

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

MISC.CRIMINAL APPLICATION NO. 5 OF 2020

(Originating from Economic Case No. 5 of 2019 of the District Court of
Nzega at Nzega)

MLEWA SALUMU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

KIHWELO, J.

The ruling in this matter was reserved by my late brother, Bongole, J, who suddenly fell ill and died on the night of 15th July 2020 two days before the date when the ruling was set for delivery on 17th July 2020. The record has now been re-assigned to me.

In this matter the applicant is essentially seeking for enlargement of time within which to lodge both notice and petition of appeal out of time against the decision of the Igunga District Court (Hon. G.N. Barthy-RM), in Economic Case No. 5 of 2019. The application is by Chamber Summons supported by Affidavit of the applicant and the application has been taken

out under the provisions of Section 361(2) of the Criminal Procedure Act, [Cap. 20 R.E 2002] (Henceforth "the CPA").

The background to the matter, is, briefly, that the applicant stood arraigned for two counts. On the first count, the applicant was charged for Illegal Traditional Healing Practice contrary to section 45(1) of the Traditional and Alternative Medicine Act, 2002. On the second count, the applicant was charged for Unlawful Possession of Government Trophy contrary to section 86(2) (e)(iii) of the Wildlife Conservation Act, No. 5 of 2009. As the applicant admitted to have committed the offence the trial court found him guilty, he was accordingly convicted and sentenced to pay Tshs. 100,000/= or serve six (6) months in default in respect of the first count. He was also sentenced to serve a prison term of twenty (20) years in respect of the second count.

Being unhappy with the said conviction and sentence, the applicant sought to appeal to this Court but for some reasons the said appeal could not be filed in time hence the present application.

Without looking at the other averments deposed to by the Applicant, I think, the Applicant is mainly trying to attribute the delay to reason furnished in paragraph 3 of the affidavit. I will quote it:

"3. That, after being convicted and sentenced, the trial court only explained to me the right to appeal, it did not go further to inform me the appeal process as mandated by section 359(1) of the CPA, hence, I failed to comply with such provision of the law, hence, this present application."

At the hearing of the application before this court, the applicant appeared in person fending for himself. He basically adopted what was averred in his affidavit in support of the application. In rejoinder though the applicant submitted issues that were not averred in his affidavit in support of the application. He valiantly argued that the delay to file the appeal was occasioned by the delay to be supplied with a copy of judgment which according to him was supplied on 1/9/2019 and it was after that he started looking for a lawyer then it was taken to a typist (presumably his application) who lost the documents. The applicant strenuously argued that he was not negligent but rather the trial court delayed in giving him the necessary documents.

It is instructive to interject a remark, by way of a postscript that the submission by the applicant in relation to the delay occasioned by the court to supply him the judgment was not averred in his affidavit but rather was raised from the bar. The position of the law is very clear that submissions made from the bar are not evidence because such submissions are made without oath or affirmation, and the party making them is not subject to cross examination by his opponent and that being the case the court will not accord any weight.

Mr. Tito Mwakalinga, learned State Attorney for the respondent Republic, was fairly short. He strongly opposed the application on account that the delay was due to the applicant's negligence and that the applicant has not given any good cause for the delay. He further submitted that the

applicant was notified of his right to appeal and that he was convicted on 15/5/2019 but the application was filed on 15/12/2019 which is seven (7) months after his conviction and the applicant did not account for that delay.

From the affidavit of the applicant as well as the rival oral submissions by the parties, the issue that clearly emerges and cries for my determination is whether the applicant has disclosed sufficient cause for extension of time in which to file the intended application.

I find it convenient to start with the law which gives this Court discretion to enlarge time within which to file notice and petition of appeal.

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

There is a plethora of legal authorities in which the phrase "good cause" referred in the provision above has been judiciary tested. In the case of **Aidan Chale v. The Republic**, Criminal Appeal No. 130 of 2003 (unreported) the Court of Appeal followed the path taken in the decision in **R. v. Governor of Winchester Prison, ex p Roddie** [1991]2 All ER 931, in which at page 934 Lloyd, L.J had the following to say;

" 'Good cause' will usually consist of some good reason why that which is sought should be granted. It does not have to be something exceptional. "To amount to "good cause" there must be some good reason for what is sought." It was considered that it was undesirable

to define "good cause" and that it should be left to the good sense of the tribunal which has to decide whether or not good cause has been disclosed."

Furthermore, the phrase "good cause" received judicial interpretation in the case of **Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (unreported) in which the Court of Appeal stated;

"What constitutes good cause cannot be laid by any hard and fast rules. The term "good cause" is relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."

It is instructive to state that under section 361(2) the High Court has a wide discretion to extend the time. This discretion, however wide it may be, is a discretion to be exercised judiciously having regard to the particular circumstances of each case. I think that the law relating to extension of time under the above provision is now fairly settled, after the decision of the case of **Kassana Shabani and Another v Republic**, Criminal Appeal No. 476 of 2007 (unreported) which was quoted with approval in the recent case of **Ntigwa Gwisu v Republic**, Criminal Appeal No. 428 of 2015 (unreported) in which the Court of Appeal while stressing the point that extension of time to appeal under section 361(2) of the CPA is a discretion of this Court but such discretion must be exercised judiciously and flexibly with due regard to the relevant facts of the case. The court of Appeal stated thus:

"Since there appears to be a recurring or perennial problem, we would like to take this opportunity to make it clear that once an applicant under section 361 of the Act has satisfactorily accounted for the delay in giving notice of appeal or filing a petition of appeal, extension of time ought to be granted as a matter of right."

I have deliberately reproduced paragraph 3 of the applicant's affidavit in order to clearly show the reason for the delay which according to the applicant is the failure by the trial magistrate to inform the applicant the appeal processes in line with Section 359(1). To be precise section 359 of the CPA provides thus;

*"Section 359 (1) Save as hereunder provided, any person aggrieved by the findings, sentence or order made or passed by a subordinate court other than a subordinate court exercising its extended powers by virtue of an order made under section 173 of this Act may appeal to the High Court and the subordinate court shall at the time when such finding, sentence or order is made or passed, **inform that person of the period of time within which, if he wishes to appeal, he is required to give notice of his intention to appeal and to lodge his petition of appeal.**"(emphasis is supplied).*

A cursory perusal of the proceedings of the trial court in particular at page 4 the records reads as follows;

"Right of appeal is explained."

The question before me is whether the above statement suffices the requirement of section 359(1) that obliges the subordinate court to inform the accused of the period of time within which, if he wishes to appeal, he is required to appeal. Since the word explained is not very clear whether the applicant was not only told that he has the right to appeal but also that he has to appeal within a given period of time, I take it that such ambiguity has to be resolved in favour of the applicant. I am fortified in this view by the principle that criminal statutes must be interpreted in favour of an accused person.

I therefore find considerable merit in the applicant's prayer in that he has satisfactorily accounted for the delay in giving notice and petition of appeal in line with the settled principle in **Kassana Shabani and Another v Republic** (supra).

For this reason, I am inclined to the invitation to extend time to file notice and the petition of appeal. The applicant is at liberty to file notice of appeal within ten (10) days from the date of delivery of this ruling. Thereafter, he shall, within thirty (30) days, lodge petition of appeal.



P. F. KIHWELO

JUDGE

10/12/2020



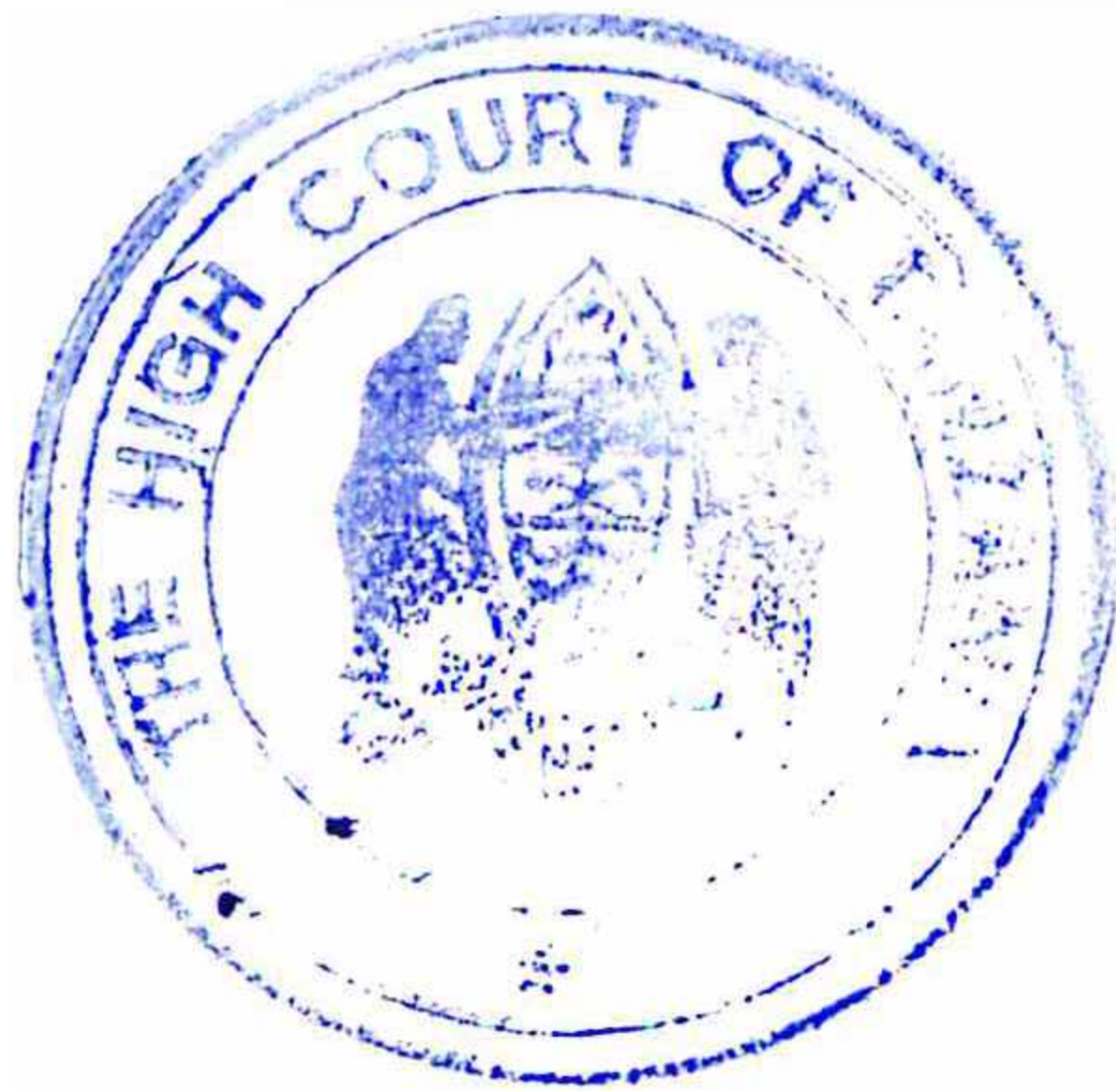
Ruling to be delivered by the Deputy Registrar on a date to be fixed.

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

P. F. KIHWELO

JUDGE

10/12/2020



Date: 17/12/2020

Coram: Hon. B.R. Nyaki, Deputy Registrar

Appellant: Present in person

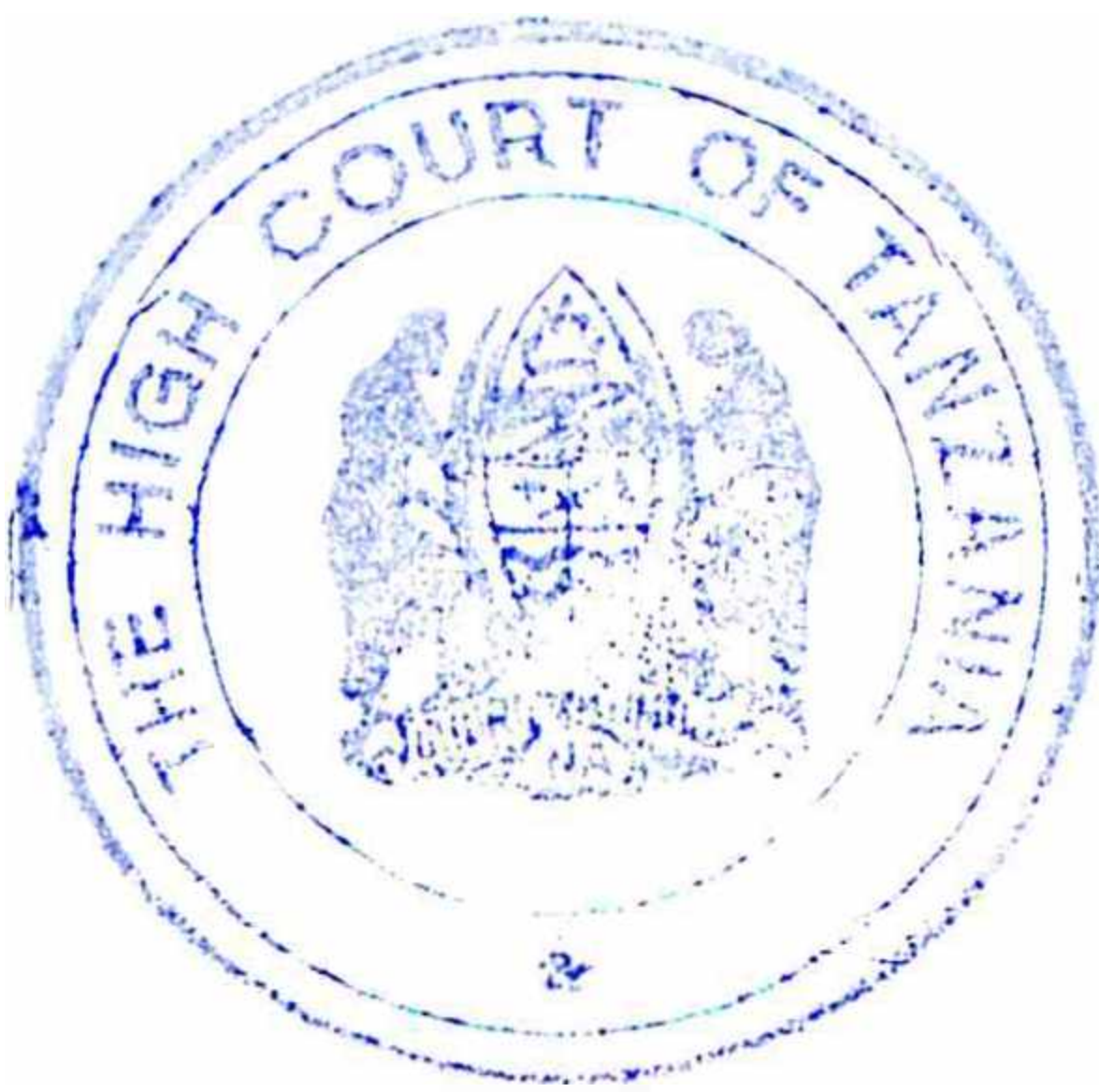
Respondent: Absent

B/Clerk: Grace Mkemwa, RMA

Court:-

Ruling delivered this 17th day of December, 2020 in the presence of the Applicant but in absence of the Respondent.

Right of appeal explained.



A handwritten signature in blue ink, appearing to be "B.R. Nyaki", is written above the printed name.

B.R. NYAKI
DEPUTY REGISTRAR
17/12/2020