

IN THE HIGH COURT FOR ZANZIBAR
HOLDEN AT TUNGUU
CRIMINAL APPLICATION NO. 73 OF 2023
(FROM CRIMINAL CASE NO. 431 OF 2019 OF REGIONAL MAGISTRATE
COURT, VUGA)

YUSSUF SEIF SAID APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

DATED: 3rd October, 2023

S. HASSAN (J)

The applicant **Yussuf Seif Said**, was charged and convicted with the offence under **section 143 (4) of the Penal Act No. 6 of 2018** and on the 12/10/2022 was sentenced by trial court Magistrate Hon. Khamis Simai to serve 10 years in Education Centre.

In the present application the applicant has moved this court by way of Chamber Summons filed under **section 3 (1) (a)(b) and (c) of the High Court Act No.2 of 1985 and section 346 (3) of the Criminal Procedure Act No. 7 of 2018** praying his appeal to be admitted out of time.

During the course of hearing the applicant was represented by learned advocate Mr. Emmanuel F. Asama while the DPP (Respondent) was represented by learned SSA Mr. Shamsi Saad

Mr Asama for the applicant raised 2 main issues in his submission and mostly relied on paragraph 4,5,6 and 7 of applicant affidavit and stated that the main reason for delay to file appeal in time was due to the fact that, the applicant had lost communication with his advocate who represented him during the trial and opted to engage the service of another advocate who demanded a lot of money for his services and the applicant family had financial constraints and could not afford to pay, but also the documents

were in the hands of the previous advocate who failed to hand over to the applicant on time. After they managed to receive the document it was discovered that the notice of appeal was missing and time for appeal had lapsed. Mr Asama made reference to the Court of Appeal case of **Hamisi Mponda v. Niko Insurance Tanzania Limited, Omary Abdallah Kilindi and Juma Selemani Mpindo, Civil Application No. 254/01 of 2012** where the Court was referred to the case of **Wambale Mtumwa Shahame v. Mohamed Hamisi, Civil Reference No. 8 of 2016 [2018] TZCA 39; [06 August, 2018, Tanzilii]** and the case of **Constantine Victor John v. Muhimbili National Hospital, Civil Application No. 214/18 of 2020 [2021] TZCA 77 [17 March, 2021 Tanzilii]** where it was stated that:

" financial constraints may not be a sufficient ground for extension of time, however there are exceptional circumstances when it can be sufficient"

In the end he pray this court to grant this application and allow the applicant to lodge his appeal out of time.

In his reply the respondent opposed the application and stated the reasons advanced by the applicant of financial constraints is not a sufficient cause for this court to grant the application under **section 346 (3) of the CPA NO.7/2018**. He further submitted that the applicant who is already serving his sentence in Education Centre could have use the service provided under **section 348 (1) (2)** of the CPA Act (supra) and lodge his appeal after the applicant has received proceeding and judgment from the court, he found the submission of missing communication between the applicant and the advocate as meritless because the applicant was required to use **section 348 (1) (2)** of the CPA (supra)

With respect of financial constraints Mr Shamsi submitted that the case of **Hamisi Mponda** (supra) cited as reference to support his client financial constraints is distinguishable based on the 2 reasons. Firstly in the case of **Hamisi Mponda**, the applicant was a disabled person and was depending on legal aid while on the present application the financial constraints was in the applicant family and the applicant himself. Secondly the applicant could have used legal aid in education centre (prison) hence he opposed the financial status of the applicant family to be sufficient cause for this court to grant this application. He further prayed for the application to be dismissed for lack of sufficient reasons.

In his rejoinder Mr Asama submitted that the negligence to lodge appeal on time was not attributed by the applicant but by the advocate who lost communication with and maintained his position that the financial constraints to be sufficient reason for this court to grant the application.

Having heard the parties, the question that follows is whether the applicant has been able to show good cause to convince this court to exercise its discretionary powers to extend time for the applicant to lodge his intended appeal out of time under **section 346 (3) of the Criminal Procedure Act No. 7 of 2018** which reads as follows:

346 (3) " The High Court or the Regional Magistrate's Court may, for good cause, admit any appeal notwithstanding that any period of limitation prescribed in this section has elapsed"

There are many authorities this court can refer to determine as when the court decides that the applicant has advance good or sufficient cause or not.

In **Meis Industries Ltd and 2 others V. Twiga Bank Corp; Misc Commercial Cause No. 243 of 2015**, High Court of Tanzania (Commercial Division) at Dar es Salaam (unreported) the Court held that:

"An application for extension of time is entirely in the discretion of the Court to grant or to refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause"

The Court also in the case of **Finca (T) Ltd and Another V. Boniface Mwalukisa, Civil Application No. 589/12 of 2018** (unreported) it was stated as follows:

"it is settled that where extension of time is sought, the applicant will be granted upon demonstrating sufficient cause for the delay. Conversely, it is also well settled that the sufficient cause sought depends on the deliberation of various factors, some of which revolve around the nature of actions taken by the applicant immediately before or after becoming aware that the delay is imminent or might occur."

Also in **Benedict Mumello v. Bank of Tanzania [2006] 1 EA 227**, the court subscribed to the decision of the single justice of the court in the case of **Tanga Cement Company Limited V. Jumanne D. Masangwa and Amos A. Mwalwandwa, Civil Application No. 6 of 2001** (unreported) where the Court held that:

"What amounts to sufficient cause has not been defined. From decided cases a number of factors has to be taken into account including whether or not the application has been brought promptly; the absence of any or valid explanation for delay; lack of diligence on the part of the applicant ."

Also the decision of the court of Appeal in **Ramadhani v. Geita Mining, misc Application No.29 of 2013 at page 2 and 3**. In this case the court explained the guiding principle that in order to justify a court extending time there must be some material on which the court can exercise the discretion. See also in **Regional Manager, Tanroads Kagera V. Ruaha Concrete Company Ltd, Civil Application No. 96 of 2007** (CAT unreported), the court observed that the following:

"What constitutes sufficient reasons cannot be laid down by any hard or fast rules. This must be determined by reference to all the circumstances of each particular case. This means the applicant must place before the court material which will move the court to exercise judicial discretion in order to extend time limited by rules"

From the above cited authorities, this court is of the firm view that the word **"sufficient or good cause"** depend on the circumstances of the case including reasons and explanations advanced by the applicant.

In the current application it is on record that the Judgment was delivered on the **12th October, 2022** and the applicant through Advocate Zulekha A. Khamis lodged the notice of appeal on the **21st October, 2022** well on time and within period provided by the law under section **346 (1) (b) of CPA Act No. 7/2018**

The records also show that the proceedings and judgment was submitted to the Miss Zulekha on the 22/02/2022 via letter reference **MM/VG/AC03/VOL1/107**. Hence the applicant had **45 days** to lodge his appeal as per section **346 (2)** of CPA (supra) which reads as follows:

(2) In computing the said period of forty five days, the time required to obtain a copy of the judgment or order appealed against shall be excluded.

According to the records, the applicant had 45 days to lodge his appeal on time from the date of **22/02/2022** when he received the proceedings and judgment from the trial court but no appeal was filed.

Now this court is asked to determine whether the reason advanced by the applicant of financial constraints is sufficient reason for this court to use its discretion to allow the applicant to lodge appeal out of time or not

In determine this application I am also alive to a settled law that the applicant has to count for each day of delay in order to show sufficient or good cause for his application

to be succeeded, see the cases of **Dsm City Council v. S. Group Co. Ltd, Civil Appeal No. 234 of 2015, Selemani Juma Masala v. Sylvester Paul Mosha & Another Civil Application No. 210 | 01 of 2017** (unreported)

In this application the applicant has relied on the reasons as shown in the **affidavit YSS2 of Ziada Mohamed Mtumweni** and no any other reasons advanced by the applicant himself as submitted by Mr Shamsi.

The case of **Hamisi Mponda** (supra) relied by the applicant the Court of Appeal at page 5 of its judgment has stated that, ***"financial constraints may not be a sufficient ground for extension of time, however there are exceptional circumstance when it can be sufficient"***.

Nevertheless, in the case of **Yusuf Same & Another v. Hadija Yusuf, Civil Application No.1 of 2002** (unreported) the Court of Appeal case cited in the **Hamisi Mponda** case (supra), while acknowledging that the financial hardship is not a good cause, the Court of Appeal explained further the certain circumstances where it may accept such reason and stated the following:

" It should be observed that the term sufficient cause should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or cases which are outside the applicant's power to control or influence resulting in delay in taking any necessary step"

In the case above the Court of appeal went on to state that:

" It follows that, generally, financial constraints is not a good cause but in exceptional circumstances, such as, an applicant is a widow and depends solely on legal aid, the Court may accept it is as a good cause for extension of time"

As stated by the Court of appeal, the general rule is that financial constraints is not a good cause for extension of time but certain exceptional circumstances may move the court to allow the court to grant extension of time.

In present application as rightly pointed out by the respondent that the applicant has failed to provide sufficient reason to move this court to grant this application and the applicant could have used legal aid available in prison as provided under section **348 (1) of CPA No 7/2018** which reads as follows:

348(1) " If the appellant is in prison, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison

who shall thereupon forward such petition and copies to the Registrar of the High Court”

Furthermore, the fact that the applicant is in prison and for that he is under the care of the authority he is located, so in the absence of communication with his advocate, the applicant was supposed to take action through those he is under their care as stated in the case of **Kabisa Satiro and 2 Others v. R, Criminal Appeal No. 191 of 2010** (unreported) where the Court of Appeal cited the case of **Shija s/o Marko v. R, Criminal Appeal No 246 of 2018** (unreported) where the Court held:

“ The appellants being in prison it is to be expected that every action they take has to be through those under whose authority they are”

This court firmly agrees with the respondent that, the applicant has failed to provide solid and tangible reasons for his delay to lodge appeal on time, the reason of financial constraints as held by the Court of Appeal in cited cases above is not at all sufficient cause for extension of time to lodge appeal out of time, but may only be valid reason depending on the prevailing circumstances of the applicant actions taken immediately before or after becoming aware that the delay is imminent or might occur, in this application, the applicant has not shown the immediate action taken by himself when he was aware that the delay is imminent or might occur.

The other reasons provided by the applicant of lost of communication with his previous advocate or the advocate demanding large sum of money are too general and no detailed explanation was provided, those reasons also falls short of being sufficient reasons. Moreover, the applicant has failed to be accounted for each day of delay.

In the end, this court is not persuaded by the reasons advanced by the applicant, the reasons relied upon are not exceptional enough to warrant this court to grant the applicant the extension of time to file his intended appeal out of time.

For the above reasons, this application is devoid of merits and it is hereby dismissed.

Ordered accordingly.

S. HASSAN (J)

Dated: 3/10/2023

Court:

Right of appeal is explained

Court: this ruling is delivered in the presence of applicant and his advocate Mr. Emanuel F. Asama and in the presence of respondent SSA Shamsi Saad on this 03/10/2023.

Sgd. S. HASSAN - JUDGE

03/10/2023

I certified that this is a true copy for original.

REGISTRAR
HIGH COURT
ZANZIBAR

