

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MTWARA**

**CRIMINAL APPLICATION NO. 93/07 OF 2019**

**ALLY MOHAMED MKUPA.....APPLICANT**

**VERSUS**

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

**(Application for Extension of time to Apply for Review from  
Judgment of the Court of Appeal of Tanzania at Mtwara)**

**(Mbarouk, Bwana, Massati, JJA.)**

**dated the 12<sup>th</sup> day of October, 2010**

**in**

**Criminal Appeal No. 2 of 2008**

**.....**

**RULING**

24<sup>th</sup> October & 6<sup>th</sup> November, 2019.

**SEHEL, J.A.:**

The applicant, Ally Mohamed Mkupa, was an appellant in Criminal Appeal No. 2 of 2008. That appeal was against the decision of the High Court of Tanzania at Mtwara that upheld the decision of the District Court of Mtwara in which the applicant was convicted with an offence of raping a five years old girl, contrary to sections 130 and 131 of the Penal Code, Cap.16 RE 2002. He was sentenced to life imprisonment. The said appeal to this Court was dismissed on 12<sup>th</sup> day

of October, 2010. The applicant wants to file review but he was late thus the present application.

By a notice of motion made under Rules 10, 48 and 66 (1) (a) of the Court of Appeal Rules, 2009 (the Rules), the applicant is seeking an extension of time within which, he can file an application for review against the decision of the Court. Sincerely, the applicant's application tasked my mind very much in trying to figure out the gist of his application. I say so because he pegged his application under the provision for extension of time but the prayers and the grounds in his notice of motion are for review. Likewise, his affidavit talks about review. Part of his notice of motion reads:

***"FOR AN ORDER:***

- 1. That the Hon. Court may be pleased to review the proceedings of the subordinate court, High court and court of appeal.*
- 2. That to allow the review on the manifest errors and to quash, set aside the conviction and sentence, and to grant me with an acquittal.*

***ON THE GROUNDS:***

1. *That the decision of the court leaves a lot of doubt that goes to the manifest errors, in that, whether the evidence of PW1, PW2, and PW6 were sufficient enough to ground conviction on the appellant;*
2. *That the decision of the court relied on the appellant's conduct of taking the child to NAUMBU Dispensary.*
3. *That the decision of the Court was based on the appellant's own admission and the credibility of PW1, PW2, and PW6."*

And his affidavit in support of the application reads as follows:

1. *"That I am the applicant in this application and therefore conversant with the facts I am about to depose.*
2. *That I was an accused person in the District court of Mtwara at Mtwara in original criminal case No. 220 of 2002 where I was charged and found guilty of rape contrary to sections 130 and 131 of the Penal Code Chapter 16 of the Laws of Tanzania as amended by Act No. 4 of 1998 and sentenced to life imprisonment.*

3. *That I appealed to the High Court of Tanzania at Mtwara against both the conviction and sentence but my appeal was also dismissed.*
4. *That being aggrieved by both judgment of the High Court and the Court of Appeal of Tanzania delivered on 2<sup>nd</sup> day of March, 2003 and 13<sup>th</sup> day of October, 2010, respectively, do hereby humbly prays for review on the grounds and facts appraising:-*
  - a) *The decision was based on manifest errors on the face of the record resulting in miscarriage of justice, and*
  - b) *The court decision is a nullity."*

The application is resisted by the respondent/Republic in the affidavit in reply that was sworn by Wilbroad Ndunguru, learned Senior State Attorney.

When the application came for the hearing, the applicant was present in person fending for himself, whereas, Mr. Wilbroad Ndunguru, learned Senior State Attorney entered appearance for the respondent/Republic.

Upon being invited to expound his grounds, the applicant opted to allow the respondent to respond first before he could respond if need arose.

From the outset, Mr. Ndunguru opposed the application. Elaborating the reasons for not supporting the application, Mr. Ndunguru argued in terms of Rule 10 of the Rules, the Court can exercise its discretionary power in granting extension of time if there is a good cause advanced by the applicant. Nonetheless, in the application at hand, according to the notice of motion the reason stated by the applicant was a manifest error without any further explanation of that manifest error. He argued, even in his affidavit the applicant failed to advance good cause for the Court to grant the requested extension of time. According to Mr. Nduguru the ground of manifest error does not fall within the ambit of "reasonable cause" as envisaged under Rule 10 of the Rules. To bolster his argument, he referred me to the decision in the case of **Joel Silomba v. Republic**, Criminal Application No. 5 of 2012 (unreported) where this Court laid down factors to be considered in an application for extension of time.

He also cited the case of **Republic v. Yona Kaponda & 9 Others** [1985] TLR 84. With that submission, he prayed for the application to be dismissed for failure to account for the four years delay.

In rejoinder, the applicant pleaded ignorance of the law that he is a lay person and he is at the mercy of the Prison authorities as such he depended much on their services. He argued that the cause for delay in lodging the application for review was not of his own making since he expressed his desire to the Prison authorities to seek for review way back in 2010. He insisted that he be granted the sought extension of time.

From the submission, the issue before me is whether, the applicant in this application has advanced good cause for the grant of the extension of time. The governing provision under which this application is made, that is, Rule 10 of the Rules provides:

*"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 in these Rules to any such time shall be construed as a reference to that time as so extended."*

From the above, the Court has powers to extend time for doing of any act that a party has failed to do within the prescribed time. The exercise of that power is discretionary which has to be exercised judiciously. Acting judicially is to act for good cause or sufficient reason. See the case of **Martha Daniel v. Peter Thomas Nko** [1992] TLR 35.

What amounts to good cause has not been defined but certain factors have to be taken into consideration in determining whether to grant or refuse extension of time. The factors, as rightly submitted by Mr. Ndunguru, have been laid in the case of **Joel Silomba v. Republic** (supra) at page 3 which are:

- i) "the length of the delay;*
- ii) the reason for the delay, was the delay caused or contributed by dilatory conduct of the applicant?;*

- iii) whether there is an arguable case, such as, whether there is point of law or the illegality or otherwise of the decision sought to be challenged; and/or*
- iv) the degree of prejudice to the opposite party if the application is granted.”*

It is the position of the law that application for review has to be filed within sixty (60) days from the date of delivery of judgment. The applicant in the present application ought to have filed his application for review latest by 12<sup>th</sup> December, 2010. However, he did not file it in time and that is why he has filed the present application for extension of time. It was filed on 16<sup>th</sup> day of July, 2015 almost after the lapse of more than four years and six months counting from the last date he was supposed to lodge his application for review. Admittedly, there was delay of a delay of four years and six months.

The ensuing question then is whether the applicant has provided any reason for that delay. Applying the factors set out in the case of **Joel Silomba v. Republic** (supra) there is no single explanation stated by the applicant in his notice of motion as extracted herein.



Likewise, the applicant has failed to account for a single day in his affidavit.

It is the requirement of the law that, in an application for extension of time, the applicant has to account for each day of the delay. See: **Mohamed Athumani Vs Republic**, Criminal Application No. 13 of 2015 (unreported).

In his rejoinder, the applicant associated the delay to the Prisons authorities, suggesting that it was not caused by his dilatory conduct. Unfortunately, that contention is in no-where to be found in his notice of motion. It is not even stated in his affidavit in support of the application. I am, therefore, inclined to hold that, the idea by the applicant to have expressed his desire for review to the Prison authorities is an afterthought.

Since in this application, the applicant has failed to advance any reason let alone good cause to warrant the exercise of judicial discretion, I am constrained to find that the inordinate delay of four years and 6 months was due to the dilatory conduct of the applicant.

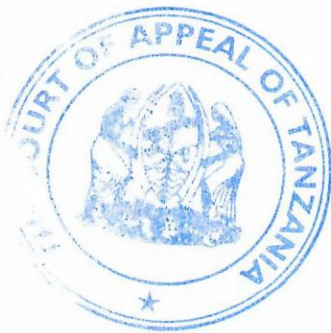
In the upshot, the application for extension of time is found to be wanting of merit and has to fail. It is hereby dismissed.

Order accordingly

**DATED** at **MTWARA** this 5<sup>th</sup> day of November, 2019.

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

The ruling delivered this 6<sup>th</sup> day of November, 2019 in the presence of the applicant in person, unrepresented and Mr. Abdulrahaman Msham, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



*S. J. Kainda*  
S. J. Kainda  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**