

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC. CRIMINAL APPLICATION NO. 15 OF 2022
(Originating from The District Court of Mbarali at Rujewa,
Criminal Case No. 97 of 2020)**

ACHENI SAMWELI.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

R U L I N G

Dated: 11th 18th July, 2022

KARAYEMAHA, J

On 26th June, 2020, the applicant together with Fitaah Hers and Omary Hussein (1st and 2nd accused persons), who are not part to this application, were arraigned before the District Court of Mbarali at Rujewa. Whereas the 1st and 2nd accused persons were charged with the offence Unlawful present in the United Republic of Tanzania contrary to section 45(1)(i)(g) and (2) of the Immigration Act [Cap 54 R.E 2016], the applicant was charged with the offence of Smuggling Immigrants contrary to section 46(1)(c)(g) Immigration Act [Cap 54 R.E 2016]. The applicant pleaded guilty and was accordingly convicted. Consequently, he was sentenced to pay a fine of Tshs. 20,000,000/= (twenty million)

or in default to serve a term of 20 years imprisonment on 16th July, 2020.

On 1st April, 2022, after almost 1 years and 8 months of inaction, the applicant instituted an application, by way of chamber summons praying for twin orders as follows:

- (i) This Honourable Court be pleased to enlarge time within which an applicant can file his notice of appeal out of time.*
- (ii) Any other relief(s) the Honourable Court may deem fit to grant.*

The chamber summons is supported by an amended affidavit filed on 29/6/2022 after the prayer to do so was granted, sworn by Acheni Samweli, the Applicant, and it sets out facts and grounds upon which the said prayers are sought. The respondent opposed the application through the counter affidavit duly sworn by Mr. Lordgud Eliamani in which the applicant's averments were put on spot light.

When the matter came up for hearing, the applicant was represented by Mr. Silas Msolansimbi, learned counsel while the respondent was represented by Mr. David Msanga, learned State Attorney. Arguing in support of the application, Mr. Msolansimbi submitted that the being a prisoner at Mbarali Prison, struggled hard to lodge a notice of appeal but was unsuccessful because the prison

authority did not give him the requisite assistance. He said that after short period he was transferred from Mbarali Prison to Ruanda Prison in Mbeya and after a while he was transferred to Songwe Prison. According to Mr. Msolansimbi, the transfers denied the applicant a chance to make follow up of documents required to lodge a notice of appeal. He stressed that the applicant lacked concentration and depended on the prison authority readiness and charity. While in Songwe prison, the applicant was given duties that consumed much of his time hence failed to file the notice of appeal. Later on, one prison officer helped him. Mr. Msolansimbi submitted that the applicant was a prisoner who depended on the prison authority to help him so he is entitled to extension of time. He relied on the case of **Gasaya Bwana Chamla vs. Republic**, Misc. Criminal Application No. 54 of 2022, **Abdul Ramadhan vs. Republic**, Misc. Criminal Application 58 of 2021 and **Joshua Malendeje vs. Republic**, Misc. Criminal Application No. 67/11 of 2017 (all unreported) to cement his position that the applicant was a lay person in prison. So, he depended on the prison authority to file necessary documents.

Mr. Msanga was categorical on his opposition to the application. He started his onslaught by contending that reasons seconding the application are baseless and unfounded for lack of evidence. The learned counsel contended that arguments that the applicant was

transferred from one prison to another ought to have been backed up by evidence or an affidavit sworn by the Prison Officer to that respect. He argued that the applicant's affidavit does not contain an averment that he was transferred from one prison to another. The learned counsel argued further that the period from 30th August, 2021 to the date of filing the application was very long intimating that he had no interest to appeal.

In his brief rejoinder, Mr. Msolansimbi submitted that documents relating to the applicant's transfers were not easy to obtain but that it was undisputed that he was in really sense the victim of transferers.

After hearing the rival submissions one question that springs to my mind is: is this a fit case for grant of enlargement of time within which to file a notice of appeal?

Position of the law on this subject is quite settled in this country, that enlargement of time is a discretion which must be exercised judiciously, on proper analysis of the facts and application of law to facts. It is given on a case by case basis, not as a matter of right, and a party must satisfy the court by placing some material before the court upon which such discretion may be exercised. In the same vein, it would be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his or her action was, in the

circumstances, inexcusable (see **Isadru vs. Aroma & Others**, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3.

Thus, in exercising the discretion, the court has to consider if reasons for applying an extension of time constitute sufficient cause or sufficient reasons. Sufficient cause must not only relate to inability or failure to take particular steps in time but also to the need for granting such extension. This has been the stance taken by courts in a number of cases. In **Republic vs. Yona Kaponda and 9 others** (1985) TRL 84 (CAT) it was held:

"In deciding whether or not to allow an application to appeal out of time, the court has to consider whether or not there are sufficient reasons" not only for the delay but also "sufficient reasons" for extending the time during which to entertain the appeal."

In amplifying this position, the Court of Appeal came up with factors that ought to be considered in determining if sufficient cause has been established. It held as follows, in **Henry Leonard Maeda and Another vs. Ms. John Anael Mongi** (Civil Application No. 31/2013 at page 19):

"... the courts may take into consideration, such factors as, ***the length of delay, the reason for the delay and the***

degree of prejudice that the respondent may suffer if the application is granted."

[Emphasis added]

In applications of this nature, the Court of Appeal has taken a position in various decisions considering the situation prisoners are not free agents who can freely make follow up on their matters hence denial of grant of extension of time is considered not preferable. It was reasoned in **Otieno Obute vs. Republic**, Criminal Application No. 1 of 2011 which was quoted in the case of **Joshua Malendeja** (supra) that:

*"I have considered the averments by both parties and come to the conclusion that this application has merit ... **As a prisoner, his rights and responsibilities are restricted.** Therefore, he did what he could do. **He may have been let down by reasons beyond his means...** Accordingly, the application is granted."*

[Emphasis added].

As stated in the supporting affidavit and the oral submissions, the applicant has resurrected his efforts to challenge the conviction and sentence after a period of 1 and 8 months since he filed his notice of intention to appeal. The reason given is that he has been a victim of transfers from one prison to another. This reason is not supported by

any evidence but as submitted by his counsel they were not in his custody and were hard to obtain from the authority concerned.

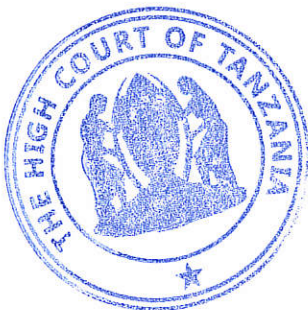
Reasoning with my brother Mtulya, J. in **Abdul Ramadhan** (supra) and guided by the position in the case **Joshua Malendeja** (supra) applications preferred under **section 361 (2) of the Criminal Procedure Act [Cap. 20 R.E 2019]**, this provision must be given broad interpretation with regard to good cause. But I think I should not waste much time because the Court of Appeal has developed a principle that whenever the court is availed with materials that the applicant was a prisoner, must be considered as a person whose freedom, right, movements and responsibilities are restricted. In this case, there is no dispute that the applicant was first an inmate of Mbarali prison. He was later transferred to other prisons as deposed under paragraph 3 of the supporting affidavit. It is obvious that the transfers left him with unfocused mind on his desires. It is well known that once an order is given cannot be easily reversed. So, whatever he wanted to do was regulated by the Prison Officers who could do what they wished at any time.

Therefore, guided by the cited precedents and taking a note of the applicant's constitutional right to appeal cherished under **Article 13 (6)(a) of the Constitution of the United Republic of Tanzania, 1977**, I find the reasons for delay advanced by the applicant constitute

good cause. For the given reasons, I find this is a fit case to exercise court's discretion to grant the application bearing in mind that the respondent cannot be prejudiced by this order. I therefore, extend time for the applicant to lodge his notice of appeal within 10 days from the date of this ruling and should as a matter of sequence file a petition of appeal within 30 days. I order so to avoid multiplicity of application in court.

It is so ordered.

DATED at MBEYA this 18th day of July, 2022



A handwritten signature in black ink, appearing to read "J. M. Karayemaha", is written above a horizontal line.

J. M. Karayemaha
JUDGE