

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(IRINGA SUB-REGISTRY)**

AT IRINGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 4772 OF 2024

CHARLES RICHARD KASUKE APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Originating from the decision of the District Court of Kilolo at Kilolo in
Criminal Case No. 08 of 2023)**

RULING

Date of Last Order: 04/03/2024 &

Date of Judgment: 20/03/2024

S. M. Kalunde, J.:

The applicant, CHARLES RICHARD KASUKE, was arraigned before the District Court of Kilolo at Kilolo in Criminal Case No. 08 of 2023 being charged with the offence of attempted rape contrary to sections 132(1) of **the Penal Code [CAP. 16 R.E. 2022]**. He was convicted and sentence to life imprisonment. He is aggrieved by the said decision and wishes to appeal to this court. However, he is out of time in lodging both, the notice of appeal and the appeal, he has thus preferred the present application which contains the following prayers:

- (a) That, this Honourable Court be pleased to extend the time within which to lodge a notice of appeal and appeal out of time.
- (b) That, this Honourable Court be pleased to any other order deemed fit and just to grant.

The application is preferred by way of a chamber summons predicated under the provisions of section 361(2) of **the Criminal Procedure Act [Cap. 20 R.E. 2022]**. In support of the application, the applicant swore an affidavit. The respondent/republic did not file a counter affidavit to resist the application.

In support of the application, the applicant adopted his affidavit filed in support of the application. According to paragraphs 4, 5, 6 and 7 of the affidavit filed in support of the application, the applicant alleges that, upon his conviction and sentence, he lodged a notice of appeal with the prison warden. Believing that the notice has been lodged, the applicant applied to be supplied with judgment and proceedings of the trial court. Thereafter, he was transferred to Isupilo Prison and later to Pawaga Prison. Later he noticed that the notice had not been supplied. He contended that the delay in lodging the notice of appeal and appeal was not of his own creation but a result of his dependency to prison

wardens. For these reasons he prayed that the application be allowed so that he can fight for his rights.

Mr. Daniel Lyatuu, learned State Attorney intimated that on the strength of the factual dispositions contained in the affidavit, the respondent/republic was supporting the appeal. the learned counsel argued that having duly lodged the notice of appeal to the prison officers, the applicant, a prisoner and lay person, was at the mercy of the prison officers who were supposed to process the notice and facilitate the availability of the necessary documents. However, they did not process the appeal resulting into the delay. He urged the court to grant the application so that the applicant appeal may be heard on merits.

It is also common ground that the applicant right of appeal is guaranteed under the Constitution of the United republic of Tanzania, 1977 and section 359 (1) of the CPA. It is also common knowledge that, the right to appeal is subject to compliance with the conditions set out under provisions section 361 of the CPA. This view was stated by the Court of Appeal decision in the case of **Sospeter Lulenga v The Republic**, Criminal Appeal No. 107 of 2006 where the Court (Munuo, J.A) held:

"To exercise the right of appeal stipulated under the provisions of section 359 (1) and (2) of the Criminal Procedure Act, 1985 Cap 20 R.E. 2002, the appellant had to comply with the mandatory provisions of Section 361 of Cap 20 ..."

Under section 361 of the CPA any person aggrieved by any finding, sentence or order made or passed of a subordinate court other than a subordinate court exercising its extended powers may appeal to this Court upon issuance of Notice of Appeal within ten (10) days from the date of the finding, sentence or order. Thereafter the applicant would be required to file the appeal within forty-five (45) days from the date of obtaining a copy of the proceedings, judgment or order appealed against. The respective section reads:

*"361.- (1) Subject to subsection (2), **no appeal from any finding, sentence or order referred to in section 359 shall 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.*

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

[Emphasis is mine]

The requirement under section 361 were further amplified by the Court of Appeal in **Binaisa Phares Sumwa Rasta & 2 Others vs. Republic**, Criminal Appeal No. 61 of 2015 (unreported) where the Court (Ndika, J.A) stated:

"The provisions of Section 361 (1) of the CPA are definite and unmistakable. They require an intending appellant, aggrieved by a subordinate court's decision, to not only lodge his notice of intention to appeal within ten days from the date of the impugned decision, but also file the intended appeal within forty-five days from the date of the decision.

In the instant case, the applicant dully lodged the notice of appeal within time and communicated the same to the prison warden. It is trite that under section 361(1) of the CPA a prisoner is only required to give a notice of his intention to appeal to the prison warden. Through his affidavit the applicant alleges that that is what he did. He could not be expected to do more than that because he cannot access the court facilities while in prison. The position is that, those in prison take acts or take actions through the people under whom they are under

authority. Thus, where those people whom they are under their authority negligently or by oversight fails to transmit the relevant documents to the Court, prisoners should not be punished. This view was articulated by the Court of Appeal in the case of **William Ndingu Alias Ngoso vs. Republic**, Criminal Appeal No. 61 of 2015, also unreported the court of Appeal (Juma, J.A, as he then was) held:

"Prisoners serving time in prison invariably have no control over which place in Tanzania they serve their sentences. They similarly have no control over the dates and times they are brought to court to hear the outcomes of their appeals. They do what the prison authorities direct them to. Failure of the applicant to be in Mwanza to receive the judgment of his appeal on 18 May, 2005 was not of his own making. As the court said in Alfred Mambya vs. Republic the appellants serving time in prison received court orders through prison authorities."

It is worth noting that, under section 361(2) of the CPA, this court has powers, where **"good cause"** has been demonstrated, to admit an appeal notwithstanding that the period of limitation prescribed in the respective section has elapsed. In the present matter, I make a finding that there is **"good cause"** for this court to exercise its discretion under section 361(2) of the CPA in granting the orders sought.

For the foregoing reasons, I am satisfied that the applicant has demonstrated **"good cause"** within the meaning of section 361(2) of

the Criminal Procedure Act. I will therefore proceed to grant the application. Accordingly, I order the applicant to file the Notice of Appeal within ten (10) days from today. In addition to that, I grant the applicant twenty-eight (28) days within which to lodge the appeal. In terms of section 361(1)(b) the said period shall exclude the time requisite for obtaining a copy of the proceedings, judgment or order appealed against.

The application is disposed in the aforestated terms.

DATED at IRINGA this 20th day of MARCH, 2024.




S.M. KALUNDE
JUDGE