

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. CRIMINAL APPLICATION NO. 8 OF 2023

(From District Court of Chunya in Criminal Appeal No. No.28 of 2009)

DAUD MWAKALINGA..... APPLICANT

VERSUS

MAJUTO LUCAS.....RESPONDENT

RULING

Date of last order: 30/05/2023

Date of Ruling: 31/05/2023

NDUNGURU, J.

The applicant in this application one Daud s/o Mwakalinga has brought this application under Section 361 (2) of the Criminal Procedure Act, Cap 20 Revised Edition 2022. In his application the applicant prays for the following orders:

- (i) That the court be pleased to allow the applicant to file Notice of appeal and Petition of appeal out of time.

(ii) Any other relief as the court may deem fit and just to grant.

The chamber application is duly supported by the affidavit duly sworn by the applicant.

The respondent is nowhere to be found despite the effort done to serve him the chamber summons. The report brought by the Ward Executive Officer of Makongolosi ward is that the respondent has shifted his residence to the place unknown by the ward authority. With that report the court found it pertinent for the application to proceed in absentia taking into account that sometimes he was served through publication in Mwananchi Newspaper but the respondent could not appear. Further to that, the applicant has been in prison from 2009 and all that time he has been roaming around in court premises looking for his right in this present matter.

When the application was called up for hearing the applicant appeared in person (unrepresented). Submitting for the application, the applicant was very short. He told the court that the respondent is nowhere to be found. He prayed the court to adopt his affidavit and consider his application.

Having considered the submissions of the applicant and examined the grounds stated in the applicant's affidavit, the striking question in this

application is whether there is any justification for this court to exercise its discretion under Section 361 (2) of the Criminal Procedure Act, Cap 20 (Revised Edition 2002). The said provision bestows this court with the discretion as it says:

"The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has lapsed."

It is trite that extension of time under the above provision is a matter of discretion on part of this court, but such discretion must be exercised judiciously and flexibly with due regard to the relevant facts of the particular case.

From the applicant's affidavit, it is clearly noted that the applicant intended to fully utilize the ten days' time of filing the notice of his intention to appeal, but he being a prisoner depended on the prison authority to the needful for him thus he had no control over his affairs. This is noted in his affidavit particularly at para 3 where the applicant states that when he entered the prison he prepared the notice of intention to appeal to be forwarded to court on time. He further prepared the petition of appeal and handed the same to the in charge of the prison to transmit it to the court.

To his shock when his appeal stood up for hearing before Hon. Chocha, J it was discovered that the petition of appeal was filed out of time consequently, it was struck out. He again, filed an application for extension of time No. 3 of 2021 before Mbagwa, J. The application was granted but he failed to file the allowed appeal on time as he was belated to supplied with copy of ruling which was to be attached to the petition of appeal to show that the court extended time for filing such an appeal. This is stated at para 5 of the applicant's affidavit. I take this as a crucial point into account.

Apart from the above, I have also considered the particular circumstances of the applicant. Being inmate serving time in prison, the applicant had no control over his affairs; he was at the mercy of the Officer in charge of the prison or the prison authority. In this regard, it is unfair to expect too much from him. See the case of: **Buchumi Oscar V. Republic**, Criminal Appeal No. 295 "B" of 2011 Court of Appeal of Tanzania, **William Ndingu @ Ngoso V. Republic**, Criminal Application No. 3 of 2014 Court of Appeal of Tanzania and **Maneno Muyombe & Another V. The Republic**, Criminal Appeal No. 435 of 216 Court of Appeal of Tanzania (all unreported).

Basing on the foregone analysis I am of the conclusion that the applicant's pursuit for extension of time has exhibited good cause. In the consequence I grant the application. The applicant to lodge his notice of appeal within Twenty-One (21) days from the date of delivery of this ruling as the notice is to be filed to the court which convicted and sentenced him and thereafter within Forty-five (45) days he shall lodge his petition of appeal. It is so directed.




D. B. NDUNGURU
JUDGE
31/05/2023