

IN THE HIGH COURT OF TANZANIA
(AT DAR ES SALAAM)
MISCELLANEOUS CRIMINAL APPLICATION NUMBER 33 of
2011

(Originating from the Kibaha District Court, Criminal Case No. 83/2008,
KATEMANA-RM)

SAID RASHIDI @ LIPINDE.....APPELLANT

VS

REPUBLIC.....RESPONDENT

RULING

Date of last Order: 03-05-2012

Date of Judgment: 14-05-2012

JUMA, J.:

On 18th day of October 2011 the applicant SAID RASHID @ LIPINDE filed this chamber application under section 361 (2) of the **Criminal Procedure Act, Cap. 20 R.E. 2002** and section 14 (1) of the **Law of Limitation Act Cap 89 R.E. 2002** praying for leave to file his appeal out of time against the decision of the Kibaha District Court (Criminal Case Number 83 of 2008-Katemana RM) which on 10th February 2009 convicted him for the offence of

rape and sentenced him to serve 30 years in prison. In support of this application Saiwello T.J. Kumwenda, the learned Advocate representing the Applicant swore an affidavit which provides the background information leading up to this chamber application. According to Mr. Kumwenda, the applicant's parents and relatives are lay villagers who did not know that there were lawyers out there who could assist them. The parents and relatives of the Applicant were ultimately advised by lawyers to write a letter to express their intention to appeal and to also ask for certified copies of judgment and proceedings. According to Mr. Kumwenda, the relatives of the applicants were finally availed copy of the Judgment on 1st May 2009.

At the hearing of this application on 1st March 2012, the applicant was represented by Mr. Kumwenda while the respondent Director of Public Prosecutions was represented by Mr. Mhina, the learned State Attorney.

It is clear from the provisions of section 361 of the **Criminal Procedure Act**; the Applicant was expected to set into motion his appeal against his conviction and his 30 year sentence by first giving a notice of his intention

to appeal within ten days from the date of his conviction and sentence. He was also supposed to follow-up by lodging his petition of appeal within forty-five days from the date of the judgment or within forty-five days of the date he received a copy of the proceedings and the judgment of the District Court.

Records show that the judgment of the trial Kibaha District Court was delivered on 10th February 2009. Further, it was not the relatives of the Applicant who six days later on 16th February 2009 wrote a letter to request for certified copies of the judgment and proceedings; but it was Mr. Kumwenda the learned Advocate who wrote that letter. Although Mr. Kumwenda swore in paragraph 5 of his affidavit that he was given the copy of judgment on 1st May 2009 the records show that the copy of the judgment was certified to be ready for collection much earlier on 16th April 2009.

Mr. Mhina, the learned State Attorney submitted in opposition to this application by contending that the applicant found himself out of the limitation period of ten days within which to file his intention to appeal and forty-five days after getting a copy of the judgment

because of the lack of due diligence by Mr. Kumwenda who had insisted to be paid first his fees before setting into motion the appeal process. The letter dated 16th February 2009 which Mr. Kumwenda wrote to request for certified copies of judgment and proceedings did not say a word about the statutory intention of the applicant to lodge an appeal.

I cannot but wonder why Mr. Kumwenda could write his letter requesting for certified copies of judgment and proceedings within the prescribed ten days but failed to express an intention to appeal. It is clear from the affidavit taken out by Mr. Kumwenda and also from the submissions he made before this court, he could not extend his professional services to the Applicant because the Applicant's relatives failed to raise the Advocate's fee.

Mr. Mhina, the learned State Attorney is with due respect correct to question the veracity of paragraph 4 of the affidavit where Mr. Kumwenda stated that the Applicant's parents and relatives ultimately were advised to write a letter to court to show their intention of appealing and also to ask for certified copies of

Judgment and proceedings. Records are clear that it was not the parents or relatives of the applicant who actually wrote the letter annexed to the affidavit. It was Mr. Kumwenda who wrote that letter and also failed to express any intention of the Applicant to lodge his appeal.

From the foregoing, it is my finding that Mr. Kumwenda was more concerned with payment of his professional fee than to express the intention of the Applicant to appeal. Mr. Kumwenda also failed to diligently read the conditions under section 361 of the **Criminal Procedure Act** which prescribe a period of ten days within which to express the intention of the Applicant to appeal and period within which the Applicant was supposed to file his petition of appeal.

I should perhaps point out here that section 14-(1) of the **Law of Limitation Act, Cap. 89 R.E. 2002** which the Applicant employed to move this court does not apply to extension of time to enable an applicant to file an appeal against a conviction and sentence. The law that is applicable is section 361 (2) of the **CPA** which the applicant cited together with the **Law of Limitation Act**.

The outstanding issue for my determination is whether lack of due diligence by an Advocate representing the applicant constitutes statutory good cause within the meaning ascribed by section 361 of the **Criminal Procedure Act (CPA)**. This provision states:

361-(2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed.

Mr. Mhina has referred me to a Court of Appeal decision in the case of **Maneno Mengi Ltd. and 3 Others Vs. Farida Saidi Nyamachumbe and Another [2004] TLR 391**. In this civil case originating from Zanzibar, the Court of Appeal stated that when there is a clear case of negligence of advocate, the party cannot be allowed to suffer, but at the same time, a negligent litigant cannot be permitted to put blame upon the advocate. With due respect to the learned State Attorney, the facts of this application before me based as they are on a criminal case interpreting what amounts to a good cause for purposes of section 361-(2) of **CPA**; are different from facts considered by the Court of Appeal in the civil case of **Maneno Mengi Ltd. and 3 Others (Supra)**. The

applicant herein is not a free man. He is serving a 30 year prison sentence. The litigant in **Maneno Mengi Ltd. and 3 Others (Supra)** was not in prison and was therefore free to follow up on appeal where his Advocate lacked diligence.

In the present application, the learned Advocate deliberately elected not to set in motion the appeal process because the relatives of the applicant had not raised requisite instruction fees. Paragraph 7 of Mr. Kumwenda's affidavit is a telling example of how learned Advocates who were consulted by the Applicant contributed to the failure by the applicant to lodge his appeal within prescribed period:

"7.-That the applicant's relatives wanted the drawing of the said appeal be drawn professionally by the Advocates but all Advocates who were being confronted, by the Applicant's relatives pronounced high and unaffordable instruction fees which the said high fees made them to decide going back to their home and start contributing what the Advocates had been charging and demanding."

While the learned Advocates like Mr. Kumwenda were sending the relatives of the applicant back home

to raise more instruction fees, the prescribed period of limitation was ebbing away to the disadvantage of the Applicant. I am satisfied that this conduct of the learned Advocates is a good cause for me to exercise my judicial discretion under section 361-(2) of **CPA** and allow the setting in motion of the process of admitting this appeal out of the period prescribed.

The application is hereby allowed and the applicant is given ten days from the date of this Ruling to lodge his notice of intention to appeal and also lodge his appeal within forty-five days of this Ruling.

DATED at DAR ES SALAAM this 14th May, 2012



**I.H. Juma,
JUDGE**

The Ruling has been delivered at Dar es Salaam this **14th May, 2012** in the presence of Mr. Kumwenda (Adocate for the Applicant **SAID RASHID @ LIPINDE** and Ms Massawe, State Attorney (for the Respondent).



**I.H. Juma,
JUDGE
14-05-2012**

