IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 261 OF 2021

HAJI MSONGELA JUMA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

04th April, 2022 & 6th May, 2022

E.E. KAKOLAKI, J.

The Applicant herein preferred this application under the provisions of section 361(2) of the Criminal Procedure Act, [Cap 20. R.E 2019] (the CPA), praying for an order of extension of time for him to issue the Notice of intention to appeal and lodge the Petition of Appeal out of time against the sentence meted on him on 31/07/2019, in Economic Crime Case No. 60 of 2019, before the Resident Magistrates Court of Dar es salaam at Kisutu. When served with the chamber summons and its affidavit duly sworn by the applicant himself in support of the application, the respondent responded by filing the Counter Affidavit strenuously challenging the merits of the

application. The matter was therefore set to be heard on merit in which parties were heard viva voce.

The facts leading to the present matter can be briefly narrated thus. The applicant herein on 19/06/2019 at Mwalimu Nyerere International Airport, while preparing to fly to China was arrested by Customs officer allegedly for failure to declare in the Cross Border Declaration of Currency and Bearer Negotiable Instruments form (Form 1), the sum of US$ 750,000 which he had possession of. He was thereafter on 25/06/2020 arraigned at the Resident Magistrates Court of Dar es salaam Region at Kisutu, facing a charge on three counts before the same was substituted on 31/07/2019 with a charge carrying two counts only. One of the two counts (first count) was on the offence of **Failure to Declare Currency**; Contrary to Regulation 5(1) and (5) of the Anti-Money Laundering (Cross Border Declaration of Currency and Bearer Negotiable Instruments) Regulations, GN. No. 268 of 09/06/2016, read together with section 28B(1)(a) of the Anti-Money Laundering Act No. 12 of 2006 as amended by the Anti-Money Laundering (Amendment) Act No. 1 of 2012. It was alleged by the prosecution that, the applicant falsely declared in form No. 1 that, the said cash belonged to H. Juma (GSM Company) while in fact it was not true.

When the applicant was called to plead to the charge on 31/07/2019, he pleaded guilty to the first count saying *'it is true I falsely declare the currency by giving false information'*, thus convicted on his own plea of guilty and sentenced to a fine of Tshs. 100,000,000 or serve custodial sentence of three (3) years in default. Further to that the court ordered for forfeiture of the said US$ 750,000 to the Government. The charge on the second count was withdrawn by the prosecution under section 91(1) of the Criminal Procedure Act on the same date of 31/07/2019, after he had pleaded guilty to the first count.

Disgruntled with the sentence meted on him and having failed to timely appeal against it, through the advice of his advocate Mr. Albert Msandu, the applicant successfully filed Misc. Criminal Application No. 83 of 2021 in this court, extending him time within which to file a revision application to this court and managed to lodge the same vide Criminal Application No. 144 of 2021. The said revision application could not breathe longer in court as it was struck out on 29/10/2021, following the preliminary objection that was raised by the Republic to the effect that, revision is not an alternative to appeal. Undaunted and heeding to the piece of advice of his newly engaged advocate, Mr. Beatus Malima, the applicant on 26/11/2021 preferred this

application in a bid to have time extended for him to challenge the sentence imposed on him by the trial court.

At the hearing of this application both parties appeared represented. The applicant hired the legal services of Mr. Beatus Malima, learned Advocate, while respondent enjoyed representation of Mr. Shedrack Kimaro, learned Principal State Attorney and Mr. Timotheo Mmari and Mr. Ramadhani Kalinga, both learned Senior State Attorneys.

This court under section 361(2) of the CPA is clothed with unfettered discretion to grant the applicant extension of time as sought in his prayers upon good cause shown. But what amounts to good cause there is no hard and fast rules as that depends on the reasons advanced by the applicant to justify grant of the sought prayers. There is plethora of authorities to that settled position of the law, but for the purposes of guidance of this court while determining this application, it pleases the Court to cite few of them. It was held by the Court of Appeal in the case of **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported) that:

> *"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is a relative one and is*

dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion. See, ***Ratman Vs. Cumarasamy and Another*** *(1964) 3 All ER and* ***Reginal Manager Tanroads Kagera Vs. Ruaha Concrete Company Limited****; Civl Application No. 96 of 2007 (unreported)"*

In another case of **Jumanne Hassan Bilingi Vs. Republic**, Criminal Application No. 23 of 2013 (CAT-unreported) Court of Appeal stated thus:

"…what amounts to good cause is upon the discretion of the Court and it differs from case to case. But basically ***various judicial pronouncements defined good cause to mean reasonable cause which prevented the applicant from pursuing his action within the prescribed time****."* (Emphasis added).

Similarly in the case of **Republic Vs. Yona Kaponda and 9 Others** (1985) T.L.R 84, the Court stated at page 86 that:

"In deciding whether or not to extend time I have to consider whether or not there are "sufficient reasons." As I understand it, "sufficient reasons" here does not refer only, and is not confined, to the delay. Rather it is "sufficient reason" for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding

circumstances, and the weight and implications of the issue or issues involved."

Trading on the above cited guidelines, it is also a duty of this Court to exercise the said discretion judiciously by satisfying itself as to whether the delay is inordinate or not, the applicant has accounted for the delayed period and whether there was apathy, sloppiness, negligence or lack of diligence on the applicant's part as it was well adumbrated by the Court of Appeal in the case of **Lyamuya Construction Company Ltd Versus Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported – CAT) when held that:

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrary. On the authorities however, the following guidelines may be formulated;

(a) The applicant must account for all the period of delay

(b) The delay should not be inordinate

(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law sufficient importance, such as illegality of the decision sought to be challenged."

"Applicant ought to explain the delay of every day that passed beyond the prescribed period of limitation."

Having examined in extenso the principles guiding this court in exercise of its discretion either to grant or refuse the applicant's prayers, the next move is the determination of the issue as to whether the applicant has advanced good cause to warrant this court grant the sought prayers. It is not in contest by both parties that, the applicant herein ought to have filed a Notice of Appeal by 10/08/2019 which is within ten (10) days from sentence date 31/07/2019 and lodge the intended appeal by 15/09/2019 which is forty five (45) days from the date of impugned sentence. As alluded to herein above, this application was filed on 26/11/2021. The period of delay to be accounted for therefore is from 10/08/2019 to 26/11/2021 when this application was preferred.

In a bid to account for the delayed days and other grounds for extension of time Mr. Malima banked on three grounds, **one**, sickness of the applicant,

second, delay encountered in prosecuting Misc. Criminal Applications No. 83 of 2019 and No. 144 of 2021 and **third**, illegality of the sentence intended to be appealed against. In this ruling I am intending to deal with one ground after another in seriatim.

To start with the first ground of sickness, Mr. Malima notified the Court that, the applicant was relying on his averments in paragraphs 14,15,16 and 19 of the affidavit. He contended, from 31/07/2019 when the applicant was sentenced up to 04/06/2021 when Misc. Criminal Application No. 83 of 2019 for extension of time to file the Revision application was filed in court, the applicant was suffering from trauma, depression and acute psychosis (disease) resulted from his incarceration in jail during the trial of his case and thereafter, the disease that deprived him of capacity to make rational decision hence failure to file the appeal timely. He said, his sickness is also evidenced in exhibit 5 to the affidavit (the letter from his doctor at Amana Regional Referral Hospital). According to him, as per applicant's averments in paragraph 15 and 16 of the affidavit, the said application was filed after confirmation from his doctor that his mental condition was on improve to allow him comprehend any nature of proceedings, and a piece of advice from his lawyer since he was still on medication by then until 05/07/2021. It was

Mr. Malima's prayer therefore that, a period of time from 31/07/2019 to 04/06/2021 should not be reckoned as sickness is considered as one of the good cause for extension of time. Reliance was made to the Court of Appeal decision in the case of **Emmanuel R. Maira Vs. The District Executive Director Bunda District Council**, Civil Application No. 66 of 2010 (CAT-unreported) and **Beatus Laurian Ndihaye Vs. Mariam Kitoelo**, Misc. Civil Application No. 06 of 2021 (HC-unreported).

On the respondent's side it was Mr. Mmari who countered Mr. Malima's submission. His response to the ground of illness was that, since the applicant claims his mental incapacity started from the time when he was in remand prison and continued thereafter, it is expected complaint on said mental status could have featured in the trial court proceedings but to the contrary is missing. He went on to state that, in other words the applicant wants to imply to the court that, from the date of his arrest on 19/06/2019 to the dates when he was arraigned in court at first on 25/06/2019 and entered a plea on 31/07/2019, he had mental disease already, something which is not true. He argued, during plea taking process the applicant was represented by two experienced advocates who could have raised that issue of his mental condition but none came forth. Mr. Mmari impressed upon the

Court that, the ground of sickness is not proved as there is no evidence to exhibit that, at the time of sentence and soon thereafter the applicant was deprived of his mental capacity to make an informed decision on whether to appeal or not or have his matter revised timely as claimed. He urged the court to dismiss this ground. In his brief rejoinder on respondent's submission Mr. Malima was insistent that, the letter exhibit 5 is explicit in paragraph 2 that, the applicant was diagnosed by the doctor to have depression and mild acute psychosis and that there is no any other evidence to contradict that doctor's opinion hence a conclusive evidence that, he was mentally deprived of his mental capacity at that time. Otherwise he reiterated his earlier submission in chief and prayers thereto.

I have keenly followed the fighting arguments from both counsels in this ground of sickness of the applicant in which this court is called not to reckon the time delayed from 31/07/2019 the date of sentence up to 04/06/2021, when the application for extension of time to file the Revision application was filed. While I am at one with Mr. Malima's proposition on the position of the law that, sickness when established is good cause for extension of time, I do not subscribe to his contention that, the alleged disease in this matter as exhibited in exhibit 5 of the applicant's affidavit deprived the applicant of

his mental capacity to make rational decision of filing the Notice of intention to appeal and the appeal itself in time against the sentence, hence forced to resort to lodging Misc. Criminal Application No. 83 of 2021. My finding is fortified with two good reasons. **One**, the submission by Mr. Malima on illness of the applicant soon after his sentence contradicts the applicant's averment in paragraph 14 of his affidavit when deposed that, he started suffering from the alleged depression, trauma and mental breakdown two months before while in remand prison and after his release therefrom on the 31/07/2019 and not immediately after sentence. For the purpose of clarity of this point, I quote paragraph 14 of the said affidavit:

> *14. I state I could not issue a notice of intention to appeal and file a petition of appeal well within the prescribed time because as a result of the penalty and forfeiture order* ***I suffered depression, trauma and mental breakdown as a result of financial loss that ensued while in remand for almost two months, and after my release from remand****. I have sought help from doctors and religious leaders ever since to try to find peace and regain control of my life. I have sought medical care from the 1st day of August 2019 immediately after I was released from remand custody on the 31st July 2019 on a plea of guilty, and continue to do so to this day. A copy of*

*my medical record is hereby attached and marked collectively as **Exhibit 5**. (Emphasis added)*

If the above quoted applicant averment is to be believed, no doubt he started suffering the alleged mental disease while in remand prison and before entering his plea on 31/07/2019. Since such complaint was not raised by either the applicant or his advocates at the time of plea taking, I find the submission by Mr. Malima that, he was deprived of his mental capacity hence failure to file the Notice of intention to appeal and the appeal itself or an application for extension of time to file the application for revision timely, is wanting in merits and has been brought up as an afterthought. One would not stop wondering, if at all he was sane enough to enter plea with such degree of disease and sanity, what prevented him to make such informed decision of filing the Notice of appeal and the appeal or revision application timely, soon after his sentence. As stated above this has no any other explanation than a conclusion that, the reason of illness to the applicant is an afterthought. **Second**, looking at the contents of exhibit 5 annexed to the applicant's affidavit, apart from stating at paragraph 2 that he was diagnosed of having depression and mild acute psychosis, it is nowhere expressed therein that, the disease deprived him of his mental capacity to

the extent of failure to make rational decision. With those two reasons, I hold the ground of sickness by the applicant is without merit and I dismiss it. Therefore the time between 31/07/2019 to 08/06/2021 when Misc. Criminal Application No. 83 of 2021 for extension of time within which to file the application for revision was lodged in court remains unaccounted for.

Next for consideration is the second ground in which Mr. Malima contended the applicant was busy in court pursuing another remedy by prosecuting the successful Misc. Criminal Application No. 83 of 2019 filed on 08/06/2021, for extension of time to file the application for revisions which resulted into filing unsuccessful Misc. Criminal application No. 144 of 2021, for the purpose of revising the sentence meted to the applicant on 31/07/2019 by the trial court as stated in paragraphs 16 and 17 of the affidavit. He went on justifying the delay arguing that, the said application for revision was struck out on 29/10/2021 on the reason that, it was wrongly preferred as an alternative to appeal before the present application was preferred on 26/11/2021, after the request for supply of copies of proceedings, ruling and order on 01/11/2021, copies which were supplied to him on the 19/11/2021. It was Mr. Malima's further submission that, the time from 08/06/2021, when Misc. Criminal Application No. 83 of 2021 was filed up to 26/11/2021, when this

application was preferred has been accounted for as the time spent by the party pursuing another right or remedy is sufficient cause for extension of time regardless whether the prosecution was rightly or wrongly conducted. To reinforce his submission he relied on the Court of Appeal decision in **Godfrey Enock Mkocha Vs. Twiga Papers Products Limited**, Civil Application No. 102 of 2013 (CAT-unreported), where an application for extension of time was under consideration and the Court held that, the time spent by the applicant in prosecuting the case, whether rightly or wrongly is a relevant factor. He therefore pressed the court to find the delay of such period has been accounted for successfully.

In response to the second ground Mr. Mmari resisted the submission by Mr. Malima arguing that, the ground by the applicant raises three alarming issues. **One**, he mentioned there was negligence or lack of diligence on the part of applicant's advocate especially on the path taken to challenge the sentence and advice extended to the applicant to pursue revision application instead of appeal which ended up being struck out. He said, lack of diligence and/or ignorance of law on the part of advocate has never been good cause for extension of time. And that, in this matter since the applicant was represented by two advocates, Mr. Masando and Mr. Malima, their

negligence in handing the said two applications cannot constitute good cause for extension of time to the applicant. To glue his stance the learned counsel referred the Court the cases of **Omary R. Ibrahim Vs. Ndege Commercial Services Ltd**, Civil Application No. 83/01 of 2020 (CAT-unreported), **Francis Konasi Vs. Felix Shirima**, Misc. Land Case Application No. 467 of 2021 (HC-unreported) and **Umoja Garage Vs. National Bank of Commerce**, [1997] TLR 109. On the **second** issue he said, the applicant in his affidavit referred to other persons (Mr. Msando, Mr. Malima and the doctor) who never made any affidavits to substantiate the facts averred therein, thus rendering the deposed facts hearsay. He cemented his argument by citing to the Court the case of **Sabena Technics Dar Limited Vs. Michael J. Luwunzu**, Civil Application No. 451/18 of 2020 (CAT). Mr. Mmari impressed upon the court that, since the averments in the said applicant's affidavit are not supported by any other affidavits then the averments that, it is advocate Msando who advised him to file the wrongly pursued application, and that he was treated as a psychiatric patient remain a hearsay in which this court is called not to rely on. On the **third** issue he argued, the time spend to await supply of the copies of proceedings, ruling and order of the struck out application should be reckoned since the same

were not prerequisite documents for filing this application. He therefore invited the court to find the second ground is not proved.

In his brief rejoinder Mr. Malima started by countering Mr. Mmari's submission on the need of other persons' affidavit to substantiate the averments in the applicant's affidavit. He argued that, there is no such need particularly in this matter as there is attached copies of applications filed by Mr. Msando and Mr. Malima (advocates) and the doctor's letter exhibit 5 which sufficiently supply the necessary facts. On second issues, he resisted Mr. Mmari's contention of negligence or lack of diligence on the advocates' part submitting that, there is nothing like that as at all-time advocates were alert and guard to challenge the sentence meted on the applicant. He distinguished the case of **Omary R. Ibrahim** (supra) with the fact of this case saying, in that case it was the Court's finding that, the applicant had failed to account for the delay for 10 months and secondly, he has turned down court's advice and took his own, which is not the case in this matter. He reiterated similar arguments to distinguish the case of **Francis Komasi** (supra). It was Mr. Malima's further submission that, since the authority in **Godfrey Enock Mkocha's case** on the principle of time spent while pursuing another remedy rightly or wrongly to constitute good cause for

extension of time remains good law, the same should be considered in this matter to substantiate the applicant's delay.

As regard to the contention by Mr. Mmari, on unaccounted for days spent by the applicant to await for supply of proceedings, ruling and order of the struck out application for not being prerequisite documents, he countered saying, the documents requested from the court are so crucial as without them this application cannot be sustained. He attacked Mr. Mmari's for relying on bare footed arguments as he cited no any provision of the law or case law allegedly contravened by the applicant to support his argument. He finally reiterated his earlier submissions in-chief and prayers thereto and rested his submission.

To start with the first issue as raised by Mr. Mmari in response to the second ground by the applicant, it is true and I agree with Mr. Malima that, the two annexed chamber applications to the applicant's affidavit as well as the letter from Amana Referral Hospital, sufficiently proved involvement of two advocate Mr. Msando and Mr. Malima, respectively in the said matters and the fact that, the applicant was attended by the author of the said letter (doctor) hence no need of taking oath or affirmation by way of affidavits in lieu of. What I find to more important therefore is consideration of the said

documents and the weight to be accorded to as part of the applicant's evidence. I therefore discard Mr. Mmari's submission on that point when insisted that, it was mandatory for the authors to swear affidavits to prove the contents referred in the said documents.

I now move to consider Mr. Malima's second reason for exclusion of days delayed on the ground that, the applicant was busy in court pursuing the two applications, thus the time from 08/06/2021 to 26/11/2021 when this application was filed should be considered to be accounted for regardless of whether their prosecution was wrongly conducted or not as stated in **Godfrey Enock Mkocha's case**. Mr. Mmari is resisting this submission contending that, the two advocates acted negligently and/or without diligence in prosecuting the two applications, the acts which cannot be condoned by this court and be considered to constitute good cause for extension of time as it was held in the cases of **Omary R. Ibrahim** (supra) and **Umoja Garage** (supra).

Having revisited the facts of this case during the trial and thoroughly perused the above cited authorities, I agree with Mr. Malima's proposition as rightly stated by the Court Appeal in the case of **Godfrey Enock Mkocha** (supra) that, the time spent by the applicant in prosecuting the case before the same

or another Court whether rightly or wrong is a relevant factor for consideration in exclusion of the time spent. However, I differ with him on the submission that, the principle in that case applies to the facts of the matter at hand. I so find as the facts in the above cited case are distinguishable to the ones in the present matter since in the former case the issue as to whether the course of action taken by the applicant during prosecution of that other matter(s) was proper or not was not at issue, unlike in this matter where the said issue is subject of contest. To appreciate the gist of that decision of the Court of Appeal in **Godfrey Enock Mkocha** (supra) the Court stated and I quote:

> *"In this case, I take inspiration from the Act, and hold that, as correctly opined by the applicant, the time he spent in prosecuting the above case, yet again rightly or wrongly, is a relevant factor in this application. The delay in filing this application may in this regard be attributed to the undisputed fact that he was pursuing another remedy.* ***Whether or not that was the proper course of action to take is not the issue of the moment****." (Emphasis is supplied)*

Unlike the circumstances in the above cited case, in this matter since the issue as to whether or not the advocates for the applicant acted negligently or in ignorance of the law when prosecuting the applications for extension

of time and revision is at issue now, I hold the cited case is distinguishable and therefore not applicable in the circumstances of this case.

With the above findings, the next issue for determination is whether the applicant's advocate in pursuing both Criminal Applications No. 83 of 2021 and 144 of 2021, acted negligently and/or without due diligence and/or in ignorance of the law. Mr. Mmari submits that, they did while Mr. Malima views it to the contrary saying that, they did not as they never contravened any court's advice as it was the case in **Omari R. Ibrahim** (supra), so it will be wrong for this court to conclude that, they acted negligently and/or without due diligence or in ignorance of the law.

It is a settled fact in this matter as rightly submitted on by Mr. Mmari that, the applicant in both Misc. Criminal Applications No. 83 of 2021 and 144 of 2021, was represented by well-trained legal minds Mr. Msando and Mr. Malima, learned advocates respectively. It is also a common knowledge to every practicing lawyer in this land that, revision is not an alternative to appeal particularly where the right of the party to appeal exists. I so view as this position of the law is repeatedly stated without numbers in several decisions of the Court of Appeal and this Court. Say a least reference is made to the cases of **Halais Pro Chemie Industries Ltd. versus A. G. Wella**

(1996) TLR 269, **M/S NBC Limited Vs. Salima Abdallah & Another**, Civil Application No. 83 of 2001, **Kezia Violet Mato Vs. National Bank of Commerce & 3 Others**, Civil Application No. 127 of 2005 and **Felix Lendita Vs. Michael Long'utu**, Civil Application No. 312/17 of 2017 (both CAT unreported). In the case of **Felix Lendita** (supra) Court of Appeal remarked thus:

> *"According to the law therefore, where there is a right of appeal the power of revision of this Court cannot be invoked."*

Again it is uncontroverted fact in this matter that, the sentence in which the applicant is seeking to assail if extension of time is granted to him is appealable and would have been appealed against straight away after being imposed to the applicant. No doubt this settled position of the law is known or ought to be or ought to have been known to the two learned advocates for the applicant, who instead of pursuing the appeal opted to go for revision which ended up being struck out. Had they acted diligently or not in ignorance of the law and properly and timely followed the appeal procedures, I am plenty sure the applicant would not have wasted time in pursuing the hopeless revision. I therefore agree with Mr. Mmari that, the learned two legal minds acted negligently or in ignorance of the correct rules of

procedure for preferring an appeal against sentence premised on own plea of guilty.

It is the law that, failure of advocate to act within the dictates of the law does not constitute good cause for enlargement of time. This position of the law was stated by the Court of Appeal in the case of **Exim Bank (Tanzania) Limited Vs. Jacquiline A. Kweka**, Civil Application No. 348/18 of 2020 (CAT) where the Court said:

> *"In the current application, the applicant relied on the fact that her matter changed hands of the lawyers from Amicus Attorneys to Locus Attorneys as the main reason for not serving the respondent on time. I am not persuaded with this reason because both firms are manned by lawyers who ought to know the Court procedures.* ***I have never come across a situation where failure of the advocate to act within the detects of the law being condoned to constitute good cause for enlargement of time and I am not prepared to do so****." (Emphasis supplied)*

Similarly in the case of **William Shija Vs. Fortunatus Masha** (1997) TLR 213 (CAT) on the issue of advocate's failure to observe correct procedure the Court of Appeal observed that:

> *"In determining whether the application should nonetheless be granted the look into account that* ***counsel had been negligent in adopting the correct procedure and this could not constitute sufficient reason for the exercise of the Court's discretion****."* [Emphasis supplied].

Furthermore in the case of **Omary R. Ibrahim** (supra), the Court of Appeal cemented on the above position of the law when stated that, *neither ignorance of the law nor counsel's mistake can constitute good cause in terms of Rule 10 of the Court of Appeal Rules, 2009*. As alluded to above, in this matter it was expected of applicant's advocates to exercise due diligence and act within the dictates of the law to file the appeal timely. Since they acted negligently and/or in ignorance of the law, I hold their acts do not constitute good cause for extension of time. Thus, I reject the applicant's second ground that, he delayed to file this application because he was busy prosecuting the two applications in Misc. Criminal Applications No. 83 of 2021 and No. 144 of 2021. In the premises the time between 08/06/2021 to 26/11/2021, I hold remain unaccounted for too.

I now turn to the last ground of illegality of the sentence imposed to the applicant as deposed by the applicant in paragraphs 12,21 and 22 of his affidavit. It is Mr. Malima's contention in this ground that, the sentence

imposed to the applicant is tainted with illegality for being premised on plea of the offence which does not exist. He said, the illegality is apparent on record as the appellant was charged of the offence of **Failure to Declare Currency** under Regulation 5(1) and (5) of the Anti-Money Laundering (Cross Border Declaration of Currency and Bearer Negotiable Instruments) Regulations, GN. No. 268 of 09/06/2016, instead of the offence of **Entering or Leaving the Territory of the United Republic of Tanzania while in Possession of Currency or Bearer of Negotiable Instruments without Declaration to the Customs Authority**, created under that Regulation. He argued, when pleading to the charge the applicant said *'it is true I falsely declare the currency by giving false information'*, meaning he pleaded to the offence of falsely declaring currency by giving False Information which does not exist. He insisted, since the said plea does not correspond or match with the offence created by the statute, it is a clear that, this is an error manifest on record. While citing to the court the cases of **Ngolo Mgagaja Vs. R**, Criminal Appeal No. 331 of 2017 and **Robert Hilima Vs. R**, Criminal Appeal No. 42 of 2019 (both CAT-unreported) he argued that, when illegality of the decision intended to be impugned is established, that alone constitute a good cause for extension of time. Further

to that he referred the court to the case of **Richard Lionga Simageni Vs. R**, Criminal Appeal No. 14 of 2020 (CAT-unreported) where the Court of Appeal enumerated relevant factors for considerations on illegality of the decision when the party pleads guilty to the charge and get sentenced. He rested his submission by inviting the court to find illegality of the sentence is established in this matter and proceed to grant the application.

In his rebuttal submission, Mr. Mmari informed the Court that, much as the applicant is entitled to appeal against the sentence obtained out of his own plea to the offence charged with, there is nothing shown in either paragraph 12 of the applicant's affidavit or counsels submission that, the sentence is illegal. He argued the sentence becomes illegal when the sentencing principles or the law have been infracted, meaning excessiveness of sentence or inadequacy or when the sentencing is against the law and not otherwise. According to him it was expected the applicant would have directed himself on those grounds while arguing the ground of illegality which is not the case, thus the ground of illegality remains unestablished. He insisted that, good cause has not been established by the applicant in this ground, and invited the court to dismiss the application for want of merit. In his rejoinder submission Mr. Malima stressed that, the case of **Richard**

Lionga @ Simageni (supra) is applicable in this matter as the court held that, if conviction on plea of guilty is entered without the court satisfying itself that, the facts adduced disclose or establish all ingredients of the offence charged with, that sentence becomes illegal and must be set side. On that submission he invited the court to grant the application and allow this court with an opportunity to investigate the propriety of the sentence and take necessary actions.

Having chewed both learned counsels' submissions and traversed through the applicant's affidavit, I am of the view that, this ground need not detain this Court much. It is settled law that, where the ground of illegality is established by the party it is sufficient in itself to warrant grant of extension of time. See the case of **The Principal Secretary, Ministry of Defence and National Service Vs. Dervan P. Valambhia** (1992) TLR 387 (CAT) and **Transport Equipment Vs. Valambia and Attorney General** (1993) TLR 91 (CAT). However the law provides further that, the said illegality must be visible on the face of record and not the one to be discovered or drawn from long arguments or process. See the cases of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010

(Unreported – CAT), **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT-unreported) and **Moto Matiko Mabanga Vs. Ophir Energy PLC and 2 Others**, Civil Application No. 463/01 of 2017 (CAT-unreported). In the case of **Ngao Godwin Losero** (supra) the Court of Appeal emphasized that:

> *"…the illegality of the impugned decision should be visible on the face of record."*

Similarly in the Court of Appeal in the case of **Moto Matiko Mabanga** (supra) had the following observations:

> *"… **I am not persuaded that the alleged illegality is clearly apparent on the face of record**. Certainly, **it will take a long drawn process to decipher from the impugned decision the alleged misdirection or non-direction on the point of law**. i.e. going through the two cases to certify if they are similar or completely unrelated and whether the conclusion of one of them will affect the other. I am therefore not persuaded, the illegality in this application constitutes a good cause." (Emphasis added)*

In the matter at hand the applicant is attributing the alleged illegality of the sentence to the plea of guilty entered by the applicant on 31/07/2019 before the trial court and not conviction resulted from that plea. I subscribe to the

proposition by Mr. Mmari that, the illegality of the sentence is challenged on established principles and not otherwise. It is a well settled principle of law that, sentence will be altered by the higher court when imposed by a trial court if it is evident that, the said trial court acted on a wrong principle; or overlooked some material factor or when the sentence so imposed is manifestly excessive in view of the circumstances of the case. The said principle was stated by the Court of Appeal in the case of **Robert Aron Vs. R**, Criminal Appeal No. 68 of 2007 (CAT unreported) when quoted with approval the principle as enunciated in the much celebrated case of **Dingwal Vs. R** (1966) Seychelles Law Report, 205, stating thus:

> *"an appeal court will only alter a sentence imposed by a trial court* ***if it is evident that the said trial court has acted on a wrong principle; overlooked some material factor; or if the sentence so imposed is manifestly excessive in view of the circumstances of the case*** *... an appeal court is not empowered to alter a sentence on the mere ground that if it had been trying the case, it might have passed a somewhat different sentence."* (Emphasis Provided).

The principle in **Robert Aron Vs. R**, Criminal Appeal No. 68 of 2007 (CAT unreported) was also later on reaffirmed in the case of **Yusuph Abdallah Ally Vs. DPP**, Criminal Appeal No. 300 of 2009, (CAT unreported) where

the Court of Appeal observed that, the above principle of law seemed to have been adopted in this jurisdiction as well. The Court went on in that case to enumerate the circumstances under which the sentence can be challenged for being illegal. The court referred them to be the circumstances where:

> *1. The sentence is manifestly excessive.*
>
> *2. The sentence is manifestly inadequate.*
>
> *3. The sentence is based upon a wrong principle of sentencing/law.*
>
> *4. A trial court overlooked a material factor.*
>
> *5. The sentence is based on irrelevant factors.*
>
> *6. The sentence is plainly illegal.*
>
> *7. The sentence does not take into consideration the long period an appellant spent in remand or police custody awaiting trial (see: **Nyanzala Madaha Vs. Republic**, Criminal Appeal No. 135 of 2005, unreported).*

In this matter as rightly submitted by Mr. Mmari, it was expected the applicant's grounds of illegality of the sentence would have been revolving around the enumerated circumstances and be visible on record without invoking long trail of arguments or process. To the contrary there is nothing indicative from either applicant's affidavit or Mr. Malima's submission

establishing or proving that, the alleged illegality of the sentence is visible on record without resorting into long drawn arguments as Mr. Malima is trying to do nor is it claimed to have been premised on the above set grounds for challenging legality of the sentence. The submission by Mr. Malima that, illegality is traced from the plea entered by the applicant on the non-existing offence, with due respect to him takes this court to a very long process to not only see or identify the alleged illegality but also comprehend it. It is from that stance, I shoulder up with Mr. Mmari proposition that, the applicant has failed to establish the ground of illegality of the said sentence. As the first and second grounds relied on by the applicant for extension of time have not been held to constitute good cause for extension of time hence failure to account for inordinate delay of more than fifteen (15) months, I hold the applicant has failed to exhibit to the court that there is good cause warranting this court to grant him extension of time to file both Notice of appeal and the appeal against the sentence meted on in by the trial court in Economic Crime Case No. 60 of 2019, on 31/07/2019.

All said and done this Court finds that, the application is without merit and I proceed to dismiss it in its entirety.

It is so ordered.

DATED at Dar es salaam this 06th day of May, 2022.

E. E. KAKOLAKI

JUDGE

06/05/2022.

The ruling has been delivered at Dar es Salaam today on 06th day of May, 2022 in the presence of Mr. Beatus Malima, advocate for the applicant and Mr. Beatha Kitau, Senior State Attorney for Respondent and Ms. Monica Msuya, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
06/05/2022