

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**MISC. CRIMINAL APPLICATION NO. 224 OF 2019**

*(Arising from Criminal Case No. 437 of 2018, District Court of Bagamoyo  
dated 12<sup>th</sup> June, 2019 before Hon. A.N. MASUA-RM)*

**HAMADI COSMAS NDUGU ..... APPLICANT**

*VERSUS*

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

**RULING**

*16<sup>th</sup> & 23<sup>rd</sup> Mar 2020.*

Before me is an application brought by the applicant under section 361(2) of the Criminal Procedure Act, [Cap. 20 R.E 2002] herein referred to as CPA praying this Honourable Court to admit the appeal by extending time to file the Notice of Appeal and Petition of Appeal out of time. It is supported by the sworn affidavit of **Hamad Cosmas Ndugu**, the applicant. Though no Counter Affidavit has been filed the application is protested by the respondent/Republic.

The brief background story of this application as gathered from the applicant's affidavit is that, he was arraigned before Bagamoyo District Court in Criminal Case No. 437 of 2018 for offences of Rape contrary to section 130(1)(e) and 131(1) of the Penal Code,[Cap. 16 R.E 2002], and

Impregnating a School Girl Contrary to section 60 (a) of the Education Act, [Cap. 353 R.E 2002], found guilty of both offences, convicted and sentenced on 12<sup>th</sup> day of June 2019 to serve (30) thirty and (3) three years imprisonment respectively. Discontented with the decision of Bagamoyo District Court, the applicant appealed to this court in (Dc) Criminal Appeal No. 30 of 2019, the appeal which was heard by a Senior Resident Magistrate with Extended Jurisdiction. The appeal was struck out on 15<sup>th</sup> October, 2019 for want of proper Notice of Appeal as the same was defective for being titled **"In the District Court of Bagamoyo at Msoga"** instead of **"In the High Court of Tanzania"**. It is from that background the applicant found himself time barred and now he has accessed this court with the present application seeking an extension of time to file the Notice and Petition of Appeal out of time.

When the application was called for hearing before me on 16/03/2020 the applicant argued his application unrepresented and the respondent was represented by Mr. Adolf Kisima, learned State Attorney. It is important also to state at this juncture that under section 361(2) of the CPA, this court upon good cause shown by the applicant can admit the appeal notwithstanding that the period of limitation prescribed in this section has elapsed. The period prescribed for filing the notice of appeal is ten days and for lodging the petition of appeal is forty five days from the date of finding, sentence or order.

The issue for determination before me is whether the applicant has shown good cause to warrant this court exercise its discretion to grant the application. Submitting on the ground for delay to file the Notice and Petition of Appeal the applicant told this court that he filed the appeal timely challenging the decision of Bagamoyo District Court the court

which convicted him of two offences named above in Criminal Case No. 437 of 2018. That he came to know that the Notice he had filed was defective when the judgment of his appeal in (Dc) Criminal Appeal No, 30 of 2019 was struck out because of the defectiveness of the Notice of Appeal for being titled "**In the District Court of Bagamoyo at Msoga**" instead of "**In the High Court of Tanzania**". That, the said defect was out of his control as the documents are normally prepared by prison officers and brought to him for signatures only before filing them to court the task which is also under prison authority. He therefore asked the court to find that he has shown good cause sufficing to grant the application and be pleased to grant the same.

Opposing the application Mr.Kisima was of the view that the reasons advanced by the applicant are unreasonable. That the mere fact that the said document are prepared by the prison officer should not be condoned by this court for the said officers have legal knowledge and ought to have known such incurable error of misquoting the title of the Notice of Appeal. That if this court accepts that reason it will open a pandora's box and attract much more application of this nature he contended. He therefore urged this court to dismiss the application for want of merit.

As stated earlier this court has discretion to grant the application upon good cause established by the applicant. What amounts to good cause is left in the hands of court's unfettered discretion basing on the circumstances of the case. See **Meis Industries Limited & Ors v Twiga Bankcorp (Misc Commercial Cause No. 243 of 2015) [2016] TZHCComD 17.**

It is not disputed by Mr. Kisima that the applicant filed Notice of Appeal and his appeal in (Dc) Criminal Appeal No. 30 of 2019 before he noticed that the said notice was defective. The applicant has submitted that, that defectiveness of title of the court was not an error of his own make as it is the prison authority that prepared it for him. Though Mr. Kisima is challenging this reason I find it worth of consideration. In my opinion it was not possible for the layperson like the applicant to note and know the effect of giving the said notice a wrong title. Mr. Kisima wants this court to believe that the said Notice by the applicant was prepared by a learned person who is a prison officer. However he has not advanced any evidence to prove to the court his assertion whoever prepares the prisoners' documents is learned person. Even if the prison officer who prepared the said Notice of Appeal for the applicant had legal background, should we punish the applicant for prison officer's omission? With due respect I think no, as for so doing would amount to punishing an innocent person who had no control of the process as rightly submitted by the applicant apart from appending his signature to the said Notice and submit the same to the prison authority for filing procedures to the court. So by signing the Notice of Appeal and later present the petition of appeal for filing in this court the applicant was in compliance with the provisions of section 363 of the Criminal Procedure Act, [Cap. 20 R.E 2002]. For the purpose of clarity it is instructive that I reproduce it hereunder:-

*S.363. If the appellant is in prison, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison, who shall*

*thereupon forward the petition and copies  
to the Registrar of the High Court.*

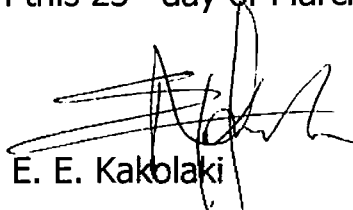
With regard to Mr. Kisima's worries that, should this application be allowed on the ground that the notice of appeal preparation process was out of applicant's control it will be opening pandora's box for other prisoners to come up with the same ground, I disagree with him. Every case is decided on its own merits. In exercising its unlimited discretion either to grant the application or not the court will normally look at all circumstances of the case before proceeding to grant the same.

Having so found and having considered the circumstances of this application, I am of the firm view that the applicant has shown good cause to warrant this court exercise its discretion to grant the application. The issue raised is therefore recorded in affirmative.

In the circumstances and for the foregoing reasons I would allow the application and extend time within which to file notice of appeal and the petition of appeal as I hereby do. Given the fact that the applicant is in prison he is directed to file the notice of appeal within (10) ten days and the petition of appeal within (45) forty five days from the date of this ruling.

It is so ordered.

DATED at DAR ES SALAAM this 23<sup>rd</sup> day of March, 2020.



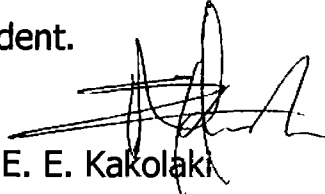
E. E. Kakolaki

**JUDGE**

23/03/2020

Delivered at Dar es Salaam today on 23<sup>rd</sup> day of March, 2020 in the presence of the Applicant and **Mr. Genes Tesha** learned Senior State Attorney for the respondent.



  
E. E. Kakolaki

**JUDGE**

23/03/2020