

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB - REGISTRY

AT SONGEA

MISC. CRIMINAL APPLICATION NO. 38115/2023

(Originating from Namtumbo District Court in Criminal Case No. 73 of 2022)

ISMAIL YASIN KAKWELA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

Date of last Order: 31/01/2024

Date of Ruling: 07/02/2024

U. E. Madeha, J.

To begin with, the Applicant that is none other than; Ismail Yasin Kakwela, was charged and convicted by the District Court of Namtumbo for two offences of rape contrary to sections 130 (1), (2) and 131 of the *Penal Code* (Cap. 16, R. E. 2022). He was sentenced to serve thirty (30) years imprisonment. Dissatisfied by both conviction and sentence meted by the trial Court, the Applicant lodged this application for extension of time to file his notice of intention to appeal and petition of appeal out of time. The application is supported by an affidavit sworn by the Applicant himself.

At the hearing of this application the Applicant has no representation, whereas Mr. Elipid Tarimo the learned State Attorney represented the Respondent/Republic.

Submitting in support of this application, the Applicant told this Court that, immediately after his conviction and sentence he was sent at Namtumbo Police Station where he stayed for eight days before he was sent at Songea Remand Prison. While at Songea Remand Prison he filed his notice of intention to appeal and submitted to the Prison authority and after one week before he was supplied with the copy of judgement and proceedings, he was transferred to Kitai Prison where he was supplied with the copies and started preparing the grounds of appeal and filed before this Court. At the hearing of the appeal, it was discovered that the appeal was filed out of time and it was struck out.

The Applicant added that the delay to file his appeal on time was caused by factors beyond his control since sometimes he was suffering with mental illness and the Prison Authority failed to file his petition of appeal on time. The Applicant prayed to be granted with an order for extension of time in order to file an appeal.

On the other hand, Mr. Elipid Tarimo, representing the Respondent resisted the Applicant's application on the ground that the Applicant claim that it was the Prison Authority which made him to fail to file his notice of intention to appeal and petition of appeal in time would have been successful if he mentioned the Prison Officer who made him to delay to file his appeal by attaching the affidavit of that Prison Officer sworn to that effect. To buttress his argument, he made reference to the decision of the Court of Appeal of Tanzania made in the case of **Airtel Tanzania Limited v. Minister of Light Electrical Installation Co. Limited and Another**, Civil Application No. 37/01 of 2020.

Mr. Tarimo went on stating that on the second, third, fourth and fifth paragraphs of the Applicant's affidavit, the Applicant averred that he failed to file his appeal since he stayed at Namtumbo Police Station for eight days before he was sent to Songea Remand Prison and later on to Kitai Prison. However, he has failed to mention the date on which he was sent and there is no documentation to prove that he was really transferred from one place to another since transfers of prisoners are recorded. He added that, the need to attach documents or exhibits to prove what has been deposed in the affidavit is important to prove that what has been deposed are

correct. He made reference to the decision of the Court of Appeal of Tanzania made in the case of **TCCIA Investment Company Limited v. Dr. Gideon H. Kaunda**, Civil Appeal No. 310 of 2019, and **Robert Madoloiyo v. Republic**, Criminal Appeal No. 486 of 2015.

On the Applicant's allegations that he was sick, Mr. Tarimo stated that it is any afterthought since in his affidavit filed in support of the application, he never stated that he was sick. He prayed for this Court to disregard such allegation.

Mr. Tarimo submitted further that, in any application for extension of time, it is the discretion of the Court whether to grant or not upon making consideration to some factors. Making reference to the decision of the Court of Appeal of Tanzania in the case of **John Paulo Yusufu v. Republic**, Criminal Appeal No. 582 of 2017 (unreported), he named the factor that are usually considered by the Court in application for extension of time to be: *First*, the length of delay, *second* the reasons for the delay, *third* if there is a point of law or illegality, *fourth* the proportionality of the harm if the application is granted or not.

Responding on the Applicant's allegations that he once filed an appeal but it was struck out for the reason that it was filed out of time, Mr.

Tarimo was of the view that, for such allegations to be believed by this Court, the Applicant was to attach a copy of ruling to prove such allegations. He added that, the Applicant was also required to attach the copy of judgment and proceedings of the trial Court to enable this Court to know when he was convicted and sentenced since the Applicant has failed even to stated such facts in his affidavit sworn in support of his application making difficult for this Court to ascertain the period of delay. Lastly, he prayed for this application to be struck out for lack of merit since the delay was caused by the Applicant's negligence. The Applicant had nothing to add in his rejoinder submission.

Having gone through the affidavit, the counter affidavit and the submissions made by the parties in this application, I find the main issue which needs to be determined by this Court is whether the Applicant has advanced good cause to convince this Court to exercise its discretion power to extend time within which the Applicant can lodge an appeal out of time.

It is the established practice of this Court and the Court of Appeal which is the Apex Court in our jurisdiction that, for applications of this nature to succeed the Applicant has to elaborate clearly the reasons for the

delay to enable the Court to use its discretion which is to be exercised judiciously. In **Robert Madololyo v. Republic**, Criminal Appeal No. 486 of 2015 [2018] TZCA 346 [14 February 2018; TanzLII], the Court of Appeal of Tanzania, quoting with approval the decision of the Supreme Court of South Africa in **Uitenhage Transitional Local Council v. South African Revenue Service**, 2004 (1) SA 292 (SCA), cautioned that, in an application for condonation the Applicant must furnish a detailed and accurate explanation of the causes of the delay to enable the Court to understand the situation and assess the responsibility.

In the instant application, the Applicant has submitted that he was making follow-up for copies of judgement and proceedings from the Trial Court. Also, the Applicant has stated that he was sick and the failure to file his appeal on time was beyond his control. As stated by the Respondent's learned State Attorney, it is undisputable fact that the Applicant's allegation has not been backed up with any document to prove its existence and make this Court believe on his allegations. The Applicant was to attach a certificate from the hospital where he attended treatment to make this Court believe that he was sick and he failed to file his notice of intention to appeal and petition of appeal on time.

It is important to note that, the Applicant was to show sufficient reason to enable this Court to exercise its discretion power. This Court in the case of **Blue Line Enterprises Ltd vs. East African Development Bank**, Misc. Civil Case No. 135/95 (unreported) stated that:

"It is trite law that extension of time must be for the sufficient cause and that extension of time cannot be claimed as of rights, that the power to grant this concession is discretionary, which discretion is to be exercised judicially, upon sufficient cause being shown which has to be objectively asserted by Court."

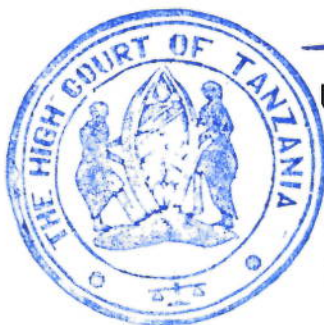
For an application of this nature to succeed, the Applicant was to account each day of delay from the date he was convicted and sentenced to serve his sentence. But the Applicant has failed to state even the date in which he was convicted and the date he was supplied with the copies of the judgment and proceedings to enable this Court to determine the length of delay.

The Applicant also has alleged that he was transferred from one prison to another something which made him to be supplied with the copies of judgment and proceedings too late. On my view, I find the Applicant was to prove such allegations by producing an affidavit sworn by

the Prison Officer and a certified copy of log book or register that shows the movement of the Applicant from one prison to another.

Thus, in the circumstance of this application, I find the Applicant has failed to advance good reason to enable this Court to exercise its discretionary power to grant an order for enlargement of time for the Applicant to file an appeal out of time and I hereby dismiss this application for want of merit. It is so ordered.

DATED and DELIVERED at **SONGEA** this 7th day of February, 2024.




U. E. MADEHA

JUDGE

07/02/2024

COURT: Ruling is read over in the presence of the Applicant and Mr. Elipid Tarimo, the learned State Attorney for the Respondent. Right of appeal is explained.




U. E. MADEHA

JUDGE

07/02/2024