

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MTWARA

AT MTWARA

MISC. CRIMINAL APPLICATION NO. 40670 OF 2023

DIBLO YUSUPH LILEMBO.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

25th & 26th January, 2024

MPAZE, J.:

Through chamber summons which is supported by the affidavit of Diblo Yusuph Lilembo(the applicant), moved the court under section 361 (2) of the Criminal Procedure Act, Cap 20 R.E 2022, hereinafter 'the CPA' praying for the following orders;

- (i) That the Honourable Court be pleased to grant the applicant an extension of time to file the petition of appeal to the High Court out of time from the conviction and sentence imposed by the District Court of Masasi
- (ii) Any other order that the court deems fit to grant

When the application came for hearing, the applicant appeared in person, unrepresented whereas Mr. Justus Zegge State Attorney appeared for the Republic.

In his submission, the applicant prayed the contents deposed in his affidavit to be adopted and form part of his submission, stating that he had nothing more to add.

Mr. Zegge supported the application, on the ground that the applicant has given sufficient reasons for the delay. He referred the court to paragraphs 3 and 5 of the applicant's affidavit, as well as sections 14 and 19 of the Law of Limitation Act, Cap 89 R.E 2019 for supporting the application.

Despite the Republic having no objection to the application, the court has to find out whether the applicant has advanced sufficient reasons for the court to extend the time for filing an appeal beyond the prescribed time.

In support of the application, Mr. Zegge, the State Attorney, cited sections 14 and 19 of the Law of Limitation Act as provisions that could empower the court to extend the time for this application. However, with due respect, there appears to be a misunderstanding of the applicability of these two sections in criminal proceedings. Section 43 of the same law categorically states;

43. *'This Act shall not apply to*

(a) *Criminal proceedings.'*

Nevertheless, the replica of the two sections is section 361(1) and (2) of the CPA. This provision empowers the court to extend the time, subject to showing a good cause. Additionally, it explicitly states that the time required for obtaining a copy of the proceedings, judgment, or order appealed against shall be excluded. For easy reference, the section stipulates;

361.-(1) Subject to subsection (2), an appeal from any finding, sentence or order referred to in section 359

(a) N/A

*(b) has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order, save that in computing the period of forty-five days the **time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded.***

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

It is plain from the cited provision that forty-five days will start running from the date when a copy of proceedings, judgment or order appalled against have been supplied to a party who intended to appeal.

After receiving a copy of the proceedings, judgment, or order that the intended appellant wishes to appeal against, he is required to file his appeal within forty-five days of receipt of the said documents. It is only upon the expiration of the forty-five days, following the receipt of such documents, that the intended appellant must apply for an extension of time while giving sufficient reason as to why he delayed filing his appeal on time.

In other words, when the intended appellant encounters delays in obtaining copies of the proceedings, judgment, or order intended for appeal, the exclusion of time is automatic. This implies that the intended appellant is not obliged to apply for an extension of time in such instances.

In the case of **Director of Public Prosecutions v. Mawazo Saliboko @ Shagi**, Criminal appeal No 384 of 2017, (unreported) when interpreting section 379 (1) (b) of the CPA which is a replica of section 361(1) (b) of the same Act had this to say;

' We are therefore settled that the time for obtaining a copy of the proceedings and judgement for appeal purposes has been excluded by the law in terms of the proviso to section 379(1) (b) of the CPA. The appellant was therefore entitled to file his appeal within 45 days after receipt of the copy of the proceedings and judgment. He need not apply for an extension of time to do so...'

In the instant application, the reasons for the delay in lodging the intended appeal, as per the applicant's affidavit, are outlined in paragraphs 5 and 7 as follows;

5. 'That, I received a copy of the judgement and proceedings of this case on 24 August 2023.

7. That failure to file the petition of appeal within the prescribed time was caused by circumstances beyond my control as I received the copies of judgment and proceedings within the prescribed time of 45 days as required under section 361(1) of the Criminal Procedure Act [Cap 20 R.E 2022] has expired and being a layman and prisoner with limited legal assistance, I did not notice in the earliest moment.'

Upon careful examination of the reasons for the delay as stated in the applicant's affidavit, what attributed to the delay is the receipt of copies of the proceedings and judgment, which were eventually supplied to him on 24th August, 2023. Notably, from the date he received these documents, 55 days had elapsed since the pronouncement of the decisions.

What the applicant was required to do, was to ensure that he filed his appeal within forty-five days from the day he received those copies,

where the extra 10 days beyond the forty-five would have been automatically excluded.

The records indicate that the applicant filed his application on 30th October, 2023 sixty-nine days later after receipts of copies of proceedings and judgement. Thus, for this application to be allowed, the applicant is required to show sufficient reason for the sixty-nine days that have elapsed since receiving copies of the proceedings and judgment.

The court is alive to the fact that there is no clear definition of what constitutes a sufficient reason and good cause, but rather, this will depend on the circumstances of each case.

Notwithstanding, the absence of a clear definition of sufficient cause, there are, however, some factors which the court may consider in determining if good cause has been shown. This has been stated in several cases, to mention one is the case of **Henry Muyaga v. TTCL**, Application No. 8 of 2011, where the Court stated;

"...In considering an application under the rule, the courts may take into consideration, such factors as, the length of delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is not granted".

Other factors to consider include whether the applicant was diligent and whether there is a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

From the applicant's affidavit, he asserted that he was convicted for the offence of Drug Trafficking under section 15A and 2(c) of the Drugs Control and Enforcement Act [Cap 95 R.E 2019] on 30th June, 2023, by the District Court of Masasi. Being dissatisfied with the decision he promptly filed a notice of appeal to the High Court through the Prison Authority Admission Office.

The applicant went on to wait for copies of the proceedings and the judgment, which he received on 24th August, 2023. At that time, forty-five days for filing an appeal had already elapsed.

Based on what I have explained above, forty-five days start running from the moment the intended appellant receives the copies he intends to appeal against, it will be noted in the present application that the reason provided by the applicant for seeking an extension of time, is the delay in receiving the copies of proceedings and judgment. This reason lacks legal merit, as all the days the appellant was waiting for the said copies are automatically excluded according to the law.

Apart from that reason, the applicant had no other good cause. I could consider striking this application, however, I understand the

applicant is a prisoner relying on the assistance of the Prison Administration Office to prepare and submit the documents to the court. striking this application may not be fair and reasonable but may lead to a multiplicity of applications.

To avoid multiplicity and because the right to appeal is not a mere privilege but rather a constitutional right, this court, in the pursuit of justice, finds it proper to grant the application than striking it out.

I accordingly extend the time within which to lodge the Appeal against the decision of Criminal Case No. 103/2023 of the District Court of Masasi at Masasi. The Appeal be filed within 30 days from today.

It is so ordered.



Dated at Mtwara this 26th January, 2024.

M. B. Mpaze
Judge

COURT: The ruling has been delivered today in the presence of Mr. Justus Zegge State Attorney for the Republic and the applicant in person.



M.B. Mpaze,
Judge
26/01/2024