

TANZANIA / JUDGMENT

iddy salum fredy vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CRIMINAL APPLICATION NO. 3/01 OF 2021 IDDY SALUM @ FREDY..... APPLICANT VERSUS THE REPUBLIC..... RESPONDENT (Application for extension of time within which to apply for Review of the decision of the Court of Appeal of Tanzania at Dar es Salaam) (Mwariia. Kwariko, Mwandambo, JJA^ dated the 18th day of November, 2020 in Criminal Appeal No. 192 of 2018

RULING

8* & 12th May, 2023 MWAMPASHI, J.A.: This is an application by the applicant, Iddy Salum @ Fredy, for extension of time within which to apply for a review of the decision of the Court (Mwarija, J.A., Kwariko, J.A. and Mwandambo, J.A) dated 18.11.2020 in Criminal Appeal No. 192 of 2018. The application which is preferred under rules 10 and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), is brought by way of a notice of motion and is supported by the affidavit of the applicant. No affidavit in reply has been filed by the respondent, i Initially, the applicant was charged in the District Court of Kinondoni with unnatural offence contrary to section 154 (1) (a) of the Penal Code [Cap. 16 R.E, 2002; Now R.E. 2022] (the Penal Code). Upon conviction, [he was sentenced to thirty year's imprisonment. In addition, he was ordered to pay Tshs. 2,000.000/= to the victim as compensation. His first) appeal to the High Court was unsuccessful as it was for his second appeal to this Court vide Civil Appeal No. 192 of 2018 which was dismissed on 18.11.2020. Still aggrieved and intending to apply for a review of the said decision of the Court, he found himself out of time to do so, hence the instant application. The ground for the delay to file the intended application for review, as it can be deduced from the notice of motion and the supporting affidavit, is that, having prepared and presented his application to the Prison Authority within the prescribed period of time, the Prison Authority delayed in presenting it to the court in time. ! Apart from the above stated grounds for the delay, there are also two grounds upon which the applicant's intended application for review will be predicated which are listed in the notice of motion as follows:

1. The decision was based on a manifest error on the face of the \ record resulting in the miscarriage of justice.

2. The applicant was wrongly deprived of an opportunity to be heard as the Court failed to discuss all the grounds raised in his supplementary memorandum of appeal and his sentence was enhanced via an amended section of law that he was not charged with or defended himself against the same. At the hearing of the application, the applicant appeared in person < unrepresented, whereas the respondent Republic was represented by Ms. Nura Manja, learned State Attorney. At the outset Ms. Manja expressed her stance that she was not i t opposing the. application. She contended that after passing through the notice of motion and the supporting affidavit, she has observed that the applicant presented his application for review to the Prison Authority at Ukonga Central Prison, where he was serving his sentence, in time, only to be let down by the Prison Authority that delayed in presenting it to the * I court within the prescribed period of time. Ms. Minja added that the delay by the Prison Authority to present the application to the Court in time was something out the applicant's control. The application having not been resisted, there was nothing the applicant could add rather than pray for the application to be granted. I On my part, having examined the notice of motion and the supporting affidavit and also having heard the brief submissions from the parties, I am of the considered view that the only issue calling for determination of this Court is simply whether good cause upon which extension of time to apply for review out of time, has been shown by the applicant. I j In applications for extension of time, the Court derives its power from Rule 10 of the Rules which provides thus: - " The Court, may, upon good cause shown, extend time limited by these Rules or by any decision of the High Court or Tribunal, for the doing of any act authorized or required by these Rules, whether before or after expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended." It has been restated by the Court in its various decisions that the i power of the Court to extend time under rule 10 of the Rules, is both broad and discretionary. The discretion is judicial and it must be exercised i according to the rules of reason and justice and not according to private i opinion or arbitrary. See *Lyamuya Construction Co. Ltd v. Board of Registered trustees of Young Women's Christians Association of i Tanzania*, Civil Application No. 2 of 2010 (unreported). The power given by rule 10 of the Rules to the Court is only exercisable if good cause is shown. Whereas there is no invariable universal definition of what constitutes good cause, in exercising its discretion under the said provision, the Court is bound to consider the prevailing circumstances of the particular case and should also be guided by a number of factors such as the length of the delay, the reasons for the delay, th^ degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law ,of sufficient importance such as illegality of the decision sought to be challenged. This position of law has been restated by the Court in a number of cases including; *The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia*
- [1992] T.L.R 387, *Dar es Salaam City Council v. Jayantilal P. Rajan*, Civil Application No. 27 of 1987 (unreported) and *Lyamuya Construction Co. Ltd* (supra), to mention but a few. It should'also be restated that in applications for extension of time to apply for rev!ew, the

applicant is required not only to show that good cause for the delay exist as per rule 10 of the Rules, but he must go further and !show that his intended application for review will be predicated on one or more of the grounds set out in rule 66 (1) of the Rules. See- Mwita Mhere v. The Republic, Criminal Application No. 07 1 of 2011, Deogratias Nicholas @ Jeshi and Another v. The i Republic, Criminal Application No. 1 of 2014, Mulokozi Anatory v. The Republic, Criminal Application No. 47/04 of 2017, and Masudi Said j Seleman v. The Republic, Criminal Application No. 22/07 of 2018 (all unreported).-In the above first case of Mwita Mhere (supra), it was stated by the; Court that: "But in applications of this nature, the law demands that the applicant should do more than account for the delay. To succeed in showing that he has a good cause under Rule 10 of the Rules, it must be shown further that the applicant has an arguable case. An arguable case is one that demonstrates that the intended grounds of review is at least one of those listed in Rule 66 (1) of the Rules".

Guided by the above stated position of the law, the issue, at this i stage, is whether the two prerequisite conditions for grant of applications for extension'of time to apply for review, have been complied with, in the j instant application. Beginning with the requirement for an applicant to show that his; intended application for review would be predicated on one or more of the grounds for review set out in rule 66 (1) of the Rules, I 6 find no difficulty in holding that the requirement has been complied with by the applicant. In the notice of motion, it is clearly indicated that the application will be predicated on the ground that the decision sought to be reviewed was based on a manifest error on the face of the record resulting in the miscarriage of justice. This is one of the grounds for review set out in rule 66 (1) (a) of the Rules. The applicant has also indicated that his intended application for review will also be based on the ground that he was wrongly deprived of an opportunity to be heard which ground is set out in rule 66 (1) (b) of the Rules. Regarding the next condition on reasons for the delay or good cause, it should firstly be noted that since the decision sought to be reviewed is dated 18.11.2020 and as, in terms of rule 66 (3) of the Rules, the period of time within which an application for review has to be made, is sixty days from the date of the decision sought to be reviewed, then the application fpr review in the instant case ought to have been filed by 18.01.2021. {According to paragraphs 12 and 13 of the supporting affidavit, the applicant prepared his application for review and handed it over to the (Prison Authority on 14.01.2021, which was within the prescribed period of sixty days. However, the Prison Authority did not present the application to the court until on 19.01.2021 hence its rejection for being time barred. The fact that the application was handed over to the Prison Authority on 14.01.2021 has not been controverted by the Respondent. The copy of the said application, which is attached to the supporting affidavit as annexure ISF 03, bears the signature of the Prison Officer SSP. H.A. Lisu and the stamp of the Officer in charge of Ukonga Central Prisorji. From the above it is therefore undisputable that the applicant was diligent as he presented his application to the Prison Authority within the prescribed period of time only to be let down by the Prison Authority that did not present it to the court in time. It should also be borne in mind that, the fart that the applicant was in prison, he was not a free agent. He depended on the assistance of prison officers and the negligence or inaction of the prison officers cannot be

resolved to the detriment of the appellant. See- Shija s/o Markov. The Republic, Criminal Appeal No. 246/18 of 2018 (unreported). From the foregoing, I am satisfied that the applicant has managed not only to show good cause for the delay but also that his intended application for review will be predicated on two of the grounds for review listed under rule 66 (1) of the Rules. For that reason, I accordingly grant the application and order that the applicant should lodge his intended application for review as prayed in the notice of motion within sixty (60) days from the date of the delivery of this ruling. It is so ordered. DATED at DAR ES SALAAM this 09th day of May, 2023. A. M. MWAMPASHI JUSTICE OF APPEAL Ruling delivered on this 12th day of May, 2023 in the presence of Mr. Iddy Salum @ Fredy, the Applicant in person and Ms. Gladness Senya, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. A LYIMO M i DEPUTY REGISTRAR LEGIST COURT OF APPEAL 9

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