vs. Domina Kagaruki and 5 others**, Civil Application No. 120 of 2018 (unreported). The learned attorney further queried why the applicant did not opt to notify the trial court orally of his intention to appeal, on the day of pronouncement of judgement which was delivered in his presence.

The respondent's counsel, in opposing the applicant's assertion on failure to find expert assistance while incarcerated, cited section 363 of the CPA. Ms. Kibodya submitted that the law provides guidance on the measures to be resorted to by an inmate who intends to appeal. The aforementioned provision provides that the inmate may submit his intention to appeal to the prison officer who will file the notice of appeal on his behalf. The learned state attorney further contended that, the applicant made no effort to support his application with a supplementary affidavit from a prison officer to substantiate his claims on the efforts made to lodge his appeal within time.

In conclusion, Ms. Kibodya submitted that under section 361 (2) of the CPA, the court has jurisdiction to grant extension of time if satisfied

that there is good cause. The learned attorney reiterated that the applicant had failed to show good cause therefore she prayed the court to refrain from exercising its discretion and the application be dismissed.

In his brief submission, the applicant adopted what had been averred in the supporting affidavit. He emphasized that the delay in lodging the appeal was not due to negligence on his part, only that his efforts were thwarted by the prevailing conditions around him.

Section 361(2) of the CPA is the basis for the instant applicant; and therefore, relevant for the determination of this matter. The said section states that: -

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

In determining whether or not this application is meritorious, the court has examined the contending submissions of the parties. I concur with the assertion of the learned state attorney that extension of time may be granted by the court; but such grant is premised on sufficient reason(s). This is in view of the fact that such extension is a discretionary remedy, granted to a party who acts equitably as per the decision of the Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat Vs. IEBC & 7 Others**, Sup. Ct. Application 16 of 2014. This entails

demonstration, by the applicant, of the reasons that prevented him from acting timely. This is what is known as 'sufficient reason'. It requires meeting some key conditions, some of which were underscored in the landmark decision of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

Examining the reasons adduced for the delay, I find nothing to convince this court that effort was made by the applicant to lodge his appeal within time. Notably, the prayer in his application is for the grant of leave to file his appeal out of time. However, the prayer is not specific whether the leave sought is for filing notice of intention to appeal, lodging the petition of appeal or both. In any case, this does not affect the determination of this application.

The facts deposed in the applicant's affidavit do not support his assertions that he made sufficient effort to file his appeal within time. Paragraphs 3 and 4 of the applicant's affidavit, are reproduced hereinbelow: -

3. That, on my admission in prison my intention was to appeal against both conviction and sentence but I failed due to lack of assistance on how to appeal.

4. That when I was in prison, I tried to make proper follow up so that I can prepare my appeal and submit it to the High Court of (T) at Mwanza with no achievement."

As rightly submitted by the learned state attorney, the applicant's facts under paragraph 4 of his affidavit required an affidavit from a prison officer to substantiate his claims on the efforts made to lodge his appeal timely. I further take cognizance of the fact that the days of the delay are far too many and I am not persuaded that, in the circumstances of this case, the fact that the applicant was serving a custodial sentence constitutes sufficient ground to exonerate him from adherence to the requirements of the law.

Equally important, the respondent submitted that the intended appeal does not stand any overwhelming chances of success. With due respect to the learned state attorney, the said submission was irrelevant because that factor is no longer a requirement and ground in the application of this nature. In the case of **Airtel Tanzania Limited Vs KMJ Telecommunications Limited**, Civil Application No. 393/16 of 2021, the Court of Appeal stated that: -

*"...for more clarity, it is no wonder that whether **"an appeal stands chances of success"** is no longer a requirement and ground for granting an extension of*

time to appeal or, as here, leave to appeal. See- Murtaza Mohamend Raza Viran v. Mehboob Hassanali Versi, Civil Application No. 168 of 2014 and Victoria Real Estate Development Limited v. Tanzania Investment Bank and 3 others, Civil Application No. 225 of 2014 (both unreported)”. [Emphasis added].

Similarly, the applicant ought to account for each day of delay from the date of judgement to the date of filing this application (from 4/11/2022 to 03/08/2023). That was not done. This is a celebrated legal principle held in numerous cases including the case of **Elius Mwakalinga Vs. Domina Kagaruka and 5 others**, (supra) cited by the learned state attorney. The said case stated that: -

“...a delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken” [Emphasis added].

In sum, in the light of my foregoing findings, I take a firm position that the applicant has failed to demonstrate good cause to deserve the grant of the application for extension of time. In the result, the application is dismissed.

It is so ordered.

DATED at **MWANZA** this 17th day of November, 2023.



I.D. MUSOKWA
JUDGE