

THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
MBEYA SUB-REGISTRY  
AT MBEYA

MISC. CRIMINAL APPLICATION NO. 11301 OF 2024

*(Originating from the High Court of Tanzania at Mbeya in Criminal Appeal No. 63 of 2021)*

SHADRACK AMBAKISYE..... APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

**RULING**

*27<sup>th</sup> & 31<sup>st</sup> May, 2024*

**KAWISHE, J.:**

The applicant Shadrack Ambakisye was arraigned in the Resident Magistrates Court of Mbeya at Mbeya with two counts. The first count rape contrary to section 130(1)(2)(e) and (131) of the Penal Code Cap 16 R.E 2019 and the second count, impregnating a school girl contrary to section 60A of the Education Act Cap 353 R.E 2002 as amended by section 22(3) of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016.

The applicant pleaded not guilty in both counts. The prosecution marshalled five witnesses to prove the case while the applicant defended

himself. At the end of the trial, he was convicted on both of the counts. He appealed to the High Court where he succeeded in one count and the conviction and sentence on rape was upheld. Irritated with the decision of the High Court in upholding the sentence of thirty years imprisonment, he wishes to appeal to the Court of Appeal but ran out of time. Thus, he filed this application to be granted time to file a notice of appeal and memorandum of appeal to the Court of Appeal out of time. He preferred his application under section 11(1) of the Appellate Jurisdiction Act, Cap 141 R.E 2022 against Criminal Appeal No. 63 of 2021.

According to his affidavit supporting the chamber summons, the applicant marshalled five reasons to be considered by the court. The reasons are paraphrased hereunder:

- 1. That he was convicted for two counts, rape and impregnating a school girl convicted and sentenced to each count thirty (30) years in jail, sentences to run concurrently of thirty (30) years imprisonment.*
- 2. That he appealed to the High Court whereby in appeal No. 63 of 2021 on 27/12/2021 the court quashed conviction on second count and up held the conviction and sentences in the first count.*
- 3. That- on 29/10/2023 he supplied with the proceedings when he perused the notice of appeal which he had prepared and lodged to court it stated that he was appealing on the second count while its conviction and sentence were already quashed by the High Court.*

4. That- the said fault was caused by typing errors by adopting the first notice of appeal filed from the trial court and as a prisoner he was transferred to Songwe prisons which made it difficult for him to follow every step of perusing the said document.

5. That as he stated under paragraph No. 3 and 4 he prays to this Hon. Court for a leave for an extension of time within which to lodge notice of appeal and memorandum of appeal out of time to the court of appeal of in criminal appeal No. 63 of 2021 as the fault which resulted his appeal to be out of time was beyond his control.

In this application, the applicant appeared in person unrepresented while, the respondent had the services of Ms. Imelda Aluko, learned State Attorney.

When the application was due for hearing, the applicant being a layman, short of understanding of the procedures and unable to articulate his submission, he briefly prayed to the court to adopt his affidavit to form part of his submission and he became numb.

In reply, Ms. Imelda, learned State Attorney did not hesitate to give the respondent's position by stating that the do not support the application. The reason appended thereto, was that in his affidavit, on the 4<sup>th</sup> reason, the applicant stated that the errors were typing errors on his appeal. To bolster her position, she cited the case of **Lyamuya**

**Construction Co. Ltd vs. Board of Registered Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, where the court gave direction on how to apply for extension of time. She averred that the applicant's negligence is not a reason for extension of time. She prayed to the court to struck them out the application.

In his rejoinder, the applicant, lamented that it is not negligence rather he was transferred to another prison. That he was moved from Ruanda Prison to Songwe Prison. He blamed the person who prepared for him the petition of appeal to have made the error. To substantiate his thirsty for help to make it through the walls of the respondent, the applicant notified the court that has never been to school thus, he does not know how to read and write.

I have keenly followed the submission made by the applicant who need time to compose himself and address the court with difficulty, but drawing much from his summons supported with the affidavit and the submission made by the respondent's learned counsel. The issue to be answered is whether the applicant has adduced a good cause to move the court to grant extension of time to file memorandum of appeal.

The application is anchored on the reason that on 29/10/2023 he was supplied with the proceedings, when he perused the notice of appeal which he had prepared and lodged to court he realized that he was appealing on the second count while, its conviction and sentence were already quashed by the High Court. On the 4<sup>th</sup> ground on the delay, he submitted that, the said fault under the 3<sup>rd</sup> ground was caused by typing errors. That such error resulted in adopting the first notice of appeal filed from the trial court and as a prisoner. That the delay was manifested with his transfer to Songwe prisons which made it difficult for him to follow every step of perusing the said document and act promptly.

On the other hand, Ms. Imelda submitted that, his negligence in filing the notice of appeal cannot be taken as a reason to grant the application.

The learned counsel's objection is very strong but, in my humble view, the environment in which the applicant is confined is a major reason leave alone his illiteracy. The applicant is an inmate and apart from the typing error occurred in the notice of appeal, he was transferred from Ruanda Prison to Songwe Prison. As he has stated, due to the transfer he was unable to do a follow up on his appeal.

The fact that, the applicant cannot read and write is an obstacle in pursuing his rights which involve writing and reading documents. Had it been that he could read and write he could have noticed that the person who helped him in preparing the notice of appeal made a mistake of appealing for quashed conviction. Short of that is the fruits he yielded in the thorns. Assuming that, there was no typing error on the notice, and the delay was due to the transfer of the applicant from Ruanda Prison to Songwe Prison, would that reason be a good cause to grant the extension of time?

The answer is drawn from the decision of **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."*

The position set by the Court of Appeal is that the High Court has to exercise its discretionary powers to grant extension of time under section 361(2) of the Criminal Procedure Act, Cap 20 R.E 2022. Since this application is for extension of time to file notice and memorandum of appeal to the Court of Appeal, the provisions of section 11(1) of the

Appellate Jurisdiction Act, vests the High Court with discretionary powers to extend time to file notice of appeal and memorandum of appeal to the Court of Appeal regardless of the expiry of time. Section 11(1) 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.**" [emphasis added].*

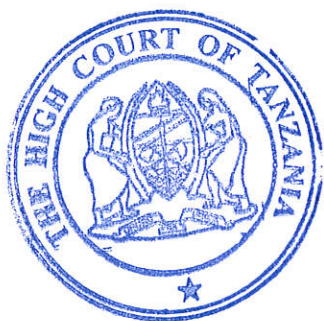
From the wording of the section, the High Court has discretionary powers to extend time for giving notice of intention to appeal from a judgment of the High Court. The application at hand, the applicant is trying his second chance. He first appealed to the High Court succeeded in one out of the two counts. Since, he is out of time, he has approached this court seeking extension of time to give notice of intention to appeal to the Court of Appeal.

In my view, the reasons adduced under paragraph 3 and 4 of the applicant's affidavit are sufficient cause to extend the time to file notice of intention to appeal to the Court of Appeal.

In that regard, the application is hereby granted. The applicant file his notice of intention to appeal within fourteen days from the date of delivery of this ruling and file his memorandum of appeal to the Court of Appeal accordingly.

It is so ordered.

Dated at **MBEYA** this 31<sup>st</sup> day of May, 2024.



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

**E.L. KAWISHE**

**JUDGE**

Ruling delivered in Chambers this 31<sup>st</sup> 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", written over a horizontal line.

**E.L. KAWISHE**

**JUDGE**

**31/5/ 2024**