

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA [MOROGORO SUB-REGISTRY]
AT MOROGORO CRIMINAL APPLICATION NO. 15211 OF 2024 (Originating from the decision of
the District Court of Cairo in Criminal Case No. 12 of 2023) GERALD SENYANGWA APPLICANT
VERSUS REPUBLIC RESPONDENT

RULING

24/07/2024 KINYAKA, J.: In Criminal Case No. 12 of 2023 before the District Court of Cairo hereinafter, the "trial court", the applicant was charged with two counts namely. Burglary contrary to section 294(2) of the Penal Code Cap. 16 R.E. 2022 and Stealing contrary to sections 258 and 265 of the Penal Code Cap. 16 R.E. 2022. On 14th March 2023, the trial court convicted the applicant to five years' imprisonment in jail on the first count, and three years' imprisonment in jail for the second count on the applicant's own plea of guilty. The sentences were ordered to run concurrently. On 4th June 2024, the applicant lodged the present application seeking the indulgence of the Court to allow him to lodge his appeal out of time. In his affidavit in support of the application, the applicant contended that upon entering prison, he preferred a notice of intention of appeal and left the same with the Prison's admission office thinking that the same was an appeal. He stated that as he was in custody, he came to realize later that the notice of appeal was not an appeal. He complained that the trial court convicted him of both counts based on his equivocal plea of guilty. The respondent opposed the application through his counter affidavit lodged in Court on 15th July 2024. He contended that the fact that he was in custody is not a good cause for delay and that his plea of guilty was unequivocal. The respondent added that the applicant did not provide proof of the alleged notice of appeal. On the date of hearing of the application on 24th July 2024, Mr. Simon Mpina, learned State Counsel appeared representing the respondent and the applicant did not appear. It is on record that the applicant has not been appearing in Court since the filing of his application. Upon the Court's inquiry of the whereabouts of the applicant from the Prison office, the Prison Officers who were attending the proceedings, informed the Court that the applicant was referred to Isanga Mental Institution in Dodoma upon being found that he was not mentally fit when in Wami Kuu Prison. In addition, on 24th July 2024, when the application was called on for hearing, the Prison Officer In Charge of Wami Kuu Prison submitted to the Court the documents evidencing transfer of the applicant from Wami Kuu Prison to Isanga Mental Institution where he is currently undergoing medication. When the learned state attorney was called to address the Court, he firstly prayed to

withdraw his counter affidavit opposing the application, the prayer which was granted by the Court. Upon the withdrawal, Mr. Mpina informed the Court that the respondent does not oppose the application. Despite the absence of the applicant, I decided to proceed with the determination of the application. The reasons being that the present matter being an application which is supported by an affidavit, the affidavit contains evidence for the Court to determine whether the same demonstrated good cause for extension of time. Further, the fact that the reason for the applicant's nonappearance is beyond his will for being suffering from mental illness, it is unlikely for him to appear in Court and argue the present application in a near future. Additionally, as the present application is uncontested, it is upon the Court to determine whether the affidavit demonstrates sufficient cause for the delay. It is worthy to reiterate at this point that the grant of extension of time is the exercise of judicial discretion which must be exercised judiciously upon the applicant's demonstration of good or sufficient cause. In the case of *Lyamuya Construction Co. Ltd v. Board of Registered of Young Women's Christian Association of Tanzania*, Civil Application No 2 of 2010 (unreported) on page 6, the Court of Appeal amplified on what to be taken into account in exercising such powers and held: "As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily... In my reading of the affidavit on the grounds in support of the application which I have summarized above, I have found in paragraphs 3 and 4 of the affidavit that the applicant being an inmate and a lay person was unable to fully appreciate the procedure for filing his appeal including differentiating between the notice of appeal that he had preferred, and the petition of appeal. Understandably, his failure to differentiate between the requirement to lodge both the notice of appeal and the petition of appeal as mandatory documents for preferring an appeal to the High Court, amounts to ignorance of procedure. On that basis, it is my profound view that, the applicant's deposition that being an inmate, he could not have fully access to the legal assistance of his choice at a required time holds water. As such, the applicant's only access to legal services was through the Prison office. I am of the position that being a detained prisoner, the applicant's preparation of the appeal was at the mercies of the prison authority who were duty bound to assist him in preparation and filing of a petition of appeal within time, the circumstances which were beyond the applicant's control. In so holding, I have been inspired by the holding in the case of *Otieno Obute V. R.*, Criminal Application No. 1 of 2011 (unreported) where the Court of Appeal held that: 'We have considered the averments by both parties and come to the conclusion that this application has 5 merit As a prisoner, his rights and responsibilities are restricted. Therefore, he did what he could do. He may have been let down by reasons beyond his means. accordingly, the application is granted,' Likewise, in *Halfani Mwisheshe Mbega v. Republic*, Criminal Application No 2601 of 2021 2023 TZCA 17572 (30 August 2023), the Apex Court maintained that;- the applicant being a prisoner, depends much on the prison authority to prepare and take care of the whole process of lodging matters in Court. Intrinsically, the applicant cannot be blamed for lodging incompetent applications, as it may sometimes be unfair to expect too much from him. The Court, in its numerous decisions of this nature, has considered the situation of prisoners that they are not free agents who can freely lodge matters before the Court and make regular follow-ups on them. See *Joseph Sweet v The Republic*,

CriminalAppeal No. 11 of2017, and Fabian Chumiia v The Republic, CriminalApplication No. 6/10 of2019(aii unreported). Based on the above findings, and considering the fact that the application was conceded by the respondent, I do not find any reason not to grant the present a pplication. ^ I hold that the applicant has managed to demonstrate good cause for the Court's exercise of its discretionary powers to enlarge time to the applicant to file a petition of appeal. In the upshot, I allow the application. Considering that it is unlikely for the applicant to lodge his petition of appeal within 45 days as required under section 361(l)(b) of the Criminal Procedure Act Cap. 20 R.E. 2022 due to his current medical condition, I order that the petition of appeal be filed 45 days from the date of certification by the mental institution on the appellant's recovery from the mental illness he is currently suffering. It is so ordered. DATED at MOROGORO this 24^^ day of July 2024. rOUR/- o H. A. KINN^AKA Uj T h- JUDGE 24/07/2024

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