

IN HIGH THE COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISCELLANEOUS CRIMINAL APPLICATION NO.1 OF 2022

*(Originating from Mtwara Resident Magistrates' Court at Mtwara in
Criminal Case No.9 of 2021)*

HAMZA FAKIHI NAPUNDA..... 1ST APPLICANT

RAMADHANI OMARY LUTAMBI.....2ND APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of Last Order: 24/2/2022

Date of Ruling: 28/2/2022

LALTAIKA, J.:

This is an application for extension of time to file a notice of appeal against the judgment of the Resident Magistrates' Court of Mtwara, at Mtwara in Criminal Case No.9 of 2021. The application is brought under section 361(2) of the Criminal Procedure Act [Cap. 20 R.E. 2019]. It is accompanied with a Certificate of Urgency drawn by Mr. Stephen Lekey, learned Counsel for both applicants. This application is supported by the

affidavit jointly affirmed by the applicants. In the Chamber Summons the applicants have raised three grounds for the application:

- “(i) This Honourable Court be pleased to extend time for the Applicants to file a notice of appeal against the sentence of the Resident Magistrates’ Court of Mtwara at Mtwara in Criminal Case No.09 of 2021.
- (ii) This Honourable Court be pleased to extend time for the Applicants to file Petition of Appeal against the sentence of the Resident Magistrates’ Court of Mtwara at Mtwara in Criminal Case No.09 of 2021
- (iii) Any other order this Honourable Court may deem fit to grant.”

In paragraph 6 of the affidavit, the applicants aver that in composing the sentence the trial Magistrate sentenced them in both counts to pay fine or to serve a jail term in default of the fine and they complied by paying the fine. The applicants aver further under paragraph 7 of their affidavit that the court went further and ordered them to pay their employees salary arrears to the tune of 72,202,000/= and in default to serve a jail term of twelve months. Lastly, as can be adduced under paragraph 8 the applicants aver that the order of payment of Tshs.72,202,000/= and serving a jail term in default, is a punishment

over and above that what they had already served for the convicted offences. The application was not contested by the respondent since, by the time of the hearing, no counter affidavit had been filed to that effect.

At the hearing of the application, the applicants did not appear but were represented by Mr. Stephen Lekey, learned Counsel. The respondent, on the other hand, was represented by Ms. Faraja George learned Senior State Attorney.

Submitting on behalf of the applicants, Mr. Lekey prayed that what is stated under paragraph 6,7 and 8 of the affidavits of the applicants be adopted as part of his submission. He stressed that the matter touched upon the question of illegality of the decision of the Resident Magistrates' Court. Referring to page 13 of the proceedings of the trial appended as annexure HR1 of the application, the learned Counsel submitted further that the said illegality had been pointed out signifying severe punishment or even double punishment.

Mr. Lekey contended further that, upon meting the sentence on the two offences the trial court went ahead and pronounced yet another sentence contrary to law. To fortify his arguments, the learned counsel referred this court to the cases of **Juto Ally vs Lukas Komba and Another**, (Civil Application 484 of 2019) [2020] TZCA 354 and **Arunaben**

Chaggan Mistry vs Naushad Mohamed Hussein and three others,
(Civil Application No 6 of 2016) [2017] TZCA 6.

As her turn to address the court came, learned counsel for the respondent Ms. George took the liberty as an officer of the court to expound on a few procedural issues that she thought her learned friend Adv. Stephen Lekey needed to take cognizance of when it comes to praying for extension of time to file petition of appeal. Ms. George went on to submit that the respondent was not objecting the application and that is the reason as to why a counter affidavit had not been filed. The learned Senior State Attorney stressed that the intention was to ensure that justice is done to both parties.

Having keenly considered submissions by both parties, I am inclined, at this juncture, to determine whether the applicants have demonstrated good cause to entitle them for extension of time to file a notice of appeal and petition out of having defaulted prescribed time as provided for under section 361(1)(a)(b) of the Criminal Procedure Act.

In his submission learned Counsel for the applicants pointed out that the main reason advanced by the applicants is illegality of the sentence of the trial court. The Court of Appeal in the case of **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women's Christian Association of Tanzania** (Civil

Application 2 of 2010) [2011] TZCA 4 elaborated widely how illegality may be raised and relied upon by a party seeking extension of time to appeal. I take liberty to quote the relevant part of the reasoning of the court as hereunder:

“Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view be said that in Valambhia’s case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The court there emphasized that such a point of law must be that of sufficient importance and I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; nor one that would be discovered by a long-drawn argument or process”.

In view of the above, it is quite clear that the issue of illegality, when raised as a ground for extension of time must be of sufficient importance and seen on the face of record not to require long drawn argument or process. In the instant matter at hand, the learned Counsel pointed out illegality of the sentence found in the record of the trial court files. It is Mr. Lekey’s considered opinion that the sentences were severe or there was double imposition of the sentence.

Imposition of sentences to the applicant which are contrary to the dictates of the law is purely a point of law of sufficient importance which may touch upon illegality of the proceedings and judgment to suffice consideration of this court. I am convinced that the issue of sentence raised vide the joint affidavit of the applicants and supported by the submission of Mr. Lekey is an illegality which deserves the attention of this court to ascertain the same.

Though the applicants have neither accounted for the number of days delayed nor advanced reasons for their delay to lodge their notice of intention to appeal and petition of appeal, the issue of illegality of the decision intended to be appealed against suffices to move this court to grant extension of time to lodge the notice of intention to appeal and petition of appeal. See the case of **Kashinde Machibya vs. Hafidhi Said**, Civil Application No.48 of 2009(unreported) where it was observed that: -

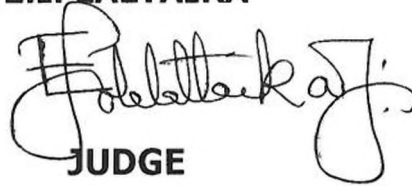
“Bearing in mind that it is now established law in this country that where a point of law involves the illegality of the decision, that by itself constitutes sufficient reason to grant an extension of time...even if the appellant’s appeal is out of time, there is no other option but to grant extension of time”.

In the light of the above position of the law and the reasoning thereof centred on submissions by learned counsels, I am convinced that the applicants have demonstrated sufficient reason to move this court to exercise its discretion to grant the extension sought.

The applicants are hereby given ten (10) days to lodge their notice of intention to appeal to this court and to file their appeal within forty-five (45) days effective from the date of this ruling.

It is so ordered.

E.I. LALTAIKA



JUDGE

28.02.2022

This ruling is delivered under my hand and the seal of this Court on this 28th day of February, 2022 in the presence of Ms. Faraja George, learned Senior State Attorney and Mr. Stephen Lekey, learned Counsel for the applicants.



E.I. LALTAIKA



JUDGE

28.02.2022