

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISCELLANEOUS CRIMINAL APPLICATION 52 OF 2023

*(Arising from Criminal Case 31 of 2022 of the Court of Resident Magistrate of
Manyara)*

SYLIVESTER BILAURO.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

13th and 23rd February 2024

MIRINDO, J.:

Sylivester Bilauri is applying for the leave of this Court to appeal out of time following his conviction and sentence for unnatural offence under section 158 (a) of the Penal Code [Cap 16 RE 2019] by Manyara Resident Magistrate's Court.

He attributes, in his affidavit, the reasons for delaying to appeal on being transferred to different prisons leading to loss of documents and to the difficulties relating to printing facilities at Babati District Prison. He managed



to secure an additional affidavit from the officer in-charge of Babati District Prison to support those facts.

In her counter affidavit, Ms Leah Enea Vyosena, learned State Attorney who also appeared for the Respondent Republic, contested the facts deponed by Sylvester. At the hearing of the application, the learned State Attorney, argued that being a prisoner was not a sufficient reason for extension of time and in any case under section 363 of the Criminal Procedure Act [Cap 20 RE 2022], a prisoner has a right to submit his appeal documents to prisoner officers to whom the law shifts the responsibility to finalise the appeal process. Given that Sylvester was present in court when the judgment was delivered and was informed of his right to appeal, but still he did not file his petition of appeal within 45 days as required by law.

In his reply to the submission by the learned State Attorney, Sylvester stated that he filed the notice of intention to appeal but when he went to prison, he could not do anything. When he went to prison officers, he was told that they were following up the matter and this caused delay.

It is clear that from the judgment of the trial Resident Magistrate's Court of Manyara that Sylvester oddly stated his intention to appeal during the mitigation stage. In the leading case of *Siasa s/o Mpinge v R*, Criminal Appeal 9 of 2003, Court of Appeal of Tanzania at Dar es Salaam (2006), the High Court struck out the appeal because it was lodged without a prior "notice



of appeal.” It was held on appeal to the Court of Appeal that “there is no format of a notice of appeal” under section 359 of the Criminal Procedure Act and the prisoner’s act of applying for a copy of judgment constituted notice of intention to appeal:

The appellant applied for a copy of the judgment on 11th October, 2001, and as is normally the case he must have stated the copy was required for the purpose of appealing. That notification, in our considered opinion, constitutes notice of intention to appeal.

In *Kassana Shabani and Another v R*, Criminal Appeal 476 of 2007, Court of Appeal of Tanzania at Dodoma (2009), the Court of Appeal held that “even oral notices of intention to appeal given at the time the judgment is pronounced to appeal are legally permissible”.

It is clear from these authorities of the Court of Appeal that Sylvester’s oral statement during the mitigation constitutes notice of intention to appeal which I now hold to have been once lodged.

The learned State Attorney argued that according to the decision of this Court in *Isack Kapesa v Republic* (Miscellaneous. Criminal Application 10 of 2022) [2022] TZHC 640 (28 March 2022) being transferred from one prison to another was not a sufficient reason for extension of time. Notwithstanding Sylvester’s transfer to different prisons, the learned State Attorney argued, he had the opportunity to present his petition of appeal to prison officers in any of those prisons, all of which are located within the jurisdiction of this Court.



I have come to the conclusion that the case of in *Isack Kapesa* is inapplicable in the present circumstances and I am bound to follow precedents of the Court of Appeal in this regard. The possibility of prisoner transfers affecting processing of prisoner appeal was accepted in *Mwantandu Eliah v R*, Criminal Appeal 477 of 2007, Court of Appeal of Tanzania at Dodoma (2009). In *Nzeyimana s/o Zeno v Republic* (Criminal Appeal 458 of 2007) [2013] TZCA 380 (19 April 2013), the prisoner who started his prison sentence immediately after being sentenced, lodged his notice of intention to appeal two days later after being sentenced. He was subjected to prison transfers- from Kasulu Prison to Bangwe Prison and then Uyui Prison in Tabora. He did not lodge a petition of appeal for two good years. The Court of Appeal held that these transfers affected the appeal process and the prisoner had shown good cause for extension of time.

Besides, the learned State Attorney noticed that the additional affidavit of the officer in charge of Babati District Prison does not explain Sylvester's efforts to follow up his appeal documents from prison officers. In a related argument, the learned State Attorney pointed out that there was no affidavit from Mbulu prison where Sylvester was initially placed.

In an ideal case, a prisoner should secure additional affidavit from a prisoner officer to corroborate his affidavits as Sylvester has done for some facts but the Court of Appeal has held in *Sospeter Lulenga v R*, Criminal Appeal 108 of 2006, Court of Appeal of Tanzania at Dodoma (2007) and



Alfred Chinga v R, Criminal Appeal 73 of 2008, Court of Appeal of Tanzania at Mbeya (2011) that, for different reasons, it is not easy for prisoners to secure affidavits from prisoner officers.

In light of the facts presented before this Court, it was demanding too much for Sylvester to speed up the appeal process or prove the problems with printing facilities over and above what he deponed. In *Sostenes s/o Nyazagiro v Republic* (Criminal Appeal 12 of 2013) [2013] TZCA 434 (7 May 2013), a prisoner applied for extension of time to appeal two years subsequent to his conviction and sentence. The High Court dismissed the application because there was no proof of the prisoner submitting his notice of intention to appeal and petition of appeal for typing. The High Court further held that there was no proof from prison authorities that there were problems with printing facilities. These findings were set aside on appeal to the Court of Appeal. The Court of Appeal held that the High Court was:

...stretching credulity too far. The appellant was not running the Prison system. Rather, the Prison system was running him.

For all these reasons, I am satisfied that Sylvester has demonstrated good cause for extension of time. Because his first notice of intention to appeal may have expired as held in the cases of *Sostenes s/o Nyazagiro and Nzeyimana s/o Zeno* which have been cited above, I grant Sylvester extension of time with orders that he should lodge his notice of intention to appeal within ten days from the delivery of this ruling and then file his petition of appeal within



forty five days, in the High Court. The officer in charge for Babati District Prison should forward the appeal to the High Court of Tanzania at Babati for further process in accordance to law.

Dated at Babati this 21st day of February 2024



F.M. Mirindo

JUDGE

Court: Delivered in chambers in the presence of the Applicant and Ms Leah Vyosena for the Respondent, State Attorney this 23rd February 2024. B/C: Lackson Rojas present.



F.M. Mirindo

JUDGE

23/2/2024

