

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MISC. CRIMINAL APPLICATION NO. 10 OF 2023

(Originating from Criminal Case No. 121 of 2022 in the District Court of Shinyanga at Shinyanga)

BONIPHACE NKINGA APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

25th October & 7th November, 2023

KAWISHE, J.:

This is an application for extension of time within which to appeal out of time to this Court against a decision of the District Court of Shinyanga at Shinyanga in Criminal Case No. 121 of 2022. The application is made by way of chamber summons under section 361 (2) of Criminal Procedure Act, CAP 20 R. E. 2019 (the CPA). The application is supported by an affidavit sworn by Boniphace Nkinga, the applicant.

The applicant was charged with unnatural offence contrary to section 154(1) (a) and (2) of the Penal Code Cap. 16 R.E 2019. The District Court

of Shinyanga convicted and sentenced him to life imprisonment, hence this application for extension of time to file his appeal against the decision of the trial court.

At the hearing the applicant appeared in person, unrepresented whereas Ms. Salome Mbughuni Senior State Attorney assisted by Ms. Upendo Mwakimonga State Attorney appeared for the Republic. The applicant appeared to be very brief. He prayed that his sworn affidavit to be adopted and form part of his submission. From his affidavit, the application together with the 14 reasons adduced, I comprehended and extracted the following from his affidavit: **one**, that the applicant was convicted and sentenced to life imprisonment on 30th day of November, 2022, **two**, that he was admitted to Shinyanga Prison at Shinyanga; **three**, that on 4th December, 2022 before the officer in-charge of the said prison he expressed his desire to appeal together with giving the notice of intention to appeal; **four**, that on 27th December, 2022 he was transferred to Isanga Central Prison in Dodoma from Shinyanga.

Five, that before the officer in-charge of Isanga Central Prison he expressed his desire to appeal to the High Court of Tanzania, Shinyanga

Registry, the challenge he encountered was that, he was not furnished with the documents of appeal, **six**, he did not receive the said documents in time hence the delay in filing his appeal; **seven**, that after receipt of the documents he had to file an application for extension of time for filing his appeal out of time.

Eight, that he has never been negligent in the preparation and conduct of the intended appeal; and **nine**, that upon granting of the application the applicant will be able to appeal against the decision of the District Court of Shinyanga before the High Court. He prays for his application to be granted in the interest of proper and competent administration of justice.

In reply Ms. Salome Mbughuni Senior State Attorney assisted by Upendo Mwakimonga State Attorney prayed that the respondent's counter affidavit be adopted to form part of their submission. They disputed the application by stating that the applicant has not given any reasonable ground to move this court in granting the extension of time to file his appeal out of the statutory time. Relying on the counter affidavit sworn by Goodluck Kasiki Saguya, State Attorney at National Prosecutions Services

Office in Shinyanga, Ms. Salome, stated that paragraph 2 of the applicant's affidavit states that the applicant was convicted by the District Court of Mbeya, that is not correct as he presented, he was arraigned before, convicted and sentenced by the District Court of Shinyanga.

She further argued that, there is no evidence adduced by the applicant to show that he informed the prisons authority about his intention to appeal and that they are the cause of the delay in processing the appeal against the decision of the Shinyanga District Court. She referred the court to section 361(1)(a) of the Criminal Procedure Act, Cap 20 R.E 2019 which requires the intention to appeal to be lodged within 10 days after the decision of the trial court, contrary to that, it can no longer be entertained. She attacked the credibility of the contents of paragraph 5 of the applicant's affidavit which lack support to show that he was transferred to Isanga Central Prison. Also, she disputed the contents of paragraph 7 of the applicant's affidavit for lack of evidence to prove that the prisons authority made efforts to get the documents required in order to file the appeal.

In summing up Ms. Salome argued that, the applicant has not adduced any evidence so far to help this honourable court to make a decision, hence his application is baseless. She posits that for justice to be acquired there is a corresponding duty to be undertaken. She closed her submission by praying to the court to dismiss the application with regard to the reasons adduced.

In rejoinder the applicant reiterated his position that, the court be pleased to adopt his affidavit and allow his application so that he may appeal against the sentence for life imprisonment meted against him.

I have given due consideration to both parties' submissions for and against this application. As a matter of principle, it is exclusively in the discretion of the court whether to grant or refuse an application for extension of time as stated in section 361(2) of the CPA. The said provision confers the High Court with discretion in the following terms:

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

In exercising the discretionary powers vested to this court by the provisions of section 361(2) of the CPA, the vital question to be answered is whether

the applicant has advanced good cause for his delay to lodge his petition of appeal out of time.

In answering the question, consideration is made to the grounds adduced in applicant's affidavit specifically under paragraphs 4 and 5 as paraphrased hereunder:

4. That, on 4th December, 2022 before the officer in-charge of the said prison I expressed my desire to appeal together with giving the notice of intention to appeal.

5. That, on 27th December, 2022 I was transferred to Isanga Central Prison in Dodoma from Shinyanga, the major challenge is that I was not furnished with the documents for appeal purpose.

These two reasons among other grounds of the application, were disputed by Ms. Salome for lack of documentary evidence. I agree with Ms. Salome that evidence is very vital in supporting any reason or argument. However, the argument best suits an environment where the applicant has freedom of movement and access to the trial court and other facilities to enable him prepare and lodge an appeal in time. The application at hand is

preferred by an applicant who is a prisoner. His movement is restricted legally given the sentence imposed by the trial court.

Being an inmate, it is obvious that the applicant could not conduct his affairs in the same manner as a free citizen would do. Given such circumstances, it is my view that, a special consideration ought to be accorded to the applicant's circumstances. As stated under oath in paragraphs 4 and 5, it is clear that the applicant did not get the copies of the relevant documents in time. Furthermore, in his sworn affidavit he deponed that he was transferred to Isanga Central Prison in Dodoma. While he was in Shinyanga Prison he was unable to get the documents, it became more difficult when he was transferred to Dodoma. This is clear that the causes of the delay were beyond the capacity of the applicant.

Based on the foregoing analysis, the applicant's prayer for extension of time has shown good cause bearing in mind that he is in prison. A similar reasoning was observed in **Rhobi S/o Kitang'ta Chacha vs. Republic** Criminal Application No. 58 of 2023, where learned Judge cited the case of **Maneno Muyombe & Another vs. Republic**, Criminal Appeal No. 435 of 2016 (unreported) where it was stated that:

"Being inmates serving time in prison, the appellants invariably had no control over their affairs and that they were necessarily at the mercy of the Officer-in-Charge of their prison, as it were. In this regard, it was to expect too much from them."

The same principle was advanced in **Maneno Muyombe & Another vs. Republic**, Criminal Appeal No. 101 of 2007, where the court stated that:

"In view of the wording of section 361 (2) (formerly Section 361 (b)), all that is required of the appellant is to show "good cause" before the High Court can invoke its discretionary powers to extend time."

In consideration of the reasons adduced by the applicant under paragraphs 4 and 5 of the sworn affidavit, the applicant has shown a good cause, thus, the answer to the question, whether the applicant has advanced good cause for his delay to lodge his petition of appeal out of time is answered in the affirmative.

The High Court in **Rhobi S/o Kitang'ta Chacha vs. Republic** (supra) deciding an application for extension of time, while exercising its discretionary powers, cited the case of **Kassana Shabani & Another vs. Republic**, Criminal Appeal No. 476 of 2007 (unreported) where Court of Appeal had this to say:

"Since there appears to be a recurring or perennial problem, we would like to take this opportunity to make it dear that once an applicant under section 361 of

the Act has **satisfactorily** accounted for the delay in giving notice of appeal or filing a petition of appeal, extension of time ought to be granted as a matter of right."

In consequence, the application is allowed. The applicant is granted leave to lodge notice of appeal to the High Court against the decision of the District Court of Shinyanga, Criminal Case No. 121 of 2022 within ten (10) days from the date of delivery of this ruling and lodge his appeal respectively.

It is so ordered.

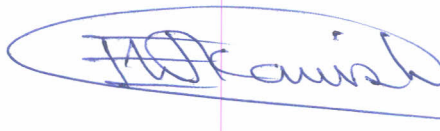
Dated at **SHINYANGA** this 7th day of November, 2023.



E.L. KAWISHE

JUDGE

COURT: Ruling delivered in Chambers this 7th day of November, 2023 in the presence of Mr. Leonard Kiwango, learned Senior State Attorney and the applicant who has appeared in person and unrepresented.



E.L. KAWISHE

JUDGE

7/11/ 2023