

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

MISC. CRIMINAL APPLICATION NO. 2 OF 2021

*(Arising from the decision of the District Court of Musoma at Musoma
in Criminal Case No. 146 of 2018)*

WILLIAM WEGORO MUGUBE APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

31st and 31st March, 2021

KISANYA, J.:

This is an application for extension of time within which to file notice of intention to appeal and petition of appeal out of time. It is brought by way of a Chamber Summons made under section 361(2) of the Criminal Procedure Act [Cap. 20, R.E. 2019) (the CPA). The Chamber Summons is supported by the affidavits of the applicant and the officer in-charge of Mollo Prison, Sumbawanga.

Briefly, on 31st October, 2018, the applicant was convicted for offences of rape and impregnating a school girl contrary to the relevant laws of the land. He was then sentenced to serve thirty years imprisonment for each offence. The sentence was ordered to run concurrently. In addition to the custodial sentence, the applicant was ordered to compensate the victim, two million Tanzanian Shillings.

The applicant delayed to lodge the notice of intention to appeal and petition of appeal within time prescribed by the law. Therefore, in order to challenge the conviction, sentence and compensation order, he has brought the present application for extension of time within which to file the notice of intention to appeal and petition of appeal.

This matter was heard through video link today, in the appearance of the applicant and Mr. Nimrod Byamungu, learned State Attorney for the respondent.

The applicant told the Court that the delay was caused by reasons beyond his control. He contended to have filed the required documents in time but received no response from the Court after being transferred from Musoma Prison to Sumbawanga Prison. The applicant also urged the Court to consider the sentence imposed to him. According to him, the sentence of thirty years is stern because he was a young person (minor).

Mr. Byamungu supported the application. He was of the view that the issue related to legality of sentence can be determined if the application is granted.

I have considered the parties' submissions for the application. It is settled law that extension of time to do an act after the expiry of the time prescribed by the law is the discretionary powers of the Court. In terms of section 361(2) of the CPA, the Court exercises the powers for extension of time within which to lodge the notice of intention to appeal or petition if good cause is shown by the applicant. Although the phrase 'good cause' is not defined in the said Act, case law has

set out factors to be considered by the court requested to extend time. These include, the length of delay, the reasons for the delay and the degree of prejudice that the respondent may suffer if the application is granted. This position has been stated by the Court of Appeal in many cases. For instance, in **Juma Shomari vs Kabwere Mambo**, Civil Application No. 330/17 of 2020, the Court of Appeal held:

However, what constitutes good cause has not been codified although this Court has, in various instances, stated a number of factors to be considered. These are; whether or not the application has been brought promptly; a valid explanation for the delay and whether there was diligence on the part of the applicant.

The Court of Appeal went on to cite the case **Tanga Cement Company Limited v. Jumanne D. Masangwa & Another**, Civil Application no. 6 of 2001; **Tauka Theodory Ferdinand v. Eva Zakayo Mwita (As Administratrix of the Estate of the Late Aibanus Mwita)**, Civil Application No. 300/17 of 2016; and **Wambura N. J. Waryuba v. The Principal Secretary, Ministry of Finance and Another**, Civil Application No. 225/01 of 2019 (all unreported), where similar position was held.

In view of the above position, this application can be determined by considering whether or not the applicant has shown good cause.

The impugned decision subject to this application was delivered on 31/10/2018. Pursuant to the provision of section 361(1) (a) (b) of the

CPA, the notice of intention to appeal and the petition ought to have been filed within ten days and forty five days, respectively, from the date of the said judgement. However, it was on 11th January, 2021 when the present application was filed.

Reading from the affidavit in support of the application and in view of the submissions by the parties, the reasons which the Court is called upon to consider are transfer of the applicant from one prison to another and the point of illegality.

Regarding transfer from one prison to another, the applicant wanted the Court to note that he was not able to make follow-up of his appeal due to the said transfer which was beyond his control. However, neither the affidavit in support of the application nor submissions made before this Court show the specific dates of transfer from Musoma Prison to Sumbawanga where he is being held. The law is settled that each day of delay has to be accounted for by the applicant. I find that the applicant has failed to account for delay caused by the alleged transfer from one prison to another. Consequently, this ground or reason cannot be considered by the Court.

The second reason is illegality. The Court is urged to consider the legality of sentence imposed by the trial court. The law is settled that illegality which is apparent on face of record is in itself a sufficient ground for extension of time. That way, the Court will be in a position to take the proper recourse and correct the record of the issue if illegality is proved. This stance was taken in **The Principal**

Secretary, Ministry of Defence and National Service v. Devram Valambia (1992) TLR 182, where it was stated that:-

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

See also the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In the case at hand, the applicant claims to be a minor. According to section 131 (2) (a) and (b) of the Penal Code [Cap. 16, R.E 2019], custodial sentence cannot be passed to a person of 18 years and below who is convicted of the offence of rape. Also, section 119 of the Law of the Child Act, Cap. 13, R.E. 2019 bars the Court from sentencing a person below 18 years (child) to imprisonment. In that regard, I am in agreement with Mr. Byamungu, the legality of thirty years custodial sentence imposed by the trial court can be determined if this application is granted. I have also considered that the respondent has supported the application. Thus, they would not be prejudiced if the application is granted.

In the final result, this application is meritorious and the same is granted. The applicant is given ten (10) days and forty five (45) days

to lodge the notice of intention to appeal and petition of appeal respectively. For avoidance of doubt, the time extended shall start to run from the date hereof. It is so ordered.

Dated at Musoma this 31st day of March, 2021.



E. S. Kisanya
JUDGE

Court: Ruling delivered through video link this 31st day of March, 2021 in the presence of the applicant and Mr. Nimrod Byamungu, learned State Attorney for the respondent.



E. S. Kisanya
JUDGE