

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPLICATION NO. 65/08 OF 2019

SIJAONA S/O KAYANDA @ TRAIPHONAPPLICANT

VERSUS

THE REPUBLICRESPONDENT

**(Application for extension of time to appeal from the Judgment
of the High Court of Tanzania at Mwanza)**

(Mchome, J.)

dated the 13th day of July, 2004

in

Criminal Appeal No. 12 of 2004

.....

RULING

30th & 31st March, 2020

NDIKA, J.A.:

The applicant, Sijaona s/o Kayanda @ Traiphon, seeks under Rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules"), on a second bite as it were, an order in respect of the following: one, that time be enlarged to enable him to institute an appeal; two, that the Registrar of the High Court should supply him the record of appeal for him to draw up and file a Memorandum of Appeal; and finally, that he be acquitted should the Registrar fail to supply him the record of appeal. The application is founded upon two affidavits, one sworn to by the

applicant and the other deposed to by Cpl. David T. Elizeus, an officer of Butimba Central Prison where the applicant sojourned. In response, the respondent lodged an affidavit in reply deposed to by Ms. Magreth Bernard Mwaseba, a State Attorney in the office of the respondent.

When the matter was placed before me for hearing, the applicant appeared in person, self-represented. On the adversary side, Ms. Mwaseba entered appearance.

I wish to remark at the outset that the Court's power under Rule 10 cited as an enabling provision for this application is explicitly circumscribed to extending time for the doing of any act authorized or required by the Rules. For ease of reference, I extract the said rule thus:

*"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."[Emphasis added]

Rule 10 as excerpted above is straightforward. As rightly submitted by Ms. Mwaseba, the above provisions are so clear that the second and third prayers as enumerated above do not fall within the ambit of Rule 10. They are manifestly ill-advised and I will disregard them.

The applicant avers in his accompanying affidavit, so far as it is relevant to his first prayer, that on 21st October, 2001 he was convicted by the District Court of Geita on two counts of robbery with violence and rape and that he was sentenced to fifteen years' imprisonment on each count, both sentences being ordered to run concurrently. On appeal vide Criminal Appeal No. 12 of 2004, the High Court (Mchome, J.) upheld the convictions as well as the sentence on the first count. Moreover, the court enhanced the sentence on the second count to life imprisonment. Still dissatisfied, he duly lodged a notice of intention to appeal to this Court. By that notice, Criminal Appeal No. 263 of 2006 was instituted.

Furthermore, the applicant bemoans that since the institution of the appeal in 2006 he has not been served with the record of appeal

thereof and, consequently, the appeal is yet to be heard. That he submitted several letters to the Registrar of the High Court requesting to be supplied with copies of the proceedings of the High Court and the judgment handed down by Mchome, J. but with no success. And that he filed Miscellaneous Criminal Application No. 82 of 2017 in the High Court seeking extension of time to appeal to this Court but the High Court (Rumanyika, J.) struck out the matter on the reason that it was frivolous and vexatious.

Addressing the Court on the merits of the application, the applicant reiterated the contents of the notice of motion and the supporting affidavits. He particularly deplored the High Court's failure to supply him copies of the judgment and proceedings of that court sought to be challenged. He thus urged that he be allowed to appeal against the decision of Mchome, J. alluded to earlier. When probed by the Court if he was aware that his appeal, Criminal Appeal No. 263 of 2006, was withdrawn on 20th July, 2012 under Rule 77 (1) of the Rules, he denied that fact and insisted that the said appeal was still pending.

Ms. Mwaseba, on the part of the respondent, countered that the application disclosed no good cause for the delay. Citing the decision of a single Justice of the Court in **John Lazaro v. Republic**, Criminal Application No. 34/04/2017 (unreported) for the proposition that an applicant for extension of time must account for each day of delay, she argued that the application does not account for the delay. Reacting to the information that the applicant's appeal, Criminal Appeal No. 263 of 2006, was withdrawn, the learned Senior State Attorney contended that the withdrawal of the appeal under Rule 77 (1) of the Rules rendered the appeal deemed dismissed. On that basis, she argued, the applicant's pursuit of extension of time to appeal is plainly misconceived. She thus urged that the matter be struck out.

Rejoining, the applicant repeated his plea that the matter be granted and that he be issued with the documents alluded to earlier.

Having heard the arguments of the parties, I think it is necessary to put the applicant's averments in the proper perspective. It is clear that he is seeking extension of time to lodge a notice of appeal, which, in terms of Rule 68 (1) of the Rules, institutes an appeal. The justification

for that course is that despite instituting an appeal (i.e., Criminal Appeal No. 263 of 2006) after he lodged his notice of appeal, no appeal or record thereof has been forthcoming. The sticking issue, then, is whether this narrative constitutes a good cause for extending time.

I am decidedly of the view that this matter is clearly misconceived. To begin with, I accept the applicant's assertion that he duly lodged a notice of appeal to manifest his intention to challenge the judgment handed down by Mchome, J. That being the case, his appeal against the said judgment was duly instituted in terms of section 61 (1) of the Tanzania Court of Appeal Rules, 1979 (now Rule 68 (1) of the Rules). There is no doubt that he is aware of this position as he has acknowledged in his supporting affidavit that the appeal was registered as Criminal Appeal No. 263 of 2006.

In terms of Rule 64 (1) read together with Rule 69 (1) of the 1979 Rules, the Registrar of the High Court was required, as soon as practicable after the notice of appeal was lodged, to prepare the record of appeal and cause a copy thereof to be served on the appellant and on the respondent. The applicant contends that no appeal or record thereof

has been forthcoming. In my opinion, the alleged failure by the Registrar to fulfil his duty to prepare and serve a record of appeal cannot constitute a ground for enlarging time for the applicant to lodge another notice of appeal. The proper approach should have been to remind the Registrar to do his part, if, indeed, it is true that he is yet to comply with the provisions of the rules cited above.

Apart from the foregoing, I indicated earlier that the applicant's Criminal Appeal No. 263 of 2006 was withdrawn on 20th July, 2012 vide an order of the Court. The applicant fearlessly disputed this fact, but I take judicial notice of the order concerned in terms of section 59 (1) (a) of the Evidence Act, Cap. 6 RE 2002 as proof of the appeal's withdrawal. I agree with Ms. Mwaseba that the withdrawal of the appeal under Rule 77 (1) of the Rules resulted in the appeal being deemed dismissed. In this sense, the difficulty facing the applicant's quest for having his day in this Court on a second appeal appears to be more compounded. In any case, the provisions of Rule 10 do not provide an avenue for resurrecting an appeal that is deemed dismissed as explained.

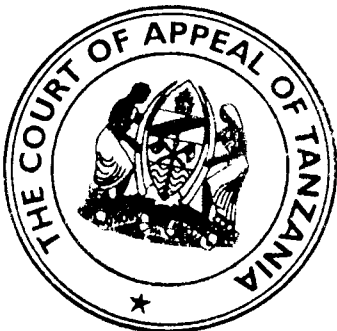
I might have extreme sympathy for the applicant but, for the reasons as explicated above, I cannot accede to his prayer for extension of time. In the result, this application is misconceived. It is thus struck out.


It is so ordered.

DATED at MWANZA this 30th day of March, 2020.

G. A. M. NDIKA
JUSTICE OF APPEAL

The ruling delivered this 31st day of March, 2020 in the presence of the Applicant in person and Mr. Paschal Marungu, learned Senior State Attorney for the respondent is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL