

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

MISC. CRIMINAL APPLICATION NO. 23 OF 2023

(Originating from Criminal Case No. 29 of 2021 in the Resident Magistrate Court of Manyara)

OMARI ELIA KULANGA.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

10th & 17th July 2023

Kahyoza, J.:

This is a ruling in respect of an application for extension of time to file a notice of intention to appeal and to appeal against the judgment of the district court.

The respondent prosecuted **Omari Elia Kulanga** with an offence of rape, under sections 130(1) (2) (e) and 131 (1) of **the Penal Code** [Cap 16 R.E 2019, now 2022] (the **Penal code**). In course of trial, Omari Elia Kulanga jumped bail, and the trial did proceed under section 226(2) of **the Criminal Procedure Act**, [Cap 20 R.E 2022] (the **CPA**). The trial court convicted the applicant with the offence of rape in *absentia*, and sentenced him to a mandatory statutory term of 30 years' imprisonment.

Aggrieved, the applicant lodged Criminal Appeal No. 7 of 2022 in this Court. On the 7th of February, 2023, this Court (Hon. G.N. BARTHY, J,) among other orders, remitted the record to the trial court with direction that section 226(2) of the CPA be complied with. In compliance with this Court's order, the trial court made a finding that the applicant failed to give sufficient reasons to justify his absence from the trial. It maintained the conviction and sentence in *absentia*. Consequently, the applicant was to serve the sentence of thirty years' imprisonment, earlier imposed by the trial court. The applicant was not amused. He moved the Deputy Registrar to submit the record before the appellant court for determination of the appeal, which he sought was still pending. Thus, he did not appeal on time.

The applicant is seeking for extension of time to appeal for two grounds. **Firstly**, that the applicant prays time to extended because he diligent in the pursuit of his appeal. The applicant wrote a letter 7 days after his conviction praying the district court to submit the file to the High Court. He wrote a letter to the Deputy Registrar praying for the record be sent back to this Court on 30.03.2023, which was received on 13.04.2023. On 02.5.2023 the applicant's advocate received an official communication from the Deputy Registrar, which required them to file a fresh appeal.

After receiving the letter from the Deputy Registrar, the applicant was advised that time to lodge a notice of appeal had already expired. To buttress the argument that diligence was a ground to extend time, the applicant's advocate referred this Court to the case of **William Kallaba Buta Butani v. R.**, Criminal Appeal No. 05 of 2005 at page 10 to 11. That there was no inaction, as they acted promptly and immediately.

Secondly, the applicant prays for extension of time as the trial court's order is tainted with illegalities on the face of record, as the trial court issued the order in violation of this Court's order. The applicant's advocate submitted that the trial court did not adhere to section 226(2) of the **CPA**, and denied the applicant the right to be heard. He cited **FINCA (T) Ltd & Kipondogora Auction Mart vs Boniphace Mwalukisa** [2019] TLR Vol. 1 312 to support his contention that illegality was a sufficient ground for extension of time.

Ms. Grace, the learned State Attorney, for the respondent, deponed and submitted that neither the applicant nor his advocate who acted diligently. She submitted that the ruling of the trial court explained clearly that the applicant had a right to appeal.

On the issue of illegality, she contended that there was no any illegality that was manifested. Section 226(2) of the CPA was complied with as ordered by this Court. She cited the case of **Benjamin Amon vs R**, Criminal Appeal No. 106/11 of 2018.

After the recital of rival arguments, I resolved to commence with the issue that the applicant was diligent in pursuing his appeal. I find it established that the applicant acted promptly in the pursuit of his appeal. The record depicts that the applicant wrote to the Deputy Registrar requesting him to remit the file before the appellate Judge for continuation of criminal appeal No. 7 of 2022. The Court advised the applicant to file a fresh appeal on 2.5.2022. As deponed under paragraph 6 of the applicant's affidavit, the applicant's advocate visited the applicant and advised him that time to lodge a notice of appeal had expired.

Following the advice, the applicant obtained from his advocate, he instituted the instant application. He signed it on the 10.05.2023 and his advocate filed it online on 25.5.2023. It is established that ignorance of the law including procedure is not sufficient reason for delay. However, it is obvious that the applicant and his advocate did not know what to do after the district court made its order. They were of the opinion that, criminal

appeal No. 7 of 2022 was still pending as it was not determined on merit. They wrote to this Court praying the Court to proceed from where it had stooped. The Court informed them that the appeal had been determined so they should file a fresh appeal. Thus, the applicant's advocate acted promptly but mistakenly by requesting the Court to take action after the trial court made its finding instead of appealing. He misled the applicant.

I had an opportunity to have a bird's eye view of the judgment of this Court. I am of the view that this Court's order, remitting the file to the trial court to comply with section 226(2) of the **CPA**, was capable of more than one interpretation. The applicant's advocate was mistaken but not out of negligence. The applicant's mistake or oversight was excusable. I wish to associate myself with a position of the Court of Appeal in **Omary Shaban Nyambu vs Dodoma Water & Sewarage Authority** (Civil Application No. 146 of 2016) [2016] TZCA 892 (13 October 2016), that a court may excise its discretion to extend time to avoid injustice or hardships resulting from accidental inadvertence or excusable mistake or error. The Court of Appeal held that-

"However, it is significant to emphasize that the Court's discretion in deciding whether or not to extend time must be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the

*basis of sentiments or sympathy. Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice - See **Shah v. Mbogo and another** [1967] E.A. 116."*

The applicant acted diligently but mistakenly. I am of the view that mistake, the applicant and his advocate committed, is excusable. I therefore, find that the applicant to have adduced a sufficient reason to ground his prayer for extension of time.

The applicant averred in affidavit and his advocate submitted that the trial did not comply with this Court's order which required it to act under section 226(2) of the **CPA**. They argued that, the trial court's non-compliance is an illegality, which is a sufficient ground for extension of time.

It is settled that illegality alone is sufficient reason for extension of time. However, illegality as ground to support an application of extension of time, it must be; **one**, on the face of record; and **two**, on the decision sought to be challenged. Thus, the alleged illegality must be something, which can be proved from the face of record. This stance was alluded in **Ngolo Godwin Losero v Julius Mwarabu** Civil Application No. 10/2015 CAT at Arusha (unreported), where the Court of Appeal reiterated its decision in

Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application 2/2010 that-

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Vaiambia 's case, the court meant to draw a general principle that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. **The Court there emphasized that such point of law must be that of sufficient importance and I, would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.** The Court in the case Certainly, it will take a long-drawn process to decipher from the impugned decision the alleged misdirection or non-directions on the points of law."* (emphasis is added)

It is obvious that the trial court complied with the order of this court to make a finding under section 226(2) of the CPA. It found that the applicant had not sufficiently disclosed ground(s) for his absenteeism. Hence, I am of the decided view that, the applicant did not demonstrate illegality on the face of the impugned decision or order of the trial court. I dismiss the second ground for extension of time for want of merit.

Eventually, I find that the applicant has adduced sufficient reason for extension for time, which is that he acted diligently though mistakenly, as shown above. He does not deserve to be punished for his prompt but mistaken act. Consequently, I allow the application and extend time for thirty (30) days from the date of this ruling. Provided that, the applicant shall within ten (10) days lodge a notice of his intention to appeal.

It is ordered accordingly.

Dated at Babati this **17th** day of **July**, 2023.



John R. Kahyoza,
Judge

Court: Ruling delivered in the presence of Ms. Grace S/A for the respondent and Ms Mwanaidi Chuma, SA and the applicant in person. B/C Ms. Fatina haymale(RMA) present.

John R. Kahyoza,
Judge

17.07.2023