

IN THE HIGH COURT OF ZANZIBAR
HELD AT TUNGUU
CRIMINAL APPLICATION NO 50 OF 2023

(Application for extension of time to file Appeal in respect of Criminal Case No 53/2021 Held at Regional Court- Mahonda)

USSI HAJI OMAR APPLICANT

VS

DPP.....RESPONDENT

RULING

20.07.2023 & 03.08.2023
S.A.HASSAN,J.:

Before the Regional Court at Mahonda, the applicant was charged with two counts of abduction contrary to Section 113(1)(a) and rape contrary to Section 108(1)(2)(e) of the Penal Act, No 6 of 2018 and upon conviction he was sentenced to serve twenty years (20) and thirty years (30) at the Institute of Correction of Offenders –Chuo cha Mafunzo and to pay compensation of Tsh 2,000,000/- to the victim.

Not satisfied with the decision the applicant intended to appeal, however, on reasons beyond the applicant's control, his appeal was not filed on hence this application was filed praying that this court enlarge time so that the applicant can file his appeal out of time.

On the day of hearing of this application the respondent was represented by My Ali Bilal, Senior State Attorney while the applicant was represented by Mr. Abdallah Abdulrahim, Learned Advocate. Mr Ali Bilal on his submission he told the court that as a matter of practice applications to file appeal out of time made by layman are granted.

In the other hand Mr. Abdallah addressed the court by stating that the applicant was initially represented by another advocate who failed to agree on payment terms hence the delay to file appeal on time and prayed that the court adapts the affidavits supporting the application which show that applicant and his parents being layperson

did not know if there is a time limit. He went on submitting that his client had intention to appeal and his appeal was delayed because he did not have funds to engage a lawyer and to dully instruct the same.

The application was supported by the applicant's affidavit, affidavit of Abdi Mzee Shaali, Advocate of the High Court of Zanzibar who affirmed that he failed to file the appeal on time due to lack of instructions from the applicant's parents and affidavit of Daudi A Luswaga, SACP and incharge of Kiinua Miguu Correction of offenders' institute who affirmed that he had received the proceeding and handed it to the applicant who handed it to his parents but an appeal was not filed because applicant's parents could not agree with the lawyer in terms of payment hence the delay. In support of his submission, advocate for the applicant mentioned the case of **Sospeter Lulenga Vs The Republic (Criminal Appeal No 107 of 2006) CAT Dodoma** (unreported) where it was decided that the default of prison officer to forward the Notice of Appeal to the High Court is sufficient ground for extending the period of appeal and **Obadia Daniel and Jubilate Mushi Vs The Republic (Criminal Appeal 442 of 2016) CAT Arusha** (unreported) which allowed the appeal on the reason that the accused persons were convicted on a defective charge sheet.

As I was preparing for the ruling it came to my realization that there were some issues which were not established in the application nor the affidavits, such as date which notice to appeal was given, dates which copies of the proceedings was obtained, date which the proceeding was handed to inmate's parents and when did the advocate return the proceeding so that the court can measure and determine the duration of the delay.

As I went further perusing the records of the case before me, it came to my knowledge that this court had heard the same application before A.I.Suwedi(J) in the **Criminal Application No 301 of 2021** and the same prayers were submitted that the applicant failed to appeal on time because his parents could not pay the lawyer hence the delay, upon hearing the application Judge Suwedi dismissed the application on 11.10.2022.

With this realization I requested parties to address me if this court is not functus officio to hear this application after the High Court decision in Criminal Application No 301/2021.

State Attorney Dawa Suleiman who was representing the Respondent (DPP) on 20.07.2023 responded by saying that if this court had already decided on the same application it becomes functus officio hence the only remedy is to struck the application.

Advocate Abdallah on the other had agreed that indeed the application was before A.Suwedi(J) however, it was struck out and not dismissed that is why he filed this application again. When this court asked him why he never disclosed in his application that he did file an application to extend time to appeal on the decision of the same case he agreed that he did not disclose the fact that he had previously file extension of time but that application was struck out and not dismissed, however, the attorney did not have any justifiable explanation as to why in the second application he failed to mention of the previous application but at the end he prayed that this application be struck out.

In ruling out this application, I associate myself with the findings in the case of **Angumbwike Kamwambe Vs Republic (Criminal Appeal No 10 of 2015) CAT at Mbeya** (unreported) where it was decided that High Court can no longer be invited to reverse its own decision because it was *functus officio*. A court becomes functus officio when it disposes a case by verdict of guilty or by passing sentence and making some orders finally disposing of the case, see also the case of **Kamundu V R (1973) EA 540**.

It is obvious that this court, had heard before it an application to extend time to appeal against the decision of Regional Court in the Criminal Case No 53/2021 and that application in the records of the court shows that it had been dismissed and the right of appeal against that decision was explained, had the applicant not pleased with the dismissal he was accorded with the right to appeal to the Court of Appeal, the reason he did not use that avenue but filed another application in the same court with the same submission is nothing other than misusing of the court's process and his own time, knowing that calculating time to file appeals is very important as each day of the delay has to be accounted for.

That being the position of the law, I agree with learned State Attorney that this court is *functus officio* and also obliged to agree with the applicant's counsel's prayer to struck out this application for being incompetent hence it is hereby struck out.

It is so ordered



S.A.HASSAN

JUDGE

03.08.2023

This ruling is delivered this 03rd of August, 2023 in the presence of State Attorney Dawa Suleiman, Advocate Abdallah Abdulrahim and the applicant.

A handwritten signature in blue ink, appearing to read 'S.A. Hassan', followed by a long horizontal line.

S.A.HASSAN

JUDGE

03.08.2023