

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB REGISTRY OF MANYARA
AT BABATI**

MISC. CRIMINAL APPLICATION NO. 28 OF 2023

(Originating from Criminal Case No. 107 of 2021 in the District Court of Hanang' at Katesh)

MKAPA KISORI.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

14th & 22nd August 2023

Kahyoza, J.:

On 05.07.2022 the district court convicted **Mkapa Kisori** with an offence of rape, sentenced him to a mandatory statutory term of 30 years' imprisonment and ordered him to pay compensation to the victim to a tune of Tzs. 200,000.00. Aggrieved, **Mkapa Kisori** signed and lodged a notice of appeal on 06.07.2022 and 12.07.2022, respectively. Unfortunately, he delayed to appeal. He instituted the instant application seeking leave to appeal out of time.

Mkapa Kisori, who was not represented, had nothing to submit – rather he prayed to adopt his affidavit. In his affidavit, he deposed that he was supplied with copies of judgment and proceedings on 28.02.2023 and engaged an advocate one Mahagi from Arusha to prepare and lodge an appeal. At unknown date, he became aware that the advocate to whom he engaged did not fulfil what was agreed afore for what was tamed as “lack of good communication especially in payments”. As a result, the prescribed time within which to file an appeal lapsed, and decided to pursue this application.

On her part, the respondent’s state attorney, Ms. Malima, deponed and submitted that since the applicant received the judgement on the 28/02/2023 and lodged this application on 13/06/2023, that is after 107 days, the applicant ought to account for the delay, even a delay of one day has to be accounted for. The applicant did not prove that he engaged an advocate. Also, he was negligent for he failed to discover that his advocate had not lodged the appeal on time, and prayed for this application to be dismissed. That the applicant failed to adduce sufficient reasons to warrant an extension of time. To buttress her arguments, she cited the case of **Benjamin Amon vs The Republic**, Criminal Application No. 106/11 of

2018 (CAT) (Unreported), citing in approval, the decision in **Bushiri Hassan vs Latifa Lukiko Kashayo**, Civil Application No. 03 of 2017 (Unreported).

It is beyond dispute that a person, aggrieved by the decision of district court or a court of the resident magistrate exercising original jurisdiction in a criminal matter, must lodge a notice of appeal within 10 days and lodge his appeal within 45 days from the date of receipt of a copy of the judgment and proceedings appeal from. Section 361(1) of **the Criminal Procedure Act** [Cap. 20 R.E. 2022] (the **CPA**) which reads as follows;

"361.-(1) Subject to subsection (2), an appeal from any finding, sentence or order referred to in section 359 shall not 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."

If a person delays to appeal, the High Court may admit his appeal if he adduces good cause for delay as provided by sub-section 361(2) of the **CPA**. It reads -

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

Black's Law Dictionary (Ninth Edition) defines "good cause" as legally sufficient reason. The term good cause is a relative one and is dependent upon the prevailing circumstances of each case. There are no hard and fast rules to what can constitute good cause. In the case of **Yusufu Same & Hawa Dada vs. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (CAT-DSM) (unreported), the Court of Appeal stated that-

"In application for extension of time is entirely in the discretion of the court to grant or refuse it. This discretion, however, has to be exercised Judicially and the overriding consideration is that there must be sufficient cause for so doing".

Among the factors to be considered by the Court in the course of exercising its discretion in issues extension of time, of which I fully subscribe to, were observed in the case of **Henry Muyaga v. Tanzania Telecommunication Company Ltd**, Civil Application No. 8 of 2011 (unreported) which was cited in **Henry Leonard Maeda and Another v.**

Ms. John Anael Mongi, Civil Application No. 31 of 2013 at page 19, it was stated thus:-

*"In considering an application under the rule, the courts may take into consideration, such factors as, **the length of delay, the reason for the delay** and the degree of prejudice that the respondent may suffer if the application is granted." (Emphasis added)*

The record bears out clearly the applicant was convicted and sentenced on the 05.07.2022, lodged his notice of intention to appeal on the 12.07.2022 and obtained the copy of judgment and proceedings on the 28.02.2023. After the exclusion of time within which to obtain copies, 45 days lapsed on the 14.04.2023. This application was filed on 13.06.2023, thus the applicant was tasked to account for 60 days' delay. The applicant's only reason for delay is that his advocate failed to lodge an appeal on time for want of proper instructions. The applicant averred in her own words that **"the learned advocate whom I engaged to prepare and submit my petition of appeal did not [file] the same due to the lack of good communication especially in payments..."**

It is ambiguous if the applicant did engage an advocate in the first instant. As submitted by the state attorney, the applicant did not adduce

evidence that he did engage the advocate. Not only that but also, the Roll of Advocates kept by the Registrar of the High Court does not bear an advocate by that name. It is not substantiated that the applicant failed to appeal because his advocate failed to discharge his profession duty with or without proper instructions.

In addition, it is settled that lack of financial means is not a good cause for delaying to take legal action. **Rustomji On Limitation**, Eight Ed. 2001 at page 27 had this to say:

"After the prescribed period has elapsed, the door of justice is closed and no plea of poverty, distress, ignorance or mistake can be of any avail. The general rule is that even a hard cash should not be allowed to disturb the law. The rule must be enforced even at risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge time allowed by the law, postpone its operation, or introduce exception not recognized by it. Whatever sympathy a Judge may feel for litigation and however dishonest and immoral the conduct of his opponent might have been in pleading the bar of limitation, the courts are warranted in introducing saving or exceptions which are not in the statute."

Rustomji's position was a similar position in **Zebitisi Kawuku V. A. Karim (1938) 5 ECCA 37** and **Halima Athuman V. Hamadi Masudi PC**

Cr App. No. 50/92 Masanche, J. (Unreported). It was held in the former case that-

"Ignorance of law, old age and lack of means are not good grounds for allowing an appeal out of time."

The applicant's allegation that the advocate did not lodge an appeal for want of proper instruction was not a sufficient reason for delay.

It settled as submitted by the State attorney that, delay even of a single day must be accounted for. The applicant did not account for period of delay. I agree with the state Attorney that, the applicant was negligent. Consequently, I find that the applicant has adduced no good cause for delay, hence, I dismiss the application for want of merit.

I ordered accordingly.

Dated at **Babati** this **22nd** day of **August**, 2023.



John R. Kahyoza,
Judge

Court: Ruling delivered virtually in the absence the parties. B/C Ms. Fatina haymale(RMA) present.




John R. Kahyoza,

Judge

22/08/2023