

IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

MISCELLANEOUS CRIMINAL APPLICATION NO. 40817 OF 2023

(Arising from Criminal Case No 29 of 2023 in the District Court of Kondoa)

SURU MOHAMED HATIBU APPLICANT

VERSUS

THE REPUBLICRESPONDENT

RULING

Date of last order: 21/02/2024

Date of Ruling: 28/02/2024

LONGOPA, J.:

Suru Mohammed Hatibu, the applicant was convicted and sentenced to serve 30 years imprisonment by the District Court of Kondoa for the offence of rape C/S 130(1), (2) (a) and 131 (1) of the Penal Code, Cap 16 R.E. 2022. The applicant is dissatisfied with the decision of the District Court of Kondoa dated 22/11/2023 thus intends to challenge it by way of an appeal. However, notice of intention to appeal and filing of the petition of appeal have not been taken timely thus this application under Section 14(1) of the Law of Limitation Act, Cap 89 R.E. 2019 and Section



361(2) of the Criminal Procedure Act, Cap 20 R.E. 2022 for the following orders, namely:

- (a) that, this Honorable Court be pleased to extend time the Applicant to file notice of intention to appeal and appeal out of time from the decision of Criminal Case No. 29 of 2023 in the District Court of Kondoa at Kondoa dated 22nd November 2023 out of time.*
- (b) That, this Honourable Court be at liberty to grant any other relief(s) that it will deem fit and just to grant.*

This application is supported by an affidavit of Mr. Dennis Michael Odhiambo, the learned advocate for applicant. The applicant's affidavits states as follows:

- 1. That, I am an advocate of the High Court of the United Republic of Tanzania and subordinate Courts.*
- 2. That, the applicant herein was arraigned before Kondoa District Court with the offence of rape C/S 130(1), (2) (a) and 131(1) of the Penal Code, Cap 16 R.E. 2019, the applicant was convicted and sentenced to serve 30 years of imprisonment. Copy of Judgment attached herein and marked KA-1, leave is craved to refer the same as part of this affidavit.*
- 3. That following that decision, applicant was sentence and prisoned, through the process of finding advocate by his relative to assist him in filing this appeal is when I*

discovered no right of appeal was explained in the judgement under this circumstance the only remedy which was available was to make this Application.

- 4. That, the applicant decision to make this application is not intentionally but it is caused by reason transpired in Paragraph 3 hereinabove.*
- 5. That, proceeding and judgment of the court is tainted with illegality, respondent did not prove his case beyond reasonable doubts and therefore applicant is intending to challenge the said decision and its proceedings.*
- 6. That, under such circumstance it is just for this Court to grant the prayers set forth in Chamber Application and if not the applicant will suffer irreparable loss.*

On 21st February 2024 when this application came for hearing, the applicant enjoyed the legal services of Mr. Denis Odhiambo, learned advocate and the Republic was represented by Ms. Neema Taji, learned State Attorney.

The Counsel for application adopted the affidavit in support of the application to form part of his submission. He stated that at the time of filing this application the time for filing notice of intention to appeal and filing of petition for appeal had lapsed by 10 days only.

It was reiterated that paragraph 3 of the affidavit contains the main ground for this application. He stated that in page 12 of the trial Court's judgment lacks explanation on the right to appeal so it was difficult for the applicant to initiate the appeal timely.

Also, it was reiterated that given the circumstances that applicant was in custody, he could not have been able to deal with the processing of the appeal save that his relative came to his rescue by assisting him only to find that he was late to file relevant documentations.

It was further averred that paragraph 5 of the affidavit reveals that there exist illegalities committed by the trial court. Thus, it is pertinent that those issues should be addressed and determined by the High Court. It was the prayer of the learned counsel for applicant that this Court is enjoined to grant the application as there are solid grounds to allow the applicant to approach the Court by way of appeal.

On the other hand, learned State Attorney stated that the cited provisions of the law empower this Court to extend time on existence of good cause. She reiterated that it is true that judgment does not contain explanation as to the right of appeal.

It was the submission of the learned State Attorney that basically the Republic is not objecting the grant of the application save that this Court

should determine the matter in accordance with the law by allowing justice to prevail.

I have dispassionately considered the affidavit supporting the application and submissions from both applicant and respondent. The respondent is not objecting to the grant of this application for extension of time to file notice of intention to appeal and petition of appeal out of time.

It is important to commence with what the law requires in case a person is dissatisfied by a decision of trial Court in criminal cases. The matter originates from the District Court of Kondoia within Dodoma Region in exercise of its original criminal jurisdiction. It is governed by the Criminal Procedure Act which in its section 361 provides for limitation of time in matters of appeal. It provides that:

361.-(1) Subject to subsection (2), an appeal from any finding, sentence or order referred to in section 359 shall not be entertained unless the appellant- (a) has given 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, within three days of the date of such sentence; and (b) has lodged his petition of appeal within forty five days from the date of the finding, sentence or order, save 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.

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

The decision of the District Court was delivered on 22/11/2023 and the time for notice of intention to appeal commenced running immediately. The applicant has not managed to give notice of intention to appeal on time thus also delaying the lodging of the petition of appeal.

However, the Criminal Procedure Act is not without a remedy. It allows that on a good cause the High Court is empowered to allow the enlargement of time. It is on that account that applicant herein preferred this application seeking this Court's intervention to enlarge time.

Criteria for enlargement of time to file notice to appeal or appeal have been well articulated in the jurisprudence. The Court of Appeal in the case of **Lyamuya Construction Company Limited v. The Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Appeal No. 2 of 2010 set the following guidelines in respect of extension of time:

- (a) the Applicant must account for all the period of delay;*
- (b) the delay should not be inordinate;*

(c) the Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take;

(d) If the Court feels that there are sufficient reasons such as existence of a point of law of sufficient importance, such as illegality of the decision ought to be challenged.

The applicant is required to provide a thoroughly explanation regarding the expired time since the date of the decision. My perusal of the affidavit in support of the application and the submissions made, I am of the view that the applicant has not managed to adequately account for each day of delay.

However, the fact that the delay is not inordinate and there is claim for illegalities in the proceedings and judgment of the trial Court, it is pertinent for this court to afford that opportunity to the applicant by granting the prayer. It is important for the High Court to be seized with opportunity to examine in detail the alleged illegalities to ensure that justice is not only done but also seen to be done.

In the application at hand, the applicant asserts possibilities of illegalities. Thus, in circumstances where the decision intended to be challenges is allegedly containing issues of illegalities such application deserve to be availed opportunity to appeal to allow the High Court to

address such alleged illegality. Illegality is one of matters of points of law of sufficient importance to warrant extension of time.

In the case of **VIP Engineering and Marketing Ltd and 2 Others vs CitiBank Tanzania Ltd** (Consolidated Civil Reference 6 of 2006) [2007] TZCA 165 (26 September 2007), the Court of Appeal stated that:

It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay.

The instant application fits squarely within the boundaries of this reasonable cause of illegality. The applicant's assertion of existence of illegality alone is sufficient cause to warrant exercise of the court's powers to extend time for the applicant to be able to pursue his right through an appeal.

I shall therefore at this juncture, allow the application for enlargement of time to file notice of intention to appeal and lodging the petition of appeal.

The applicant is granted a total of **forty-five (45) days** from the date of this ruling to file the notice of intention to appeal and lodging

petition of appeal to this Court whereby the notice must be filed within first **ten (10) days** of this decision.

It is so ordered.

DATED at DODOMA this 28th day of February 2024



Longopa
E.E. LONGOPA
JUDGE
28/02/2024.