

**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**CRIMINAL APPLICATION NO. 42/13 OF 2019**

**ROBERT s/o NYENGELA.....APPLICANT**

**VERSUS**

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

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

**(Mbarouk, Mmilla, Mwarija, JJA.)**

**dated the 14<sup>th</sup> day of August, 2015**

**in**

**Criminal Appeal No. 144 of 2012**

.....

**RULING**

27<sup>th</sup> April & 3<sup>rd</sup> May, 2021.

**SEHEL, J.A.:**

The applicant, Robert Nyengela is seeking an extension of time within which to file an application for review of the Judgment of the Court dated 14<sup>th</sup> August, 2015 (Mbarouk, Mmilla and Mwarija, JJA.). The notice of motion is predicated under Rules 10 and 48 (1) (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and Article 107A (1) (2) (a) (e) of the Constitution of the United Republic of Tanzania of 1977. It is supported by an affidavit sworn by the applicant, himself.

The main reason advanced in his application is that his previous application which he lodged is no-where to be seen. He deposed in his affidavit that immediately after the Court delivered its judgment on 14<sup>th</sup> August, 2015, he prepared his application for review under Rule 66 (1) (a) (c) of the Rules and handed it to the prison authorities to be lodged to the Court. After a long wait, he decided to make a follow up of his application only to be told that his application is no-where to be found. He was therefore advised by the Deputy Registrar, High Court, Iringa to seek an extension of time so as to be able to file another application for review. Hence, the present application. He also deposed in his affidavit that his application for review will be predicated under Rule 66 (1) (a) (c) of the Rules on grounds that: -

- 1. The Court did not consider that the record of the trial court was a nullity for failure to consider the defence case.*
- 2. The decision of the Court based on the manifest error on the face of the record resulting in the miscarriage of justice since PF3 was expunged by the High Court thus an expert opinion to prove rape (penetration) was not there.*

3. *The application for review will enable the Court to see all aspects which were overlooked in law.*

The respondent Republic opposed the application by filing an affidavit in reply sworn by Hope Charles, learned State Attorney.

The facts leading to the present application are such that; the applicant was convicted by the District Court of Iringa at Iringa with an offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap. 16 R.E 2002 and sentenced to thirty (30) years imprisonment with twenty-four (24) strokes of the cane. He was also ordered to pay the victim compensation of TZS 100,000.00 for the injuries she sustained. Aggrieved, by the conviction and sentence, he unsuccessfully appealed to the High Court of Tanzania at Iringa. His second appeal, Criminal Appeal No. 144 of 2012 was also dismissed. As he still wishes to fault the decision of the Court through review, he filed the present application for extension of time.

At the hearing of the application, the applicant appeared in person, unrepresented, whereas, Ms. Hope Charles Massambu, learned State Attorney appeared for the respondent Republic.

Arguing the application, the applicant adopted his notice of motion and affidavit in support of the application. He submitted that he timely filed the application for review and submitted it to the prison authorities for onward filing to the Court. He further submitted that given his circumstance that he is a prisoner, largely depends upon the prison officers to lodge the application to the Court on his behalf. Generally, he blamed prison officers as he contended that he filed his application for review but it is not traceable and that he had no means of making a physical follow up to ensure that the application was filed to the Court. At the end, he implored me to grant him an extension of time on account that the delay was not his making.

From the outset, Ms. Massambu opposed the application. Elaborating the reasons for not supporting the application, she argued that 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. She contended that the reason that he had earlier on filed an application for review in time which could not be traced is not backed by evidence. She submitted that apart from assertion in the affidavit, the applicant failed to attach a copy of the application nor an affidavit of the persons whom he alleged they informed him about the untraceable

application for review and accordingly advised him to file the present application. To support her contention that mere words without evidence have no evidential value, she cited the Court's decision in **Chenyenye Maganyale v. The Republic**, Criminal Application No. 28 11 of 2017 (unreported). She therefore prayed that the application be dismissed for want of merit.

In re-joinder, the applicant pleaded his limitation in movements and resources as a prisoner. He argued that all his documents were kept by the admission office which he had no immediate access of them. He further submitted that his incapacity was compounded with the fact that he was recently transferred from Mbeya Prison where his documents were kept to Kitai Prison where he had no means to access them. He therefore urged me to consider his situation and grant the application for extension.

From the rival submissions, the issue before me is whether, the application for extension of time has merit. As correctly submitted by the learned State Attorney, the applicant is required to advance good cause for the Court to grant him an extension of time. In fact, that is the spirit of Rule 10 of the Rules which 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."*

Flowing from the above, extension of time is a matter within the discretion of the Court as such a party seeking an extension must always put forward material and consideration that would persuade the Court to exercise its discretion in favour of an extension (see: - **Godfrey Anthony and Ifunda Kisite v. The Republic**, Criminal Application No. 6 of 2008 (unreported)).

In the present application, the applicant claimed that he had earlier on filed an application for review in time but that application could not be traced. Unfortunately, he did not mention date which he filed the said application. Neither did he attach any copy of it evidencing the same. I

understand that the applicant submitted orally that all of his documents were left at Mbeya Prison thus could not access his documents. I have to admit that I am not persuaded by such an excuse because the application which is placed before me shows that it was drawn and filed by the applicant. At the time of filing it, he was in Ruanda Prison, Mbeya. Mbeya is the place where the applicant claimed that he kept all of his documents. Therefore, there is no justifiable reason for not attaching a copy of the application for review to the present application in order to establish that he actually submitted it for filing.

Even if we take that his copy was also misplaced but still, the applicant did not state as to when he became aware of the untraceable application for the Court to peg the commencement of counting the days for delay. It is note-worthy to state here that the application for extension of time was filed on 19<sup>th</sup> January, 2019 whereas the judgment which the applicant intends to challenge through review is dated 14<sup>th</sup> August, 2015. Rule 66 (2) of the Rules prescribes a period of sixty (60) days within which a party may lodge an application for review. That period is counted from the date of the judgment or order sought to be reviewed. Counting from the date the judgment was delivered to the date the present application was filed, almost a period of

four years and seven months has lapsed. In absence of proof that he filed the application for review in time and the date when he became aware, I find that there is a very long period for the delay which has not been accounted for by the applicant. 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)).

Apart from the applicant being required to advance the reason for the delay, in application like the one at hand, he has also to establish that he has an arguable case. That is, he is required to demonstrate in the application for extension of time that he is intending to predicate his application for review on the ground(s) listed under Rule 66 (1) of the Rules. This was the position stated in the case **Mwita Mhere v. The Republic**, Criminal Application No. 7 of 2011 (unreported) where the Court was faced with a similar application and it had this to say: -

*"But in application of this nature, the law demands that the applicant should do more than account for the delay. To succeed in showing that he has good cause under Rule 10 of the Rules, **it must be shown***



***further that the applicant has an arguable case.***

***An arguable case is one that demonstrates that the intended grounds of review is at least one of those listed in Rule 66 (1) of the Rules.”***

*[emphasis is added].*

Without going into the merits of the grounds, none of grounds listed in the applicant's affidavit fall within the ambit of Rule 66 (1) of the Rules. The applicant deposed that he intended to file an application for review on grounds that; one, the trial court failed to consider his defence case. Two, there was no expert opinion to prove the offence of rape (penetration) as PF3 was expunged by the High Court. And three, the Court will have an opportunity to review the whole case. Grounds number one and two are not grounds for review. They are grounds of appeal because they deal with factual findings of the courts. It is trite law that a review is not an appeal. The third ground does not fit in anyway within the grounds enumerated under Rule 66 (1) of the Rules which are: - the decision was based on a manifest error on the face of record which resulted in the miscarriage of justice; or a party was wrongly deprived of an opportunity to be heard; or the court's decision is a nullity; or the court had no jurisdiction to entertain

the case; or the judgment was procured illegally, or by fraud or perjury. In totality, I am certain that the applicant failed miserably to show that he has an arguable case in the application for review in case an extension of time is granted.

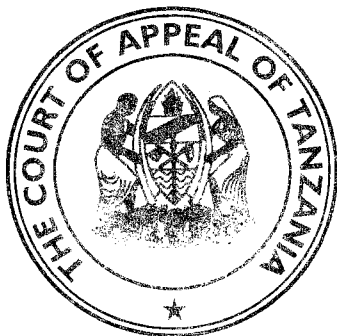
That said, the applicant has failed to advance any reason let alone good cause to warrant me exercise my judicial discretion.


In the end, I am constrained to find that the application for extension of time is without merit and has to fail. Accordingly, I do hereby dismiss it.

**DATED at IRINGA** this 3<sup>rd</sup> day of May, 2021.

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

The Ruling delivered this 3<sup>rd</sup> day of May, 2021 in the presence of the Appellant linked via video conference at Iringa Prison and Ms. Blandina Manyanda, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**