



THE JUDICIARY OF TANZANIA

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA AT MUSOMA

(CORAM: HON. KAMAZIMA KAFANABO)

CRIMINAL APPLICATION NO. 000039175 OF 2023

BARAKA PETER ZACHARIA COMPLAINANT / APPELLANT / APPLICANT /
PLAINTIFF

VERSUS

THE REPUBLIC RESPONDENT / DEFENDANT

RULING

Fly Notes

Extension of time within which to file notice of appeal.

Facts

The Applicant herein was charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16. However, after a full trial, this court found the Applicant guilty of manslaughter and accordingly convicted him of the offence. On 15/10/2020 The Applicant was, as a result, sentenced to serve eighteen (18) years in prison. The appellant was dissatisfied with the sentence of 18 years imprisonment but did not succeed in initiating any appeal process until 30th November 2023 when this application was prepared, signed, and later filed in court

Ratio Decidendi

A party is not allowed to controvert facts of a sworn statement by submissions from the bar. Extension of time shall be granted upon the applicant demonstrating good/sufficient cause.

22nd of January 2024

Hon. KAFANABO.:

This is an application for an extension of time within which to file a notice of appeal out of time. The application is brought by chamber summons under section 11 of the Appellate Jurisdiction Act, Cap. 141. R.E. 2019, supported by an affidavit of the applicant. This application arises from the decision of the High Court of Tanzania, at Musoma, (His Lordship Galeba, J., as he then was) in Criminal Sessions Case No. 21 of 2020, the Republic v. Baraka s/o Peter @ Zacharia.

The facts of the matter can be deduced from the Applicant's affidavit and the same are straightforward. The Applicant herein was charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16. However, after a full trial, this court found the Applicant guilty of manslaughter and accordingly convicted him



of the offence. On 15/10/2020 The Applicant was, as a result, sentenced to serve eighteen (18) years in prison.

The appellant was dissatisfied with the sentence of 18 years imprisonment but did not succeed in initiating any appeal process until 30th November 2023 when this application was prepared, signed, and later filed in court.

The major reason for the delay as per the Applicant's affidavit is that, immediately after the judgment of this court was delivered he struggled to file his notice of appeal in this court. Nevertheless, the Applicant did not succeed because the relevant notice of appeal was misplaced in the court's registry until the time for filing the same had elapsed. Further, he indicated that he intends to file a fresh notice of appeal and that his rights were seriously prejudiced by this court's stiff sentence.

The respondent, however, did not file a counter affidavit to controvert the facts averred by the Applicant in his affidavit in support of the application.

At the hearing, the Applicant appeared in person and the Respondent was represented by Mr. Felix Mshama, learned State Attorney, who resisted the application even though they did not file a counter affidavit.

The Applicant, in support of the application, apart from what was stated in his affidavit, submitted that he was convicted and sentenced on 15/10/2020. Moreover, when preparing himself to file a notice of appeal, on 19th October 2020, he was transferred from Musoma Prison to Kyabakari Prison both in the Mara region, and then to Ruanda Prison in the Mbeya Region, and in December 2021, he was transferred back to the Musoma Prison. He was of the submission that this contributed to his delay in filing the notice of appeal as he was not settled and thus this application.

On the part of the Respondent, Mr. Felix Mshama contested the facts contained in the Applicant's affidavit by way of oral submissions. However, with respect, this court will not consider his submissions purporting to contradict the Applicant's affidavit because facts averred in the affidavit are denied or refuted by filing a counter affidavit, not by statements or submission from the bar. In the case of **Andrea Mtinda v. Republic, Criminal Appeal No. 167 of 2008 (Unreported)** the Court of Appeal observed, on page 8 of the typescript, that:

The second, simple, and pertinent question alluded to above was whether it was proper for the respondent Republic's counsel to be allowed to challenge the contents of the applicant's affidavit by way of a mere statement from the bar. We are settled in our minds that it is both the law and practice that whatever is stated on oath has to be challenged by another statement on oath, in the form of a counter affidavit. This was not done in this case.

The Court, further, observed that:

With respect, we have noted in the course of the sessions here that this is a recurring problem. The Republic is allowed in most cases to controvert affidavits of appellants/applicants by mere statements from the bar. **This is not appropriate. The Republic, like any other respondent, is supposed to file a counter affidavit where it does not agree with the contents of the affidavit.** Mere contention at the bar is not sufficient. A copy of the



counter affidavit must be served on the applicant/appellant well in advance to give adequate time to prepare. The counter affidavit also assists to put one on notice of and prepare for what is expected of at the hearing.

In light of the above, it means that the Respondent's submissions challenging the facts contained in the Applicant's affidavit, took the Applicant by surprise and unprepared. This is taking into account the fact that the Applicant is an inmate and unrepresented. It follows that the Respondent's submissions against facts contained in the affidavit will have no bearing in determining this application.

Moreover, the Respondent did not contest the Applicant's oral submission that he was transferred from Musoma Prison to Kyabakari Prison, then to Ruanda Prison in the Mbeya region, and then back to Musoma Prison.

It was the Respondent's further submission that the Applicant had failed to account for each day of the delay since 15th October 2020 which is more than three years' delay without taking any action to pursue the appeal. He further submitted that the Applicant slept on his right, and therefore, has himself to blame. He urged this court to dismiss the application for want of merits. He supported his submission by citing the case of **Moroga Mwitwa Moroga vs Republic (Criminal Appeal 181 of 2020) [2022] TZCA 340 (14 June 2022)**.

In a brief rejoinder, the Applicant stated that he could not account for each day of the delay because in prison they work, and because of that he could not prepare his application timely.

After hearing the parties' submissions, it is now pertinent to determine the major issue as to whether the Applicant has demonstrated sufficient or good cause for this court to grant him an extension of time.

Starting with the reasons expressed by the Applicant in his submissions, that is, immediately after being sentenced and committed to Musoma Prison, after four days, that is on 19th October 2020 he was transferred to Ruanda Prison in the Mbeya Region. Thereafter, in December 2021 he was retransferred to Musoma Prison in the Mara region. Another reason for the Applicant's delay was that in prison they work, and given the circumstances of the prison, he could not take note of what they did every day to account for each day of the delay.

This court takes cognizance of the fact that the said submission on the Applicant's transfer is not based on the facts stated in the affidavit in support of the application. However, since the Respondent had an opportunity to refute or deny them by oral submissions as well, and chose not to contest them, then this court takes them as valid remarks by the Applicant.

Moreover, in the affidavit supporting the application, which was not controverted by the Respondent, as no counter affidavit was filed; the Applicant deponed that immediately after the judgment of this court was delivered he struggled to file his notice of appeal in this court, but could not succeed because the relevant notice of appeal was misplaced in the court's registry until time for filing the same had elapsed.

It follows that the guiding law on the extension of time within which to file the notice of appeal is provided for in the Appellate Jurisdiction Act and the Court of Appeal Rules.



Rule 68(1) of the **Court of Appeal Rules, 2009** (as amended from time to time) provides that:

‘Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in triplicate with the Registrar of the High Court at the place where the decision against which it is desired to appeal was given, **within thirty days of the date of that decision**, and the notice of appeal shall institute the appeal.’

The Applicant could not file his notice of appeal within 30 days as required by law. The remedy available was to apply for an extension of time under Section 11(1) of the **Appellate Jurisdiction Act, Cap. 141 R.E. 2019** which provides that:

‘Subject to subsection (2), **the High Court** or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, **may extend the time for giving notice of intention to appeal from a judgment of the High Court** or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired.’

Moreover, the basis for granting an extension of time is provided for under Rule 10(1) of the Court of Appeal Rules, 2009 (as amended from time to time), which provides that:

The Court may, **upon good cause shown**, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended.

Moreover, the Court of Appeal in the case of **Yusufu Hassan v. the Republic, Criminal Application No. 50/12 of 2017** held that:

In exercising its discretion to grant an extension of time, the court considers the following crucial factors: **the length of the delay, the reason of the delay and degree of prejudice that the respondent may suffer if the application is granted. It is therefore the duty of the Applicant to provide the relevant material in order for the court to exercise its discretion.**

It also this court’s understanding that the inclined practice in this area of law is to grant applications for extension of time where sufficient cause is shown, especially to applicants who are inmates or prisoners, as most of their actions or steps towards appeals are at the mercy of the prison authorities. This was held by the Court of Appeal in the cases of **Sospeter Lulenga v. The Republic, Criminal Appeal No. 107 of 2006 (Unreported)**, **Maneno Muyombe and Another v. The Republic, Criminal Appeal No. 435 of 2016 (unreported)** and **Yusufu Hassan v. the Republic, Criminal Application No. 50/12 of 2017 (unreported)**.

Given the position above, the Applicant in this case has provided material to this court upon which to act and grant extension of time. This is due to the fact that the contents of the Applicant’s affidavit were not controverted by the Respondent under oath.



Further, the submission regarding Applicant's transfer from one prison to another, as indicated herein above, was also not contested by the Respondent and thus taken positively by this court.

The Respondent's submission that the Applicant failed to account for each day of the delay, and thus slept on his right, has no legs upon which to stand in the absence of the counter affidavit as observed above; and for not contesting the Applicant's oral submission on his transfer under prison authorities. Consequently, the case of **Moroga Mwita Moroga vs Republic (Criminal Appeal 181 of 2020) [2022] TZCA 340 (14 June 2022)** relied upon by the Respondent is distinguishable under the circumstances of this case. This is taking into account the fact that the issue of the Respondent not contesting facts contained in the affidavit and oral submissions did not arise in that case.

In light of the above, this court finds that the Applicant has demonstrated sufficient cause warranting an extension of time. Therefore, this application is allowed. The Applicant is required to file a notice of intention to appeal from a judgment of this court dated 15th October 2020 within twenty (20) days from the date of this decision.

It is so ordered.

Dated at **MUSOMA ZONE** this 22nd of January 2024.



KAMAZIMA KAFANABO

JUDGE OF THE HIGH COURT

