

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB-REGISTRY

AT MBEYA

MISC. CRIMINAL APPLICATION NO. 11302 OF 2024

(Arising from the District Court of Mbeya in Criminal Case No. 130 of 2022)

NYALOBİ KIBONA..... APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

RULING

27th and 31st May, 2024

KAWISHE, J.:

The applicant, Nyalobi Kibona was charged before the District Court of Mbeya in Criminal Case No. 130 of 2022 and he was convicted for Transporting Illegal Immigrants contrary to section 46 (1) (c), (g) and (e) of the Immigration Act, Cap 54 R.E 2016. He was punished to Tzs. 20,000,000/= or to serve twenty (20) years jail. Dissatisfied with the conviction and sentence he decided to appeal but found himself out of time. As a result, he filed this application for extension of time within which to file his appeal out of time. The application is made by way of chamber summons supported by an affidavit deposed by the applicant.

He prayed to this court that it may be pleased to grant the applicant leave for an extension of time within which to lodge notice of appeal and petition of appeal out of time in Criminal Case No. 130 of 2022.

The reasons as per the affidavit are reproduced hereunder regardless of the errors therein:

- 1. THAT – I was convicted for Transporting illegal immigrants c/s 46 (1) (c) (g) and (e) of the Immigration Act, Cap 54 R.E 2016 and sentenced to pay fine Tzs. 20,000,000/= or to serve twenty (20) years Jail.*
- 2. THAT- as the trial judgement delivery on 27/7/2023 when entered in Ruanda central prisons I prepared notice of appeal and the same was forwarded to the court in time.*
- 3. THAT- on 14/8/2023 the trial court supplied me with the copy of judgment and the proceedings and on 17/08/2023 I prepared petition of appeal and handed it to the officer in charge of Ruanda central prisons for forwarding to the court in time.*
- 4. THAT- from 17/8/2023 up to 18/3/2024 I follow up my appeal to the officer in charge and asked him why I wasn't called by the high court summons to hear my appeal, but the said prison authority told me that it forwarding to the court out of time.*
- 5. THAT- the prisons authority told me that due to the exchanged of the court system of JSDS 2 as the said system was collapsed with its appeal, and the prison authority notified me that when filed the same in a new system of **ELECTRONIC CASE MANAGEMENT** (E-CASE MANAGEMENT SYSTEM) the time was already expired.*
- 6. THAT- as stated in 3-4 and 5 the fault which made my appeal to be out of time is totally beyond my control as myself I was complied section 361 (a) and section 363 both of the CPA Cap 20 RE 2022.*

7. THAT- now I am an applicant applying to this hon. Court leave for an extension of time within which notice of appeal and petition of appeal of time and my appeal to be heard out of time in CRIMINAL Case No. 130 of 2022.

The application was objected to by the respondent's learned counsel. The applicant appeared in person unrepresented while, the respondent was represented by Ms. Imelda Aluko, learned State Attorney.

Nyalobi, the applicant being a layman and unrepresented did not have much to say. He prayed to the court to adopt his affidavit to form part of his submission. He prayed to the court to grant his application to file an appeal out of time. He added that he prepared the appeal on time and submitted it to the Admission Officer of Songwe Prison. Later on he was informed that his appeal was on time but there were changes on the filing system of the court. That they looked for the appeals and could not find them in the system. That they had to refile the appeal. He prayed to the court to be granted with the application of leave to file appeal out of time.

Ms. Imelda Aluko, learned State Attorney in reply, she clearly stated that, the respondent objects the application. She argued that, if the Admission Officer of Songwe Prison, delayed the applicant in filing his appeal, should have sworn affidavit for the same. She defaulted the reason

that the applicant was just informed by the Admission Officer of Songwe Prison that there was a change in the filing system of the court which caused the delay. Failure to attach an affidavit of the Admission Officer of Songwe Prison, his reasons are baseless. She prayed to the court to strike out the application.

In rejoinder, Nyalobi submitted that in Songwe Prison they were called by the admission officer and informed them orally, that the appeals were out of time. That they had to wait for the summons. On the issue of attaching an affidavit, he prayed to the court to accept his oral submission as that is what he heard by his ears.

I have fervently followed the brief and precise submission from the applicant and the respondent's counsel.

All the seven reasons advanced by the applicant are aimed at proving that the applicant was not negligent in pursuing his right to appeal rather he was let down by the prison's authority aggravated by the change of court filing system. On the other hand, the respondent's learned counsel wants applicant to adduce an affidavit from a prison's officer to show that he informed the applicant about the delay due to system changes.

The issue before this court to determine is whether the applicant has advanced good cause for his delay to lodge his petition of appeal out of time.

In responding to this question, first, I have to look at the circumstances surrounding the applicant. He is a prisoner whose freedom of movement and self-conduct is limited. Simply, his daily routine is managed by the prison officers. Second, I have to look at the powers of the court to grant extension of time to file an appeal. As a matter of law, it is exclusively in the discretion of the court whether to grant or refuse an application for extension of time as stated in section 361(2) of the Criminal Procedure Act, Cap 20 R.E 2022. The said provision confers the High Court with discretion in the following terms:

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

In exercising the discretionary powers vested to this court by the provisions of section 361(2) of the CPA, I revert to the question whether the applicant has advanced good cause for his delay to lodge his petition of appeal out of time.

In his 2nd ground, he stated that he prepared notice of appeal and the same was forwarded to the court in time. On the 3rd ground, he argued that he prepared the petition of appeal and handed it to the officer in charge of Ruanda Central Prisons for forwarding to the court in time. On the 5th ground he stated that prisons authority informed him that due to the changed court system of JSDS 2 as the said system collapsed with his appeal, and the prison authority notified him that when filed the same in a new system of **ELECTRONIC CASE MANAGEMENT** (E-CASE MANAGEMENT SYSTEM) the time was already expired. The 6th ground states that the fault which made his appeal to be out of time is totally beyond his control as he complied section 361 (1) (a) and 363 of the CPA Cap 20 RE 2022.

These four reasons among other grounds of the application, were disputed by Ms. Aluko for lack of documentary evidence. I agree with Ms. Aluko that evidence is very vital in supporting any reason or argument. However, the argument best suits an environment where the applicant has freedom of movement and access to the trial court and other facilities to enable him prepare and lodge an appeal in time. The application at hand is

preferred by an applicant who is a prisoner. His movement is restricted legally given the sentence imposed on him by the trial court.

Being an inmate, it is obvious that the applicant could not conduct his affairs in the same manner as a free citizen would do. Given such circumstances, it is my view that, a special consideration ought to be accorded to the applicant's circumstances.

Based on the foregoing analysis, the applicant's prayer for extension of time has shown good cause bearing in mind that he is in prison. A similar reasoning was observed by this court in the case of **Rhobi s/o Kitang'ta Chacha vs. The Republic (Criminal Application No. 58 of 2022) [2023] TZHC 305 (16 February 2023)**, where learned Judge cited the case of **Maneno Muyombe & Another vs. Republic (Criminal Appeal No. 435 of 2016) [2019] TZCA 260 (23 August 2019)** where it was stated that:

"Being inmates serving time in prison, the appellants invariably had no control over their affairs and that they were necessarily at the mercy of the Officer-in-Charge of their prison, as it were. In this regard, it was to expect too much from them."

The same principle was advanced in **Maneno s/o Muyombe & Another vs. Republic (Criminal Appeal 101 of 2007) [2011] TZCA 132 (28 January 2011)** where the Court stated that:

"In view of the wording of section 361 (2) (formerly Section 361 (b)), all that is required of the appellant is to show "good cause" before the High Court can invoke its discretionary powers to extend time."

In consideration of the reasons adduced by the applicant under paragraphs 2, 3, 5 and 6 of the sworn affidavit, the applicant has shown a good cause thus, the answer to the question, whether the applicant has advanced good cause for his delay to lodge his petition of appeal out of time is answered in the affirmative.

The High Court in **Rhobi s/o Kitang'ta Chacha vs. Republic** (supra) deciding an application for extension of time, while exercising its discretionary powers, cited the case of **Kassana Shabani & Another vs. Republic**, Criminal Appeal No. 476 of 2007 (unreported) where Court of Appeal had this to say:

*"Since there appears to be a recurring or perennial problem, we would like to take this opportunity to make it clear that once an applicant under section 361 of the Act has **satisfactorily** accounted for the delay in giving notice of appeal or filing a petition of appeal, extension of time ought to be granted as a matter of right."*

The Court of Appeal, stated it categorically that once the applicant has satisfactorily accounted for delay in giving notice of appeal it ought to be granted as a matter of right. The same with this application at hand. The applicant has shown that he made efforts to pursue his right of appeal but things were beyond his control. It does not augur well to insist the applicant to demand and produce an affidavit from the prisons officer to account for the delay he caused to the applicant (a prisoner). The relationship between a prisoner and a prisons officer speaks for itself. In my view, it could not be that easy for the applicant to ask the prisons officer to swear an affidavit telling the court that he delayed the applicant in filing his notice of appeal and appeal accordingly. In that regard, I am convinced that the applicant could not secure the affidavit and his prayer to believed his oral submission given his circumstances holds water.

From the case law and the provisions of section 361(2) of the Criminal Procedure Act, Cap 20 R.E 2022, the applicant has advanced good cause for the delay hence, the application is allowed. The applicant is granted leave to lodge notice of appeal to the High Court against the decision of the District Court of Mbeya in Criminal Case No. 130 of 2022

within ten days from the date of delivery of this ruling and lodge his appeal respectively.

It is so ordered.

Dated at **MBEYA** this 31st day of May, 2024.



A handwritten signature in blue ink, appearing to read "E.L. Kawishe", is written over a horizontal line.

E.L. KAWISHE

JUDGE

Ruling delivered in Chambers this 31st day of May, 2024 in the presence of Ms. Imelda Aluko, learned State Attorney for the Respondent and in the presence of the applicant who has appeared in person and unrepresented.



A handwritten signature in blue ink, appearing to read "E.L. Kawishe", is written over a horizontal line.

E.L. KAWISHE

JUDGE

31/5/ 2024