IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MWANZA

AT MWANZA

MISC. CRIMINAL APPLICATION NO. 02 OF 2023

(Arising from the Criminal Case No. 189 of 2020 in the Resident Magistrate's Court of Mwanza at Mwanza, before Ryoba, RM, dated 6th of April, 2021.)

DIRECTOR OF PUBLIC PROSECUTION ..... APPLICANT

VERSUS

THOMAS JILUMBA ..... 1ST RESPONDENT

SALIM RAMADHAN ..... 2ND RESPONDENT

NELSON CHRISTOPHER ..... 3RD RESPONDENT

MATHIAS MADUKA ..... 4TH RESPONDENT

RULING

30th October, & 15th November, 2023.

MUSOKWA, J.

The respondents herein, were charged with the offences of store breaking, stealing and being found in possession of stolen properties, contrary to section 7 (1) (b) of the First schedule, section 57 (1) and section 60 (2) of the Economic and Organized Crimes Control Act. Cap. 200 R.E 2019. A criminal case No. 189 of 2020 was preferred against the accused persons in the Resident Magistrate's Court of Mwanza. On 6th April 2021, the trial court dismissed the matter for want of prosecution, citing section 225(5) of the Criminal Procedure Act, Cap. 20, R.E. 2022 (CPA). Since delivery of the impugned decision, more than two and a half years have elapsed. Currently, the Director of Public Prosecution (DPP),

the applicant herein, preferred an *omnibus* application seeking an order for extension of time to give notice of intention to appeal; and at the same time seeking an order for extension of time to lodge the petition of appeal. The application is made under sections 392 A (2) and 379 (1) and (2) of the CPA, and is supported by the affidavit of George Geofrey Ngemera, an officer of the applicant, duly authorized to depone thereof.

When the matter came for hearing, the applicant was represented by Mr. Christopher Olembile, learned state attorney. The respondents failed to appear as efforts to locate them had proven futile; the affidavit of Investigation Officer SP Henry Mbilinyi was attached to that effect. This necessitated the court to order the matter to proceed *ex-parte*.

In his submission, the applicant reiterated what was stated in the affidavit. Mr. Olembile proceeded to submit that sections 379 (1) and (2) of the CPA require the DPP to lodge the notice of appeal within 30 days; and to lodge the petition of appeal within 45 days respectively of the order or judgment against which the appeal is sought. The applicant further acknowledged his awareness on the legal requirement to account for each day of delay. The learned state attorney submitted that in certain circumstances, the requirement to account for each day of delay is waived. It was his further submission that the circumstances surrounding

the present application, meet the conditions to warrant the court to waive the requirement to account for each day of delay.

The major ground in support of this application for extension of time, Mr. Olembile stated, is the illegality of the order of the Resident Magistrate's Court delivered on 6th April, 2021. The learned state attorney asserted that the said order is contrary to ***section 225(5) of the CPA*** which provides as follows: -

> *"Where no certificate is filed under the provisions of subsection (4), the court shall proceed to hear the case or,* ***where the prosecution is unable to proceed with the hearing discharge the accused*** *in the court save that any discharge under this section shall not operate as a bar to a subsequent charge being brought against the accused for the same offence."* [Emphasis added]

The learned state attorney submitted that the aforementioned provision requires the court, in the event the prosecution is unable to procure witnesses, to discharge the accused. He added that the provision directs the court, in such circumstances, to strike out the case. It was his submission that by so doing, the prosecution will not be barred from re-arraigning the accused and charging them with the same offence. Mr. Olembile stated that the illegality in the order of the honourable resident

magistrate, is to the effect that the case was dismissed; the result of which the prosecution is barred from re-arresting the accused persons and charging them with the same offence. The learned state attorney referred the court to page 27 of the typed proceedings of the trial court which reads as follows: -

> *"The case is **dismissed** for want of prosecution u/s 225(5) of CPA, Cap. 20 R.E. 2019".* [Emphasis added]

Mr. Olembile cited the decision of the Court of Appeal of Tanzania (Court of Appeal) in the case of **Hussein Ramadhan Beka Vs. Republic**, Criminal Appeal No. 349 of 2016, whereby the court stated in such a scenario, the trial court ought to strike out the case and not to dismiss it. In further support of his arguments, he relied upon the decisions of **VIP Engineering and Marketing Limited & Two Others Vs. Citibank Tanzania Limited**; consolidated Civil References No. 6, 7 and 8 of 2006. In the latter decision, he reiterated, it was held that illegality can be a sufficient reason for the court to extend the time. It was his prayer that the court should consider this ground to be a good cause, to warrant extension of time.

Before going into the merits or otherwise of the *omnibus* application, section 397(2) of the CPA is relevant for the determination of this matter. The said section states that: -

> *"The High Court may, **for good cause,** admit an appeal notwithstanding that the **periods** of limitation prescribed in this section have elapsed"* [Emphasis added]

Under the above section, this court is allowed for good cause to admit an appeal notwithstanding the lapse of the periods of limitation prescribed under section 379 of the CPA. Certainly, the word **"periods"** refers the period of thirty days to give notice of intention to appeal; and a period of forty-five days for lodging the petition of appeal as reflected under section 379(1) (a) and (b) of the CPA. In that regard, the omnibus application is valid and indeed, the two prayers are not diametrically opposed to each other. Similarly, in the case of **OTTU on behalf of P.L. Asenga and 106 others Vs AMI(Tanzania) Limited**, Civil Application No. 20 of 2014 (Unreported), the Court of Appeal held on page 29, among other things, that: -

> "…***unless there is a specific law barring the combination of more than one prayer in one chamber summons, the courts should encourage this procedure*** *rather than thwart it for fanciful reasons. We*

wish to emphasize, all the same, that each case must be decided on the basis of its own peculiar facts" [Emphasis added]

Coming to the question of merits or otherwise of the application, the applicant has advanced the issue of illegality being the sole ground for the prayers sought. To start with, it is a trite law that extension of time is granted at the discretion of the court upon demonstration of sufficient reasons. But the discretion must be exercised judiciously, based on the rules of reason and justice. This court is guided by the holding of the Court of Appeal in the case of **Rose Irene Mbwete as Administrator of the estate of the late Mary Dotnata Watondoha Vs. Phoebe Martin Kyomo**, Civil Application No. 70/17 of 2019 (unreported). On page 11 of the said case, it was held that: -

*"Therefore, **as a matter of general principle, it is in the discretion of the Court to grant or not to grant extension of time**. However, that **discretion must be exercised judiciously**, according to the rules of reason and justice, and not permit private opinion or arbitrarily. The term **"good cause"** has not been defined, but it can be interpreted depending on the circumstances of each case".*

[Emphasis added]

In the landmark decision of **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) the Court of Appeal laid down the following conditions in consideration of an application of this nature:

> *(a) The applicant must account for all the period of delay.*
> *(b) The delay should not be inordinate.*
> *(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
> *(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged.*

Courts, through numerous decisions have been warned against interpreting these conditions conservatively; it has been insisted that each case must be decided based on its unique circumstances. Courts are also warned against being led by sympathy in their decisions. In the case of **Dephane Parry v. Murray Alexander Carson** [1963] EA 546, in the defunct East African Court of Appeal, it was emphasized that: -

> *"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles.*

> ***If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy,*** *and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."* [Emphasis added]

As indicated earlier, the application before me is confined to an issue of illegality. Accordingly, the celebrated legal principle requiring to account for each day of delay will, in the circumstances of this matter, be inapplicable. As correctly submitted by the applicant, illegality, if established, can be a sufficient ground for the court to exercise its discretion and extend the time. The applicant's cited case of **VIP Engineering and Marketing Limited & Two Others** (supra) is relevant in this regard. In another recent case of **Attorney General Vs. Emmanuel Malangakisi (as attorney of Anastansious Anagnostou) and three others**, Civil Application No. 138 of 2019, the Court of Appeal held a similar position on page 17: -

> *"…in our jurisdiction, the law is settled that where illegality is an issue in relation to the decision being challenged,* ***the court has the duty to extend time so that the matter can be looked into****"* [Emphasis added]

However, the alleged illegality must be of sufficient importance and it has to be apparent on the face of records. Thus, the illegality does not need to be discovered by a long-drawn argument or process. In the case of **Stephen B.K. Mhauka Vs. The District Executive Director Morogoro District Council and two others**, Civil Application No. 68 of 2019 (unreported) the Court of Appeal held on page 15 that: -

> *"…before dwelling on the existence of illegality or otherwise, as earlier pointed out, we are aware of the* ***principle that the point of law constituting illegality must be of sufficient importance and it has to be apparent on the face of records"*** [Emphasis added]

The illegality alleged by the applicant is that the trial court dismissed the criminal case for want of prosecution under section 225(5) of the CPA. According to the applicant, dismissal of the criminal case under section 225(5) of the CPA was uncalled for. Instead, the trial court ought to have opted to strike out the case to allow the applicant to initiate similar offence(s) against the accused persons.

In the course of his submissions, the applicant cited the case of **Hussein Ramadhan Beka** (supra) intending to support his position. However, the said case is not relevant to the matter before this court. While the issue at hand is whether or not the word "dismissed"

"discharged" or" struck out" can be used under section 225(5) of the CPA; the purported authority deliberated on the issue of whether or not a time barred criminal appeal before this court can be "dismissed" or" struck out". Therefore, with due respect to the learned state attorney, the authority is inapplicable and misplaced. For ease of reference, the relevant part of the case states: -

> *"The appellant HUSSEIN RAMADHAN BEKA, was on 22/11/2006,* ***convicted*** *by the District Court of Nyamagana District (Mhina—RM), of armed robbery contrary to Section 287A of the Penal Code Cap. 16 Vol. 1 of the laws as amended by Act No. 4/2004. He was* ***sentenced to serve thirty years in prison****…****He drew his petition of appeal to the High Court on 09/10/2013****. He finally lodged his first appeal in the High Court on 28/10/2013. It is apparent from the record of this appeal that the appellant did not have the chance to argue his grounds of appeal before the High Court because,* ***De-Mello, J. in the absence of the parties, issued an order dated 30/12/2013 dismissing his appeal.*** *The first appellate Judge stated:*
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> *'Owing to computation, the Appeal is '****Time Barred****'. It is in violation of the law. I* ***dismiss it*** *accordingly".* [Emphasis added]

Making reference to the cited section 225(5) of the CPA, it is clear that an accused person discharged under the said section may be re-arrested and charged with similar offence(s). This is evident because the law uses the words *"save that any discharge under this section shall not operate as a bar to a subsequent charge being brought against the accused for the same offence"*. Having held that discharge under section 225(5) of the CPA is not a bar to subsequent charge on same offence, the next question is what is the legal consequence of the "dismissal" order granted under section 225(5) of the CPA.

In answering this question, the Court of Appeal in the case of **Twaha Hussein Vs. Republic,** Criminal Appeal No. 415 of 2017 (unreported) provided valuable guidance. On page 7, 10, and 11, the Court of Appeal held as follows: -

> *"…and the hearing was adjourned on several occasions up to 3/12/2015 when the following ensued: "Prosecutor; The case is for hearing, no witness.". The Court made a following: "Court: Case is hereby* ***dismissed for want of prosecution. Section 225(5) of CPA****.*
>
> *In the present case, although the* ***dismissal order*** *did not expressly acquit the appellant, however, it had the effect of dismissing the charge in Criminal Case No. 26 of 2015 and as such,* ***there was nothing pending to warrant the***

> ***prosecution to institute against the appellant, another case based on same facts for the same offence.*** *We say so because the* ***dismissal order*** *has not been reversed or set aside by any competent court.*
>
> *In the circumstances of this particular case, in the wake of the* ***dismissal order*** *which has not been reversed or set aside by a competent court,* ***prosecution was barred from instituting another criminal case charging the appellant with unnatural offence on accusation that he sodomised the victim".*** [Emphasis added]

Based on the holding of the case of ***Twaha Hussein*** (supra), it is clear that once a dismissal order is granted under section 225(5) of the CPA, be it correctly or otherwise, the prosecution is barred from instituting a similar offence. Consequently, this court is satisfied that the applicant has shown illegality which is apparent on the face of records. The order of the trial court dated 6th April, 2021 dismissing Criminal Case No. 189 of 2020 for want of prosecution under section 225(5) of the CPA is tainted with illegalities which need to be looked into by this court at an appropriate time. As correctly held by the Court of Appeal in the case of **VIP Engineering and Marketing Limited & Two Others** (supra) illegality itself constitutes sufficient reason for extending time.

As a result, the *omnibus* application is meritorious and is hereby granted. The applicant is ordered to give a notice of intention to appeal and lodge the petition of appeal within fourteen days after the date of this Ruling.

It is so ordered.

DATED at **MWANZA** this 15th day of November, 2023.

I. D. MUSOKWA
JUDGE

Court:

This Ruling is delivered today 15th November, 2023 in the presence of Mr. John Joss, State Attorney for the Applicant, and absence of all Respondents.

I. D. Musokwa
JUDGE
15.11.2023