

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MOSHI**

**CRIMINAL APPLICATION NO. 37/05 OF 2020**

**ELIZABETH @ BELLA.....APPLICANT**

**VERSUS**

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

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

**(Mjasiri, Mwarija and Mwangesi, JJA.)**

**dated the 4<sup>th</sup> day of December, 2017**

**in**

**Criminal Appeal No. 293 of 2015**

.....

**RULING**

*23<sup>d</sup> & 25<sup>th</sup> August, 2023*

**MASOUD, J.A.:**

The applicant was, with eleven other accused persons, charged with three counts, namely, of conspiracy to commit an offence contrary to section 384 of the Penal Code, and two counts of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E 2002 now R.E 2022]. The second count involving stealing Tshs. 239,490,000.00 and the third count involving stealing a sub-machine gun with Serial No. 02870.

The applicant, together with two others, namely, Samwel Gitau Saitoti and Michael Kimani, (the first and second accused in the trial court respectively) were convicted as charged on all the three counts and were sentenced to seven (7) years imprisonment on the first count, and thirty

years (30) imprisonment for each of the remaining two counts. The sentences were ordered to run concurrently.

Her first appeal in the High Court in Criminal Appeal No. 33 of 2013 of 2015 was partly successful. The High Court did not uphold the trial court's conviction and sentence on the first and third counts. However, her appeal was not successful on the second count. Aggrieved, the applicant lodged her second appeal in this Court in Criminal Appeal No. 293 of 2015. This Court was however of the view that as the appeal was without merit, there was no basis in faulting the decision of the first appellate court. The second appeal was thus dismissed by virtue of the decision of this Court dated 4<sup>th</sup> December, 2017.

As the applicant was aggrieved by the decision of this Court and could not lodge her application for review within sixty (60) days of the delivery of the impugned decision under rule 66(1)(2) & (3) of the Tanzania Court of Appeal Rules, 2019 (the Rules), she lodged the instant application for an extension of time within which to file an application for review of the decision of this Court in Criminal Appeal No. 493 of 2015 dated 4<sup>th</sup> December, 2017 out of time. The application was filed on 12<sup>th</sup> December, 2019 and is supported by the applicant's affidavit and opposed by the respondent Republic through an affidavit in reply sworn by Mr. Diaz Makule, learned Senior State Attorney.

In her affidavit supporting the application, the applicant advanced three reasons. They are as follow:

One, that she is a prisoner whose movement and actions are limited and hence dependent on steps taken by the prison. As such, much as she wanted to apply for review, there was nothing she could do after expressing her intention to the prison which was expected to act according to the prevailing procedure in the prison of handling court matters relating to prisoners.

Two, there was excessive delay in availing her a copy of the judgment of this Court in Criminal Appeal No. 293 of 2015. Thus, whereas the judgment is dated 4<sup>th</sup> December, 2017, the same was availed to the prison on 9<sup>th</sup> April, 2018 and subsequently thereafter availed to her by the prison.

Three, based on the decision of this Court in a second appeal (Criminal Appeal No. 5 of 2016) preferred separably by her original co-accused persons (i.e Samwel Gitau Saitoti and Michael Kimani Peter) which nullified the proceedings of the first appellate court and the trial district court save for the position at the trial district court as was on 25<sup>th</sup> September, 2008 on account of missing record of the trial district court, the Court in the applicant's second appeal (i.e. Criminal Appeal No. 293 of 2015) erred in upholding the decision of the first appellate court, although

there was an incomplete record of the trial court which was vital to the determination of her second appeal. This reason was equally set as a ground for her intended application for review if the sought extension is granted.

The respondent, as above highlighted, opposed the application. There was however not much in the affidavit in reply of the respondent other than mere general denials and noting specific averments by the applicant. The exceptions were, namely; first, on the averment by the respondent in opposition that the date on which the impugned decision of this Court was delivered is 4<sup>th</sup> December, 2017 and not 27<sup>th</sup> November as claimed by the applicant; and second, on the averment by the respondent in opposition that the applicant did not raise the issue of incomplete record of the trial court in this Court since the appeal by her original co-accused persons (Criminal Appeal No. 5 of 2016) was separately entertained as was hers and hence the outcome in the latter had nothing to do with her.

At the hearing, the applicant appeared in person and was unrepresented while the respondent was represented by Mr. Diaz Makule, learned Senior State Attorney. The respective affidavits were adopted as part of the applicant's and respondent's oral submissions respectively.

The applicant's submission mirrored her averments in the affidavit in support. She however insisted on her limitation in movements and taking

actions as a prisoner as the main reason behind the delay, which was complicated further by the delay in availing her the copy of the decision sought to be reviewed if the sought extension is granted. In respect of the delay to avail her the copy of the impugned decision, the applicant drew my attention to the prison stamp dated 9<sup>th</sup> April, 2018 on the first page of the judgment of this court sought to be reviewed should I grant the extension sought, which copy was annexed to her affidavit in support. The stamp, indeed, signifies the date on which the copy of the judgment reached the prison.

The applicant added that although the prison received the copy on 9<sup>th</sup> April 2018, the applicant got the copy sometimes later which was completely beyond her control as a prisoner. The applicant also brought to my attention the issue of incomplete record of the trial district court which was not considered in her second appeal before this Court despite being raised but not being reflected in the decision.

On the above point, I was referred by the applicant to the copy of the judgment of this Court in the second appeal that was brought by her original co-accused persons (i.e Criminal Appeal No. 5 of 2016). The copy of the said judgment was annexed to the applicant's affidavit in support. I was then shown how the same was decided based on the fact that there was incomplete record of the trial district court which was overlooked by

this Court when it was deciding her second appeal (i.e Criminal Appeal No.293 of 2015).

On his part, Mr Makule argued that the issue of incomplete record was not a reason for extension of time as the same could have made a very good ground of appeal. In so far as the same was not raised, it cannot be raised now to justify granting of the sought extension. The applicant seems to have come up with the point, the learned Senior State Attorney argued, after becoming aware of the decision of this Court on the second appeal by her original co-accused persons and the consequences that followed thereafter. In doing so, the learned Senior State Attorney said that the point is a mere afterthought.

In the end, the learned Senior State Attorney said that the period of delay of about 18 months, if it is reckoned from 9<sup>th</sup> April 2018 when the copy of the judgment sought to be reviewed in case the extension sought is granted was received by the prison up to 12<sup>th</sup> December, 2019 when the instant application was lodged, is quite inordinate. It seemed to him that there was no good cause shown to cater for such period of delay, although he had nothing in reply in relation to the reason attributing delays to the situation of the applicant as a prisoner. Nonetheless, the learned Senior State Attorney invited me not to extend the time.

In rejoinder, the applicant reiterated her situation as a prisoner which meant that she could not move things the way she would have wished and take necessary steps as to preparing and lodging the application for review timeously after receiving the copy of the impugned judgment of this Court. She further insisted that she raised the issue of incomplete record of the trial court before this Court in her second appeal in vain.

She seemed, likewise, to submit, albeit in a layperson's language, that the decision of this Court in the second appeal by her co-accused persons (Criminal Appeal No. 5 of 2016) which nullified the first appeal proceedings in the High Court and the proceedings of the trial District Court save for the position at the trial court as was on 25<sup>th</sup> September, 2008 meant that the decision in her second appeal (Criminal Appeal 293 of 2015) which did not take into account the missing record of the trial district court as was Criminal Appeal No. 5 of 2016 amounted to an illegality justifying granting of the extension sought. In other words, the applicant appeared to allege that there is an illegality in the decision sought to be reviewed if the extension of time is granted.

Her reasoning in relation to the foregoing is based on the point that both appeals, that is, the one that the applicant preferred in this Court (i.e Criminal Appeal No. 293 of 2015), and the one that was preferred in this Court (Criminal Appeal No. 5 of 2016) by her original two co-accused persons, arose from the same proceedings of the trial district court despite

the said appeals being handled separately. She, therefore, urged me to consider her situation and the issue of incomplete record of the trial district court and grant the instant application for extension.

The issue for determination is whether the applicant has shown good cause to warrant exercise of my discretion under rule 10 of the Rules in favour of the sought extension. On this issue, I am mindful of the reasons raised in the affidavit of the applicant and the nature of the opposing stance taken by the respondent as reflected in the affidavit in reply. I am also mindful of the oral submissions by both parties expounding on their averments in their respective affidavits.

One of the reasons, which has to do with an applicant's situation as a prisoner and her limited movements in that respect is common feature in most of the applications of this nature. See, **Otieno Obute v. Republic**, MZA Criminal Application No. 1 of 2011, **Joseph Sweet v. Republic**, Criminal Appeal No. 11 of 2017, **Fabia Chumila v. Republic**, Criminal Application No. 6/10 of 2019, **Maulid Swedi v. Republic**, Criminal Application No. 66/11 of 2017. In **Otieno Obute**, for instance, the Court stated as follows as it was granting the extension of time:

*"I have considered the averments of 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”.*

Going by the rival submissions, it is clear to me that there was no response made by the learned Senior State Attorney on the above point despite the same being conspicuous in not only the oral submission by the applicant but also in her affidavit supporting the application. In the affidavit in reply, the respective paragraph of the applicant's affidavit that raised the reason about the applicant's situation as a prisoner and not as a free agent was generally and not specifically disputed which meant that the respondent is not in substance disputing the reason raised by the applicant.

The point on the missing record of the trial district court was the basis of the decision of this Court in Criminal Appeal No. 5 of 2016 delivered on 30<sup>th</sup> August, 2019 originating from the same trial district court's criminal proceedings as was the applicant's second appeal in this Court in Criminal Appeal No. 293 of 2015 decided in 2017 which did not consider the issue of missing record of the trial court. As already pointed out above, it appears that the applicant is by design advancing an allegation of illegality in the decision of this Court in Criminal Appeal No. 293 of 2015 as one of the grounds adduced in support of her application for extension of time.

In **Mohamed Salum Nahdi v. Elizabeth Jeremiah**, Civil

Reference No. 14 of 2017, this Court stated that:

*"... the law is fairly settled that in applications of this nature, once an issue of illegality in the decision sought to be challenged is raised, that amounts to good cause and the Court, even if every day of delay is not accounted for, would grant an extension sought so as to rectify the illegality on appeal. That this is the law has been stated by the Court in a string of decisions- see: **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 185; **The Principal Secretary, Ministry of Defence and National Service v. D P Valambhia** [1992] TLR 387; **Theresia Mahoza Mganga v. The Administrator General RITA**, Civil Application No. 85 of 2015; and **Said Nassor Zahor & 3 Others v. Nassor Zahor Abdallah EI Nabahany**, Civil Application No. 278/15 of 2016".*

Certainly, the applicant has on the above reasons and the authorities relied on in my determination, shown good cause as required under rule 10 of the Rules to warrant the exercise of my discretion in favour of the sought extension.

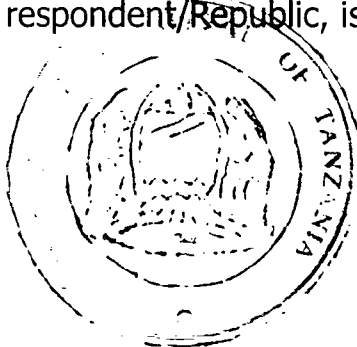
Apart from the foregoing, the applicant has also demonstrated the ground which, pursuant to rule 66(1) of the Rules, she intends to hinge her application for review on, if the sought extension is granted. The same relates to the point on the missing record of the trial court which was not taken into account by this Court in Criminal Appeal No. 293 of 2015 as afore explained. See, **Mwita Mhere v. Republic**, Criminal Application No. 7 of 2011 (unreported).

On the strength of the reasons shown by the applicant and the above authorities referred, I find this application meritorious. I therefore grant it. The applicant is given sixty (60) days reckoned from the date of delivery of this ruling within which to lodge her application for review out of time against the decision of this Court in Criminal Appeal No. 293 of 2015. It is so ordered.

**DATED at MOSHI** this 24<sup>th</sup> day of August, 2023.

B. S. MASOUD  
**JUSTICE OF APPEAL**

The Ruling delivered this 25<sup>th</sup> day of August, 2023 in the presence of the Applicant who appeared in person, Mr. Philbert Mashurano and Mr. Innocent Exavery Ng'assi both learned State Attorneys for the respondent/~~Republic~~, is hereby certified as a true copy of the original.



  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**