

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CRIMINAL APPLICATION NO. 29/01 OF 2017

ELINAZANI MATIKO NG'ENG'E.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Application for extension of time to apply for Review of the
decision of the Court of Appeal of Tanzania
at Dar es Salaam)**

(Mbarouk, Mwarija, And Lila, JJ.A.)

**dated the 10th day of March, 2017
in
Criminal Appeal No. 241 of 2012**

RULING

10th & 18th June, 2019

KWARIKO, J.A.:

The applicant Elinazani Matiko Ng'eng'e was convicted of murder of his wife by the High Court of Tanzania at Dar es Salaam (Aboud, J) and sentenced to suffer death by hanging. His appeal before this Court was dismissed on 10/3/2017. Still undaunted, the applicant intends to challenge that decision by way of a review. To that end, by a notice of motion, he has filed this application for extension of time to apply for the review in terms of Rules 10 and 66 (3) of the Tanzania Court of Appeal

Rules, 2009 (the Rules). The application is also supported by the affidavit of the applicant. The notice of motion has been predicated upon the following grounds: -

(a) That the applicant filed application for review on time through the Officer in Charge of Ukonga Central Prison but the same was not lodged due to non-compliance with Rule 66 (1) of the Tanzania Court of Appeal Rules, 2009.

(b) That the applicant be given opportunity to address irregularities of the decision of the trial court and of the Court which have caused injustice to him.

In his affidavit in support of the notice of motion, the applicant reiterated his grounds listed above. He added that, the Registrar of the Court of Appeal informed him through a letter he annexed as EM1 that his application for review was short of the requirements of Rule 66 (1) of the Rules hence could not register it. The respondent did not file any affidavit in reply.

When the application was called on for hearing on 10/6/2019, the applicant appeared personally, unrepresented while Mr. Ramadhan Kalinga, learned State Attorney, represented the respondent.

In arguing the application, the applicant first prayed to adopt the notice of motion and the accompanying affidavit to form part of his oral submissions. He further reiterated his affidavit evidence and added that the decision of this Court contains errors as it did not consider the evidence of the post-mortem report.

On his part, Mr. Kalinga opposed this application and went on to submit that, because the applicant intends to challenge the decision of the trial court, essentially, he wants the Court to re-open the appeal process. Further, the applicant has not mentioned the alleged irregularities either in the notice of motion or the affidavit, argued Mr. Kalinga. To bolster his argument, he cited the decision of the Court in **Grayson Zacharia Mkumbi @ Mapendo v. R**, Criminal Application No. 12/01 of 2017 (unreported). The learned counsel added that the applicant did not give grounds for review as required under Rule 66 (10 (a) to (e) of the Rules. That, the applicant neither showed that he has

chances of success in the intended review. To that end, he referred the Court to its decision in **Karim Kiara v. R**, Criminal Application No. 4 of 2007 (unreported).

On the other hand, the learned State Attorney was of the view that, the applicant has sufficiently explained the reason for the delay to apply for the review. However, in the end Mr. Kalinga argued that the application is devoid of merit and prayed for it to be dismissed.

The applicant did not have anything new to submit in his rejoinder. He insisted on his earlier submissions.

I have considered this application in the light of the opposing submissions from both parties. The law is now settled that in an application for extension of time to apply for review, the applicant is required not only to show good cause for the delay as per Rule 10 of the Rules, but also to show one or more grounds for review as shown under Rule 66 (1) of the Rules. Some of the decisions of this Court in that respect are; **Elia Anderson v. R**, Criminal Application No. 2 of 2013; **Anyelwisye Mwakapake v. R**, Criminal Application No. 1 of 2014;

Hamisi Angola v. R, Criminal Application No. 6 of 2015; **Aziz Mohamed & Another v. R**, Criminal Application No. 4 of 2015; **Jirani Maarufu v. R**, Criminal Application No. 8 of 2013 and **Tanzania Fish Processors Limited v. Eusto K. Ntagalinda**, Civil Application No. 41/08 of 2018 (all unreported). For instance, in **Elia Anderson 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 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 of the grounds mentioned in paragraphs (a) or (b) or (c) or (d) or (e) of Rule 66 (1)."

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 10/3/2017 and the date the former application

for review was denied registration on 9/5/2017. It is my considered view that the applicant who is in prison with controlled movements, has been able to account for this delay as he had been diligently pursuing his case.

However, upon perusal of the court record, it shows that this application was filed on 14/8/2017 though by 19/5/2017 the applicant was aware that his application for review was not registered as it did not meet requirements of the law. If that is the case, the applicant has not been able to account for the second aspect of the delay which is the period between 19/5/2017 and 14/8/2017 when he filed this application. This is a long period and the Court cannot just gloss it over. It is settled law that each day of delay should be accounted for. In the case of **Hassan Bushiri v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), the Court said thus:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".

Thus, it is clear that the applicant has failed to meet the first condition for the grant of this application.

As regards the second condition, I will let Rule 66 (1) (a) to (e) of the Rules speak 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 the instant case the applicant's ground for intended review raised in the notice of motion says thus: -

"That the applicant be given opportunity to address irregularities of the decision of the trial

court and of the Court which have caused injustice to him”.

As rightly argued by Mr. Kalinga, the applicant’s intention to challenge the proceedings of the trial court would amount to re-opening the appeal before this Court which has already been disposed of. See also the decision of the Court in **Kiara Kiama v. R**, Criminal Application No. 04 of 2007 (unreported). Further, the applicant did not say which among the grounds in Rule 66 (1) of the Rules the ground raised in the notice of motion has been predicated upon.

During the hearing of the application, the applicant tried to impute that the Court committed an error by not considering the evidence of the post-mortem report. However, this matter was not raised in the notice of motion or affidavit for the other party to get opportunity to respond to it. However, even if the applicant has raised this issue in the application, he would not have an arguable case because the issue of post-mortem report was dealt with by the Court where it was said at page 21 of the judgment as follows: -

"We find merit in the 8th ground of appeal, and for that reason of non-compliance with the requirements under section 291 (3) of the CPA, we expunge the post mortem report (Exh. P. 2)."

[See also the decision in **Aziz Mohamed & Another v. R**, (supra)].

Conclusively, I am settled in my mind that the applicant has not only failed to account for the delay but also has not been able to show the grounds for the intended review. The application is lacking in merit and it is hereby dismissed.

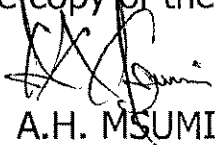
It is ordered accordingly.

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

M. A. KWARIKO
JUSTICE OF APPEAL

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




A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL