

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
CRIMINAL APPLICATION NO. 43 OF 2021
(Arising from Criminal Case No. 118 of 2020 at Ilemela District Court)

NTINGA NG'HABI MASALU-----APPLICANT

VERSUS

THE REPUBLIC----- RESPONDENT

RULING

Last order: 17.02.2022

Ruling date: 22.02.2022

M.MNYUKWA, J.

This is an application for extension of time to file an appeal against the decision of Ilemela District Court which was delivered on 31/05/2021 in Criminal Case No. 188 of 2020. The application is brought by way of chamber summons supported by the affidavit of Robert Neophitius, learned counsel and it is brought under section 361(2) of the Criminal Procedure Act, Cap. 20 R.E 2019



The application was argued before me orally during which the applicant was represented by the learned counsel, Mr. Deus Richard and the respondent, that is the Republic was represented by Ms. Magreth Mwaseba, learned state attorney.

Arguing in support of the application, Mr. Deus Richard pressed me to grant extension of time to file appeal out of time. He prayed to adopt the affidavit sworn by Robert Neophitius to form part of his submissions. He submitted that the applicant has been convicted and sentenced for the offence of rape and he has been in custody since 30/05/2021. That upon receipt of the copies of the impugned decision on 24/09/2021 they started filing the appeal in the Judicial Statistical Dashboard System (JSDS 2). That on 03/11/2021 they managed to upload the appeal as it is evidenced on Exhibit P2 which is an extract from JSDS- 2.

The counsel for the applicant further submitted that, after close follow-up of their appeal to the court, they have noticed that instead of clicking the button of High Court, the advocate who filled that appeal clicked the button of Ilemela District Court and that they have come to realize that mistake on 10/11/2021 in which the time within which an applicant was required to file an appeal had lapsed. He added that, at the time in which the applicant filed his appeal that is on 03/11/2021, he was



within the statutory period of filing appeal as the law requires the appellant to file an appeal within 45 days.

He went on that, after he realized so, he informed the applicant who was in custody for the purpose of getting his consent as to whether they should proceed with the matter or not. After getting the consent from the applicant, on 23/11/2021 they uploaded the application into the system hence the present application.

The counsel for the applicant strongly submitted that the mistake done by the advocate in filing the appeal was a human error and it was not their intention as the appeal was filed within time. He therefore prayed the Court to grant the application.

Responding to the application, Ms. Magreth Mwaseba submitted that upon going through the applicant's affidavit and upon hearing the submission from the learned counsel for the applicant and based on the nature of the sentence imposed to the appellant, she is not opposing the application for extension of time to file an appeal out of time.

The learned state attorney went on that since section 361 (2) criminal Procedure Act, Cap 20 R.E 2019 gives this Court power to extend time if sufficient reasons has been advanced and the fact that the



applicant delayed for a period of two weeks, it is her view that, the period delayed is reasonable time as the applicant cannot be condemned on the wrong filing done by his advocate taking into consideration that the system of filing is new and most of the user are not aware of it. Therefore, she prayed the application to be granted.

After the concession of the learned state attorney, the counsel for the applicant did not re-join as he had nothing to re-join.

I have given careful consideration to the reasons advanced by the learned counsel for the parties. The central issue for consideration and determination is whether sufficient reasons have been advanced to warrant the extension of time sought by the applicant.

As it was cited in the chamber summons, the applicant move this court through section 361(2) of the Criminal Procedure Act, Cap 20 R.E 2019. This is the provision of law that gives this court power to extend time upon good cause shown by the applicant. The section provides that:

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

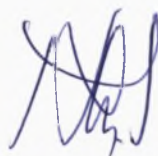
As it was highlighted in the case of **Jacob Shija vs M/S Regent Food & Drinks Limited and The Mwanza City Council**, Civil



Application No 440/08 of 2017, CAT at Mwanza (unreported) among other things stated that:

“What amount to good cause cannot be laid by any hard and fast rule but are dependent upon the facts obtaining in each particular case. That is each case will be decided on its own merits, of course taking into consideration the questions, inter alia, whether the application for extension of time has been brought promptly, whether every day of delay has been explained away, the reasons for the delay, the degree of prejudice to the respondent if time is extended as well as whether there was diligence on the part of the applicant.”

In the application at hand, I have gone through the applicant's learned counsel submissions, the available court record and indeed revisited the affidavit. Upon going through the record, I find the notice of appeal that was filed on 09/06/2021 which is 9 days after the impugned decision to be delivered on 31/05/2021. To my understanding, the act of filing a notice of appeal to this Court initiates the appeal and vividly shows an intention of the applicant to have been dissatisfied with the decision in which the appeal is sought for.



Again, it was submitted that the applicant failed to appeal within time due to the human error committed by his advocate since mistakenly the applicant's counsel filed an appeal by uploading its appeal at Ilemela District Court instead of the High Court. It is a settled law that it is unjust to impute the advocate's mistake into the applicant.

In the persuasive decision of the Court of Appeal of Kenya at Nairobi, in **Githere v Kimungu** [1976-1985] 1 EA 101 (CAK) as quoted in approval in the case of **Bahati Musa Hamisi Mtopa vs Salum Rashid**, Civil Application No 112/07 of 2018 it was stated that

" That where there has been a bona fide mistake, and no damage has been done to the other side which cannot be sufficiently compensated by costs, the court should lean towards exercising its discretion in such a way that no party is shut out from being heard; and, accordingly, a procedural error, or even a blunder on a point of law, on the part of an advocate (including that of his clerk), such as a failure to take prescribed procedural steps or to take them in due time, should be taken with a humane approach and not without sympathy for the parties, and in a proper case, such mistake may be a ground to justify the court in exercising its discretion to rectify the mistake if interests of justice so dictate, because, the door of justice is not closed merely because a mistake has been made by a person of



experience who ought to have known better, and there is nothing in the nature of such a mistake to exclude it from being a proper ground for putting things right in the interests of justice and without damage to the other side; but whether the matter shall be so treated must depend upon the facts of each individual case.

That the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress, and that the court should not be so bound tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case, and this is a principle which a court must remember when judicially exercising its discretionary power."

The Court of Appeal of Tanzania in the case of **Bahati Musa Hamisi Mtopa** (supra) when borrowing leaf in the above persuasive decision of Kenya Court of Appeal, stated that;

"... We like in the above case, think that the error committed by the applicant's learned counsel was purely a human error. We think that if this application is granted no serious damage will be done to the respondent who, as the record loudly speaks out, was also not in attendance when the Reference was dismissed."



Guided by the above decisions, in the present application the available record suggests that, after the applicant's advocate noticed the human error that has been committed of uploaded appeal into the wrong court, the applicant's advocate consulted his client who was in custody to get his consent to rectify the error which resulted the filing of the present application. As it was rightly submitted by the learned state attorney that apart from the human error done by the applicant's advocate which is excusable, the two-week delayed in filing the present application is reasonable time. I join hand with the learned state attorney as the delay was due to consultations done by the applicant's counsel to obtain the consent of his client who is in custody.

Furthermore, the records show that the appeal which was mistakenly filed at Ilemela District Court, was filed within time as the same was submitted for filing in the JSDS 2 on 3/11/2021 at 15: 52:11 and admitted on 11/04/2021 at 07:19:2021. On that basis, I am satisfied that the applicant filed the appeal within time though mistakenly filed in the wrong court.

In the final analysis, I find that the applicant has managed to show good cause upon which this Court can exercise its discretion to grant extension of time to file an appeal out of time. Therefore, the applicant



is granted 45 days from the date of this Ruling to lodge an appeal to this Court.

It is so ordered.


M.MNYUKWA
JUDGE
22/02/2022



Ruling delivered on 22nd day of February, 2022 via audio teleconference whereby all parties were remotely present.


M.MNYUKWA
JUDGE
22/02/2022