

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF MWANZA)**

AT MWANZA

MISC. CRIMINAL APPLICATION NO. 01 OF 2021

(In the matter of an application for leave to lodge both Notice & Petition of appeal out of time as arising from the Judgment of the District Court of Sengerema at Sengerema, in Criminal Appeal No. 26 of 2014)

KIZITO MPANGALALA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

8th & 15th March, 2021

ISMAIL, J.

This application seeks an enlargement of time that will enable the applicant, a convict who is serving a custodial sentence, to lodge his notice of appeal and the appeal, against the decision of District Court of Sengerema at Sengerema. The conviction and eventual 5-year jail sentence was in respect of five counts of threatening violence against two police officers and three militia men.

The application has been preferred under section 361 (1) (2) of the Criminal Procedure Act, Cap. 20 R.E. 2019, and it is supported by an affidavit of Kizito Mpangalala, the applicant, and it sets out grounds on which prayers sought in the application are based.

Reasons for the application are spelt out in paragraphs 8 through to 13 of the affidavit. The applicant's main contention is that the delay was caused by his inability to mobilise funds which would enable his family engage a lawyer who would draw the grounds of appeal, noting that Kasungamile Prison, in which the applicant was first confined did not have admission officers who would help him draw the grounds of appeal. It was not until he was transferred to Butimba Central Prison that he was able to enlist the assistance of the admission officers. His appeal was caught in the web of time prescription that knocked it out.

The application has been met by opposition from the respondent. Through a counter-affidavit, sworn by Georgina Kinabo, the respondent's state attorney, grounds on which the application is based has been shrugged off. The respondent contends that the appeal does not stand any overwhelming chances of success. The deponent has further averred that no exceptional circumstances or unusual reason have been adduced to move the Court to grant the application.

Hearing of the application which was, conducted virtually by audio-conference, saw the applicant fended for himself, while the respondent was represented by Ms. Georgina Kinabo, learned State Attorney. In his brief submission, the applicant reiterated what has been averred in the supporting affidavit. He added that mobilization of funds to meet the lawyer's expenses succeeded at a time when the country was facing the Covid-19 pandemic that came with the suspension of visitors to prisons. It was not until his transfer to Butimba Central Prison that his quest for the service of lawyer was met. However, his appeal fell through on account of being time barred.

Ms. Kinabo contended that the applicant has not accounted for the days of delay from the date he received a copy of the judgment to the date of filing this application. She contended that the law is clear in that respect, citing the decision of the Court of Appeal in ***Mathias Charles Kaselele v. The Registered Trustees of the Archdiocese of Mwanza***, CAT-Civil Application No. 6 of 2016 (unreported). She prayed that the application be dismissed.

From the parties' contending submissions, the singular issue is whether the application is meritorious.

The law, as it currently obtains, is to the effect that extension of time is grantable upon the party's ability to demonstrate that grant of such extension is premised on a credible case. This is in view of the fact that such extension is a discretionary remedy, granted to a party who acts equitably (See the Supreme Court of Kenya's decision in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014). This entails demonstration, by the applicant, of the reasons that prevented him from acting timely. This is what is known as **sufficient reason**. It requires that a party meets some key conditions, some of which were underscored in the landmark decision of ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (unreported), in which the Court of Appeal laid down the following conditions:

- "(a) *The applicant must account for all the period of delay.*
- (b) *The delay should not be inordinate.*
- (c) *The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
- (d) *If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient*

importance; such as illegality of the decision sought to be challenged."

While courts have been encouraged to ensure that they apply a liberal interpretation of what sufficient cause is, they have been warned against being led by sympathy in their decisions. This delicate balancing act was accentuated in ***Dephane Parry v. Murray Alexander Carson*** [1963] EA 546, wherein it was held:

"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

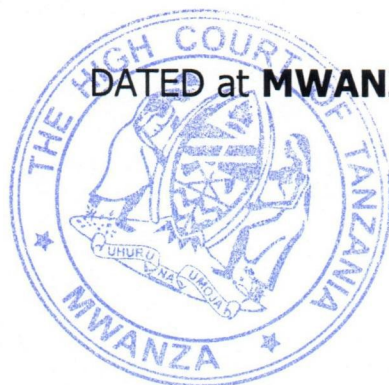
Looking at the reasons adduced for the delay in taking action timely, I observe nothing but a vindication to the applicant, and an acknowledgement of the efforts which were employed by the applicant in trying to push his case and making sure that the grounds of appeal are prepared expertly and without any delay.



While these efforts bore no desired fruits, it would be profoundly unfair to hold that such delay was a result of the applicant's sloppiness, negligence or any sense of apathy. The facts deposed in the supporting affidavit do not suggest that the applicant sat and twiddled his fingers, or that he dawdled along, doing nothing. As I realize that the days are far too many, I am not persuaded that, in the circumstances of this case, such period constitutes an inordinate delay, or an act of **"aiding a man to drive from his own wrong"**, as was held in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503.

In the upshot, I find that application is meritorious, and I grant it. The applicant is given **14 days** which to the notice of appeal and the appeal itself.

It is so ordered.



DATED at **MWANZA** this 15th of March, 2021.

M.K. ISMAIL

JUDGE