

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 37 OF 2023

(Originating from the ruling of the Hanang District Court Misc. Application No. 13 of 2022)

SAFARI AMSIAPPELLANT

VERSUS

WILLIAM KASHULUZA RESPONDENT

JUDGMENT

30th June & 10th July, 2023

Kahyoza, J.:

William Kashuluza instituted criminal proceedings against **Safari Amsi** before the primary court. The primary court convicted **Safari Amsi** and sentenced him to pay a fine and compensation. **Safari Amsi** did not appeal on time. He instituted an application for leave to appeal out of time before the district court. The district court found no merit in **Safari Amsi's** application for extension of time. It dismissed the application, hence, **Safari Amsi** instituted the instant appeal, contending that the district court erred to hold that a medical report was not tendered to support the allegation of sickness and that the appellant was not seriously sick to access legal service.

Safari Amsi raised two grounds of appeal, which resulted to the following issues-

1. was the district court justified to disregard a medical chit attached to an affidavit because the applicant did not tendered it?
2. did the district court err to hold that the appellant was not seriously sick?

I wish to state that this appeal proceeded *ex-parte*. **William Kashuluza** refused service as evidenced by the process server's affidavit of service. It is upon being satisfied that **William Kashuluza** refused service, I allowed the appellant to proceed *ex-parte*. Mr. Mniko, learned advocate appeared for **Safari Amsi** during the hearing of the appeal.

Was the district court justified to disregard a medical chit attached to an affidavit because the applicant did not tendered it?

Safari Amsi complained in the first ground of appeal that the district court erred in law and fact to hold that the appellant did not tender medical report during the hearing of the application to support his allegation. The appellant's advocate submitted the appellant filed an application for extension of time by chamber summons supported by an affidavit. The appellant averred in the affidavit that he was sick and attached a medical chit and a payment receipt. He argued that the magistrate was required to consider the affidavit and the annexure when determining the application. He argued further that, an affidavit is evidence and that it must be

considered as whole with annexure(s). To support his contention, the appellant's advocate cited the case of **Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another** (Civil Appeal No. 82 of 2017) [2018] TZCA 297 (13 December 2018).

Having heard the appellant's advocate's submission, I share his views that the magistrate erred to hold that the appellant who was the applicant did not establish the allegation that he was sick for failure to tender a medical chit and payment receipt annexed to the affidavit. It is settled, as submitted by the advocate, that an affidavit is evidence and the annexure form part and parcel of the affidavit. The affidavit must be considered as whole in determining the application. The Court of Appeal in **Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another** (supra) held that-

"We agree with the appellant's counsel that, from the nature of the proceedings, the learned judge erred in disregarding the documentary evidence annexed to the appellant's affidavit on the ground that the same were not tendered at the time when the appellant's counsel was making his oral submission.This is for obvious reason that, affidavit is evidence and the annexure thereto is intended to substantiate the allegations made in the affidavit.

Unless it is controverted therefore, the document can be relied upon to establish a particular fact.”

The district court was duty bound to consider the affidavit, the annexure, the evidence contravention and make a finding. It had no justification whatsoever to disregard documentary evidence simply because the same were not tendered.

I uphold the first ground of appeal, that the district court had no justification to disregard the medical chit attached to the affidavit because the appellant did not tendered it.

Did the district court err to hold that the appellant was not seriously sick?

The appellant complained in second ground of appeal that the court erred in law and fact by finding that the appellant was not serious sick and that he could manage to go to the advocate’s office for advice as he managed to go to hospital.

The appellant’s advocate submitted that the district court had no ground to hold that the appellant was not seriously sick. He submitted further that, the respondent did not bring evidence to prove the allegation that the appellant was not seriously sick as he did not file a counter affidavit. He added that it was wrong for the district court to rely on the submission of the respondent that he saw the appellant working in his farm. He submitted

that the it is settled that submission is not evidence. To support his contention, he cited the case of the **Registered Trustees of the Archdiocese of Dar es slaam v. The Chairman of Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 where the Court of Appeal held that-

"... submissions are not evidence. Submission s are generally meant to reflect the general features of a party's case. They are elaborations or explanations on the evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

The appellant's advocate concluded that the district court erred to rely on unsubstantiated submission of the respondent.

Let me commence by stating the obvious; **firstly**, that it is settled that submission is not evidence but explanation of evidence. I therefore, share with the appellant's advocate's, the view that the district court erred to rely on the respondent's oral submission that the appellant was not seriously sick; **secondly**, that there is no dispute that the respondent did not file a counter affidavit before the district court to contest the appellant's application for extension of time; **thirdly**, the effect of failure to file a counter affidavit is far from unsettled, which is that failure to file a counter affidavit is a signification that the application is not factually opposed. The

court of Appeal in **William Getari Kegege vs Equity Bank & Another**, (Civil Application No. 24 of 2019) [2021] TZCA 185 (7 May 2021) held that-

"It is trite that a party who has not filed an affidavit to contest what has been deposed in an affidavit supporting an application may be entitled to an oral reply but only on matters of law; not on matters of fact. That this is the law has been stated in a number of our decisions - see: **Fransisca Mbakileki v. Tanzania Harbours Corporation**, Civil Application No. 71 of 2002, **Finn Von Wurden Petersen and Another v. Arusha District Council**, Civil Application No. 562/17 of 2017 **Fweda Mwanajoma and Another v. Republic**, Criminal Appeal No. 174 of 2008 and **Jonas Betwel Temba v. Paul Kisamo and Another**, Civil Application No. 10 of 2013 (all unreported). In **Finn Von Wurden Petersen** (supra), for instance, the Court relied on its previous decision in **Yokobeti Sanga v. Yohana Sanga**, Civil Application No. 1 of 2011 (unreported) to hold:

"... it is settled that where the respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the contents of the applicant's affidavit.... Therefore, the respondent who appears at the hearing without having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law."

Given a clear position of the law demonstrated above, I am of the firm view that, **William Kashuluza**, the respondent, who failed to file a counter

affidavit, was precluded from challenging the applicant's contention that he was sick. This, the district court had no evidence to counter the appellant's allegation that he was sick and unable to appeal. Thus, the district court misdirected itself to rely on **William Kashuluza's** submission that the appellant was not sick as he saw him working in his farm. I find merit in the appellant's complaint that the district court misdirected itself to hold that the appellant was not seriously sick. It is settled that a judgment or a ruling must be grounded on evidence properly tendered. The district court had no evidence from **William Kashuluza**, the respondent, to ground its ruling that the appellant was not seriously sick. I uphold the second ground of appeal.

In the end, I find that the appellant adduced evidence to prove by balance of preponderance that, he was delayed to appeal due to ill health. Ill health is a good ground for delay. See the decision in **Leonard Magesa v. MIS Olam (T) Ltd, Civil**, Appeal No. 117 of 2014 (unreported), where the Court of Appeal upheld ill health as ground for the applicant's failure to file written submission. An applicant who raised ill health as ground for failure to take a legal step within the prescribed time, must explain how ill health prevented him. I had a cursory review of the appellant's affidavit supporting the application, which demonstrated that the appellant fell sick

few days after he was convicted. He was diagnosed and found suffering from pneumonia. He was attended but he did not recover. Later, he was diagnosed and found suffering from chronic bronchitis. He was attended.

I am of the firm view that the district court exercised its discretion wrongly by taking into consideration evidence that, the appellant was not seriously sick, which was not properly adduced. It misdirected itself. Consequently, I allow the appeal, set aside the district court's ruling dismissing the application for extension of time. I also grant the appellant an extension of 20 days within which to appeal against the decision of the primary court. I make no orders as to costs.

Dated at Babati this **10th** day of **July**, 2023.



A handwritten signature in black ink, appearing to read "John R. Kahyoza", written over a horizontal line.

**John R. Kahyoza,
Judge**

Court: Judgment delivered in the absence of the parties. Ms Fatina (RMA) is present.

A handwritten signature in black ink, appearing to read "John R. Kahyoza", written over a horizontal line.

**John R. Kahyoza,
Judge
10. 07.2023**