IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPLICATION NO. 2 OF 2015

MWAMEDI HAMIS @ SAKIS ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for extension of time within which to apply for Review of the judgment of the Court of Appeal)

(Lubuva, Mbarouk and Othman, JJ.A)

dated the 14th day of July, 2008
in
Criminal Appeal No. 97 of 2008

RULING

17th & 29th May, 2019

MWAMBEGELE, J.A.:

On 14.07.2008, the Court (Lubuva, Mbarouk and Othman, JJ.A) dismissed an appeal by the applicant in which he was challenging a conviction of murder and its flanking sentence of death by hanging meted out to him by the High Court sitting at Sumbawanga (Mmilla, J. – as he then was). The applicant wished to challenge the decision by the Court through review but time which he could do that had elapsed. He thus lodged the present application by a notice of motion taken out under rule

10 of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (hereinafter referred to as the Rules) seeking an extension of time within which o lodge an application for review against the said decision. The application is supported by an affidavit deposed by the applicant himself. The respondent Republic, through an affidavit in reply deposes by Annunciatha Leopold, a State Attorney in the Office of the National Prosecution Services, resisted the application by a document titled "counter affidavit".

When the application was placed before me for hearing on 17.05.2019 the applicant appeared in person, unrepresented. The respondent Republic had the services of Ms. Annunciatha Leopold, learned State Attorney.

Fending for himself, the applicant first adopted the notice of motion and the accompanying affidavit and clarified that he was convicted and sentenced to death by the High Court at Sumbawanga in 2006 and the Court of Appeal sitting at Mbeya affirmed the conviction and sentence in 2008. After the Court confirmed his conviction and sentence, he was transferred from Ruanda Prison in Mbeya to Isanga Prison in Dodoma which made the follow-up of the judgment so as to file an application for

review an uphill task. He later got the copy while he was at Isanga but that was when the time frame within which he could lodge an application for review had already elapsed. In sum, he submitted that the delay to file the application within the prescribed time was not due to his own making but because of the transfers from one prison to another. As a prisoner behind bars, he had no control of he said transfers, he argued. He thus prayed that the application be allowed so that he could challenge the decision of the Court in the intended application for review.

For the respondent Republic, Ms. Leopold resisted the application with some considerable force. Having adopted the contents of the affidavit in reply as part of her oral submissions, the learned State Attorney submitted that the application had no merit as the same, in view of the depositions of the applicant in the affidavit in reply, ought to have been appended with an affidavit of the prison officer to verify what was deposed to the effect that the applicant was being transferred from one prison to another. The learned State Attorney, however, had no case law to support her argument. She submitted that the applicant had not brought before the Court good cause to warrant it exercise its discretion under rule 10 of the Rules. To support her arguments, the learned counsel cited **Dani**

Upesi & 2 others v. R., Criminal Application No. 21 of 2013 and **Jackson Kihili Luhinda & another v. R.**, Criminal Application No. 1 of 2013 (both unreported decisions of the Court).

In his brief rejoinder, the applicant submitted that a lawyer at Isanga Prison in Dodoma, a certain Vedasto, swore an affidavit to verify that he received the copy of judgment after time within which he could file an application for review had expired. He added that the Prison Officer in charge of Isanga Prison in Dodoma, one Mwambije, authorised the said Vedasto to swear that affidavit. Even though the affidavit has not been attached, he prayed that his application should not be dismissed for mistakes which were not his.

In determining the present application, let me, first, restate the law in applications for extension of time to file an application for review. This law, upon a plethora of authorities, is, to my mind, settled. In applications of this nature, an applicant must not only show good cause for the delay in terms of rule 10 of the Rules but also must show on which ground or grounds out of the five grounds in para (a) to (e) of rule 66 (1) of the Rules the intended application will be predicated. These two prerequisites must be established cumulatively at the time of applying for extension.

That this is the law was stated in a string of decisions of the Court. These are **Eliya Anderson v. R.,** Criminal Application No. 2 of 2013, **Laureno Mseya v. R.,** Criminal Application No. 8 of 2013, **Deogratias Nicholaus @ Jeshi & Another v. R.,** Criminal Application No. 1 of 2014, **Philmon Zuberi v. R.,** Criminal Application No. 6 of 2014, **Salum Nhumbuli v. R.,** Criminal Application No. 8 of 2014, **Kafuba Mwangilindi v. R.,** Criminal Application No. 15/08 of 2015, **Charles John Mwaniki Njoka v. R.,** Criminal Reference No. 2 of 2014, **Nyakua Orondo v. R.,** Criminal Application No. 2 of 2014 and **African Fish Processors v. Eusto K. Ntagalinda,** Civil Application No. 41/08 of 2018 (all unreported), to mention but a few. In **Laureno Mseya** (supra) for instance, the Court observed:

> *"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 has also established by affidavit evidence, at that stage either explicitly or implicitly, that the review application would be predicated on one or more of the grounds mentioned in Rule 66 (1) and not on mere personal dissatisfaction with the outcome of the appeal ..."*

Likewise, in **Salum Nhumbili** (supra) the Court recited its earlier decision in **Eliya Anderson** (supra) wherein it was held:

> *"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 has also established by affidavit evidence, at the stage of extension of time, either implicitly or explicitly, that if extension is granted, the review application would be predicated on one or more of the grounds mentioned in paragraphs (a) or (b) or (c) or (d) of (e) of Rule 66 (1)."*

In the case at hand, has the application established these two requirements? This is the question to which I now turn. I start with the second requirement. As can be gleaned from the affidavit, the reasons why the applicant could not timely lodge the application for review are that he was being transferred from one prison to another. Nothing is said in the notice of motion and the flanking affidavit in support of the application about rule 66 (1) (a) to (e) of the Rules. The applicant has just burnt a lot of fuel in explaining about the first requirement which must be established in applications of this nature as alluded to above. No reference is made to

rule 66 (1) except for rule 66 (3) which prescribes the time limit of sixty days of the pronouncement intended to be challenged within which an application for review may be lodged in the Court. For this ailment, the present application is misconceived. It must fail.

But before I pen off, let me, briefly, address the question regarding the name of the document lodged to resist the application. Ms. Leopold titled it "counter affidavit". There is no document with such a name in the Rules. What the respondent ought to have lodged was an "affidavit in reply". Be that as it may, I haste the remark that calling the document "affidavit in reply" or "counter affidavit" is a mere matter of nomenclature. It depends on where the document is used. That is to say, an "affidavit in reply" and a "counter affidavit" refers to one and the same document. It is called an 'affidavit in reply' in this Court but the same document will be called 'counter affidavit" in courts bellow. It is a question of nomenclature of no very great importance but a practice founded upon prudence that has been in place since the inception of the Court and thus desirable to follow.

The foregoing finding disposes of this application. It is for this reason that I find no reason to determine on the question whether or not

the applicant has shown good cause for the delay, for, whatever answer not make any difference on the outcome of the application. This is so because, as already said, the two conditions must be established cumulatively.

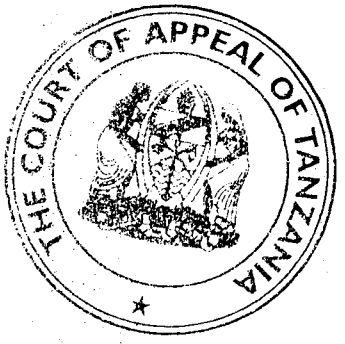
The above said, that is, as the applicant has not shown any grounds under rule 66 (1) paras (a) to (e) on which the intended application for review would be pegged if an enlargement of time is granted, the present application must fail. It is hereby dismissed.

Order accordingly.

DATED at **DAR ES SALAAM** this 24th day of May, 2019.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL