

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

LINKED TO TABORA SUB-REGISTRY VIA VIDEO CONFERENCING FACILITY

CRIMINAL APPLICATION NO. 66/11 OF 2017

MAULID SWEDI 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)**

(Msoffe, Kimaro, Mandia, JJA.)

dated the 30th day of June, 2011

in

Criminal Appeal No.s. 185, 186 & 187 of 2008

RULING

04^h March, & 23rd April, 2020

KEREFU, J.A.:

This is an application in which the applicant seeks the order of the Court for extension of time within which to lodge an application for review out of time. The basis of the application is the decision of this Court (Msoffe, Kimaro, Mandia, JJA.) dated 30th June, 2011 in Criminal Appeal No.s. 185, 186 & 187 of 2008.

The application has been preferred under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) through a Notice of Motion supported by the affidavit of Maulid Swedi, the applicant. On the other side, 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. 21 of 2014 was struck out on 19th September, 2017 for being time barred;*
- (c) the intended review will be based on Rule 66 (1) (a) of the Rules, as the judgment of the Court has manifest errors on the face of record, which had occasioned injustice on the applicant; and*
- (d) any other order that this Court may deem fit and just to grant.*

In the supporting affidavit, the applicant had indicated that this is not the first time he makes initiative towards the review of the referred Civil Appeal Nos. 185, 186 & 187 of 2008. In an earlier Criminal Application No. 02 of 2011, which was lodged immediately after delivery of the impugned decision he sought a review of the said decision after he noted that there are manifest errors on the face of record, but on the 08th May, 2013 the said application was struck out for being incompetent. The applicant did not rest, but lodged another application for review, Criminal Application No.21 'B' of 2014, which was also struck out for being time barred, hence the present application on the extension of time to allow the applicant to lodge his application for review out of time.

It is also important to narrate, albeit briefly, that the applicant together with two others who are not party to this application were arraigned before the District Court of Nzega for the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 R.E 2002 vide Criminal Case No. 62 of 2004. The applicant and his fellow were convicted and sentenced to 30 years imprisonment. Aggrieved, the applicant unsuccessfully appealed to the High Court where the appeal was transferred to the Resident Magistrate Court of Tabora and heard by the Magistrate with extended jurisdiction vide Criminal appeal No. 42CF, 43CF and 44 of 2006. Again, dissatisfied the applicant unsuccessfully appealed to this Court in Criminal Appeal Nos. 185, 186 and 187 of 2008. He then, unsuccessful lodged an application for review, as indicated above.

At the hearing of the application, the applicant appeared in person, unrepresented, whereas the respondent was represented by Mr. Tito Ambangile Mwakalinga, learned State Attorney.

In his brief submissions, the applicant narrated the sequence of events towards this application as highlighted in his supporting affidavit. He added that, he being a prisoner behind bars he had no control of the process of filing applications or even making follow up therein, because he depends much on the Prison authority. It was his strong argument that, since the first application was lodged within time after he discovered that the judgment of the Court has manifest errors on the face of record, the same constitutes good cause to warrant grant of this application. As such,

the applicant prayed that the application be granted to allow him to lodge the intended application for review out of time.

On his part, Mr. Mwakalinga opposed the application by arguing that the applicant has failed to establish good cause for the delay. He referred to paragraphs 5, 6 and 7 of the supporting affidavit where the applicant has indicated that the delay was caused by the fact that all his previous applications were struck out for being incompetent, and argued that, it is obvious that those applications were lodged without following legal procedures, thus an ignorance of the law, which cannot constitute a good cause for granting an extension of time. To buttress his position he cited the case of **Ally Kinanda and 2 Others v. Republic**, Criminal Application No. 1 of 2016 at pages 6 and 7 and **John Lazaro v. Republic**, Criminal Application No. 34/04 of 2017 (both unreported). He finally prayed for the application to be dismissed.

I wish to preface my determination of this application by stating at the outset that, in an application of this nature, the applicant is required to show good cause in terms of 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 order to justify the delay, the applicant has submitted that after the decision sought to be challenged was handed down he within time lodged an application for review after observing that the same had manifest errors on the face of record. However, the said application was struck out on account of incompetence. Immediately, he lodged another application, Criminal Application No.21 'B' of 2014 which was also struck out for being time barred on 19th September, 2017. Thus, he did not have any other option than to lodge this application for extension of time on 13th November, 2017.

I am aware that these reasons for the delay were objected to by Mr. Mwakalinga that they do not constitute good cause. With respect, I am unable to go along with his reasoning. It is on record that the decision sought to be reviewed was delivered on 30th June, 2011 and immediately thereafter, the applicant lodged an application for review, i.e Criminal Application No. 2 of 2011 which was struck out for being incompetent. Subsequently, he lodged another application No. 21 of 2014 which was also struck out for being time. All these efforts indicate that the applicant did not stay idle, but prosecuting several applications before the Court.

I am also aware that Mr. Mwakalinga had as well blamed the applicant for lodging incompetent applications that he is ignorant of the law and procedures. Again, with respect, I am unable to agree with Mr. Mwakalinga on this point, because the applicant being a prisoner, he depends much on the prison authority to prepare and take care of the whole process of lodging matters in Court. As such, the applicant cannot be

blamed for logging incompetent applications, as it may sometimes be unfair to expect too much from him. This Court, in various decisions has considered the situation of prisoners that they are not free agents who can freely lodge matters before the Court and make regular follow-ups on them; and thus granted applications for extension of time. See for instance **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].

When all is said and done, I am satisfied that the applicant has exhibited good cause for failure to lodge his application for review within time.

In addition, it is my considered view that, since the applicant has indicated that his application for review will be based on the apparent error on the record i.e Rule 66 (1) (a) of the Rules, is in compliance with the

requirement of the law. In that respect, further elaboration and explanation on the said ground will be pursued in an application for review if extension of time is granted.

Therefore, 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