

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISC. CRIMINAL APPLICATION NO. 47 OF 2022

*(Arising from the decision of Economic No. 19 of 2019 in the District Court of
Tarime at Tarime)*

BETWEEN

WANKURU s/o MORENDA @ RHOBIS SANGA @ ISAYA..... APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

RULING

21st Nov & 5th Decemberr, 2022.

M. L. KOMBA, J.:

This is an application for extension of time to file Notice of Appeal and later on to serve the respondents Notice of Appeal out of time to appeal to this court against decision of District Court at Tarime in Economic case No. 19 of 2019. The application is made by way of chamber summons under section 361 (1) (a) (b) and section 2 of Criminal Procedure Act, CAP 20 R. E. 2019 (the CPA). The application is supported by affidavit of Christopher Waikama, Counsel for the applicant. The matter was filed under certificate of urgency.

When the matter was scheduled for hearing, applicant was represented by Christopher Waikama, advocate while Respondent, the Republic was

represented by Frank Nchanila (SA). In support of the application the applicant started by adopting his affidavit and submitted that the applicant delayed to appeal to this court on time due to the truth that he is in prison. In his submission he provides a short history that the applicant was arraigned in District Court of Tarime in illegally possession of the Government trophy. Upon found him guilty, District court convicted appellant and sentenced him. He further submitted that it is a legal requirement that notice of appeal to be filed within ten days. From the date the appellant was accessed with legal service until when the application is filed in this court, he is late by 27 days. He said, it is true that the applicant is supposed to account for delay and that by the time Chamber Application is filed, the applicant was within the time to appeal but because it was out of the ten days it necessitated to apply for time so that he can file notice of appeal.

Elaborating more on the time, Mr. Waikama explained that the deadline for filing an appeal was 12/11/2022 and that by that time the applicant could manage to file petition (because this application was filed on 3/11/2022) but could not manage to file notice on time. The reason for delaying to file notice was due to the fact that the applicant is in jail.

Mr. Waikama explained the position of law that in order for the court to award extension of time there must be reasons and it should not be negligence. He said the applicant is in jail and he could not attend some of his issues including the lodging of notice of appeal. He nailed his submission by citing the decision in Court of Appeal at Mbeya in the case of **Maneno Muyombe & Another vs. Republic**, Criminal Appeal No. 435 of 2016 (unreported). Where the court extended time for the appellants to appeal out of time and at page 8 the CAT directed that one of the reasons where court can extend time is the circumstance of the applicant be in jail where he cannot do things in his liberty. According to Mr. Waikama, being in jail is one of the conditions to be considered. It was his argument that the applicant will suffer much than the respondent if application will not succeed and pray for the court to grant extension of time.

In reply Mr. Nchanila said the respondent is objecting this application because applicant has no sufficient reasons for his delay and pray his counter affidavit to be adopted. He presented that according to section 361 (1) (a) and (b) and section 2 of the CPA, there are conditions to the applicant to file notice of appeal within ten days. He said according to counsel for applicant, the judgement was delivered on 28/09/2022 the application was submitted

03/11/2022. There is a total of 36 days delayed and not 27 days as submitted. He insisted that Notice is important as it initiate an appeal and pray this court to see the applicant has failed to account for each day of delay.

Mr. Nchanila pray this court not to consider the case of **Maneno & Another vs. Republic** (supra) as it is distinguishable. He said in the cited case there was two issue which justices of appeal deliberated that applicant denied to be served by the copy of judgement. In the application at hand, the applicant is not indicating that he was denied the copy. He said the affidavit indicated that he failed to communicate with his relatives and paragraph 5 and 6 of affidavit is about failure to get service of the advocate and the communication break down and alerted that these were not issues in the cited case, so the case is distinguishable.

State Attorney presented that section 361 (2) of the CPA was interpreted by Justices of Appeal in **Moroga Mwita vs. Republic**, Criminal Appeal No. 181/2020 CAT at Musoma (unreported) that on good cause court may admit an appeal. It was his submission that, for a court to determine whether to grant or not the determinant factor is explanation of good cause of delay. He explains further that according to the case of **Moroga Mwita vs.**

Republic (supra), the applicant should explain good cause and each day has to be accounted. He concluded that the applicant in present application failed to explain and account for 36 days and pray this court to rule so.

In using his opportunity in joinder Mr. Waikama confirmed that in his affidavit he explains that applicant was delayed in supply of copy of judgment and proceedings of the District Court and was repeated during submission. He insisted that the CAT decision which he cited during his submission serves the purpose as the applicant in this application is in jail who cannot decide things on his own. In the cited case, he yelled, the delay was for 6 years and the CAT agree to extend time. While acknowledging the importance of accounting for each day as was in **Moroga Mwita vs. Republic** Mr. Waikama said even the circumstance of the case must be considered. That mark the end of submission.

I have given due consideration to both party's submission for and against this application. As a matter of principle, it is entirely in the discretion of the court whether to grant or refuse an application for extension of time as it is in section 361 (2) of the CPA. The said provision bestows the High Court with discretion in the following terms:

'The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed.'

It is trite that extension of time under the above provision is a matter of discretion on the part of the High Court but such discretion must be exercised judiciously and flexibly with due regard to the relevant facts of the particular case. In emphasize this, I recite the case the case of **Kassana Shabani & Another v. Republic**, Criminal Appeal No. 476 of 2007 (unreported) where Court of Appeal had this to say;

*'Since there appears to be a recurring or perennial problem, we would like to take this opportunity to make it dear that once an applicant under section 361 of the Act has **satisfactorily** accounted for the delay in giving notice of appeal or filing a petition of appeal, extension of time ought to be granted as a matter of right'*

The key word from the excerpt is satisfactorily. The counsel for the applicant filed affidavit which was adopted during submission. In looking for satisfaction in reasons adduced, and for easy of reference paragraph 5 and 6 of the counsel for the applicant affidavit reads as follows;

'5. That, the applicant is late in lodging his notice of intention to appeal for almost 27 days after the date of the decision and the said lateness was caused by circumstances which is assistance of an advocate and

there was remote communication with his relative hence failed to lodge the notice in time and thereafter to lodge an appeal.

6. That, after the conviction applicant rose communication with his relatives to procure his appeal and he made follow up to obtain a copy of judgement and proceedings so as to enable him to file his appeal but he failed to obtain the same.'

The applicant is a prisoner, he had communication break down with his relatives and faced challenges in obtaining copy of judgement and proceedings. These factors are serious for a person who is in prison where his movement and communication are restricted. I agree with State Attorney that upon delay, and in order for the extension of time to be considered, applicant must explain good cause and has to account for each day. Every general rule must have exception. It has been explained that the applicant is serving thirty years imprisonment.

As stated under oath paragraph 5 and 6, it is clearly that the applicant failed to get copies of relevant documents on time. While I agree with the decision in **Moroga Mwita vs. Republic** (supra), that applicant should explain good cause and each day has to be accounted, other circumstances too must be considered. Delay in receiving the intended copied vitiated by the fact that applicant is in jail. This is enough to be a good cause of delay as rightly

presented by Mr. Waikama. The fact that the applicant is a prisoner, his action and movements solely depend on the mercy of the officer-in-charge of the prison and it is unfair to expect much from a prisoner. See **Maneno Muyombe & another vs. Republic (supra)** and **Buchumi Oscar vs. Republic**, Criminal Appeal No. 295 'B' of 2011 (un reported).

Based on the foregoing analysis, the applicant's pursuit for extension had exhibited good cause. In consequence, application allowed. The appellant is granted leave to lodge notice of appeal to the High Court against the decision of District Court of Tarime in Economic case No. 19 of 2019 within ten days from the date of delivery of this judgment and thereafter within forty-five days to lodge petitions of appeal.




M. L. KOMBA

Judge

5th December, 2022