

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

CRIMINAL APPLICATION NO. 123/07/OF 2018

BAKARI ABDALLAH MASUDI APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Application for extension of time within which to lodge the
Application for review from the judgment of the
Court of Appeal at Mtwara)**

(Mjasiri, Mmilla and Mwambegele JJ.A.)

dated the 10th day of May, 2018

in

Criminal Appeal No. 126 of 2017

RULING

29th October, & 1st November, 2019

MWANDAMBO, J.A.:

The applicant lost his battle before the Court in Criminal Appeal No. 41 of 2016. Believing that the Court was wrong in dismissing his appeal, he wants to assail that decision by way of a review. Quite unfortunate for him, the time within which to do so is not in his favour. It has run out so to speak. Intermis of rule 66 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the time within which a litigant can challenge the Court's judgment or

order by way of review is sixty (60) days reckoned from the date of judgment or order. The applicant has thus commenced the process towards seeking the review of the impugned decision. He is now seeking the Court's indulgence by extending the time for filing the intended application for review.

The judgment which the applicant seeks to be reviewed was delivered on 9th May, 2018. Despite the dismissal of his appeal, the applicant did not take any step until 9th November, 2018 when he filed an application for extension of time to seek a review. The application is predicated under rule 10 and 66 (3) of the Rules by way of notice of motion supported by the applicant's own affidavit.

The grounds upon which the applicant has filed the application are set out in the notice of motion. They are; **one**, a copy of the impugned judgment was not supplied to him until 21st July, 2018 the date on which he was transferred from Lilungu Prison in Mtwara to Ukonga Prison in Dar es Salaam. **Two**, a copy of the impugned judgment was a necessary document to be annexed to the affidavit in support of the notice of motion. **Three**, if his application is

granted, he intends to challenge the judgment on the grounds set out under Rule 66 (1) (a) and (b) of the Rules.

The above grounds are by and large repeated in the affidavit in which the applicant avers that at all material times he has been in the hands of prison authorities with no legal representation and so he did all he could single handedly. On the whole, the applicant invites the Court to grant the application in the interest of justice.

The respondent has resisted the application through an affidavit in reply sworn by Mr. Emmanuel John Yarot, learned State Attorney. Apart from disputing most of the averments in the affidavit, the deponent contends that the applicant has failed to demonstrate the existence of any manifest error apparent on the face of the record let alone evidence of denial of the right to be heard in his affidavit. He thus invites the Court to dismiss the application.

At the hearing of the application, the applicant appeared in person, unrepresented to argue the application. He urged the Court

to grant his application on the strength of the grounds set out in the notice of motion and the founding affidavit. Mr. Abdulrahman Msham learned Senior State Attorney, appeared assisted by Mr. Emmanuel John Yarot, and learned State Attorney, representing the respondent/Republic.

The essence of Mr. Msham's submission in reply was that the applicant has not succeeded in persuading the Court to exercise its discretion in his favour. In amplification, the learned Senior State Attorney argued that the fact that the applicant has been in the hands of prison authorities as averred in para 6 of the affidavit as the only reason for the delay is not a sufficient ground for extending the time sought. Relying on the Court's previous decision in **Mary Mohamed China vs. Republic**, Criminal Application No. 2 of 2010 (unreported), the learned State Attorney argued that in the absence of an affidavit from the Prison Officers, the applicant's claim that he expressed his intention to seek review remain wild and the same cannot be sustained.

I have examined the grounds in the notice of motion and the founding affidavit in the light of the enabling provision as well as decided cases on the issue against the oral submissions by the learned Senior State Attorney. I wish to begin my discussion with the obvious. This is an application for extension of time which is subject to the Court's discretion exercisable on the basis of the available material before it. It has long been the rule that the principle underlying the exercise of discretion is that it must be exercised judiciously as opposed to personal whims, sympathy or sentiments. That principle has been echoed in various cases out of which, in **Daud s/o Haga vs. Jenitha Abdon Mchafu**, Civil Application No. 19 of 2006 (unreported) referring to **Parry vs. Carson** [1963] E.A. 546, it was stressed that whims or sympathy has no place in the court's exercise of its discretion for extension of time. A similar position was reiterated in the case of **Kalunga & Company Advocates vs. National Bank of Commerce Limited** [2006] TLR 235.

As a corollary to the foregoing, courts, and in particular this Court, have determined applications for extension of time taking into account a number of factors developed through case law. Of course, not oblivious of the fact that each case must be determined on its own facts, for no facts in one case are identical to facts in another case. Until such time other factors or benchmarks are developed, at the moment, an application for extension of time can be granted if the applicant establishes the following. **One**, reason for his delay in taking a particular step. **Two**, explaining away the delay by accounting for each day of delay. **Three**, an explanation that the delay is not too inordinate and not a result of lack of diligence, sloppiness or negligence. **Four**, in fitting cases, existence of apparent illegality on the face of the decision sought to be challenged. See for instance; **Lyamuya Construction Co. Ltd vs. Board of Trustees of the Young Christian Women Association (YWCA)**, Civil Application No. 2 of 2010 (unreported).

Subjecting the above to the instant application, there is no dispute that the applicant was transferred from Lilungu Prison in Mtwara to Ukonga Prison in Dar es Salaam on 21st July, 2018 over two months from the date of the impugned judgments. There is no dispute too that a copy of the impugned judgment was supplied to the applicant on the date of his transfer to another prison. By that date, the time for lodging an application for review had already run out.

There is no gainsaying that a copy of the judgment was a necessary document to be annexed to the application for review. However, there is no indication whatsoever that the applicant expressed his intention to seek review any time prior to the date he was supplied with a copy of the judgment which coincided with the date of his transfer. In my view, in the absence of any indication that he expressed his intention to challenge the decision sought to be reviewed at any time prior to the date of the supply of that copy on 21st July 2018, the delayed supply of the copy of judgment could not have been a valid reason for the applicant's delay in pursuing

the intended review. Such claim could have been backed by an affidavit from the prison officers but none has been attached.

Equally so, the transfer to another prison could not have been a reason for the delay considering what I have already said in the preceding paragraph. Had it been a valid reason, there is no evidence regarding the date applicant expressed his intention to seek review now that he had a copy of the impugned judgment in his hands. I agree entirely with Mr. Msham relying on **Omary Mohamed China's** case that the mere fact that the applicant was in the hands of prison authorities in the absence of an affidavit from any of the prison officers backing up his claim behind his failure to take steps in seeking review is of no help to him. It is an unsubstantiated claim falls far below any of the benchmarks considered to constitute good cause capable of moving the Court to exercise its discretion in the applicant's favour.

In view of my determination of the two grounds in the notice of motion, the last ground must fall suit. I appreciate that the applicant has stated in the notice of motion that his intended

application for review will be predicated on two grounds set out in rule 66(1) (a) and (b) of the Rules consistent with the Court's previous decisions. For instance, in **Charles Barnabas vs. Republic.**, Criminal Application No. 13 of 2009 (unreported) stated the law to the effect that in an application for extension of time to apply for review, an applicant must indicate in his notice of motion or supporting affidavit which of the grounds of review under Rule 66 (1) he intends to rely on should the Court grant an extension of time. However, indicating the proforma grounds in the intended application presupposes that the applicant has shown good cause for the delay which is not the case in the instant application. In **Eliya Anderson vs. Republic.**, Criminal Application No.2 of 2013 (unreported), the Court held that an application for extension of time to apply for review should not be entertained unless the applicant has not only shown good cause for the delay, but has also established by affidavit at the time of filing the application for extension of time, that if extension is granted, the review application would be predicated on one or more of the grounds

specified under Rule 66(1). In other words, both conditions must be met and not otherwise. The applicant has not met the former condition with the attendant consequences.

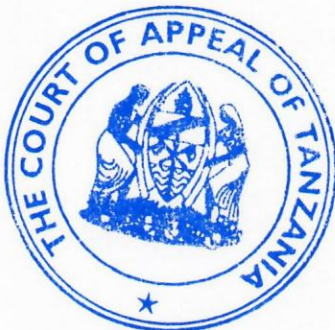
In the event, the application is found to be misconceived and the same stands dismissed.

Order accordingly.

DATED at **MTWARA** this 31st day of October, 2019.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The ruling delivered this 1st day of November, 2019 in the presence of the applicant in person, unrepresented and Mr. Abdulrahman Msham learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



S. J. Kainda
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DEPUTY REGISTRAR
COURT OF APPEAL