

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISCELLANEOUS CRIMINAL APPLICATION NO. 26 OF 2023

(Arising from the Criminal Case No. 112 of 2022 before the District Court of Simanjiro at Orkesumet)

SAID MOHAMED.....APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

28th August & 1st September, 2023

Kahyoza, J.:

Said Mohamed, the applicant, was convicted with the offence of incest and sentenced to thirty years' imprisonment. Aggrieved, **Said Mohamed** lodged an appeal, which he withdrew on 10.7.2023. Before, he withdrew the appeal, **Said Mohamed** had instituted the instant application seeking for extension of time to appeal out of time. He instituted the application for extension of time on 7.6.2023.

The issue is whether the applicant has adduced sufficient reason for delay. The applicant's application is supported by the applicant's advocate's affidavit. The applicant's advocate submitted that after the applicant's

conviction, she wrote to the trial court requesting for a copy of the judgement and proceedings. She averred that the applicant was convicted on 25.11.2022 and the trial court supplied him with a copy of the judgment on 15.2.2023. She concluded that the applicant's delay to appeal was beyond control.

The application was heard by way of written submission. The applicant's advocate submitted that her client was supplied with the copy of the judgment on 15. 2.2023 while time to appeal had already lapsed. She prayed this Court to exercise its discretion to grant an application for extension of time. she cited the case of **Juto Ally v. Lukas Komba & Another**, Civil Application No. 484/17 of 2019.

The Republic filed a counter affidavit through Ms. Rose Sebastian Kayumbo, to refute allegation in the applicant's affidavit. She deposed that the applicant did not annex any document to substantiate the allegation in paragraph 4 of the affidavit. The applicant's advocate's allegation in paragraph 4 was that she wrote a letter requesting for copy of the judgment and proceedings. And that the judgment and proceedings were yet typed. She refuted the applicant's allegations that the trial court delayed to supply her with a copy of judgment and proceedings.

The respondent's state attorney submitted to oppose the application, that the applicant's advocate that the applicant delayed to institute the appeal was due to the trial court's delay to submit him the judgment and proceedings on time was baseless. She added that it held no water. She contended that the applicant did not lodge a notice of appeal. She insisted that a notice of appeal under section 361(1) of the **Criminal Procedure Act**, [Cap. 20 R.E. 2022] initiates an appeal.

She contended that to grant an application for extension of time a person applying for extension of time must adduce sufficient cause. To support her contention, she cited the case of **Benjamin Amon v. R.** Criminal application No. 106/11 of 2018 (CAT-Unreported). She submitted that the Court of Appeal laid down several principles in **Benjamin Amon v. R.** (supra) which need to be considered in granting extension to include-

- i. the applicant must account for each day of delay;
- ii. the delay should not be inordinate;
- iii. the applicant must show diligence and not apathy, negligence, or sloppiness of the action that he intends to take;
- iv. if the court feels that there is sufficient reason.

The respondent's state attorney insisted that the applicant is required to show good cause why he failed to do what he was supposed to do within the prescribed time. To support her contention, she cited the case of **A.G.**

v. Emmanuel Marangakis & 3 Others, Civil Application No. 138/ 2019 CAT.

Furthermore, the respondent's state attorney submitted that the applicant was required to account for all period of delay. She argued that the applicant did not account for the period from 15.2.2023 to 13.6.2023 when he filed the instant application. She refuted the applicant's advocate submission that the applicant lodged appeal, which he later withdrew as the allegation was not raised in the affidavit.

A brief background is that; the district court convicted **Said Mohamed** with the offence of incest and convicted him to serve a custodial sentence. He was convicted on 15.2.2013. He lodged a notice of appeal. Later, on 30.3.2023, **Said Mohamed** lodged an appeal, which he withdrew on 10.7.2023. Before he withdrew the appeal, the applicant had lodged the application for extension of time.

It is settled that this Court may extend time to appeal if the applicant adduces good cause for delay. Thus, as submitted by the respondent's state attorney an application for extension of time may be granted upon the applicant adducing good cause. The Court of Appeal in **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application NO. 6 of 2001 (unreported) held that-

"It is trite law that an 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. What amounts to "sufficient cause" has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant."

I reviewed the applicant's affidavit and the submission in support of the application, the least I can say is that the applicant has not disclosed the good cause for delay. The applicant stated that the trial court delayed to supply him a copy of the judgement. He averred that the trial court supplied him a copy of the judgment on 15.2.2023. The law is clear that the court has to exclude time spent to obtain a copy of the judgment and proceedings. Thus, forty-five days, the time within, which to appeal commenced running from 15.2.2023. Simple calculation shows that time within, which to appeal expired on 1.4.2023. The applicant delayed to lodge his appeal until he filed the instant application on 13.6.2023. The applicant did not account in his affidavit why he failed to appeal from the date he obtained the judgment until when he filed an application for extension of time.

The applicant's advocate submitted that the applicant delayed had instituted an appeal which he withdrew on 10.7.2023. The respondent's advocate refuted the argument that the applicant instated the appeal which he later withdrew as the applicant did not state so in his affidavit. Times without number, this Court and the Court of Appeal have heard that submission is not evidence. The evidence to support an application is found in the affidavit and not in the submission. For that reason, the applicant must adduce reason for delay in the affidavit. The Court of Appeal held in case of the **Registered Trustees of the Arch Dioceses of Dsm vs. The Chairman Bunju Government and Others**, Civil Case No. 147 of 2006, that-

"...reasons for delay must be reflected in the affidavit. Submissions are not evidence but explanations on the evidence already tendered."

The applicant has not adduced any reason for delay let alone sufficient reason for delay. The applicant averment that he delayed to obtain a copy of judgment is a sufficient reason for delay before he obtained a copy of the judgment and proceedings. He has not accounted for period of delay after he was supplied with a copy of the judgment and proceedings.

It is true that the applicant did not state in the affidavit that he filed an appeal and withdrew it. However, I am of the firm view that the fact that

the applicant lodged his appeal and withdrew it is such an obvious fact that need no proof. I found a copy of the appeal which was withdrawn in the lower court record. I agree the applicant had a duty to state facts in the affidavit, the question is, should justice be so blind and ignore the obvious facts to the detriment of the applicant. The circumstance shows that the applicant's advocate did not do enough research to establish whether the applicant had already lodged an appeal. After she was engaged she filed an application for extension of time. Upon discovering that the applicant had already lodged an appeal, she applied to withdraw. It is unfortunate that the applicant's advocate applied to withdraw the appeal because the appeal was filed out of time. She misdirected herself. Another question is whether we should permit the applicant to suffer because of her advocate's incompetence.

I wish to point out why I said the applicant's advocate misconstrued that the applicant's appeal was out of time. There is no doubt that the applicant was convicted on 25.11.2022. He lodged a notice of intention to appeal on 28.11.2022. The trial court did not supply him a copy of the judgment and proceedings until 15.2.2023 as the applicant alleged. However, a copy of the judgment shows that the prison officers received a copy of the judgment on 13.3.2023. I will take a position that the applicant

received a copy of the judgement and proceedings on the date deposed in the affidavit that is on 15.2.2023. The applicant lodged his appeal on 30.3.2023.

It is settled as provided by the proviso to section 361 (1) (b) of the **CPA**, that time within which to appeal *reckons from the date of the receipt of the requisite copies*. This position was taken in the case of **DPP V Mawazo Saliboko and 15 Others** Criminal Appeal No. 384/2017, where the Court stated that-

*"....we are in agreement with both parties that the learned Judge erred to hold that the appellant ought to have applied for extension of time to file appeal so that the time requisite for obtaining a copy of the proceedings could be excluded by the court. We are saying this because the law has already excluded that time. The proviso to section 379 (1) (b) quoted above is self-explanatory, it does not need any interpretation, it is clear and not ambiguous. It says that in computing the 45 days, the time requisite for obtaining a copy of the proceedings, judgment or order appealed from shall be excluded. **It follows therefore that an intended appellant is required to lodge his petition of appeal within forty-five days reckoned from the date of the receipt of the requisite copies.** There are several authorities by this Court which interpreted this provision of the law, some of them are **Sospeter Lulenga v. R**, Criminal Appeal No. 108 of 2006 (unreported) and **Matheo***

Paulo & Another (*supra*) cited by Mr. Tibabyekomya. For instance, in the former case, faced with similar situation, the Court interpreted section 361 (1) (b) of the CPA which is similar to section 379 (1) (b) of the CPA and stated that: -

"....., although judgment was delivered on 27/12/2004, the 45 days required within which to file the petition of appeal accrued from the date when the copy of judgment was received, that is, on 20/3/2005. Thus, when the appellant lodged his petition of appeal on 31/3/2005, it was still within time in terms of the proviso to section 361 (1) (b) of the Criminal Procedure Act, 1985....."

Given the facts and the position of the law explained above, I am of the decided view that the applicant's appeal, which he lodged on 30.3.2023, was instituted on time. The applicant obtained a copy of the judgment and proceedings on 15.2.2023 and that the date forty-five days within which to appeal ***reckoned from the date of the receipt of the requisite copies***. On 30.3.2023, when the appellant lodged the appeal, forty-five days had not expired. That is the reason why I stated that the applicant's advocate misdirected herself to withdraw the appeal because it was time barred.

Eventually, I find that the applicant has not adduced sufficient reason for delay. However, basing on the circumstance of this case, I find that the applicant's delay was technical one, as he delayed prosecution the appeal which was withdrawn. The appeal, the applicant's advocate withdrew was

within time. The applicant's advocate withdrew it out of her incompetence which should not be allowed in the circumstances of this case to cause injustice to the applicant. I believe this one such rare cases where an application for extension of time may be granted on the negligence of an advocate. Consequently, I grant the application extension of time. The applicant will file the appeal within 20 days from today.

I order accordingly.

Dated at Babati this **1st** day of **September**, 2023.



John R. Kahyoza,
Judge

Court: Ruling delivered in the presence of the appellant and Ms. Rose Kayumbo learned state attorney for the Respondent. B/C, Ms. Ombeni (RMA) present.

John R. Kahyoza,
Judge

1. 09.2023