

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA SUB REGISTRY
AT TABORA

MISC. CRIMINAL APPLICATION NO. 33 OF 2023

*(Arising from Urambo District Court in Criminal Appeal No.9 of 2022
originating from Ulyankulu Primary Court in criminal case No. 63 of
2022)*

EMMANUEL MPUYE.....APPELLANT

VERSUS

MATHEO NYANDWI.....RESPONDENT

RULING

Date of Last Order: 12/02/2024

Date of Delivery: 07/03/2024

MANGO, J.

The applicant Emmanuel Mpuye filed this application for extension time so as to lodge an appeal out of time against the decision of the District Court of Kaliua in Criminal Appeal No. 9 of 2022, original Criminal Case No. 63 of 2022 before Ulyankulu Primary Court.

The application is by way of Chamber summons made under section 25(3)(b) of the Magistrates Courts Act [Cap 11 R.E 2019], supported by an affidavit sworn by the Applicant.

The brief facts to this application is that the appellant was charged for the offence of malicious injury to property contrary to section 326 of the Penal Code [Cap 16 R.E 2022] before Ulyankulu

Primary Court. The trial Court found him guilty of the offence, convicted and sentenced the Applicant to pay a fine of Tshs 500,000/= or six months imprisonment in default of payment and compensation for the injuries caused for a tune of Tshs 2,348,000/=.

Aggrieved with the decision of the trial court the Applicant lodged a petition of appeal to Kaliua District Court which was registered as Criminal Appeal No. 9 of 2022. On 3rd March 2023, dismissed the appeal for being filed by another person different from the Applicant and the Applicant had no knowledge of its contents.

Still desirous in pursuit of his right the applicant has approached this court for extension of time to file second appeal.

During hearing of the application, both parties appeared in person.

The applicant had nothing more than adopting the contents of his affidavit as his submission. In his affidavit, he stated that the appellate magistrate dismissed his appeal without giving him opportunity to be heard, alleging that it was not filed by the applicant. He faulted the dismissal order for being unfair tainted with irregularities because the decision reached was not based on determination of the appeal on merit.

He concluded that he was not aware as to what was written on his appeal because he instructed his daughter to prepare the petition of appeal while he was in custody and that he was not informed by the appellate magistrate that his appeal was dismissed.

On his part the respondent prayed to adopt the contents of his counter affidavit. On his counter affidavit he stated that the Applicant delayed to file his appeal for 4 months thus, has to account for every single day of delay. He stated further that, illegality cannot be used as a shield to hide against inaction on the party of the Applicant.

He concluded that the reasons advanced by the applicant are meritless because he used to attend in the first appellate court for his appeal.

In rejoinder the applicant had nothing to add other than praying for his application be granted.

In light of the arguments raised by the parties, the thrust on the Court is to consider as to whether or not the Applicant has shown a good cause for the delay to warrant grant of this application.

It is trite law that, the Court may only exercise its discretion to grant an application for extension of time if the applicant has shown a good cause for the delay.

As to what constitutes a good cause for delays and how the period of delay should be accounted for, the Court of Appeal of Tanzania in the case of **Hamis Babu Bally vs the Judicial officers Ethics Committee and Others** (Misc. Civil Application 37 of 2019) [2020] TZHC 357 (3 March 2020), pointed out as follows;

- “i) To account for all period of delay*
- ii) The delay should not be inordinate*

- iii) *The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and*
- iv) *The existence of a point of law of sufficient importance, such as the illegality of the decision sought to be appealed against."*

Based on what has been highlighted above, this Court is enjoined in this application, to consider as to whether the applicant qualifies in terms of the factors enumerated above.

It should be noted that, the time limit to file an appeal is thirty (30) days. The impugned order was delivered on 03/05/2023 and the present application was lodged on 18/09/2023. Thus the Applicant ought to have accounted for the delay from 02/06/2023 to 18/09/2023 when he filed the application at hand.

Unfortunately, the Applicant has not accounted for his delay with any sufficient cause. I hold so while aware that the Applicant alleged that he was not aware that his appeal was dismissed because such allegations are not borne by record. Court record indicates that on the date the appeal was dismissed, 3/05/2023, the Applicant was present. Thus he ought to have heard the order issued by the Court on that particular day. Despite that, the Applicant did not state as to when he received information that his appeal was dismissed. In such circumstances, the Court cannot presume that the Appellant was informed of the Court order dismissing his appeal.

Despite such findings, the Applicant raised illegality as among the grounds for extension of time. The alleged illegality is contained

under paragraph 6 of the applicant's affidavit, in which he stated that;

6. *"The appellate magistrate dismissed the applicant's appeal without giving the applicant opportunity to be heard on the competence of the appeal, the allegation that the applicant knew nothing about the appeal without being heard became the basis of the dismissal."*

It is trite law that when illegality is raised and such illegality is clear on face of record, the Court has to extend time in order for the same to be cleared by the Appellate Court. See the decision of the Court of Appeal of Tanzania in **Moto Matiko Mabanga vs Ophir Energy Plc & Others** (Civil Application 463 of 2017) [2019] TZCA 135 (12 April 2019). The alleged illegality in this application is clear on face of record. The Appeal was dismissed without affording the Appellant to be heard.

In the circumstances, I find that the application has merit to the extent explained above and the same is here by granted. The Applicant should lodged his intended appeal within thirty (30) days from the date of this ruling. Given the fact that the Respondent has not anyhow contributed to the Applicant's delay to file his intended appeal, I do not award costs.

Dated at Tabora this 7th day of March 2024




Z.D. MANGO
JUDGE

