

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

**TABORA DISTRICT REGISTRY**

**AT TABORA**

**MISCELLANEOUS CRIMINAL APPLICATION NO 30 OF 2020**

*(Originating from Criminal Case No. 147 of 2015)*

**SALUM S/O RASHID KINGALANGALA.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

*15/2/2020- 8/3/2021*

**BAHATI, J.:**

The applicant **Salum Rashid Kingalangala** has moved this court in terms of section 36(2) of the Criminal Procedure Act, Cap.20 seeking for extension of time within which to file a leave to appeal out of time. The application is supported by Chamber Summons. The reasons for the application are contained in the affidavit deponed.

On the date of hearing of this application, the applicant was represented by the learned counsel, Mr. Mwigamba Sosthenes while

the respondent had services of learned State Attorney, Mr . Deusdedit Rwegira.

In his submission, the counsel for the applicant submitted that this is an application under section 361(2) of the Criminal Procedure Act, Cap. 20. He prayed to this court to adopt the affidavit to form part of this submission.

As for illegalities, he argued that the impugned decision is tainted with illegalities. He submitted that there are illegalities that the witnesses procured by the prosecution contradicted with each other. His client was alleged for an offence of corruption. He submitted that the witnesses who saw PW1 stated that the applicant requested TZS 20,000/=-, PW 5 stated that he conspired to TZS 40,000 and PW2 stated that he demanded TZS 20,000. PW6 and PW7 stated to be 40,000/=. This is revealed in the proceedings of the court. Although there was contradiction still the court convicted him.

He further submitted that there is no place where the client was given a charge sheet or a complainant statement as required.

The counsel for the applicant also contended that when the exhibits were tendered, the accused was not allowed to examine the exhibits tendered by PW. He submitted that following those illegalities, there was no fair hearing on the part of the accused. He, therefore,

prayed to this court for an extension of time. To support his argument he cited the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia [1992] TLR 182** that where there is illegality; the court can grant an extension of time. He further submitted that another reason for his application is that there is nowhere the accused has been notified that the documents are ready to file for his appeal although the accused had shown his intention to appeal. He contended that it was the court's duty to prepare all documents however there is nowhere shown he was called to collect such documents. To bolster his argument he cited the case of **Tanzania China Textile Friendship V Charles Kabweza and others.**

In response, the respondent strenuously opposed the appeal. He submitted that the applicant has not submitted or explained the reasons for his delay in the appeal before this court.

He contended that the applicant has to show why he has been late to file an appeal. On his affidavit in paragraphs 3-6 read in tandem with oral submission, the applicant is only attacking the trial proceedings on irregularities. He submitted that the issue of legality, in this case, can be dealt with in appeal and not at this juncture. To discuss the illegalities of appeal is amounting to nugatory as it will be to prejudice the respondent since it will be unfair because the respondent

has not prepared for it so he cannot make a fair comment on whether there are illegalities or not.

The counsel for the respondent further submitted that in his oral submission, the applicant has argued on the contradictions encountered. He reiterated that this matter can be submitted in appeal, similar to the issue of the charge sheet. This is not the proper forum to discuss.

He submitted that the applicant has not accounted for the days of his delay and his delay is inordinate. The impugned decision was delivered on 7/3/2016 and the applicant started banking on the legal process on 6/9/2020. For four years the applicant has not indicated what transpired, there is no evidence to show that he ever applied for proceedings in time. He has not explained as to when he was supplied with the proceedings. In those circumstances; this delay is out of negligence and does not mean to grant for extension of time.

He submitted that the case of **China Friendship** (supra) which the applicant has applied is distinguishable. In the present case, no evidence has been adduced by the applicant to have applied to the court. He submitted that the mere filing in absence of a letter for applying the proceedings as to where the documents can be sent do not mandatorily make the court duty-bound since no address is shown

as to where the documents could be dispatched to. He further submitted that what the applicant is adducing is the grounds of appeal. The applicant has stayed for four years when he was convicted and since he paid the fine he was a free agent then he could make a follow-up. Therefore this appeal is an afterthought.

In a brief rejoinder, the applicant reiterated his submission in chief and emphasized his prayer that the application be granted to enable him to address the pointed-out illegalities in the impugned decision. He submitted that it is not true that the illegality at this stage is premature, only the applicant has highlighted some of the illegalities not in detail. He then prayed this court to be granted an extension of time.

Having heard from both parties, the issue to be determined by this court is whether the grounds adduced are meritorious.

It is a general principle that extension of time is granted by the Court in exercising its judicial discretion upon the establishment of sufficient cause which prompted the delay by the applicant.

As averred by the applicant on the first ground of appeal, through the affidavit no reason depicted for the delay since 10/03/2016 up to when he filed to the court. In this case at hand it is more than inordinate the decision under attack was given on 7<sup>th</sup> March 2016 and

the applicant started banking on the legal process on 6<sup>th</sup> September 2020 and for 4 years the applicant has not indicated what transpired. There is no evidence showing that he ever applied neither for the proceedings nor as to when he was supplied with that copy of proceedings.

I agree with the respondent on this argument because, apart from making a blanket claim that he was not supplied with the documents, the applicant has not mentioned any specific period or dates when he received them. I am satisfied that the first reason for the delay advanced by the applicant is unsustainable.

As alluded earlier as a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice. In the case of **Mbogo Vs. Shah [1968] EA** The defunct Court of Appeal for Eastern Africa held thus:-

*"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal, and the degree of prejudice to the defendant if time is extended."*



When all is said concerning the guiding principles I will right away reject the explanation of the applicant. Hence this ground has no merit.

Coming to the second ground of appeal, the applicant has complained of illegality on the part of the decision.

It is a trite law that one of the accepted reasons for granting an extension of time is the illegality or otherwise of the impugned decision. The Court in the case of **Principal Secretary, Ministry of Defence and National Service V. Devram Valambhia [1992] TLR 182** at page 189 said:-

*"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 is established, to take appropriate measures to put the matter and the record right".*

It is evident that the application before me is premised under the court to exercise its discretion to grant an application for extension of time if the applicant adduces good cause to justify the delay. It has been also held in times without number that, a ground alleging illegality constitutes good cause for an extension of time. Among the decisions include, **Principal Secretary Ministry of Defence and National Service v. Devram P. Valambhia [1992] TLR 387** and **Kalunga & Company**

**Advocates Ltd (supra). In Principal Secretary Ministry of Defence and National Service, (supra) the Court stated that, “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”.**

Having said that on the ground alleging the existence of illegalities in the impugned decision, I am mindful of the fact that I am not supposed to dig much on the same, but only to consider as to whether the same constitute good cause to warrant a grant of this application. In his submission, the applicant contended that the respondent failed to avail him of a copy of the proceedings. He also submitted that he has been waiting for such a document but to no avail.

In my considered view, the arguments made by the applicant's reason for seeking an extension of time raise the issue of the illegality or otherwise of the decision of the trial court. For that reason, in the case of **Principal Secretary Ministry of Defence, (supra)** where the Court, while considering a ground of illegality submitted before it, observed that, "*We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is*



*sufficient importance to constitute sufficient reason for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand." The Court went on to state 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 is established, to take appropriate measures to put the matter and the record right."*

It is, however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled and it should be borne in mind that, in those cases where extension of time was granted upon being satisfied that there was illegality, the illegalities were explained. For instance, in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1999] TLR 182 9 the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice. We also subscribe to the views expressed by the Court in the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, when the Court observed;- "Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the court meant to

draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as *the question of jurisdiction*; not one that would be discovered by a long drawn argument or process.

Applying the above-mentioned statement of principle to the application under consideration, I have not been persuaded by what is before the Court, on the alleged illegality in the trial court decision, to lead me to state that it is apparent on the face of it and thus can be discerned as a good cause for the Court to grant the prayers sought in this application.

In the event, I must conclude that, under the circumstances of this case, the applicant has failed to illustrate good cause that would entitle them extension of time as sought. This application is consequently dismissed.

Order accordingly.



**A. A. BAHATI**

**JUDGE**

**8/03/2020**

Ruling delivered under my hand and seal of the court in the chamber, this 8<sup>th</sup> day March, 2021 in the presence of both parties, Sosteness Mwigamba for applicant and John Mkonyi for Republic.



**A. A. BAHATI**

**JUDGE**

**8/3/2021**

