IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CRIMINAL APPLICATION NO. 65/02 OF 2020

THE REPUBLIC ..... APPLICANT

VERSUS

SUMNI AMA AWEDA ..... RESPONDENT

(Application for Extension of Time within which to lodge an Application for a Review from the Judgment of the Court of Appeal of Tanzania at Arusha)

(Lila, Kwariko, Mwandambo, JJA.)

dated the 27th day of November, 2019

in

Criminal Appeal No. 319 of 2016

.....

RULING

2nd & 8th December, 2022

MASHAKA, J.A.:

By a notice of motion made under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Republic who is the applicant, is seeking an order for extension of time within which to lodge an application for review of the judgment of the Court dated 27th November, 2019 (Lila, Kwariko and Mwandambo, JJA) in Criminal Appeal No. 319 of 2016. It is supported by an affidavit sworn by Charles Kagirwa, learned State Attorney.

In the notice of motion, the applicant is moving the Court for an order that:

1. *This Honorable Court be pleased to grant an order for extension of time to allow the applicant to file an application for review from the decision of the Court of Appeal of Tanzania at Arusha dated 27th November, 2019 in Criminal Appeal No. 319 of 2016.*
2. *Any order(s) this Honorable Court may deem fit and just to grant.*

The respondent, Sumni Ama Aweda who is held in remand prison did not file affidavit in reply.

To appreciate the issue involved in this application, it is pertinent to bring forth the background to the application. The respondent was convicted on 14th December, 2015 by the High Court of Tanzania at Arusha in Criminal Session Case No. 15 of 2015 with an offence of murder contrary to section 196 of the Penal Code, [Cap. 16 R.E 2002] and sentenced to suffer death by hanging. Aggrieved, by the conviction and sentence, he appealed to the Court vide Criminal Appeal No. 319 of 2016.

In that appeal, it was discovered that, before the hearing and determination of the Criminal Session Case No. 15 of 2015, there was Criminal Session Case No. 38 of 2006 before Massengi, J. at the High Court in which the respondent was convicted for the offence of murder and sentenced to death by hanging. The respondent was aggrieved and

preferred his appeal vide Criminal Appeal No. 393 of 2013 in which the Court nullified the proceedings of the Criminal Session Case No. 38 of 2006 and ordered retrial before another Judge.

In contravention of the order, the respondent was remitted to the committal court and again committed for the same offence and the trial ensued before the High Court of Tanzania at Arusha vide Criminal Session Case No. 15 of 2015.

Thereafter, the respondent lodged an appeal against the judgment and sentence in Criminal Session Case No. 15 of 2015 vide Criminal Appeal No. 319 of 2016 in which the Court nullified both the committal proceedings, the High Court proceedings, judgment, the conviction and sentence meted to the respondent in the Criminal Session Case No. 15 of 2015. The Court directed that the case file be remitted to the High Court for it to comply with the Court's order in Criminal Appeal No. 393 of 2013 and retrial should be conducted in Criminal Session Case No. 38 of 2006.

The applicant complied with the order of the Court only to realise that the Criminal Session Case No. 38 of 2006 was withdrawn by the Republic under Section 91(1) of the Criminal Procedure Act [Cap 20 R.E 2022] (The CPA). Hence the present application.

The applicant further averred at paragraphs 4, 5, 6 and 7 of the affidavit that the application for review will be predicated under Rule 66 (3) of the Rules on grounds: -

4. *That, on the 27th day of November, 2019, the Court of Appeal of Tanzania at Arusha delivered a judgment and ordered for retrial and directing that, the same be conducted in Criminal Session Case No. 38 of 2006 afresh by arraigning the respondent, taking the plea and conducting a preliminary hearing afresh before another judge.*
5. *That, following that decision on the 3rd day of March, 2020 when this matter came up for plea taking before Honourable Massara, J at the High Court of Tanzania at Arusha, it was discovered that the Criminal Session Case No. 38 of 2006 was withdrawn under section 91(1) of the Criminal Procedure Act [Cap 20 R.E 2002], on the 23rd February, 2015 before Honourable Moshi, J.*
6. *That, following the withdrawal of the Criminal Session Case No. 38 of 2006, the High Court of Tanzania at Arusha failed to conduct a plea taking to the non-existing file.*
7. *That, the aforementioned reasons shows that there is manifest error on the face of the record hence the Court's intervention is of utmost important and since the statutory period of time for lodging an*

application for review has lapsed, there is a need for the applicant to be granted leave to file the application for review out of time.

When the application was called on for hearing, Ms. Lilian Kowero, assisted by Ms. Eunice Makala, both learned State Attorneys represented the applicant and the respondent was present in person.

In her submission in support of the application, Ms. Kowero adopted the notice of motion and the supporting affidavit (at paragraph 4 of affidavit), contending that the Court ordered the retrial of Criminal Session Case No. 38 of 2006 on 27th November, 2019. In compliance to the Court's order, the case was placed before another High Court Judge only to realise that the Criminal Session Case No. 38 of 2006 had been withdrawn under section 91 (1) of the CPA. She further pointed out that rule 66 (3) of the Rules requires an application for review to be lodged within sixty (60) days in which they were out of time since 27th November, 2019.

Ms. Kowero expounded that they were late to lodge the application because the impugned decision had directed that the retrial should be conducted in Criminal Session No. 38 of 2006 instead of Criminal Session No. 15 of 2015. She contended that when the matter came for plea taking on 3rd March, 2020 before Hon. Massara, J, it came to their knowledge

that Criminal Session Case No. 38 of 2006 had been withdrawn on 23rd February, 2015. The reason advanced by Ms. Kowero is that they were busy to get the necessary record, impugned judgment dated 27th November, 2019 and the High Court decision. She concluded by praying to the Court to grant an order to extend time to lodge an application for review.

In reply, the respondent strongly opposed the application submitting that the appeals against the conviction and sentence by the High Court have been determined twice and the Court ordered retrial in both times but to date he has not been retried. He thus urged the Court to settle this matter and let it come to an end. He further stated that ,he has been in prison for the past 18 years; he is sick and does not receive treatment because he has not been convicted. He pointed out that he is remanded for a long time and wondered how the applicant still wants to lodge a review while there is no evidence against him. He concluded by praying to the Court to set him free.

In rebuttal, Ms. Kowero reiterated her prayer for justice to be done to the respondent.

The issue for consideration by this Court is whether the applicant has demonstrated good cause to warrant the application for extension of

time to lodge an application for review. This application is predicated under rule 10 of the Rules which gives discretion to the Court to grant extension of time where there is good cause which reads 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."*

In the application, the applicant averred that there is a manifest error on the face of the record hence the Court's intervention is of the utmost importance as the statutory period of sixty days to lodge an application for review has passed. Ms. Kowero stressed that there is a need to extend time to file an application for review.

It is without a doubt that manifest error on the face of the record can be a good cause for the Court to exercise its discretion to extend time. However, there are two preconditions to be met before such discretion can be exercised. First, the applicant is required to demonstrate good cause for the Court to grant him extension of time which is the spirit of rule 10 of the Rules in which the applicant is to account for each day of

delay. Also, the applicant must show diligence in prosecuting the intended action. The extension of time is a matter in which the party seeking such extension is to provide the relevant material in order to persuade the Court to exercise its discretion in favour of extension.

It is a settled position of the law, that for the Court to exercise its discretion to extend time, there must be a *"good cause"* shown by the applicant that upon becoming aware of the fact that she is out of time, there ensued circumstances beyond her control that prevented them to act in time persuading the Court to exercise its discretion in favour of granting an extension.

Also, what constitutes good cause has not been laid down by any hard and fast rules as the term "good cause" is a relative one and dependent upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion as stated in **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd,** Civil Application No. 13 of 2010 (unreported). There are number of factors which have to be considered that there is a good cause as stated in **Tanga Cement Company Limited v. Jumanne D. Masangwa & Amos A. Mwalwanda,** Civil Application No. 06 of 2001; **Omary Shabani Nyambu v. Dodoma Water and Sewerage Authority,** Civil

Application No. 146 of 2016 (both unreported). Good cause can also be deduced from the decision of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported), that **one**, the applicant must account for all the period of delay; **two**, the delay should not be inordinate; **three**, the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; **four**, if the court feels that there are other sufficient reasons, such as the existence of the point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

In the light of the above position, the applicant is required to account for each day of delay which should not be inordinate and show diligence in the prosecution of his application.

In this application, the applicant submitted that the decision of the Court dated 27th November, 2019 in Criminal Appeal No.319 of 2016 ordered the retrial of the respondent in Criminal Session Case No. 38 of 2006 afresh by arraigning him, taking plea and conducting a preliminary hearing before another judge other than Hon. Massengi, J. When the case was placed before another judge on the 3rd March, 2020, they became aware that the Criminal Session Case No. 38 of 2006 was

withdrawn under section 91(1) of the CPA on 23rd February, 2015. This application was presented for filing on 3rd April, 2020. Unfortunately, the applicant has not accounted for the 127 days of delay from the delivery of the impugned decision dated 27th November, 2019 to the date of 3rd April, 2020 when this application was lodged.

The second precondition apart from the applicant being required to advance the reason for the delay in this application, he is required to demonstrate that in the application for extension of time he intends to predicate his application for review on the ground(s) listed under rule 66 (1) of the Rules. This was the position held in **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."*

Pursuant to rule 66(3) of the Rules, the application for review has to be filed within sixty days from the date of the impugned decision. In

the instant application, the impugned judgment was delivered on 27th November 2019 and the present application was lodged on 3rd April, 2020, 127 days late. In explaining the delay, Ms. Kowero argued that the delay to lodge the application for review was caused by the fact that the impugned decision directed that the retrial should be conducted in Criminal Session Case No. 38 of 2006, and on 3rd March 2020 when the matter came up for plea taking before Hon. Massara, J it came to their knowledge that the Criminal Session Case No. 38 of 2006 had been withdrawn as earlier stated; almost four months had passed. Then, Ms. Kowero stated further that they were busy to get the impugned judgement dated 27th November, 2019 and the High Court decision.

Usually, it is the practice of the Court of Appeal that the date when the judgment is pronounced is the same date it is served to the parties as gleaned from the certification by the Deputy Registrar that the judgment was delivered on the 27th September, 2019 in the presence of the learned State Attorney and the respondent. There is no requirement of writing a letter requesting for copy of the decision, hence the argument by the learned State Attorney that she was busy getting the impugned decision is farfetched. In respect of the High Court decision, the learned State Attorney has not provided any evidence to prove that she was waiting for the decision as there is no letter to the Registrar requesting to be supplied

with the copy of the decision. However, the affidavit supporting the notice of motion is silent on that aspect. The learned State Attorney needs to be reminded that affidavits which are statements made on oath, are the basis upon which applications are decided. Any statement not raised in affidavit is always disregarded as a mere statement from the bar as stated in **Richard Mchau v. Shabir F. Abdulhussein**, Civil Application No. 87 of 2008 (unreported), that:

> *"It is our considered view that if the applicant was served out of time, he would not have failed to raise such an alarm in the affidavit. Having not done so, we think, the respondent's contention to the effect that the applicant's assertion is an afterthought holds a lot of water."*

Similarly, in this application, the alleged contention that the applicant was processing to get a copy of the decision from the High Court must have been an afterthought because it is inconceivable that the applicant would not raise that fact in the supporting affidavit and instead raised it now orally at the hearing of the application without accounting for the days in which such request was made.

Further, it was on 03rd March, 2020 when the applicant discovered that the Criminal Session Case No. 38 of 2006 had been withdrawn and lodged the current application on 3rd April, 2020, hence failing to account

for each day of delay. In that regard it is evident that the applicant has failed to show diligence, was negligent and uncertain in prosecuting her application.

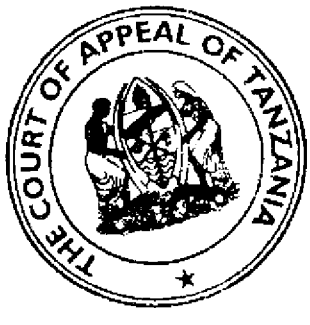
That said, the applicant has failed to advance any reason let alone good cause to warrant me to exercise my judicial discretion.

In the event, I am constrained to find that the application for extension of time is without merit. Consequently, I do hereby dismiss it.

DATED at **ARUSHA** this 8th day of December, 2022.

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this day 8th of December, 2022 in the presence of Ms. Penina Ngotea, learned State Attorney the Appellant/Republic and Mr. Sumni Ama Aweda, the respondent in person; is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL