

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 13 OF 2020

(Originating from Shauri la Jinai No 32 of 2019 at Arusha Chini Primary Court and Misc. Criminal Case No 2 of 2020 at the District Court of Moshi)

AMOS NANAI APPELLANT

VERSUS

ATHUMAN JUMA..... RESPONDENT

JUDGEMENT

MUTUNGI .J.

Before the District Court of Moshi at Moshi the Appellant had unsuccessful moved the Court seeking for extension of time within which to file an appeal against the judgement of the Arusha Chini Primary court vide Shauri la Jinai No 32 of 2019.

I find it apt to narrate the background of this application albeit briefly. The Appellant was convicted by Arusha Chini Primary court in "Shauri la Jinai No. 32 of 2019". Prior to this case, the Appellant had filed Criminal Case No. 31/2019

against the respondent where he was acquitted. The applicant mistakenly appealed against Criminal Case No. 31/2019 instead of Criminal Case No. 32/2019 which had its judgment delivered on 20/5/2019 and the lodged appeal (on 7/5/2020) accordingly struck out. The time to appeal against Criminal Case No. 32/2019 had elapsed so the Applicant unsuccessful made an application (No. 2/2020) for extension of time before the District Court of Moshi. Aggrieved, he has come through the window of appeal in this court with the following grounds: -

- 1. That, the trial magistrate failed to properly count down the days from which the applicant had requested to be granted the copy of the ruling and the time he filed the application was within time.*
- 2. That, the Honourable court erred in both law and fact for failing to determine the varied time and grant the appellant an extension of time to file the appeal.*
- 3. That, the Honourable court disregarded the applicant's reason about the fact that the District Court had delayed to grant him a copy of the ruling of criminal case no. 02 of 2020 and hence he was within time.*

4. That, the Honourable court erred in both law and fact by not acknowledging the fact that the appellant and the respondent have previous feuds and the act of leaving the issues of appeal un answered will leave the two at logger heads.

The parties appeared in person, prayed to proceed by way of written submissions, and were accordingly ordered to file the same, which were filed as scheduled.

Submitting on first, second and third grounds of appeal, the Appellant tried to demonstrate the delay was due to the late supply of the copy of ruling in Miscellaneous Criminal Application No. 2/2020. The Appellant contended that the ruling was delivered on 30/10/2020 and the copies were supplied on 2/11/2020. Furthermore, the applicant complained he was curtailed the right to be heard in the said criminal case once he was not granted a right to defend himself. He prayed this court does grant extension of time to file the intended appeal for justice to prevail.

Lastly the Appellant raised the issue of strengthening the relationship between the two rival parties in the event the application is granted. He reasoned, the two had unresolved issues and leaving the appeal unanswered will create more enmity. The appellant further explained the

court had a duty to resolve disputes to come to an amicable settlement. He was of the settled view justice will not be attained if each party will not be given an opportunity to adduce evidence and a just decision made.

Contesting the submission by the Appellant, the Respondent replied to the grounds generally. For the ground that the delay was due to late supply of the ruling and order by the District Court, he lamented this was a new ground which was not raised in the Affidavit nor submission at the trial court for the parties to argue on the same. In view thereof this court cannot deliberate on such issues. To cement his argument, he cited the case of **Elisa Moses Msaki vs Yesaya Ngateu Matee [1990] TLR 90 CAT.**

The Respondent argued, it is trite for extension of time to be granted, the applicant is required to show good cause for the delay. He referred the court to the case of **Hassan Bushiri vs Latifa Lukio Mashayo, Civil Application No. 3 of 2207 (unreported)** citing the case of **Omary Makunja vs Republic, Criminal Application No. 88 of 2018 (CAT at DSM).**

The Respondent further contended, the reasons advanced by the appellant for delay was the time spent in prosecuting the defective appeal which was struck out

by the District Court on 7/5/2020. The appellant is seen seeking for extension of time on 22/6/2020, which was 45 days after the appeal was struck out. In that regard the Appellant had failed to account for the 45 days of delay. He referred the court to the case of **Sebastian Ndaula vs Grace Rwamafa, Civil Application No 4 of 2014 (CAT at Bukoba unreported)** which had a similar scenario and the court found there were same gaps not accounted for.

The respondent further argued from the time when the Appellant was aware that the earlier appeal was struck out, he was to establish that he acted expeditiously in filing his application for extension of time, something which he did not do. He cited the case of **Royal Insurance Tanzania Limited vs Kiwengwa Strand Hotel Limite, Civil Application No. 116 of 2008 (unreported)** cited in the case of **Sebastian Ndaula vs Grace Rwamafa (supra)** to cement his position, that advocated for expedite action and it should be in good faith.

Furthermore, the Respondent contended, the Appellant was not diligent to prosecute his earlier petition of appeal. He had been alerted of the error through his reply but remained adamant. The error was occasioned in this case by the appellant himself through his dilatory conduct and

cannot form the reason for extension as per holding in the case of **Shanti vs Hindocha and Others [1973] E.A 207.**

In concluding the Respondent argued, the appellant failed to account for 45 days of delay from the date when his first appeal was struck out to the date when the application for extension of time was filed. He is to blame himself and for that he had no sufficient grounds for extension of time. The appeal should be dismissed with costs.

In rejoinder, the Appellant reiterate that he was within time as the copies of judgement of Miscellaneous Criminal Application No. 2/2020 were supplied to him on 2/11/2020. In reply to the submission that he has raised new issues, he contended, the reason of late supply with copies was raised in the affidavit as well as in his written submission.

The Appellant argued, the respondent cited irrelevant authorities to mislead the court. The case cited of **Elisa Moses Msaki (supra)** is distinguishable from the facts of this case.

Moreover, the Appellant reiterate his earlier position that he was not negligent as he had a good ground to support his application. He was pursuing a different application

and for that the delay was technical which is excusable. He cemented this point by referring the court to the case of **William Shija and another vs Fortunatus Masha [1997] TLR 213** and the case of **Mumello vs Bank of Tanzania [2006] E.A 227.**

The applicant reiterated the reason for delay as set out in the affidavit that, the delay was caused by late supply of the copies of judgement and decree which are necessary documents in lodging any appeal. He cited the case of **The Director of Public Prosecutions vs Mawazo Saliboko @ Shanghi and Others, Criminal Appeal No 384 of 2017 [CAT at Tabora, (unreported)]** to support his position.

The appellant further averred that granting applications of this nature is discretionary where he made reference to the case of **Henry Muyaga vs Tanzania Telecommunication Company Limited, Civil Application No. 8 of 2011 (unreported)** which was cited in the case of **Henry Leonard Maeda vs Ms John Anael Mongi, Civil Application No. 13 of 2013.**

The appellant concluded his rejoinder by stating, in deliberating whether there is sufficient cause to grant extension, consideration must depend on circumstances of each case and in that regard he had sufficient reasons

in the circumstances of this matter hence the appeal should be allowed so as to challenge the disputed decision.

After the above summary the issue for determination is ***whether the Honourable District Magistrate was right in refusing to grant the extension of time as prayed in the application before her.***

Gathering from the appellant's submission, he had two reasons for delay. **First** late supply of the copies of judgment and **second**, the delay was occasioned by his own error in which instead of appealing against criminal case no. 32/2019 he appealed against criminal case no. 31/2019 which both incidentally were referring to the same parties.

Starting with the reason that he was supplied late with copies of the judgment and order, I keenly passed through the lower court records including his submissions thereto and affidavit, this reason was not presented therein. In other words, this is a new fact the appellant tries to penetrate through at the appeal stage, which is not allowed as rightly submitted by the Respondent. For ease of reference paragraph 9 of the appellant's Affidavit in the lower court states: -

“That, this application had been brought with undue delay and I am eager to challenge the judgment of Criminal Case No. 32/2019 which was delivered against me.”

With due respect, the Appellant is confusing things, this issue has been raised in this appeal under the first ground of appeal. The reality remains the stated reason is introduced in this court at the appeal stage. It can thus not be canvassed as prayed and is accordingly disregarded. As for the reason that the delay was occasioned by the defective appeal, this again is not a sufficient reason for extension of time. It has been stated in a number of the decisions that negligence is not a sufficient reason for extension of time. The Court of Appeal in the case of **Tanzania Fish Processors Limited vs Eusto K. Ntagalinda Civil Application No. 41/08 of 2018** quoted the case of **Fortunatus Masha vs William Shija & Another [1997] T.L.R 154** which held: -

“Distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the

*present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalized by striking it out, **the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal.** In fact, in the present case the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal".*
[Emphasis added]

I will borrow the wisdom of the authority above, and proceed to find, the appellant's negligence cannot be over looked, but this is on filing of the incompetent appeal and not on filing the application for extension of time. Be as it may, the ruling was delivered on 7/5/2020 and the copy was ready for collection on 5/6/2020. It is on record that the disputed application for extension of time was lodged on 22/6/2020 which was 17 days later and not 45 days as counted and found by the District Magistrate. The

foregoing notwithstanding, it is settled delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken. See **Omary Makunga vs Republic, Criminal Application No. 88 of 2018 (CAT-DSM) (unreported)**. In this case the 17 days were not accounted for.

It would seem the appellant was already aware that he was out of time, it was thus prudent on his part to have acted expeditiously and in good faith immediately after the receipt of the judgment/order. For any stretch of imagination coming after a lapse of 17 days was not expedite enough as established in the case of **Royal Insurance Tanzania Limited (supra)**.

As for the 4th ground of appeal that the trial court failed to acknowledge the fact that, the two have a long misunderstanding and if the appeal remained unanswered the two are to remain enemies. For all intent and purposes this ground is not one of the factors for extension of time and I find no need to proceed to task my mind thereon.

In the final analysis, I find this appeal has no merits, the Appellant had failed to show good cause upon which the

court could exercise its discretion to grant the extension of time as prayed in the lower court. It is hereby dismissed.

It is so ordered.


B. R. MUTUNGI
JUDGE
17/06/2021

Judgment read this day of 17/6/2021 in presence of both parties.


B. R. MUTUNGI
JUDGE
17/6/2021



RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
17/6/2021