

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

CRIMINAL APPLICATION NO. 102/13 OF 2018

JOSEPH MAGINGO.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Application for extension of time to lodge Review out of time from the
decision of the Court of Appeal of Tanzania
at Iringa)**

(Mbarouk J.A., Mmilla J.A., And Mwarija J.A.)

**Dated the 27th day of August, 2015
in
Criminal Appeal No. 223 of 2014**

RULING

30th April & 8th May 2019

WAMBALI, J.A.:

In the District Court of Songea, the applicant was charged and convicted with the offence of rape contrary sections 130(1) (2) (e) and 131 (2) of the Penal Code, Cap 16 R.E 2002. He unsuccessfully appealed to the High Court. Aggrieved by the decision of the first appellate court, he lodged his second appeal before the Court of Appeal, but the same was dismissed in its entirety. The applicant still protested his innocence and filed his application for review, but on the hearing date (9/10/2017), he prayed to withdraw the same. His prayer was accordingly granted

and the Court marked the application to have been withdrawn under Rule 58(3) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

That withdrawal however, did not hinder the applicant to access the Court. He is thus currently before the Court seeking an order for extension of time within which he can lodge an application for review out of time. The application has been preferred under Rules 10 and 48 (1) of the Rules, through a notice of motion supported by the affidavit of Mr. Joesph Magingo, the applicant.

At hearing of the application, the applicant appeared in person, unrepresented, while Ms. Tumaini Ngiruka learned State Attorney, appeared for the respondent Republic.

To emphasizes his desire to apply for review, the applicant submitted that he has acted promptly in filling his application for extension of time within which to file an application for review. He explained further that he earlier filed his application for review on time after the judgment of the Court was delivered, but the said application contained some defects and as a result he prayed to withdraw the same. His prayer was granted as alluded above.

The applicant emphasized that he still have interest to pursue his application for review, but he is out of the prescribed time that is why he has brought the present application seeking extension of time. He therefore adopted the notice of motion and affidavit and urged me to consider specifically the reasons advanced in paragraphs 4 and 6 of his affidavit and grant the application.

On his part, Ms. Ngiruka, protested the application. The major reason being that, the applicant has not furnished good cause as required by Rule 10 of the Rules to warrant the grant of the application sought. She submitted that as per the referred paragraphs of the applicant's affidavit, there is nothing which has been stated to justify the extension of time due to the delay from 9th October, 2017 to 6th August, 2018 when he lodged the present application.

Ms. Ngiruka thus concluded that apart from the failure to account for the cause of delay, generally the applicant has not shown or indicated any legal issue which would be considered by the Court as the basis of seeking review as required by Rule 66 (1) of the Rules if the application for extension of time is granted. She thus prayed that the application be dismissed.

The pertinent issue to be determined is whether the applicant has demonstrated good cause to warrant the Court to exercise its judicial discretion under Rule 10 of the Rules. For the sake of guidance Rule 10 states as follows:

"The Court may, upon good cause shown, extend 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 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 so extended."

No one can doubt the fact that as per the cited rule above, extension of time can be granted upon establishing good cause for delay. However, what amount to "good cause" has not being defined in the Rules. In most cases it will depend on the circumstance of a particular case. Hence, the Court has a wide discretion to grant extension of time depending on the nature and circumstance of each case. The applicant must therefore convince the Court that good cause for the delay exist. It is in this regard that in **Tanga Cement Company**

6 of 2001 (unreported) the Court stated that:

“what amount to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant”.

In the present application, it is without question that the same has been unduly delayed for almost ten months. As pointed out by the applicant, his earlier application for review was marked withdrawn on 9th October, 2017. However, despite the fact that the applicant has indicated that even after he withdrew that application he was still interested to challenge the judgment of the Court on review, his current application was filed on 6th August, 2018 which was after almost ten months elapsed.

Yet, the main reason for delay advanced by the applicant as it can be gathered under paragraph 4 of his affidavit is that he lodged his application for review in time, but the same was withdrawn and he acted promptly to file this application. Indeed, in paragraph 6 of his

affidavit he stresses that his delay to file this application in time is beyond his control as he is under the prisons authority and therefore he depends on them for everything.

It is noted that the applicant's prayer to withdraw his application for review was due to the fact that the same had some errors. Thus, the withdrawal immediately left him in a position of rendering his further application for review to be out of time. In the circumstance, he was in good position and enjoined to immediately file his application for extension of time to lodge review out time instead of waiting for ten months. Unfortunately, the applicant did not act promptly and diligently to lodge the same in time. Moreover he has not categorically accounted through his affidavit the major cause of his delay for the whole period stated above.

I have also seriously taken note of the argument that the applicant is a prisoner under custody and that he depended much on the prisons authority. However, the applicant has failed to account for the delayed days from 9th October, 2017 when he withdrew his application for review to 6th August, 2018 when he lodged this application for extension of time. Even if it is taken that the period from 20th July, 2018

when he signed his notice of motion and handed over the same to the prison officer to 6th August, 2018 should be excluded from the limitation period, still he would not have sufficiently accounted for the period of delay from 9th October, 2017 to 20th July, 2018. Moreover, his affidavit is silent on the reasons for delay from 9th October, 2017 to 6th August, 2018.

I therefore think that he cannot validly blame the prison authority on the delay. Indeed, his affidavit has not indicated that he handed this application to the responsible Prison officer before 20th July, 2018 to entitle him to shift the blame to the prisons authority.

Another requirement which the applicant was required to show is to indicate under which paragraphs of Rule 66(1) of the Rules, his application for review will be based, once extension of time is granted.

In the present application, it is evident that the applicant has not at all neither indicated in his notice of motion nor deposed in his affidavit if the intended application for review will be predicated upon any paragraph of Rule 66 (1) (a) to (e) of the Rules. I wish to draw inspiration from the decision of this Court in **Gibson Madenge v. The**

Republic, Criminal Application No. 3 of 2012 (unreported) in which it was stated that an applicant who files an application under Rule 10 of the Rules for extension of time to file review, should not only state in his notice of motion or in the affidavit filed in support thereof, the grounds for delay, but should also show that his application is predicated upon one or more grounds of review listed under Rule 66(1) of the Rules.

Moreover, the Court in **Nyakua Orondo v. The Republic**, Criminal Appeal No.2 Of 2014 (unreported) elaborated that the applicant in the application for extension of time to file review must show that when the application is granted the review will be predicated in one of the grounds enumerated in Rule 66(1) of the Rules.

The rationale behind the requirement is that the Court is strictly enjoined to entertain a review on the basis of one or more of the five grounds prescribed in Rule 66(1) (a) to (e) of the Rules. As such, it would be futile to grant extension of time to apply for review when the Court is not certain if the intended application would be based on either of those grounds. Indeed, it will be a disguised attempt to re-open the appeal to suit the needs and convenience of the intended applicant.

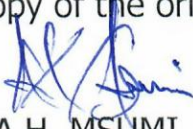
In view of the aforesaid, I am settled that the appellant has tremendously failed to account for the inordinate delay of the period between 9th October, 2017 to 19th July, 2018 and to show that he intends to apply for review in which grounds(s) of Rule 66(1) (a) to (e) of the Rules. I therefore agree with the submission of the learned State Attorney for the respondent Republic that the application deserves an order of dismissal. In the event, I find that the application is not merited and it is accordingly dismissed.

DATED at **IRINGA** this 6th day of May, 2019.

F. L. K. WAMBALI
JUSTICE OF APPEAL

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




A.H. MSUMI

DEPUTY REGISTRAR
COURT OF APPEAL