

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

MISC. CRIMINAL APPLICATION NO. 15 OF 2023

(From original Criminal Case No. 161/2018 of Chato District Court)

THOMAS ^{s/o} LUPAMA -----APPLICANT

VERSUS

REPUBLIC-----RESPONDENT

RULING

July 20th & 28th, 2023

Morris, J

Mr. Thomas Lupama, the applicant above, has filed in this Court the present application. He is moving the Court to extend time within which he may file a notice of appeal and appeal against the judgement of Chato District Court in Criminal Case No. 161 of 2018 dated 20/12/2019. The application is supported by the affidavit of the applicant. The counter-affidavit of Sileo Mazullah opposes the application.

The applicant appeared for hearing unrepresented. However, the respondent enjoyed representation by Ms. Mwanahawa Changali and Ms. Thabitha Zakayo, learned State Attorneys. According to record, the applicant

was charged and convicted by Chato District Court for rape. Consequently, he was sentenced to 30 years imprisonment. He was aggrieved by such decision but was late to file the notice of appeal and subsequent appeal. Hence, this application is one of his attempts to effectuate the envisaged appellate proceedings.

From his affidavit, the applicant deposes to had delayed in filing the notice of appeal and intended appeal for two reasons. That, his relatives were seeking legal assistance; and that, he lost much time because he was transferred from one prison to another. Such reasons were also vivid in his submissions. It was submitted by him that he was jailed at Chato prison then he became transferred to Malya prison after one year. Again, a year late, he was transferred to Maswa prison. He also argued that he had lodged his first appeal but it was dismissed for it was filed without prior notice of intention to appeal. He therefore prayed for the application to be allowed.

In reply it was submitted by the respondent's counsel that the facts in the applicant's affidavit do not adequately support the application. Further, the respondent argued that there is no proof by affidavit from prison officer regarding his claimed transfers. Further, his relatives did not swear affidavits



to support his allegation that they were seeking legal service to help him with appeal processes. In this connection, I was referred to the case of ***Zainab Abdallah v R***, Misc. criminal application No. 29 of 2022 (unreported).

Further, it was submitted that though appeal is a constitutional right, such right is enjoyed by observing time limitation. To the respondent, the impugned judgement was delivered on 20/12/2019. This application was filed on 25/4/2023. That means, the applicant lost about 1,125 days and the same remain unaccounted for. Further reference was made to the cases of ***Boniface Alistedes v R***, Criminal Application No. 06/08 of 2019 and ***Damas Assay and Another vs. Raymond Mgonda and Others***, Civil Application No. 32/17 of 2018 (both unreported). These cases reinforce the long-time principle that every day of the delay must be accounted for. Therefore, it was prayed for the application not be granted.

In rejoinder, the applicant submitted that he made follow-up of the judgement for a year. The trial magistrate passed on and that prison officers promised to prepare necessary documentation then he was transferred to Malya Prison. Consequently, he missed the chance to make necessary steps



Having considered the rival submissions of both parties, it is upon this court to see whether or not ground advanced by the applicant (seeking advocate, transfer from prison and technical delay) suffice in making this court to allow the application. It is a cardinal law that the powers to extend the time is discretional. This discretion however must be exercised judiciously as opposed to personal whims, sympathy or sentiment. See ***Bakari Abdallah Masudi v Republic***, Criminal Application No. 123/07 of 2018; and ***Bank of Tanzania v Lucas Masiga***, Civil Appeal No. 323/02 of 2017 (both unreported).

Further, the law requires that the applicant should demonstrate sufficient reason(s) as to why he/she did not take the necessary step(s) timely. In doing so, he/she will discharge the obligation of proving how each day of delay justifiably passed by at no applicant's fault. Accordingly, the subject applicant will deserve a favorable court's discretionary advantage as it was held in ***Hamis Babu Bally v The Judicial Officers Ethics Committee and 3 Others***, CoA, Civil Application No. 130/01 of 2020 (unreported).

Starting with the reason of seeking an advocate. As correctly submitted by the respondent, such deposition was not backed by the affidavit of such relative(s). Therefore, the deposition stands to be hearsay. Further, time spent for seeking legal assistant or advocate is not a sufficient reason for extension of time. See the case of ***Ally Kinanda and 3 others v Republic***, Criminal Application No. 1 of 2016 (unreported). Accordingly, this reason lacks merit.

The other limb is that he was transferred from one prison to another, it was deposed in the affidavit that the applicant lost communication with his relatives due to his transfer to Malya and Maswa prisons. During submissions, he seemingly clarified that he was transferred from Chato prison to Malya prison after one year from the date of judgement. I understand that the law is merciful when a prisoner delays to lodge proceedings in court because while at prison they are not free agents. See the cases of ***Maulid Swedi v R***, Criminal Application No. 66/11 of 2017; ***Otieno Obute v R***, Criminal Application No. 1 of 2011; ***Joseph Sweet v R***, Criminal Appeal No. 11 of 2017; and ***Fabian Chumila v R***, Criminal Application No. 6/10 of 2019 (all unreported).

However, as correctly submitted for the respondent no proof of his transfer from one prison to another has been tabled. Leaving that aside, the applicant was transferred, if at all, after lapse of one year from Chato prison. Therefore, he had ample time to file the notice of appeal and the appeal on time. hence the second ground also has no merit.

Regarding the last ground, he submitted that he filed an appeal on time but it was dismissed for lack of prior notice of appeal. As a general rule, technical delay is a sufficient reason for extension of time. The fact that the applicant was prosecuting an appeal need be taken into account as stated in the case of ***Mathew T. Kitambala v Rabson Grayson and another***, Criminal Appeal No. 330 of 2018 (unreported).

However, I am inclined to disregard this ground for a number of reasons. **One**, this ground came in the course of submissions. It does not feature in the affidavit of the applicant. Submissions are not evidence. Refer to ***Registered trustees of Archdiocese of Dar es Salaam v The Chairman, Bunju village Government***, Civil Appeal No.147 of 2006; and ***Ison BPO Tanzania Limited v Mohamed Aslant***, Civil Application No. 367/18 of 2021 (both unreported).

Two; the applicant failed to prove the existence of the alleged dismissed appeal as no any proof was attached in the affidavit or its case number mentioned in the course of submission for this court to take judicial notice. **Three;** no evidence as to when the same was dismissed for the purpose of accounting days of delay.

As correctly submitted for the respondent, it is cardinal principle that one applying for extension of time must account for every day of delay. In the case of ***Hassan Bushiri v Latifa Mashayo***, Civil Application No. 3 of 2007 (unreported). In that case, it was held that “delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken” (see also the cases of ***Yazid Kassim Mbakileki v CRDB (1996) Ltd Bukoba Branch & Another***, Civil Application No. 412/04 of 2018; and ***Ally Mohamed Makupa v Republic***, Criminal Application No. 93/07 of 2019 (both unreported).



In upshot the application lacks merit and it is accordingly dismissed.
No orders as to costs. It is so ordered. Right of appeal is fully explained to
the parties.



C.K.K. Morris

Judge

July 28th, 2023

The ruling is delivered this 28th day of July 2023 in the presence of the
applicant and Ms. Monica Mwery, learned State Attorney for the respondent.

C.K.K. Morris

Judge

July 28th, 2023