

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**MISC. CRIMINAL APPLICATION NO. 7 OF 2020**

(Arising from the High Court of Tanzania at Moshi in Criminal Appeal No. 4 of 2019 and originating from the District Court of Moshi in Miscellaneous Criminal Application No. 112 of 2019, Himo Primary Court in Criminal Case No. 112 of 2019)

**ABEID IBRAHIM ----- APPLICANT**

**VERSUS**

**PIUS ABIUD ----- RESPONDENT**

**RULING**

**MUTUNGI .J.**

The Applicant dully represented by Mr. Hemed Semith has instituted this application praying inter-alia for the following orders: -

- (a) That, may this honourable court be pleased to set aside the order dismissing Criminal Appeal No. 4 of 2019 in this court which was delivered on 23/1/2020 by myself and make an order for restoration of the said appeal in the court.

(b) Costs of this application.

(c) Any other relief this honourable court deems just to grant.

Despite efforts to serve the respondent he adamantly refused summons. The court had no option but to proceed with the hearing of the application *ex parte*. To begin with, the applicant's counsel who apparently is the deponent of the corresponding Affidavit averred that, on the material day he was sick and had tried to seek the help of other advocates which exercise did not yield any fruits. He averred sickness is an act of God. The counsel further reminded the court, the existence at the time of the novel pandemic (corona virus), given its seriousness it would have scared any natural person at this given moment in our history to appear in court. The story did not end here, he also had experienced a car break down (paragraph 7 of the Affidavit) on the very day.

He also commented on the life span of the appeal in this court, that it had been in court for a very short period not calling for a dismissal. Hence the dismissal was pre-mature. Instead the court should have adjourned the hearing. It was the learned counsel's contention that, this court has no

powers to dismiss criminal appeals originating from Primary Court for want of prosecution. The counsel further pointed out that the court did not specify the time when the appeal was to be heard on 23/4/2020. It was hence unjustifiable to dismiss the said appeal for want of prosecution before 9:15 a.m, which time the deponent arrived at the court premises.

It was the applicant's prayer that the court should invoke the recently introduced principle of "overriding objective" to cure what transpired before the court. He supported his words with the dictates of Article 13 of the National Constitution 1977 as amended from time to time. To support his stance the counsel referred the court to the case of **Alliance one Tobacco Tz (Ltd) and another V. Mwajuma Hamisi and Another, Misc. Civil Application No. 803/2018 (HCT-DSM) unreported.**

It was further submitted that, the dismissed appeal had overwhelming chances of success. The counsel mentioned among these, the fact that the Lower Court had brushed aside the reason that engaging an advocate was not a sufficient reason to transfer the case from Himo Primary Court to itself. In the event that the appeal is not restored it may

result into blessing an illegality. The applicant had a right to legal representation and this is the bottom-line.

Having summarized the counsel's submission the pertinent issue is whether the applicant's counsel has demonstrated sufficient reasons to grant this application. He has advanced several reasons to convince the court to grant the same. Among these is the reason of sickness of the applicant's counsel as deponed in his Corresponding Affidavit to the chamber summons. He alleges he was sick on the material day when the case was called up for hearing. To this he has attached a copy of the hospital chit as annexure "H12" dated 23/4/2020 where the doctor prescribed two days excuse from duty. He further states he could not communicate his sickness to his colleagues despite his efforts on the fateful day.

The court has considered sickness is an act of God which in the normal way of life cannot be predicted. It is thus found that this is indeed a sufficient reason to warrant extension of time. The same was underscored in the case of **Richard Mgala & 9 others .V. Aikael Minja & 4 others, Civil Application No. 160 of 2015.** I further borrow leaf from the case of **Emmanuel Maira .V. The District Executive Director Bunda**

where it was held: -

**“....Health matters in most cases, are not the choice of human being, cannot be shelved and nor can anyone be held to blame when they strike...”**

Be as it may the court has observed and considered the sequence in the court corams of how the learned counsel had made been entering appearances before the appeal was dismissed. It is very open that the learned advocate had been active in prosecuting the appeal. In view thereof the learned counsel is given a benefit of doubt that he might probably have fallen sick on the material day. All said and done, I find no need of venturing into the rest of the reasons, once the court has been satisfied that the counsel was prevented by sickness from appearing when the appeal was called on for hearing. In that regard the application is accordingly granted and Criminal Appeal No. 4/2019 is accordingly re-stored.



  
**B. R. MUTUNGI**  
**JUDGE**  
**23/7/2020**