

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CRIMINAL APPLICATION NO. 95/01 OF 2018**

**KALEBI ELISAMEHE ..... APPLICANT**

**VERSUS**

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

**(Application for extension of time to file Review from the**

**decision of the Court of Appeal of**

**Tanzania at Dar es Salaam)**

**(Munuo, Kileo & Mandia, JJ. A)**

**dated 29<sup>th</sup> day of February, 2012**

**in**

**Criminal Appeal No. 315 of 2009**

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**RULING**

10<sup>th</sup> & 18<sup>th</sup> July, 2019

**KWARIKO, J.A.:**

The applicant Kalebi Elisamehe was convicted of the offence of rape contrary to sections 130 (1) (2) (b) and 131 (1) of the Penal Code [CAP 16 R.E. 2002] by the District Court of Monduli and was sentenced to thirty (30) years imprisonment. He unsuccessfully appealed to the High Court. Still protesting his innocence, the applicant filed his appeal to this Court but it was found devoid of merit and accordingly dismissed on 29/2/2012.

Though aggrieved by that decision, the applicant was late to take any necessary step in that regard. He has now filed this application for extension of time to apply for review of that decision. The applicant has preferred this application by a notice of motion taken under Rules 10 and 66 (1) (a) (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules). According to the notice of motion, the application is based on the following ground: -

*That, the delay to file application for review was attributable to the applicant being transferred between three different prisons.*

The notice of motion is supported by the affidavit sworn by the applicant. The relevant paragraphs in the affidavit are summarized hereunder: -

- 1. That, after the impugned judgment was delivered the applicant was transferred from Karanga Prison-Kilimanjaro to Maweni Prison-Tanga, thus failed to take steps to file application for review.*

*2. That, another application similar to the present one was struck out on 24/7/2018 for being incompetent.*

On its part, the respondent Republic did not file any affidavit in reply. At the hearing of the application, the applicant appeared personally, unrepresented while Ms. Neema Moshi and Mr. Adolph Ulaya, learned State Attorneys represented the respondent Republic.

When the applicant was called upon to argue his application, he started by adopting his notice of motion and the supporting affidavit to form part of his oral submission. He further explained that on 13/3/2012 he was transferred from Arusha where his appeal was heard to Karanga prison and later on 9/7/2012 he was again transferred to Maweni prison. As for the grounds for the intended review, which are required to be shown in the notice of motion, he submitted that the same will be raised in the substantive application once this application is granted. He pointed out however, that he intends to challenge the Court's decision on the ground that the Court denied him the right of being heard. He urged the Court to grant his application.

In her reply, Ms. Moshi argued that the delay to file intended application for review is inordinate. She pointed out firstly, that the applicant has not accounted for the period between 24/7/2018 when the previous application was struck out and 4/10/2018, the date on which he filed this application. Secondly, that the impugned decision was given in 2012 and the applicant slept on his right for six unaccounted for years. Ms. Moshi contended that the applicant could have filed the application for review in between the prison transfers. She argued that, the applicant has not shown good cause for the delay as required under Rule 10 of the Rules.

In respect of the grounds for the intended review, Ms. Moshi contended that none has been shown by the applicant as the applicant's affidavit only explains the reasons for the delay. She stressed that the applicant has not shown any of the grounds as stipulated under Rule 66 (1) (a) to (c) of the Rules. To support her contention the learned State Attorney cited the decision of the Court in **Grayson Zacharia Mkumbi @ Mapendo**, Criminal Application No. 12 of 2017 (unreported). She urged the Court to dismiss the application.

In rejoinder, the applicant contended that, the order given on 24/7/2018 did not specify the time limit within which to file another application. However, he argued that, he promptly filed this application after he was supplied with the said order. He went on to argue that, the prison office's stamp in his affidavit connotes that what is contained therein is the truth regarding his transfer different prisons.

Regarding the grounds for the intended review, the applicant argued that the relevant law he quoted is sufficient for now. That, he could not mention the grounds for fear of being used by his opponents.

I have gone through the notice of motion, its supporting affidavit and the submissions for and against the application. The law is now settled that in an application for extension of time to apply for review, the applicant is to fulfill two conditions. **One**, he should show good cause for the delay as per Rule 10 of the Rules, and **two**, he should show one or more of the grounds stipulated under Rule 66 (1) of the Rules as the basis of his intended application. Some of the pronouncements of this Court in that respect are; **Laureno Mseya v. R**, Criminal Application No. 8 of 2013; **Deogratias Nicholaus @ Jeshi and Another v. R**, Criminal Application

No. 1 of 2014; **Nyakuo Orondo v. R**, Criminal Application No. 2 of 2014; **Elinazani Matiko Ng'eng'e v. R**, Criminal Application No. 29/01 of 2015; **Tanzania Fish Processors Limited v. Eusto K. Ntagalinda**, Civil Application No. 41/08 of 2018; **Paulo Mbogo v. R**, Criminal Application No. 111/01 of 2018 and **Karlos Peter v. R**, Criminal Application No. 18/01 of 2018 (all unreported). For example, in **Laureno Mseya v. R** (supra), the Court said thus: -

*"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 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....."*

At this point, the question to be asked herein is whether the applicant has complied with the conditions for the grant of this application. As regards the first condition, there are two aspects of the delay in this case. First, it is the period between the pronouncement of the impugned

decision on 29/2/2012 and 16/8/2017 when the applicant filed Criminal Application No. 30/12 of 2017 which was struck out on 24/7/2018 for being incompetent. The applicant's argument is that, soon after the pronouncement of the impugned decision, he was transferred to Karanga prison on 13/3/2012 where he stayed until he was moved to Maweni prison on 9/7/2012. As rightly submitted by Ms. Moshi, had the applicant really intended to apply for review, he should have done so while at Karanga prison because by simple calculation, he stayed there for four months before he was moved to Maweni prison. He has not accounted for that period.

As if that inaction was not enough, the applicant did nothing for the next five years when he woke up and filed the application for extension of time to apply for review on 16/8/2017. The second period the applicant has not explained is from 24/7/2018 when the former application was struck out and 4/10/2018 when this application was filed. The applicant argued that there was no time limit given for him to file another application. But the Court is satisfied that the applicant did not act promptly and was not diligent enough to pursue his right if at all he was serious with what he had intended to achieve.

The law is settled that in an application for extension of time to do a certain act, the applicant should account for each day of the delay. There is plethora of authorities of the Court on this requirement. Some of them are:

- **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007; **Bariki Israel v. R.**, Criminal Application No. 4 of 2011 and **Bharya Engineering Co. Ltd v. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017 (all unreported). For example, in the case of **Bariki Israel** (supra) it was said thus: -

*"...in an application for extension of time, the applicant has to account for every day of the delay."*

The foregoing shows that the applicant has failed to show good cause for the delay which is the first condition precedent for this application to succeed.

In relation to the second condition, the applicant was required to show a ground or grounds upon which he intends to base his application. The grounds upon which an application for review may be predicated are stipulated under Rule 66 (1) (a) to (e) of the Rules. That Rule provides as follows: -



*"The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds: -*

- (a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or*
- (b) a party was wrongly deprived of an opportunity to be heard;*
- (c) the court's decision is a nullity; or*
- (d) the court had no jurisdiction to entertain the case; or*
- (e) the judgment was procured illegally, or by fraud or perjury."*

In this application, neither in the notice of motion nor in his affidavit, has the applicant shown any of the above-mentioned grounds for the intended review. It is only in the submission at the hearing of the application did the applicant say that, although he was there when the appeal was called for hearing, the Court denied him opportunity of being heard. It is my considered view that this is an afterthought. The applicant should have raised this ground in the notice of motion and explain it in the affidavit.

The applicant's contention that he did not mention the grounds for the intended application for fearing that to do so would prejudice him is equally untenable.

Finally, on the basis of the foregoing, there is no gainsaying that the applicant has not only failed to account for the long delay but has also not been able to show the grounds for the intended review. For these reasons the application is lacking in merit. The same is thus hereby dismissed.

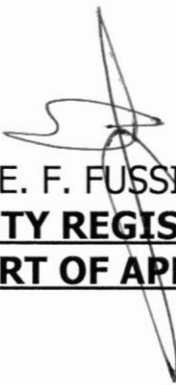
It is so ordered.

**DATED at DAR ES SALAAM this 16<sup>th</sup> day of July, 2019.**

M. A. KWARIKO  
**JUSTICE OF APPEAL**

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



  
E. F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**