

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOB DISTRICT REGISTRY
AT BUKOBA

MISC. CRIMINAL APPLICATION NO. 37 OF 2021

(Arising from Criminal Case No.23 of 2020 of Muleba District Court, at Muleba)

NDESILE DEUS APPLICANT

VRS

REPUBLIC.....RESPONDENT

RULING

07/09/2021 & 24/09/2021

NGIGWANA J,

Before me is an application for extension of time to file a notice of appeal and petition of appeal out of time registered by the Applicant under section 361(2) of the Criminal Procedure Act (Cap 20 R.E 2019).

The applicant in his oral submission, prayed his affidavit embodying the reason for delay to be adopted. He therefore presented that he failed to file a notice of intention to appeal within ten days as required by the law due to the inconveniences caused by prison administration which was beyond his control. Paragraph 2,3,4 and 5 of the applicant's affidavit compliment the applicant amplifications in his submission in chief, that he was sentenced on 06/08/2020 to serve 30yrs imprisonment for the offence of incest by male by the District Court of Muleba. He was aggrieved by that decision and therefore notified the prison authority of Muleba on his intention to appeal against the decision to the High Court. The prison officers did not transmit the same in time. That within ten days after being admitted to Muleba Prison he was transferred to Kitengule prison without signing the notice of appeal and that the time to file notice elapsed.

In reply, Mr. Uhagile, a State Attorney for Republic refuted the application by submitting that the court has not been properly moved for the applicant citing the provisions of section 361(2) of the CPA, Cap 20 R.E 2019 instead of section 392 A of the same Act. He added that should the court find that the wrong citation is cured by overriding objective, he still prayed that the application should not be granted.

In rejoinder, the applicant reiterated that the reason for delay was out of his control as he was delayed by prison officers.

Having considered the submissions from both parties and the affidavit of the applicant in this application, I have to determine whether the applicant has demonstrated sufficient cause to warrant this court to grant extension of time to file a notice of appeal and petition of appeal out of time. The applicant submits that he has so demonstrated while the respondent's learned state attorney opposes.

Mr. Uhagile for Republic had raised a point of law that the provision of section 361(2) was wrongly cited as the applicant ought to have cited the provision of section 392A of CPA. For the sake of clarity and easy reference, it is imperative to quote the both provisions as hereunder:

Section 361(2) provides "*The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed*".

While section 392A with sub section (1) & (2) provides. "*(1) Every application under this Act shall be made before a court either orally or in written form.*

(2) An application made in written form shall be by way of a chamber summons supported by affidavit."

I think this objection should not detain me. Section 361(2) cited by the respondent provides on the power of the High Court to extend time to appeal on sufficient cause notwithstanding that the period of limitation has elapsed.

Along with that, section 292A on subsection (1) and (2) provides a procedure upon which the applicant may bring the application for the High Court to exercise such power. All these provisions complement each other, the only right move is to cite both provisions and not one of them contrary to what Mr.Uhagile has subscribed for and similarly, contrary to what the applicant has done.

Citing only section 361(2) which gives the High Court power to extend time and omitting to cite section 392A (1) & (2) which provides a procedure is an irregularity which is curable and not fatal as there is no way it can occasion failure of justice to the adverse part. This is because the omitted provision by the applicant directs the compliance of making application orally or written application and if written to be by way of chamber summons supported by affidavit upon which the applicant complied with the provision by filling a chamber summons supported with his affidavit. The best objection which this court would have accepted should be that of filling of an application by the applicant without filling an affidavit and chamber summons. Conversely, the Respondent's State Attorney did not say how the omission occasioned failure of justice. The omission, in my view is cured by the Overriding objective principle of clearing away the undue technicalities at the expense of doing justice. The objection is therefore overruled.

I now move to determine whether the applicant has demonstrated good cause to warrant this court to exercise its discretion to extend time?

Section 361(2) of CPA, Cap 20 which the applicant has cited allows this court to extend time upon good cause being demonstrated by the applicant. Also See **Ratnam v. Cumarasamy** (1964) 3 All ER 933 where it was stated thus:

"The rules of court must, prima facie, be obeyed, and in order to justify a court in extending the time during which some step-in procedure requires to be taken, there must be some material on which the court can exercise discretion. If the laws were otherwise, a party in breach would have unqualified right to an extension of time which would defeat the purpose of the rules which is to provide for a time table for the conduct of litigation."

There was no Counter Affidavit filed by the learned state Attorney. Failure to file a counter Affidavit has the legal effect that the respondent cannot be heard disputing the facts averred in the affidavit by the applicant save for points of law. There is no apparent reason for this court not to believe that the delay was due to prison officers who did not submit the notice of intention to appeal presented to them before they transferred the applicant from Muleba where he was convicted to Kitengule prison as rightly submitted by the applicant. The fact which was not disputed by the respondent's counsel. Keenly perusal on the applicant's affidavit reveals that the applicant was in Kitengule Prison as it was endorsed by the officer in charge Kitengule Prison.

This court has found merit in this application as the applicant has demonstrated good cause for delay and which was beyond his control.

In the end result, I am convinced that the applicant has managed so sufficiently to demonstrate sufficient cause for delay that the delay was beyond his control to warrant this court to have time extended for him

to file notice and appeal out of time to pursue his intended appeal. The application for extension of time is hereby granted. The applicant should file the notice of appeal within 10 days and an appeal within 21 days from the day of this order.

Order accordingly.




E. L. NGIGWANA

JUDGE

24/09/2021

Ruling delivered this 24th day of September, 2021 in the presence of the Applicant in person, Amani Kilua, learned State Attorney for the Republic and Mr. E.M. Kamaleki, Judges' Law Assistant.




E. L. NGIGWANA

JUDGE

24/09/2021