

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

MISC. CRIMINAL APPLICATION NO. 43 OF 2022

(Arising from Criminal Case No. 199 of 2020 from District Court of Chato at Chato)

FABIAN S/O PHILIPO 1st APPLICANT

THOMAS S/O JAMES 2nd APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

10th October, 2022 & 20th March, 2023

ITEMBA, J

At the District Court of Chato, the two applicants hereinabove were charged with and convicted of the offence of gang rape. The 1st applicant was further charged with and convicted of the offence of impregnating a primary school girl. They were both sentenced to life imprisonment. Before me is an application by both applicants, moving this court to grant them leave to file an appeal out of time against the said District Court's decision. The application is supported by the joint affidavit of both applicants. For the respondent, Ms. Rehema Mbuya, the learned senior state attorney filed a counter affidavit to oppose the application.

The applicants aver that, they were convicted on 13/10/2021 and immediately thereafter, lodged their notice of appeal. That, they prepared

the said notice while kneeling down and the prison officer was interrogating them and reducing into writing what they stated. That, one Thomas James was asked to append his fingerprint on behalf of Fabian Philipo. That, the said notice had irregularities and was not competent enough to move the court, therefore the delay is out of their control as they are both inmates.

In her counter affidavit, Ms. Mbuya strongly disputed the contents of the applicants' affidavit stating that the applicants were supposed to annex the affidavit of the Prison officer in Charge to prove that they gave an oral notice of intention to appeal within time. She stated further that in absence of such proof, there is no sufficient reason which has been established by the applicants.

At the hearing, the applicants fended for themselves while Ms. Mbuya SSA appeared for the respondent. The applicants being laymen, one at a time, tried to express their prayers stating that after they were convicted, they were sent to Chato Prison. That, they had their notice of appeal. They signed some documents but they were not given any copy, they were informed that all documents are with their records of appeal. Then, they were transferred to Mwanza.

In rebuttal Ms. Mbuya stated that she opposed the application because there is no valid ground established by the applicants. She gave her reasoning by restarting what is in her counter affidavit.

Having considered the affidavit, counter affidavit and both parties' submissions, the issue is whether the applicants have established a good cause for this court to grant them extension of time.

Section 361 of the Criminal Procedure Act, Cap 20 R.E 2019 provides thus:-

361.-(1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant-

(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and

(b) has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order, save that in computing the period of forty-five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded.

*(2) 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 law that extension of time will be granted on court's discretion and upon the applicant showing a good cause for the delay. There are factors which the court considers when determining whether a good cause has been established.

These factors though not exhaustive are such as;

- (i) the length of the delay;
- (ii) the reasons for the delay;
- (iii) the degree of prejudice the respondent stands to suffer if time is extended;
- (iv) whether the applicant was diligent; and
- (v) whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged.

See for the example the cases of **Dar es Salaam City Council vs Jayantilal P. Rajani**, Civil Application No. 27 of 1987, **Tanga Cement Company Limited vs Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 and **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women's**

Christian Association of Tanzania, Civil Application No.2 of 2010

(All unreported).

I have carefully gone through the applicants' grounds of application and the respondents' reasons for disputing the same. In general, they explain that they intended to appeal, within time, but their wish was not possible as they were inmates. I agree with the learned state attorney's position that the applicant's perception is supposed to be supported by evidence, preferably the affidavit from the Prison Officer in charge. However, it appears in the verification clause of the applicant's affidavit that, this application for extension of time was made while the applicants were at Butimba Prison. Meaning that, after being convicted, they were first sent to Chato Prison and later moved to Butimba Prison. The applicants have also stated this in their submissions. I think, under these circumstances it would not be practical for the applicants to obtain the affidavit from the Prison Officer in charge back in Chato, considering the fact that the applicants were under custody. The said affidavit would have been available only under the favor or mercy of the Prison Officer in charge Butimba.

Furthermore, in the records of this application, I have also come across the ruling by Hon. Ndyansobera J, in **Criminal Appeal No.25 of**

2022, where on 19/7/2022, he struck out the applicants appeal as it was incompetent. The Notice of Appeal was titled In the District Court of Chato instead of in the High Court of Tanzania.

Therefore, it is clear that the applicants have been struggling to reach the High Court but have been facing technical hurdles most of them due to them being laymen and fully indoors.

I find that, these are the circumstances which amounts to a good cause as required by the law, under section 361(2) of the CPA. That said, the applicants' application has merit and it is hereby granted. The applicants are to file their intended appeal within 21 days from the date of delivery of this ruling.

It is ordered accordingly.

DATED at **MWANZA** this 20th day of March, 2023.



L. J. ITEMBA
JUDGE