

**IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI**

CRIMINAL APPLICATION NO. 38/05 OF 2020

VIVIAN EDGIN.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Application for extension of time to file review out of time against the
decision of the Court of Appeal Tanzania at Arusha)**

(Rutakangwa, Kileo and Massati, JJA.)

dated the 2nd day of August, 2016

in

Criminal Appeal No. 455 of 2015

.....

RULING

18th & 23rd August, 2023

MASOUD, J.A.:

The applicant was charged with and convicted of the offence of trafficking in narcotic drugs contrary to section 16(1)(b) of the Drugs and Prevention of Illicit Traffic in Drugs Act. Cap 95 R.E 2002 as amended by section 31 of the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2012, and sentenced to life imprisonment. The conviction by the trial court was a result of the applicant's admission in the course of her defence of possession of what turned out to be cocaine hydrochloride.

She lost in her appeal as this Court was, in its judgment handed down on 2nd August, 2016, satisfied that the trial court did not err in convicting the appellant of the offence. The Court had regard to the

applicant's own admission of possession of the pellets which were proved to be cocaine hydrochloride.

As the applicant was aggrieved by the decision and could not lodge her application for review under rule 66 (1)(2) & (3) of the Tanzania Court of Appeal Rules, 2019 (the Rules) within sixty (60) days of the delivery of the impugned decision, she lodged the instant application for an extension of time within which to file an application for review of the decision of this Court dated 2nd August, 2016 in Criminal Appeal No. 455 of 2015. The application is supported by the applicant's affidavit and opposed by the respondent Republic through an affidavit in reply sworn by Mr. Innocent Elawony Njau, learned Senior State Attorney.

In her affidavit supporting the application, the applicant deposed that her delay in filing the intended application for review of the impugned judgment was attributed to "*matters that were beyond her ability as a prisoner*", for all matters relating to her intended application for review were being handled by the prison. She also deposed in her affidavit that when the impugned judgment was availed to her, the time within which she could have filed the intended review had already elapsed. It was however not stated in her affidavit as to when the applicant received the copy of the impugned judgment.

Apart from deposing on the foregoing reasons, the applicant deposed that she has an arguable case for review of the impugned decision. In such respect, she averred that the impugned decision was based on an apparent error on the face of the record which resulted into miscarriage of justice on her part. Her affidavit expounded on this reason, clarifying that this Court in its judgment erred in failing to nullify the judgment, and the entire proceedings of the trial court, on account of flouting the mandatory provision of section 211(1) of the Criminal Procedure Act, Cap. 20 R.E. 2019 now R.E 2022 (the CPA).

The respondent, as shown above in passing, opposed the application. It was by and large averred for the respondent that the applicant has not in her application met the requirements necessary for warranting extension of the time within which the intended application could be filed. The respondent's position was therefore that there were no materials in the affidavit warranting exercising the Court's discretion in favour of the sought extension.

When the application was called on for hearing before me, the applicant appeared in person and was unrepresented while the respondent was represented by Mr. Innocent Eliawony Njau, learned Senior State Attorney. Both parties adopted their respective affidavits. The learned

State Attorney specifically adopted the affidavit in reply filed on 14th August, 2023 which was duly served on the applicant.

Having adopted her affidavit supporting the application, the applicant had nothing to add. It was not surprising as she is a layperson and appeared in person unrepresented as stated above. On his part, Mr. Njau elaborated his reasons in reply for not supporting the application. He argued that in terms of rule 10 of the Rules, the Court can only exercise its discretionary power in granting the extension of time if there is good cause shown by the applicant that accounts for the entire period of delay.

In so far as the learned counsel for the respondent is concerned, the reason stated in the applicant's affidavit does not account for the inordinate delay of about three years, regard being had to the fact that the impugned decision of this Court was delivered on 2nd August, 2016 whilst the instant application was lodged on 12th December, 2019. Fortifying his submission, Mr. Njau said that the averment in the affidavit supporting the application that shifted the blame to the prison officials for the delay of more than three years has not at all been supported by any proof, say an affidavit from the prison substantiating the assertion by the applicant. It therefore means that the reason, the learned Senior State Attorney argued, does not at all constitute good cause for the inordinate delay of more than three

years. It cannot, therefore, he further argued, warrant the Court to exercise its discretion in favour of the sought extension.

To drive home his argument, the learned Senior State Attorney relied on the case of **Kenedy Owino Onyachi and Another v. The Republic**, Criminal Application No. 26/01 of 2019 (unreported) in which the Court at page 6 restated the position that:

"In exercising its discretion of whether or not to grant extension of time, the Court is required to exercise it judicially while being guided by such factors which may not be exhaustive such as:

(1) The applicant must account for all period of delay;

(2) The delay should not be inordinate;

(3) The applicant must show diligence and not apathy, negligence or sloppiness on the action that it intends to take;

(4) If the Court feels that there are other sufficient reasons such as existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

*(See: **Lyamuya Construction Company Ltd v. Boad of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010". (Unreported).*

With such submission, Mr. Njau therefore urged me to dismiss the application for want of merit.

In rejoinder, apart from reiterating her limitation in movement and taking actions as a prisoner, the applicant argued from the bar that she was unwell and as a result was admitted at Mount Meru Hospital for a period of two years. And that, during that time, she could not do anything in relation to her intended application for review. She added that it was only when she was discharged from the hospital that she took necessary steps which were however, limited by her situation as a prisoner as she solely depended on the prison in taking the necessary steps. She, therefore, urged me to consider her situation and grant the application for extension.

In view of the foregoing rival submissions, the issue for determination is whether or not the applicant has shown good cause to warrant exercise of my discretion under rule 10 of the Rules in favour of the sought extension. This is the issue that I am set to determine.

My scrutiny of the Court record left me in no doubt that the decision sought to be impugned was delivered on 2nd August, 2016 while the instant application was filed on 12th December, 2019. Indeed, there is in between a lapse of period of more than three years. Despite such inordinate delay, the reason attributing blame to the Prison was not supported by any proof on

the record as very well submitted by the learned Senior State Attorney for the respondent. The complaint on the delay to be availed the copy of the impugned decision after it was delivered was hanging and unsubstantiated. I say so because the applicant could not even for instance state when exactly she received the said copy of the impugned decision, the period of delay occasioned by the alleged failure to be availed the impugned decision and thus when exactly the time started to run against her. See **Godfrey Anthony and Ifunde Kisite v. The Republic**, Civil Appeal No. 6 of 2002 (unreported).

I am thus not definite as to whether or not there was indeed a delay in availing the impugned decision to the applicant as alleged. The argument that the applicant was admitted in hospital for two years needs not detain me since it is a mere argument from the bar. The applicant's affidavit has nothing akin to being unwell and being admitted at Mount Meru Hospital for two years. See for instance the case of **Kennedy Owino Onyachi** (Supra) which relied on, for instance, **Tanga Cement Co. Ltd v. Yahaya Athumani Mruma and 4 others**, Civil Application No. 1 of 2017 (unreported) with regard to the principle that the Court ought not to give credence to argument from the bar.

Apart from the applicant being required to show good cause for the delay, she has in an application like the instant one to demonstrate the

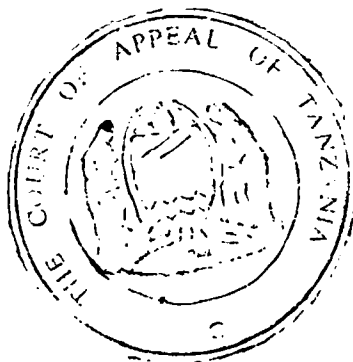
grounds or any of the grounds listed under rule 66(1) of the Rules. See **Mwita Mhere v. The Republic**, Criminal Application No. 7 of 2011 (unreported). Admittedly, the applicant has shown a ground in which she would predicate her application under rule 66(1) of the Rules if the extension sought is granted, but has failed to show good cause envisioned under rule 10 of the Rules to warrant the exercise of my discretion in favour of the sought extension. I am thus inclined not to allow the application.

In conclusion, therefore, the application for extension of time within which to file the intended application for review against the impugned decision of this Court in Criminal Appeal No. 455 of 2015 is without merit and has to fail. I do hereby dismiss it.

DATED at **MOSHI** this 22nd day of August, 2023.

B. S. MASOUD
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of August, 2023 in the presence of the Applicant appeared in person and Ms. Agatha Pima, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



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