

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPLICATION NO. 57/01 OF 2018

JOSEPH PIUS MUSHI @ JOSE..... APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Application for extension of time within which to lodge Review
Application from the decision of the Court at Dar es Salaam)**

(Msoffe, Mbarouk, and Oriyo, JJ.A)

dated the 5th day of June, 2009

in

Criminal Appeal No. 300 of 2007

RULING

3rd & 21st May, 2019

LEVIRA, J.A.:

The applicant, Joseph Pius Mushi @ Jose applies for extension of time within which to lodge application for review of the judgment of the Court (Msoffe, Mbarouk, and Oriyo, JJ.A) dated 5th day of June, 2009. The Notice of Motion is made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit duly deposed by the applicant. The application relies on three main grounds advanced by the applicant in the Notice of Motion as follows:

- a) That, the applicant was not supplied with a copy of the Court Judgment on time, hence he failed to prepare and forward to the Court the Notice of Motion within the prescribed time.
- b) That, the law requires annexing the copies of the Judgment so it was impossible to lodge the application without attaching the same.
- c) That, the applicant intends to rely on Rule 66(1)(a) in his Review Application.

I wish to note that, the respondent did not file affidavit in reply and thus, the applicant's averments in the accompanying affidavit are uncontested.

The brief background of the matter at hand is that, in the District Court of Morogoro the applicant was charged in Criminal Case No. 29 of 2001 with the offence of armed robbery contrary to sections 285 and 286 both of the Penal Code. He was convicted of that offence and ultimately, sentenced to serve 30 years imprisonment and to undergo 12 strokes of the cane. Aggrieved by that decision, he unsuccessfully appealed to the High Court and the Court. The applicant is still aggrieved and therefore, he intends to

challenge the decision of the Court through review; hence, the current application for extension of time to lodge review application to the Court.

At the hearing of this application, the applicant appeared in person, unrepresented whereas, the respondent Republic was represented by Ms. Sylvia Mitanto assisted by Ms. Florida Wensesla us both learned State Attorneys. The applicant opted to adopt his Notice of Motion and the supporting affidavit as part of his submission.

Elaborating on the reasons for delay to lodge application for review on time, the applicant stated that, being a prisoner, he solely depends on the prison authority in preparation of the Court documents. He tried to show that he is not the one to blame, and that the prison authority made a follow up of the said decision but they were not supplied on time.

Regarding the allegation of irregularities mentioned in paragraph 10 of his affidavit, the applicant contended that, the charge sheet placed before the trial court was defective as it did not disclose the name of the victim. Another irregularity according to him is that, it was wrong for him to be sentenced to serve 30 years imprisonment. The applicant argued that, by the time he was charged

and convicted, in 2001, the law provided for punishment of 15 years as minimum sentence or 20 years imprisonment as maximum sentence.

On her part, Ms. Mitanto conceded to the application. According to her, having gone through the Notice of Motion and the applicant's affidavit, she was of the view that the applicant has been able to advance good cause for the delay involved. This is due to the fact that, as a prisoner, the applicant depends on the prison authority in preparation and lodging of documents in Court.

Regarding the issue of irregularity advanced by the applicant in relation to the defect in the charge sheet, Ms. Mitanto opined that, this ground is baseless. However, she supported the applicant in regard to the issue of punishment, that it was wrong for the applicant to be sentenced to serve 30 years imprisonment. She asserted that, by the time the applicant was convicted, the punishment was life imprisonment and not 15 or 20 years imprisonment sentence alleged by the applicant. Ms. Mitanto was of the view that, the applicant was supposed to be sentenced to life imprisonment. However, she added that, the applicant was supposed to be charged with the offence of robbery with violence and not armed robbery. In essence, she

supported the applicant that he was not supposed to be sentenced to serve 30 years imprisonment though she differed in what could be the proper sentence. Finally, Ms. Mitanto conceded to the allegation that there is irregularity in the impugned decision and therefore, she prayed for the application to be granted in order for the applicant to be punished accordingly.

In a short rejoinder, the applicant insisted that, Sections 285 and 286 of the Penal Code under which he was charged did not provide for a punishment of 30 years imprisonment he is serving currently as shown above. He reiterated what he stated in his submission in chief while insisting that, he depends on prison authority and as such, failure to attach charge sheet to his affidavit is not his fault. He prayed to be allowed to lodge the intended application for review out of time.

I wish to state at the onset that, despite the fact that the respondent supported the application, I am obliged to determine as to whether the applicant has shown good cause to warrant extension of time. In so doing, I am guided by the provisions of Rule 10 of the Rules which underscore the need of showing good cause in an application for extension of time. The said rule provides as follows:

*"The Court may upon **good cause shown**, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference to that time as so extended". [Emphasis added]*

As it can be deduced from the above grounds appearing in the Notice of Motion, the sole reason for delay to lodge application for review is that, the applicant was not supplied with the copy of the Judgment of the Court on time. In his affidavit (paragraph 6), the applicant states that, he lodged Criminal Application No. 17 of 2009 to the Court with a view of seeking leave to lodge application for review out of time but it was struck out. Thereafter, he lodged Criminal Application No. 29 of 2012 with the intention to amend Notice of Motion in the intended Criminal Application No. 17 of 2009 but the same was also struck out. In paragraph 10 of the supporting affidavit, the applicant prays that his application be granted so that the irregularities of the decision of the Court can be addressed.

After considering the applicant's grounds in this application, I wish to stress that, whether or not to extend time in the application like the one at hand, good cause will always be determined

depending on the circumstances of each case. In **Elia Anderson v. Republic**, Criminal Application No.2 of 2013, the Court held that:

"An application for extension of time to apply for review should not be entertained unless the applicant has not only shown good cause for the delay, but also established by affidavit evidence, at the stage of extension of time either impliedly or explicitly that if extension is granted, the review application would be predicated on one or more grounds mentioned in paragraphs (a) or (b) or (c) or (d) or (e) of Rule 66(1)."
[Emphasis added].

The applicant in the current application is a prisoner serving 30 years imprisonment sentence after being convicted of armed robbery. Being under that situation, he solely depends on the prison authority in preparation and lodging application in Court. However, this fact alone does not discharge him from the obligation of explaining as to when he was supplied with necessary documents and/or attaching the affidavit from the prison authority to support his allegation that, the prison authority or the Court delayed him. The applicant has just made a bare assertion in his affidavit and oral submission before me that, he was not supplied with the copy of the Judgement of the

Court on time. The record of application is silent as to when he received the said copy as a way of accounting for the delay.

According to the supporting affidavit, the last application he made to the Court was Application No. 29 of 2012, where the applicant intended to amend the Notice of Motion. The said application was struck out on 29th October, 2013; from there, the record is silent until on 2nd May, 2018 when the current application was lodged, more than four (4) years later. Basing on that situation, it is not known as for how long the applicant waited for the said copy of the Judgment of the Court to enable me determine whether or not the delay is inordinate. Therefore, I find that the applicant has not shown good cause for the delay to lodge review application in time.

I now revert to consider the second ground in regard to the alleged irregularities of the decision of the Court under the guidance of the position set in **Mwita Mhere v. the Republic**, Criminal Application No. 7 of 2011 (Unreported), where the Court when was dealing with the application like the one at hand, had this to say:

"But in application of this nature, the law demands that the applicant should do more than account for the delay. To succeed in showing that he has good

*cause under Rule 10 of the Rules, **it must be shown further that the applicant has an arguable case.***

An arguable case is one that demonstrates that the intended grounds of review is at least one of those listed in Rule 66(1) of the Rules.”[Emphasis added].

In his oral submission, the applicant challenged the decision of the Court on two points. First that, the decision of the Court was reached without considering that the charge sheet was defective, as it did not indicate the name of the victim. Second that, the sentence of 30 years imprisonment which he is currently serving is excessive, as the provisions of the law he was charged with provided for 15 years and 20 years imprisonment as a minimum and maximum sentence, respectively. His claim was somehow supported by Ms. Mitanto though in a different approach. Ms. Mitanto was of the view that, the applicant was supposed to be sentenced to life imprisonment, as that is what the law provided then. She added that, previously, the law did not provide for armed robbery under sections 285 and 286 of the Penal Code. She said, the offence therein was robbery with violence and not armed robbery with which the applicant was charged, convicted and sentenced. She thus prayed for

the application to be granted for the applicant to be punished accordingly.

I am mindful of the position of the law that, the application for review cannot base on reviewing a charge sheet and thus, a mere complaint on charge sheet does not fall squarely on good cause justifying extension of time to lodge review application. In addition, I wish to state that, Rule 66 (1) (a) of the Rules under which the third ground in the Notice of Motion is based requires the application for review to base on a manifest error on the face of record resulting in the miscarriage of justice. It should be noted that, review is neither an alternative to appeal nor a second appeal to the Court by itself.

Having perused the record, I wish to observe that, in the application of this nature, it was not necessary for the applicant to attach the charge sheet as Ms. Mitanto would wish. The attached impugned decision and the applicant's affidavit bear the evidence that the applicant was charged with armed robbery under Sections 285 and 286 of the Penal Code in Criminal Case No. 29 of 2001. However, as stated above, this fact alone does not justify the application. The applicant is obliged to show that there is an error apparent on the face of record resulting in the miscarriage of justice. But, as

indicated earlier, the intention of the applicant in the intended review application is to challenge the charge sheet for being defective and the sentence on the ground that, it is excessive. In my view, the above two grounds fit for appeal and not review. Therefore, they cannot fall squarely on the terms of Rule 66(1)(a) of the Rules preferred by the applicant. For that reason, this ground also fails.

In fine, I find and hold that, the applicant has failed to show good cause to justify his application for extension of time to lodge review application. The application is hereby dismissed.

DATED at DAR ES SALAAM this 13th day of May, 2019.

M.C. LEVIRA
JUSTICE OF APPEAL

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


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL