

IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. CRIMINAL APPLICATION NO. 45 OF 2022

*(Originating from DC Criminal Appeal No. 58 of 2020 of High Court of Tanzania Sumbawanga
District Registry at Sumbawanga)*

CALVIN MLASU **APPLICANT**

VERSUS

THE REPUBLIC **RESPONDENT**

RULING

05th & 29th September, 2023

MRISHA, J.

The applicant herein has preferred this application under the provisions of section 383(3) of the Criminal Procedure Act, [Cap 20. R. E.] (the CPA) praying for re-admission of Criminal Appeal No. 58 of 2020 of the High Court of Tanzania at Sumbawanga, that was dismissed by Hon. Nkwabi, J on 11th February, 2022 for want of prosecution.

When served with the Chamber summons supported by an affidavit duly sworn by the applicant himself, the respondent Republic did not file any Counter Affidavit.

The facts leading to the present matter can be briefly narrated thus; on 18/12/2019 at Inyonga Health Centre area in Inyonga village within Mlele District in Katavi Region, the applicant was found in unlawful possession of human drugs and medical devices with a total value of Tshs. 2,009,401/= the properties which having regard to all the circumstances, were reasonably suspected to have been stolen or unlawfully acquired.

He was thereafter on 20/12/2019 arraigned at the District Court of Mlele at Mlele, facing a charge on two counts before the same was substituted on 17/04/2020 with a charge carrying one count only. The count was on the offence of Having possession of goods suspected of having been stolen or unlawfully acquired, contrary to section 312(1)(b) of the Penal Code [Cap 16 R. E. 2002] (now R.E. 2022).

When the applicant was called to plead to the charge on 20/05/2020, he pleaded not guilty to the charge, thus the hearing of the case started and after a full trial, the applicant was found guilty of the offence charged, convicted and sentenced

to serve one (1) year jail imprisonment. In addition, the trial court ordered an Exhibit P1 the medicine and medical equipments to be handled to Inyonga 'B' Health Centre and those which are in bad condition be destroyed by the respondent authority.

Disgruntled with the conviction and sentence meted on him, the applicant filed notice of appeal timely against the same through the legal service of his advocate who was Loth Joseph Mwampagama, and successfully filed Criminal Appeal No. 58 of 2020 in this Court. However, when the appeal was scheduled for hearing on 11/02/2022; the applicant did not appear before the court, henceforth, his appeal was dismissed as indicated above. The applicant on 31/10/2022 preferred this application in a bid to ask the court to re-admit his appeal so that he can proceed with his journey of challenging the decision of the trial court which resulted into his conviction and sentence.

At the hearing of the application the applicant appeared alone, unrepresented whereas the respondent Republic was represented by Mr. David Mwakibolwa, learned State Attorney. The applicant started throwing his stones by contending that he was sick when the case was called on for hearing stating that he was referred to Mbeya Zonal Referral Hospital for treatment, and was diagnosed with a disease called angina pectoris and chronic typhoid. That his treatment took five

months and become stable. He was given a long break so that the disease would subside. He tendered the medical certificate to this court to substantiate his submission and the said document was not objected by the respondent.

In his affidavit at paragraph 4, the applicant avers that on the same day and date his advocate was about to attend a burial ceremony of his beloved friend at Katavi region. Thus, the applicant prayed to this court to allow his application and re-admit his appeal since his appeal is very important to him to the extent that if this court does not grant his application, he will lose an employment benefit as a Civil servant and his life will be ruined.

In reply, the respondent Republic opposed the application and contended that the dismissal order made by Hon Nkwabi, J was proper. Mr. Mwakibolwa referred to this court section 381(1) of the CPA which provides at the outset that the court has jurisdiction to dismiss an appeal for want of prosecution when the appellant or his advocate does not appear when the appeal is called on for hearing.

The respondent's counsel then submitted that in our case, neither appellant nor his advocate appeared before the court when the appeal was called on for hearing which indicates that they were negligently on their failure to make

appearance; he added that the applicant's counsel was supposed to file a notice of his absence or representation or send any other person and notify the court about their none appearance. To support his argument Mr. Mwakibolwa cited the case of **Dr. Ally Shabaha vs Tanga Bohora Jamaat** [1995] TLR. 305 CAT.

In addition, the learned State Attorney argued that the applicant was supposed to notify the court that he was sick before 11/02/2022 when the case was scheduled for hearing. He challenged the reasons for nonappearance of the applicant and his advocate as averred at paragraph 4 of the applicant's affidavit, alleging that the same contradicts with the ones the appellant advanced in his submission in chief. Hence, the counsel for the respondent prayed to this Court to disregard the applicant's submission that he was sick.

More so, the learned counsel challenged the medical certificates annexed in the applicant's affidavit and argued that they are medical prescriptions which do not show when the appellant was admitted in hospital. He also contended that the said document appears to be forged as there is a variation of serial number.

In his response to the averment that the applicant was admitted on 11/02/2022 and became stable and discharged in hospital on 11/07/2022, Mr. Mwakibolwa contended that the applicant was supposed to file an application for re-admission

of his appeal as soon as possible, but he sit and delayed until on 31/10/2022 when he filed his application which delay amounted to more than 90 days meaning that the applicant was negligent.

Mr. Mwakibolwa was emphatic that legally negligence is not a ground for extension of time to file an application for the readmission re-admission of the case. To bolster his point, he cited the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010(unreported).

Regarding a claim that the applicant's advocate was bereaved and attended the funeral ceremony of his best friend at Katavi Region, Mr. Mwakibolwa argued by citing the case of **John Chuwa v Antony Siza** [1992] TLR. 233 the court held that:

"An affidavit of a person so material as cashier in this case ought to be filed to substantiate the said allegation."

He further submitted that the information that applicant's advocate attended a funeral ceremony is so material in this case and need to be supported by an

affidavit of the advocate in order to support his argument; however, in the instant case no affidavit was filed and that led to an afterthought.

Finally, the learned State Attorney argued that the reasons averred in the applicant's affidavit do not amount to a good cause to warrant re-admission; he cited the case of **George Shambwe v Attorney General** [1997] TLR. 176 CAT with a view of cementing his argument. Thus, he prayed to this court to dismiss the instant application.

In re-joinder, the applicant argued that the bereavement is a sudden act since no one knows when he/she can be bereaved. On issue of variation of serial number, he argued that the patient's treatment conducted online which means that the medical description was issued online and no medical guideline directed the medical doctor to fill the prescription following the serial number. Finally, the appellant reiterated what he stated in his submission in chief.

This court under section 383(3) of the CPA is clothed with unfettered discretion to grant the applicant's prayer for re-admission of the appeal as sought upon showing a good cause, but what amounts to good cause there is no hard and fast rules as that depends on the reasons to be advanced by the applicant in order to justify granting of the sought prayer(s).

There is a plethora of authorities to that settled position of the law, but for the purposes of guidance of this court while determining this application, it pleases the court to just cite a few of them. It was held by the Court of Appeal in the case of **Oswald Masatu Mwizarubi vs Tanzania Fish Processing Ltd**; Application No. 13 of 2020 CAT (unreported) that:

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

In another case of **Jumanne Hassan Bilingi v Republic**, Criminal Application No. 23 of 2013 CAT (unreported) the Court held that:

"...what amounts to good cause is upon the discretion of the Court and it differs from case to case. But basically, various judicial pronouncements define good cause to mean, reasonable cause which prevented the applicant from pursuing his action within the prescribed time."

It is also a duty of this court to exercise its discretion judiciously by satisfying itself as to whether there is inordinate delay or not, whether the applicant has accounted for each day of the delayed period and whether there was apathy,

sloppiness, negligence or lack of diligence on the part of the applicant; See **Lyamuya Construction Company Ltd vs Board of Registered Trustee of Young Women's Christian Association of Tanzania** (supra).

The above-mentioned principles will guide this court in exercise of its discretion either to grant or refuse the applicant's prayers. The issue is whether the applicant has advanced some good cause to warrant this court grant him the prayers he has come up with through his application.

It has not been disputed by both parties, that the applicant herein filed a notice of appeal timely against the decision of the trial court, and he successfully filed a Criminal Appeal No. 58 of 2020 in this Court. However, on 11/02/2022 the appeal was dismissed for want of prosecution.

In his prayer for re-admission of the said appeal, the applicant based on two grounds namely sickness of the applicant, and second, applicant's advocate was bereaved and attended to the funeral ceremony of his friend. I will deal with such grounds accordingly.

On the ground of sickness, the applicant was relying on his averments at paragraph 4 of the affidavit. He contended he was sick when the case was called on for hearing; he was admitted at Mbeya Zonal Referral Hospital for treatment

which took him one week before the date of hearing on 11/2/2022, and was diagnosed with the deceased called angina pectoris and chronic typhoid.

He said, his sickness is also evidenced by exhibit annexed to the affidavit (the medical certificate from Mbeya Zonal Referral Hospital). That it took him five months to become health wise stable and filed the said application on 31/10/2022. It was therefore, the applicant prayer that his sickness be considered as one of his good causes for re-admission of his appeal.

On the respondent's side, Mr. Mwakibolwa who countered the applicant's submission arguing that the applicant's ground of sickness was an afterthought. He claimed that the applicant was supposed to notify the court, but also his submission in chief contradicted with the averments contained in paragraph 4 of his affidavit.

In addition, Mr. Mwakibolwa contended that the document annexed in the affidavit does not show when the applicant was admitted in hospital rather its shows medical prescription stating that since, the applicant was treated and admitted on 11/07/2022 and became stable and discharged on 11/07/2022, he was supposed to apply for re-admission as soon practicable, but he seated and

delayed until on 31/10/2022 when the application was filed, which shows that more than 90 days elapsed.

In his brief rejoinder regarding the respondent's submission, the applicant insisted that he was admitted in hospital one week before the hearing date of his appeal, hence it was not easy for him to have chances of notifying the court that he will not be able to be present at the time his appeal will be heard by this court.

I have keenly followed and considered the rival submissions from both parties on this ground of sickness of the applicant in which this court is called upon to order re-admission of Criminal Appeal No. 58 of 2020 which was dismissed on 11/02/2022 as indicated above.

I am at one with the applicant's proposition on the position of law that sickness when established, is a good cause for re-admission of case. However, I do not subscribe to his assertion that the alleged disease in this matter as annexed to the applicant's affidavit show that the applicant was admitted in Mbeya Zonal Referral Hospital for five months.

I say so because the annexed documents are medical prescriptions which do not show when the applicant was admitted. Also, no official letter from Mbeya Zonal

Referral Hospital was annexed to the said affidavit to show that the applicant was attended by the doctor and to provide a brief medical history of the patient (applicant).

Additionally, the fact that the applicant was admitted in hospital one week before the date of hearing of his appeal on 11/02/2022, one would have expected the medical prescription annexed in the applicant affidavit to be issued before the date of hearing of his appeal and not subsequent thereto. As the records reveal, the annexed medical prescription with serial number 140353 was issued on 11/02/2022, and another medical prescription with serial number 140379 was issued on 11/03/2022; again, the document with serial number 140353 was issued on the same date of the hearing of the appeal, while another one with serial number 140379, was issued on 11/03/2022, one month later.

If the quoted documents are to be believed, then it is no doubt that the applicant started suffering from the alleged disease on 11/02/2022 and not one week before his appeal was called on for hearing, but as I have pointed above, that was not the case. Hence, I find the submission of the applicant to contradict with his annexed documents.

Looking on the date of applicant that he was hospitalized, and the time he was discharged from the hospital and then filed this application, the applicant has claimed that he was hospitalized on 11.02.2022 and that he was treated for five months then thereafter he filed this application on 31.10.2022.

Despite the fact that the applicant was stable after five months, the records show that he filed this application on 31.10.2022 which means that there was a lapse of about 90 days from when he was discharged from the hospital. Unfortunately, the applicant failed to account for those days of his delay.

Assuming that the facts submitted by the applicant are true, and then the applicant would be successful in accounting for the period on or about July, 2022 after being discharged from hospital, to the date of filing of this application on 31/10/2022, yet it is about 90 days lapsed. It is trite law that, the applicant is supposed to account for each day of the delay. That position was stated in the case of **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007(unreported) where the 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 periods within which certain steps have to be taken."

That apart, both the affidavit in support of the application and the applicant's oral submissions are silent on what was transpiring with the applicant on unexplained total of 90 days counting from when he was discharged from hospital on July, 2022 to the date when he filed this application in Court on 31.10.2022. Hence, I find the 90 days of delay to be inordinate to be excused by the court.

In respect of the second ground, the applicant has averred at the paragraph 4 of his affidavit, that his advocate failed to appear in court on the hearing date because he was about to attend a burial ceremony of his beloved friend at Katavi. In response to that ground, Mr. Mwakibolwa resisted the submission of the applicant arguing that the applicant in his affidavit referred to another person who never made any affidavit to substantiate the facts averred in his respective affidavit, thus his ground is an afterthought. To cement his argument, the respondent's counsel cited the case of **John Chuwa v Antony Siza** (supra).

In his brief rejoinder, the applicant countered the respondent's submission by arguing that to be bereaved is a sudden act as no one knows when he or she can be bereaved and that his advocate did not get chance to notify the court on that alleged excuse.

On my part, I accept the argument of Mr. Mwakibolwa that the affidavit of a person so material as applicant's advocate in this case ought to be filed to substantiate the said allegation. This position was stated in the case of **NBC Ltd vs Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (unreported) the Court held that:

"...an affidavit which mentions another person is hearsay unless that other person swears as well."

Therefore, due to the reasons advanced above, I dismiss the applicant's application for want of merit.

It is so ordered.



A.A. MRISHA
JUDGE
29.09.2023

DATED at **SUMBAWANGA** this 29th Day of September, 2023.



A.A. MRISHA
JUDGE
29.09.2023