

TANZANIA / JUDGMENT

JOSHUA BALKI 1

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
MANYARA AT BABATI MISCELLANEOUS CRIMINAL APPLICATION NO. 24163 OF 2024
(Originated from Criminal Case No. 67/2022 in Mbui District Court at Mbui) JOSHUA
BALKI..... APPLICANT VERSUS
REPUBLIC..... RESPONDENT

RULING

3(f* October - November, 2024 Mwihambi, J This is an application for extension of time to lodge appeal under sections 361 (2) and 392A (2) of the Criminal Procedure Act [Cap. 20 R.E. 2022], (hereinafter referred to as CPA). It is supported by affidavits of the applicant, Joshua Balki and the officer in charge of Mbui District Prison, Mr. Raymond Laurence Mushi. In the District Court of Mbui the applicant was charged for unnatural offence under section 154 (1) (a) and (2) of the Penal Code [Cap. 16 R.E. 2022] and was convicted and sentenced to life imprisonment. Aggrieved with decision, the applicant appealed to (this court vide) Criminal Appeal No. 000001641 of 2024. The appeal was however struck out as it was filed out of the period of time prescribed by law. It was actually filed after a lapse of 15 months from the date of the decision. Hence this application for extension of time to lodge the intended appeal. According to the affidavit that supports the application, the applicant, provides two reasons for the delay to lodge the appeal on time: first, that he was admitted to Mbulu District Prison on 11th August, 2022 and on 30th August, 2022 he was transferred to Arusha Central Prison and that he moved without copies of his judgement and proceedings (because by then he was yet to receive them). Second, that because of the transfer he was unable to receive the copies in time. The officer in charge of Mbulu District Prison, Mr. Raymond Laurence Mushi, in paragraph 4 and 5 of affidavit regarding information of the applicant, confirms that the applicant was admitted at Mbulu District Prison on 11th August, 2022 and on 30th August, 2024 he was transferred to Arusha Central Prison. He further states that: "...after his transfer to Arusha central prison one month later Mbulu district court brought his copies of judgement and proceeding but there happened misplacement of the documents in question in the admission office Mbulu prison." (Emphasis is mine). 2 On the other hand, the respondent opposed the application by a counter affidavit sworn on 29th September, 2024 by Mr. Raphael John Rwezahula, learned State Attorney. Among other things, he stated that the applicant has not attached proof of the alleged movements and did not state the exact date that he received copies of judgement and proceeding for the purpose of accounting the number of

days of delay. That, the applicant did not state the date when the judgement that he intends to appeal was delivered for him to account for the number of days of delay. On the affidavit of the officer in charge of Mbulu Prison, the learned State Attorney stated that nothing has been attached to substantiate that the applicant was indeed transferred to Arusha Central Prison on 30th August, 2022. That it is not disclosed when the documents in question were misplaced, recovered and supplied to the applicant for the court to determine the extent of delay. Reference is made to paragraph 4 - 7 of the said counter affidavit. At the hearing the applicant appeared in person, unrepresented, while the respondent/Republic was represented by the learned State Attorney, Mr. Raphael John Rwezahula. The applicant also opted to adopt the filed affidavit to form his submission. On part of the respondent, the learned State Attorney, argued that although it is 3 Court's discretion to grant application for extension of time, the applicant must first show sufficient reasons for the delay. He referred the Court to section 361 (2) of the CPA which governs applications for extension of time, and the case of *Kalunga and Company, Advocates v. National Bank of Commerce Limited*, [2006] TLR 235 where it was held that an application for extension of time must provide good cause. The learned State Attorney also referred the case of *Benjamin Amon v. Republic*, Criminal Application No. 106/11 (2018) which provides four factors for a court to consider in deciding whether there is a good cause. That is, the applicant must account for all the period of delay, the delay should not be inordinate, the applicant must show diligence, and not apathy, negligence or sloppiness of the action that he intends to take and lastly if the court feels that there are other sufficient reasons, such as existence of a point of law on decision sought to be challenged. The learned State Attorney further argued that the applicant's reasons for delay are not sufficient because there is no proof attached and no dates mentioned thus leaving the court uncertain on delayed days. This also goes to the support affidavit by the officer in charge of Mbulu District Prison. The learned State Attorney summed up by arguing that the applicant has failed to give sufficient reasons by accounting for 4 each day delayed. That applicant's affidavit only shows the applicant's apathy and inadvertence and in law that does not amount to be a good cause, as it was also mentioned in *Metal Products Ltd v. Minister for Lands & Director of Land Services* [1989] TLR 5. The learned State Attorney finally prayed for rejection and dismissal of the application. In a brief rejoinder, the applicant reiterated that after the sentence he was placed in Mbulu Prison where he stayed for two weeks then he was transferred to Arusha where he stayed for one year and three months and while in both Prisons copies of the judgement and proceedings were not sent. He added that whenever he asked Prison officials for the copies the reply was "zitaletwa, zitaletwd". The applicant referred the issue of proof that was raised by the learned State Attorney, and argued that in the prison where he is there are about 200 prisoners and only one lawyer to whom everyone needs the services of and so "muda wa kumfuata ni shida sand". After having examined the applicant's affidavits, counter affidavit and rejoinder I think the main issue for this Court to determine is whether the applicant has submitted good cause for this Court to grant the extension of time to lodge appeal out of time. As the learned State Attorney rightly stated, applications for extension of time in the High Court are governed by section 361 (2) of the CPA which reads- 5 "361(2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed". (Emphasis is mine). It is worth mentioning at this juncture that in determining whether there is a good cause,

each case has to be evaluated according to its circumstances, as what amounts to a good cause may differ from one case to another. It was also held in *Harrison Mandali and Other v. the Registered Trustees of the Archdiocese of Dar es Salaam*, that it may not be conceivable to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers factors such as the length of the delay involved, reasons for the delay, the degree of prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion, the conduct of the parties and the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal. The applicant argued that he was moved from Mbulu Prison to Arusha, and that he moved without those documents. The learned State Attorney submitted the applicant did not provide proof of the alleged movements. This raises a question; when a prisoner is transferred from one prison to another does the prisoner receive transfer documents? 6 The Prisons (Prison Management) Regulations, 1968 made under the Prisons Act [Cap. 58 RE. 2002] do not provide for a situation where a prisoner gets transfer documents, instead the duty to keep prisoners' documents/records lies on the officer in charge of the Prison. Regulation 2 provides that- "On the admission to prison of a prisoner the officer-in-charge shall cause to be recorded the following particulars regarding such prisoner- full name ... offence, previous convictions (if any), date of admission, remission which may be earned and earliest date of release". In these circumstances a proper person to submit proof of the applicant's (prisoner) transfer is the officer in charge of the relevant Prison, and indeed the said officer has, by way of affidavit, proved what the applicant says about the transfer. This Court takes judicial notice of contents of the affidavit as it contains statements of facts based on deponent's actual knowledge bearing in mind what was said in *Attorney General v. Dickson Paulo Sanga* (Civil Appeal No. 175 of

2020) TZCA 371 (5 August 2020) that an affidavit is a substitute to oral evidence. The applicant also argued that because of the transfer he was not able to receive copies of judgement and proceedings on time. The officer in 7 charge again supported this, adding that one month after the applicant's transfer from Mbulu Prison to Arusha, (that is September/October, 2024) the documents were brought to Mbulu Prison but were misplaced at the admission office. As in the other reason this is also opposed by the learned State Attorney as important dates are not mentioned to enable the court to measure the delay (that is, date of the relevant judgement, when copy of judgement and proceeding were received, "lost and found" and given to the applicant). It has been held in *Buchumi Oscar v. Republic*, Criminal Appeal No. 295 "B" of 2011, *William Ndingu@ Ngoso v. Republic*, Criminal Application No. 3 of 2014 and *Maneno Muyombe and Another vs. Republic*, Criminal Appeal No. 435 of 2016 [2019] TZCA 260 that a convict in prison loses control of the appeal process and he relies on the mercy of prison officers. Even in this case, the applicant had no power on his appeal process, what he could do and what he actually did was keep asking about copies of the judgement and proceedings. In this point I have in mind the applicant's words at the rejoinder that "nakala zangu hazijaletwa, kila nikizidai naambiwa zita/etwa, zitaletwa". Records in this Court show that the applicant gave notice of intention to appeal way back in

16th August, 2022 which is in line with section 361

- (2) of the CPA, he received copy of the judgement and proceedings on 8 8th December, 2023 and filed the appeal on 19th January, 2024. This activeness shows that had it not been on the misplacement of documents, the applicant could have managed to meet the time limitation to file the intended appeal. On the omission to mention dates in the affidavit, I take note of the applicant's cry that he could not get proper legal advice due to limited legal services in prison. In other words what the applicant is saying is that had he received proper legal advice the omission of mentioning important dates could not have happened. After all said and done, I have considered the applicant's fundamental right to be heard under Article 13 (6) (a) Constitution of the United Republic of Tanzania [Cap 2 R.E. 2002] and find it not proper to deny him an opportunity to appeal because of the delay caused by misplacement of necessary documents, the misplacement that was not of his doing nor happened under in his control. It was held in Said Thomas Mhombe and Another v. Republic (Consolidated Criminal Appeals No. 469 Of 2019) TZCA 340 (30 September 2019) that the High Court is empowered to admit an appeal out of time if good cause for the delay is shown by the applicant. In other words, what is required by the High Court is to satisfy itself that a good cause is given by the applicant for not appealing within the limitation set out in section 361 (1) (b) of CPA. 9 Basing on the peculiar circumstances of this application I am satisfied that the applicant has shown good cause for the delay, therefore I allow the application and grant extension of time to lodge an appeal before this Court. The applicant should file the appeal within fourteen days from the date of delivery of this Ruling. DATED at BABATI this 4th day of November, 2024. N.J.Mwihambi JUDGE 04/11/2024. COURT: Ruling delivered today in the presence of the Applicant Joshua Balki, and Mr. Raphael Rwezahula State Attorney, for the respondent. B/C Miss Fatina R. Haymale (RMA) present. Right of appeal explained. N.J.Mwihambi JUDGE 04/11/2024. io

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