

**IN THE HIGH COURT OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

MISC. CRIMINAL APPLICATION NO. 19 OF 2023

(Originated from the District Court of Nkasi at Namanyere in Criminal Case No. 177 of 2022)

MARCO ^S/O SHIJA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

20th March, 2024 & 17th April, 2024

MRISHA, J.

In this application, the applicant **Marco Shija** is seeking for the order of extension of time to file a notice and petition of appeal to the High Court of Tanzania out of time. The chamber summons is made under the provisions of section 361(2) of the Criminal Procedure Act, [Cap 20 R.E. 2022] (the CPA) and it is supported by an affidavit sworn by the applicant himself.

The main reasons leading for this application can be briefly gathered from his an affidavit and trial court records. The applicant was convicted by the District Court of Nkasi at Namanyere for the offence of Stealing contrary to section (sic) 25(1) and 265 of the Penal Code Cap16 R.E. 2022, on his own plea of guilty and sentenced to five (5) years imprisonment. Dissatisfied

with the said decision, he desired, but he failed to lodge notice of appeal with the court within the statutory time. Hence, the present application.

The applicant has averred in his affidavit that he was delayed to receive a copy of judgment which led to his failure to prepare his appeal within time. That the delay came due to human imperfection and was out of his control. He concluded by averring that the conviction and sentence meted out to him were imperfect. He insisted that he is innocent and would challenge the decision to this court.

During the hearing of this application, the applicant appeared in person, unrepresented while the respondent Republic had the legal service of Ms. Atupelye Makoga and Ms. Jackson Komba, both learned State Attorneys. Being a lay person, the applicant prayed to adopt his affidavit for it to form part of his submission and urged court to allow his application.

In reply, Ms. Atupelye Makoga, learned State Attorney, supported the application arguing that the reason averred at paragraph 4 of the applicant's affidavit that he delayed to receive a copy of judgment and proceedings.

She said that ground is supported by the affidavit of the Officer in charge of Sumbawanga Prison, as it is shown at paragraph 2 of that officer's affidavit

Who avers that the applicant's delay to file his notice and petition of appeal with the court was due to delay of the copy of judgment and several prison's transfer upon the applicant. Hence, he was not able to appeal on time.

The learned State Attorney agreed with the reasons adduced by Officer in charge Sumbawanga Prison that the appellant was transferred to different prisons and argued that those reasons are valid. She thus, implored this court to allow the applicant to file his appeal out of time. To buttress her position, she cited the case of **John Ambros @Mwanambilo v Republic**, Criminal Application No.8 of 2023 HCT Sumbawanga in which the court held that:

"Transfer of prison from one prison to the next, it amounts to good cause and it is out of control of the applicant."

The above being the submissions of both parties who appear to sail on the same boat as far as the reasons fronted by the applicant are concerned, I

am of the view that the issue for determination is whether the applicant has assigned sufficient reasons to warrant the grant of his application.

At this juncture, I wish to point out that I am impressed and persuaded by the principle of law stated in the case of **John Ambros @Mwanambilo** (supra) referred to me by the respondent's counsel for it suits the prevailing circumstances of the application now before me.

It is a common ground that being a prisoner on transfer from one prison to the next, any delay occurred was contributed by circumstance beyond his control. In my view, the reasons put apparent by the applicant herein in his submission in chief and which have also been supported by the adverse party, indicate that the applicant has actually assigned sufficient reasons for his delay to challenge the decision of the trial court within the statutory time of forty five (45) days from the date of finding, sentence or order, as it is provided under section 361 (1) (b) of the CPA. Hence, he cannot be blamed on the same.

Before I wind up, I feel pleased to comment a little bit above the manner in which the trial magistrate cited the provisions of the law at page 4 of the trial court's typed proceedings. In citing the penal provisions in regard to

the offence the applicant stood charged before the trial court, the honorable trial magistrate wrote as follows: -

*"...this court finds the accused person guilt of the **offence of stealing c/s 25 (1)** and 265 of the Penal Code Cap 16 RE 2022 and went on to convict him accordingly as charged on his own plea of guilty." [Emphasis supplied]*

The above excerpt particularly the bolded words, would mean that the offence of stealing the appellant was charged with before the trial court, stemmed, inter alia, from what the trial magistrate regarded as the provisions of section 25 (1) of the Penal Code.

However, with all due respect to the learned trial magistrate, the said statute does not have a provision as section 25 (1), rather it has the provisions of section 25 with eight (8) paragraphs (a-h) which provide for kinds of punishment, as the marginal note to that section clearly reveals.

Also, if the trial magistrate or the framer of the charge sheet under scrutiny intended to cite two provisions of the law which provide for the offence of stealing, then he could have begun with the provisions of section 258 (1) (2) of the Penal Code which provides for the definition of theft, then

followed by the provisions of section 265 which provides for the General punishment for theft. Up to that note, I wish to remind the trial magistrates and framers of charge sheets to carefully cite proper provisions of the law in order to avoid unnecessary ambiguities which might have caused the prosecution cases to flop unnecessarily.

Reverting back to the present application, in the light of the foregoing reasons, I cannot, but agree with the prayer of the applicant. The applicant is hereby given thirty (30) days from the day of this ruling to file his notice and petition of appeal at the appropriate High Court Registry.

It is so ordered.


A.A. MRISHA
JUDGE
17.04.2024

DATED at SUMBAWANGA this 17th day of April, 2024.




A.A. MRISHA
JUDGE
17.04.2023