

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 190 OF 2021

*(Arising from Criminal Case No. 852 of 2019 in the District Court of Ilala
before Hon. E. Nassary, SRM)*

SAID RAMADHANI ISSA @ KESHIA -----1ST APPLICANT

RAMADHAN HADI RASHIDI -----2ND APPLICANT

BUNDA RASHIDI -----3RD APPLICANT

VERSUS

THE REPUBLIC-----RESPONDENT

RULING

Date of Last Order: 22/09/2021

Date of Ruling: 24/09/2021

ITEMBA, J;

In this matter the three (3) above named applicants have lodged an application for an extension of time within which to file a notice of appeal out of time. Their application arises from the decision rendered by the District Court of Ilala In Criminal Case No. 852 of 2019. With respect to the said decision, the applicants were convicted of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E: 2002) as amended by Act No. 3 of 2011 and sentenced to serve thirty (30) years of imprisonment.

Their appeal against conviction and sentence was then filed and indexed as Criminal Appeal No. 34 of 2021, however the same was struck out by this Court on 12th August 2021 for bearing an incompetent notice of appeal. The appellants had also improperly moved the Court by filing their points of grievance vide Memorandum of Appeal.

In the course of initiating their appeal, the applicants have lodged this application under section 2 (1) of the Judicature and Application of Laws Act, R.E 2019 and section 361 (2) of the Criminal Procedure Act [Cap 20 R.E: 2019]. The application is supported with the affidavit sworn by the applicants' learned advocate, one, Paskas Alexander.

When the matter was called for hearing, the applicants were represented by Mr. Paskas Alexander assisted by Mr. Hashim Rungwe learned advocates whilst the respondent was under the services of Ms. Jenifer Masue, Senior State Attorney.

Mr. Alexander submitted to the effect that, the applicants are praying for extension of time to lodge their Notice of appeal out of time. The learned brother explicated that the reason why the applicants delayed to lodge their Notice of appeal in time was due to the fact that the timely Notice of appeal which they lodged before in Criminal Appeal No. 34 of 2021 before this Court, did not have a Court Stamp and therefore the appeal was struck out.

Mr. Alexander contended that it was not the applicants' faults rather it was Prison officer's; and the applicants being laymen could not detect the omission in time. He then prayed the application to be granted based on those grounds. To bolster his preposition, he invited this Court to make reference on it's decision in **Rajabu Shabani Rajabu vs. The Republic**, Misc. Criminal Application No. 235/2019, HCT at Dar es Salaam,

(Unreported) where the Court stated *inter alia* that where the delay is beyond the control of the applicant by the mistake done not by the applicant, it is a justifiable reason for delay.

Upon being prompted by the Court on the verification clause, Mr. Alexander admitted that it was defective as one of the paragraphs (paragraph 11) was not verified. He claimed that it was an oversight and then prayed for leave to amend the same, the prayer was not objected. After being granted leave, he amended the said affidavit in support of chamber summons to include paragraph 11.

On the other hand, Ms. Masue for the respondent did not contest the application, she actually conceded to it. Nevertheless, she articulated to the effect that the provisions of section 2 (1) of Judicature and Application of Laws Act (JALA) were irrelevant and it was not proper to encompass the same in the chamber application, however she stressed that the defect is curable.

Ms. Masue further accentuated that the relevant provision which is section 361 (2) of the CPA provides that, the Court can invoke the powers to extend time, if only there is a reasonable ground to do so. The fact that the trial Court delivered a judgment on 4th January, 2021 and the applicants lodged their Notice in time but the Notice was held defective for want of Court's stamp, therefore it was Ms. Masue's contention that the delay was reasonable.

The learned sister then concluded in finality that the prayers in the chamber application be granted to the applicants so that they can lodge their Notice of Appeal and know their fate.

In the rejoinder, Mr. Alexander conceded to the defect discovered in chamber summons in respect of citation of section 2 (1) of JALA and

then prayed for it to be ignored by the Court and the focus should be made onto the relevant one cited.

Basing on the recent position of the law that the invocation of inapplicable provision of the law does not make the application incompetent, I am fortified not to detain myself here on the aspect of wrong citation of the law. (See the case of **MIC Tanzania Limited and 3 others vs. Golden Globe International Services Limited**, Civil Application No. 1/16 of 2017 and the case of **Joseph Shumbusho vs. Mary Grace Tigerwa and 2 others**, Civil Appeal no. 183 of 2016 (All unreported)). Henceforth, the only question for determination of this matter is *Whether the applicants have managed to give sufficient reason (s) for the delay to warrant the grant of the extension of time.*

It is trite principle of the Law that the Court may for any reasonable or sufficient cause advanced by the applicant grant leave for extension of period of limitation. See the case of **Benedict Mumello vs. Bank of Tanzania** (2006) 1 EA 227 (CAT) and the case of **Lyamuya Construction Company Ltd vs. Registered Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). In both cases it was stressed that an application for extension of time is entirely in the discretion of the court to grant or refuse it and the same may be granted only where sufficient reasons for the delay has been established.

I am in agreement with the learned senior state attorney that powers to extend time for filling notice of appeal under section 361 (2) of the CPA is discretionary and is exercised only when there is a good cause.

I have taken time to peruse the contents of the affidavit in support of the application. Paragraphs 4, 5,6,7,8,9,10 and 11 divulge that the trial

court decision was delivered on 4th January 2021. *Annexure SRB 1* to the affidavit in support of application exposes that the applicants filed their notice of intention to appeal on the 5th day of January, 2021. That was one day after the date of their conviction and sentence. The said notice of appeal was handed over to the prison officer in charge for service, who lodged it in Court as required under the provisions of section 363 of the CPA. Indeed, the notice of appeal appeared not to have court's stamp an omission which was beyond the control of the applicants. Secondly, the Court had not been properly moved since the applicants filed a memorandum of appeal instead of petition of appeal. For those reasons, this Court struck out the whole appeal.

I am of the considered view that when Criminal Appeal no. 34/2021 was under determination, the applicants' believed that the Notice of intention to appeal had no defect for them to pursue their right to appeal. If such omission was not committed the purported appeal was timely and could have been determined on merit.

The applicants delayed to lodge this intended Notice of appeal when they were pursuing the said appeal in good faith. It is trite law that a delay arising from time spent in the corridors of the court to pursue justice in good faith constitutes an excusable delay. (See:- **Omary Ally Nyamalege (as administrator of the Estate of the Late Seleman Ally Nyamalege) and Others vs. Mwanza Engineering Works**, Civil Application No. 94/08 of 2017).

From the above-mentioned case of **Omary Ally Nyammalege (as administrator of the Estate of the Late Seleman Ally Nyamalege)** (*supra*), among other things, the Apex Court of the land, mentioned one of the very important factors for consideration by the Court while

determining application of this nature, that is the diligence of the applicant. From the records, upon the Criminal Appeal no. 34/2021 being struck out, the applicants did lodge the instant application on 27th August 2021 despite the existing process of procuring the typed ruling from the Court's registries considering the situation that applicants are held in custody. I believe the applicants acted diligently under such circumstances.

I am alive with the fact deponed under paragraph 10 of the affidavit in support of application, that the other reason which lead to Criminal Appeal no. 34/2021 being struck out was due to fact that the document containing grounds of appeal was titled "MEMORANDUM OF APPEAL" instead of "PETITION OF APPEAL." One may term it as negligence on the part of the applicants, however, it is a trite law that an appeal is initiated by a valid Notice of Appeal. If the notice of appeal appears to be defective, the whole appeal is subject to being struck out for being incompetent. (See:- the case of **Majid Goa Vedastus V. R.**, Criminal Appeal No. 268 of 2006, **Emmanuel Andrew Kanengo v. R.**, Criminal Appeal No. 432 of 2007, **William Sunday v. R.**, Criminal No. 75 of 2007, **Daud Mwampamba v. R.**, Criminal No. 204 of 2009, **Hilda Andolile @ Panjani v. R.**, Criminal Appeal No. 203 of 2009 **John Petro v R.** Criminal Appeal No. 130 of 2010, (all unreported).

Henceforth under those premises, even if the applicants would have filed an appropriate petition of appeal, yet, under the circumstances of the purported appeal, the Criminal Appeal no. 34/2021 would have been struck out for want of proper notice. From the outset, I find it unnecessary to detain myself on the aspect of the so purported Memorandum of Appeal filed by the applicants.

Basing on the above stated reasons which I have expounded in line with the fact that the respondent does not contest the instant application, I am convinced beyond doubt that the applicants have disclosed a sufficient and a reasonable ground for delay and therefore the application is granted. The applicants are ordered to file their Notice of Appeal within fourteen (14) days from the date of delivery of this ruling.

It is ordered accordingly.



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L. J. Itemba

JUDGE

24/09/2021

Ruling delivered under my hand and seal of the court in chambers in presence of Mr Paskas Masoye and Hashim Rungwe advocates for the applicants, Ms Tupokigwe RMA and in the absence of the respondent.



A handwritten signature in blue ink, appearing to read "L. J. Itemba".

L. J. Itemba

JUDGE

24/09/2021