

**IN THE UNITED REPUBLIC OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA**

MISC. CRIMINAL APPLICATION NO. 1 OF 2022

(Originating from Tabora Resident Magistrate Court Criminal Case No. 15 of 2019)

GOLAN S/O SALUM.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of Submissions: 27/02/2023

Date of Delivery: 27/02/2023

AMOUR S. KHAMIS, J:

Golan Salum is aggrieved by Judgement and Sentence of the Resident Magistrate Court of Tabora (Nsana, RM) dated 21/10/2020 and lodged the present application for extension of time to file a notice of appeal and Petition of Appeal out of time.

The application was lodged by way of Chamber Summons under Section 361 (2) of the Criminal Procedure Act, Cap. 20, R.E 2019 and supported by an affidavit sworn by Thadeous Fredrick Kivurunzi, learned advocate.

Records show that on 19/09/2022, by Ms. Tunosye John Luketa, learned State Attorney for the Republic, moved this Court to allow the respondent to file a counter affidavit.

The prayer was granted and filing date was set for 26/09/2022. For no apparent reason(s) the counter affidavit was not filed. The matter was mentioned on 10/10/2022 and 14/11/2022 but the respondent neither communicated its predicament to filing a counter affidavit nor sought an extension of time.

Today, having heard submissions by Mr. Joseph Makene, learned State Attorney and Mr. Thadeus F. Kivurunzi, learned advocate for the applicant, I delivered a ruling in which a fresh prayer for leave to file a counter affidavit was refused.

On that background, hearing proceeded on premises of the ruling delivered today which took into account a fact that the application has been pending in Court since 3/01/2022.

The issue is whether the application discloses a good cause for extension of time.

Upon submissions by Mr. Thadeus F. Kivurunzi and on perusal of the chamber summons and supporting affidavit, I became attracted to paragraph 4 of the affidavit which reads:

“4. That the applicant herein above delayed to file an appeal in time since he was not aware of the decision on the case herein as during the early stage of the trial of this case he became sick hence lost track of the case herein. Annexed herewith is copy of the medical doctor’s report marked “Annexure GS – 1”

With absence of the counter affidavit, this Court is not in a position to know the respondent's version of the story. However, annexure "GS - 1" referred to by the applicant is a medical chit issued by Malongwe Dispensary of P.O. Box 517 Tabora.

The medical report show the applicant was admitted at the dispensary on 5/06/2020 allegedly for severe pneumonia and malaria. He was bed ridden for almost one week.

Thereafter, he was subjected on post discharge treatment for sometime. Mr. Thadeus Kivurunzi contended that the applicant actively attended trial when three (3) prosecution witnesses testified but fell sick when the remaining two witnesses were about to give evidence.

He asserted further that the trial Court did not bother to trace the applicant's whereabouts and instead proceeded in absentia hence the conviction and sentence which are sought to be challenged.

The learned advocate for the applicant invited this Court to extend time on the ground that there is an illegality on record because the applicant was not afforded the right to be heard.

At this point in time, this Court is not availed with the trial Court's records, and even if supplied, it is not opportune to determine whether the trial court's decision to proceed in absentia of the applicant was legally right or otherwise.

However, the application on its face, suggest that the impugned proceedings, judgement and sentence were all conducted exparte against the applicant who had attended prior proceedings.

In my view, that is an issue of law to be examined by this Court by way of appeal.

In **FWEDA MWANAJOMA, JOHN DANIEL V REPUBLIC, CRIMINAL APPEAL NO. 174 OF 2008** (Unreported), the Court of Appeal held that by dint of Section 226 of the Criminal Procedure Act where an accused is convicted in absentia after closure of the prosecution case, he shall have the same right as the one under Section 226 to be heard as to why he failed to appear, and as to whether he has a probable defence on merit.

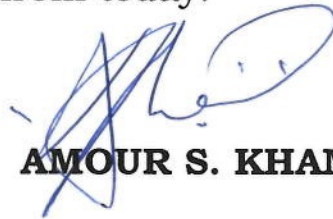
Therefore, on account of the stated reasons, I am persuaded by the decision in the case of **HAMZA FAKIHI NAPUNDA V REPUBLIC, MISC. CRIMINAL APPLICATION NO. 1 OF 2022** (unreported) wherein this Court held that:

“.....the issue of illegality when raised as ground for extension of time must be of sufficient importance and seen on the face of record not to require, long drawn arguments. “

In my view, this application established that the applicant is entitled to explain by way of appeal as to why he did not appear on the days the case was adjourned and as to whether he had a probable defence or not.

Consequently, the application is granted. Let the applicant lodge a notice of appeal within ten (10) days and petition of appeal within thirty (30) days from today.

It is so ordered.



AMOUR S. KHAMIS

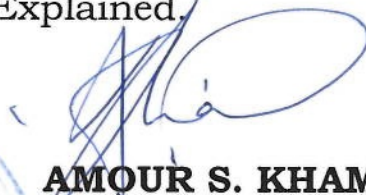
JUDGE

27/02/2023

ORDER

Ruling delivered in chamber in presence of Mr. Joseph Makene, State Attorney for the Republic and Mr. Thadeous F. Kivuruzi, Advocate for the applicant. The applicant is also present.

Right of Appeal Explained.



AMOUR S. KHAMIS

JUDGE

27/02/2023