

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

LINKED TO TABORA SUB-REGISTRY VIA VIDEO CONFERENCING FACILITY

CRIMINAL APPLICATION NO. 67/11 OF 2017

JOSHUA MALENDEJA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Application for extension of time to lodge an application for review out of
time against the decision of the Court of Appeal of Tanzania at Tabora)**

(Mbarouk, Mandia, Mmilla, JJA.)

dated the 17th day of September, 2013

in

Criminal Appeal No. 40 of 2012

RULING

04^h March, & 23rd April, 2020

KEREFU, J.A.:

By Notice of Motion the applicant herein has brought this application for extension of time to lodge an application for review under Rule 10 of the Tanzania Court of Appeal Rules, 2009, (the Rules). The application is supported by an affidavit deponed by the applicant. On the other hand, the respondent has filed an affidavit in reply opposing the applicant's application.

In the notice of motion, the applicant has advanced the following grounds, that:-

- (a) The application for review out of time upon extension of time be allowed;*
- (b) The previous application for review lodged before the Court, Criminal Application No. 11 of 2014 which was lodged within time was struck out on 20th September, 2017 for being incompetent; and*
- (c) Any other order that this Court may deem fit and just to grant.*

For a better understanding of this application, I find it apposite to narrate, albeit briefly, that the applicant was charged and convicted by District Court of Maswa with the offence of rape contrary section 130 (2) (e) and 131 of the Penal Code, Cap 16 R.E 2002 and sentenced to thirty years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court of Tanzania at Tabora vide Criminal Appeal No. 196 of 2006. Still contesting his innocence, he appealed to this Court in Criminal Appeal No. 40 of 2012 but the said appeal was dismissed. After observing errors in the said judgment, he immediately and within time lodged an application for review of the said judgment. However, his application was struck out on account of incompetence, hence this application for extension of time to file application for review out of time.

At the hearing of the application, the applicant appeared in person, unrepresented, whereas the respondent was represented by Mr. Tumain Pius Ocharo, learned State Attorney.

When invited to address the Court, the applicant after adopting his notice of motion and the supporting affidavit, opted to hear from the respondent first, and thereafter would make a rejoinder, if would find it necessary.

Upon taking the floor, Mr. Ocharo commenced by fully adopting the contents of his reply affidavit to form part of his oral submissions. He then stated that, he is opposing the application because the applicant has not given sufficient reason for the delay. He specifically referred to paragraph 5 of the supporting affidavit and argued that, the reasons stated by the applicant to prefer an application for review is that there are incurable irregularities in the impugned decision. He argued that, an incurable irregularity is not one of the grounds for review envisaged under Rule 66 of the Rules. He as such prayed for the application to be dismissed.

Upon being probed by the Court as whether paragraphs 6, 7 and 9 of the reply affidavit are related to this application, Mr. Ocharo

conceded that those paragraphs are raising matters which are not related to the applicant's application, but a different application which is not before the Court. As such, he prayed for the said paragraphs to be expunged from the record of this application.

In a brief rejoinder, the applicant reiterated the contention put forward in the notice of motion and the supporting affidavit. It was his strong argument that what he has submitted in those documents constitutes good cause to warrant grant of the application. He argued further that, he being a prisoner behind bars he had no control of the process of lodging or even making follow up on the application as he depends much on the Prison authority. As such, he prayed that the application be granted to allow him to lodge the intended application for review out of time.

From the contents of the notice of motion and the supporting affidavit together with the rival submissions by the parties, there is only one issue for determination; whether or not the applicant has established good cause for grant of this application. I wish to note that, the law is settled that in an application for extension of time, the

applicant is required to show good cause as per Rule 10 of the Rules.

For avoidance of doubt, the said Rule provides that:-

*“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 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].*

Under the above cited provision of the law, the requirement which the applicant has to satisfy is to show good cause for the delay in filling the application. There are numerous authorities to this effect and some of them include, **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** (2006) TLR 235, **Wankira Benteel v. Kaiku Foya**, Civil Reference No. 4 of 2000 and **Attorney General v. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 at pg 11 (unreported), to mention but a few.

In exercising its discretion to grant extension of time, the Court considers crucial factors, which are not necessarily exhaustive but at the moment they include; *cause of the delay, length of the*

delay, whether or not the applicant has accounted for the delay and degree of prejudice that the respondent may suffer if the application is granted and whether there is illegality or any issue of law of sufficient public importance in the decision sought to be challenged.

See for instance **Saidi Ambunda v. Tanzania Harbours Authority**, Civil Application No. 177 of 2004, **Regional Manager Tan Roads Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 and **Lyamuya Construction Co. Ltd v. Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (all unreported). It is therefore the duty of the applicant to provide relevant material facts in order for the Court to exercise its discretion.

In the current application, I have had an opportunity to peruse through the documents submitted by the applicant and there is no dispute that, the decision of the Court (Criminal Appeal No. 40 of 2012) sought to be reviewed was delivered on 17th September, 2013. It is also on record that, immediately, after discovering that the said decision has incurable irregularities, he lodged his application for review, Civil Application No. 11 of 2014, but it was struck out on 20th

September, 2017 for being incompetent and he lodged this application in November, 2017. All his efforts towards the said review could not succeed. Thus, he did not have any other option than to lodge this application for extension of time.

It is on record that the application by the applicant has been opposed by the respondent by lodging a reply affidavit. With respect, I have perused the said affidavit, but the same is not responding to the application before the Court. It is obvious that the respondent opposed the current application by using facts from a different application. In the event, and though, Mr. Ocharo had since conceded to this fact and asked me to only expunge paragraphs 6, 7 and 9 of the reply affidavit, but I find the entire affidavit to be misconceived. In the circumstances, and considered a fact that the applicant herein did not stay idle, as he took action immediately after the impugned decision was handed down on 17th September, 2013 and since then he was prosecuting matters before the Court, I find the reasons he adduced herein to amount to a good cause for the delay.

In addition, I am mindful of the position taken by the Court in various decisions where the Court considered the situation of

prisoners that they are not free agents who can freely make follow-ups on their matters; and thus granted applications for extension of time. See for instance cases of **Otieno Obute v. The Republic**, MZA. Criminal Application No. 1 of 2011; **Joseph Sweet v. The Republic**, Criminal Appeal No. 11 of 2017 and **Fabian Chumila v. The Republic**, Criminal Application No. 6/10 of 2019 (all unreported). Specifically, in **Otieno Obute** (supra) while granting extension of time to the applicant who was a prisoner, the Court stated that:-

*"I have considered the averments by both parties and come to the conclusion that this application has merit ... **As a prisoner, his rights and responsibilities are restricted.** Therefore, he did what he could do. **He may have been let down by reasons beyond his means...** Accordingly, the application is granted."* [Emphasis added].

Likewise, in the current application, the applicant being a prisoner, I also find the reasons for delay he advanced to constitute good cause. In that respect, it is my considered view that all matters for the review he submitted herein will be further elaborated and explained during the intended application for review.

That said, in the exercise of the Court's discretion, I extend time for the applicant to lodge his application for review out of time. The said application should be lodged within sixty (60) days from the date of delivery of this Ruling. It is so ordered.

DATED at DAR ES SALAAM this 6th day of March, 2020.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of April, 2020 in the presence of Applicant in person and Ms. Gladness Senya, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.


B. R. NYAKI
DEPUTY REGISTRAR