

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**MZA CRIMINAL APPLICATION NO 4 OF 2014**

**JOSEPH NGELEYA.....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**(Application for Extension of time to file an Appeal out of time  
against the decision of the High Court of Tanzania  
at Mwanza.)**

**(Nyangarika, J.)**

**dated the 10<sup>th</sup> day of September, 2008**

**in**

**Civil Appeal No. 112 of 2007.**

**RULING**

22<sup>nd</sup> & 29<sup>th</sup> October, 2014

**ORIYO, J.A.:**

The applicant, Joseph Ngeleya filed the instant application seeking an order for extension of time within which to file an appeal out of time. The application brought in the form of a Notice of Motion is made under Rule 10 of the Court of Appeal Rules, 2009 and was lodged on 16<sup>th</sup> day of December, 2013.

The application is supported by an affidavit of the applicant himself and another affidavit of SP P. Mukama, a Superintendent of Prison at Butimba Central Prison.

The applicant was charged and convicted of the offence of Rape contrary to sections 130(1) and 131 (1) of the Penal Code, Cap 16 R.E 2002. The trial District Court of Serengeti at Magumu, Mwanza, sentenced him to serve 30 years imprisonment. That was on 29<sup>th</sup> day of November, 2002.

However, he did not file a notice of appeal in time. So he applied for enlargement of time to do the needful, an application which was granted by the High Court Mackanja J, on 13<sup>th</sup> August 2007 in Misc. Criminal Application No. 22 of 2002. The High Court ordered him to lodge the Notice of Appeal within forty five (45) days.

The time allowed elapsed as the applicant fell sick and was admitted at Bugando Hospital and could therefore not file his appeal on time. Subsequent thereto the court file was renamed as "High Court Criminal Appeal No 112 of 2007 between the applicant and D.P.P".

At the hearing thereof, the court found that the same memorandum of appeal, copy of judgment and the proceedings of the trial court were the same which were filed in the High Court on 15.2.2005, (Notice of Appeal out of time, memorandum of appeal and chamber application supported with an affidavit.) The court, (Nyangarika,J.), on 10/09/2008 dismissed his appeal on the ground that,

after the Ruling of the court on 13.8.2007, which gave the appellant extension of time to file his appeal out of time, he was supposed to institute a fresh appeal by filling a fresh Notice of his intention to appeal and a Petition of appeal as mandatorily required under the provisions of section 361(1) (a) and (b) of the Criminal Procedure Act, Cap 20, therefore there was no competent appeal before Nyangarika, J, for determination on 10/09/2008.

The applicant was aggrieved with that decision and filed Mza Criminal Application No 5 of 2010, which came before my learned brother, Justice Mussa, J.A.; and in his Ruling dated 11<sup>th</sup> day of March, 2013, he struck it out for being incompetent.

The applicant filed this application of the same nature in Mza Criminal Application No 4 of 2014 asking the Court to extend time to file his appeal out of time.

When this application came up for hearing, Ms Martha Mwadenya learned State Attorney, represented the respondent/Republic, while the appellant appeared in person (unrepresented). The learned State Attorney observed that as the application for the extension of time is for filling an appeal in the High Court, the appellant ought to file the same before the High Court and if his application is refused then he has room

to come to this Court. She prayed that the application to be struck out and the applicant be ordered to follow the proper procedure. The applicant had nothing useful to contribute, being a layman and a prisoner.

Apparently, this unfortunate state affair was partly contributed to by some registry officers in the High Court and the relevant prison officer(s). The applicant was supposed to comply with **Rule 47 of the Tanzania Court of Appeal Rules, 2009**, which states:-

“Whenever application may be made either to the Court or to the High Court, it shall in the first instance be made to the High Court, or tribunal as the case may be, but in any criminal matter the Court may in its discretion, on application or of its own motion give leave to appeal or extend time for the doing of any act, notwithstanding the fact that no application has been made to the High Court.”

I wish to hasten here and state that, Rule 47 of the Court Rules, would have been applicable, all things being equal, however, it is not relevant in this application for the simple reason that the extension of time sought before this Court is against the decision of Nyangarika, J. dated 10/09/2008 in High Court Criminal Appeal No 112 of 2007;

according to the Notice of Motion. It is only upon the facts available in the supporting affidavit of Joseph Ngeleja which bring out the truth of the matter. The applicant's quest is to have time extended to appeal after the expiry the earlier extension of 45 days time granted by Mackanja, J. on 13/08/2007 in Misc Criminal Application No 22 of 2005.

The reasons stated as to why the applicant failed to file the appeal within those 45 days are found in the applicant affidavit and which in my view, constitute good cause under Rule 10 of the Court of Appeal Rules.

Therefore, the references in the titles of both the Notice of Motion and the supporting affidavit are confusing as far as the intended appeal is concerned. The decision of Nyangarika, J. which is shown to be complained against in both documents, cannot be faulted because it merely states what was found in the record of the purported appeal number 112 of 2007, which was, in fact, not yet filed. Apart from what the learned judge stated, it was reinforced and confirmed by the applicant himself when he admitted before the court to have not filed any further documents since 13/8/2007. In other words, the applicant admitted what was stated by the learned High Court judge that there was nothing before him for determination.

I think, it has amply been demonstrated above that the application is incompetent because the applicant could not, in law, have instituted any competent appeal against the decision of Nyangarika, J. of 10/09/2008. Accordingly, the application is struck out as correctly urged by the learned State Attorney.

The applicant, if he so wishes, is at liberty to file an appropriate application in the High Court, similar to the one he filed before Mackanja, J. but this time, for the extension of time after failure to comply with the extension of 45 days granted by Mackanja, J.

The applicant is advised to elaborate in detail on the reasons for the delay since 13/8/2007, to date.

DATED at MWANZA this 29<sup>th</sup> day of October, 2014.

K.K. ORIYO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



  
Z.A. MARUMA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**