

TANZANIA / JUDGMENT

salum chalamanda athuman chala and another vs the republic 2023 tzhc 19787 3 august 2023

COURT
TZHCDECIDED
3 August 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF
SONGEA AT SONGEA MISC. CRIMINAL APPLICATION NO. 6 OF 2023 SALUM CHALAMANDA
ATHUMAN CHALA 1ST APPLICANT ALLY RASHID HASSAN
..... 2ND APPLICANT VERSUS THE REPUBLIC
..... RESPONDENT (Originating from the decision of the
District Court of Tunduru at Tunduru in Criminal Case No. 21 of 2023)

RULING

2nd and 3rd August, 2023 KISANYA, J.: This is an application for extension of time within which to lodge the notice of intention to appeal and petition of appeal out of time. It is preferred under section 361(2) of the Criminal Procedure Act, Cap. 20, R.E. 2019 (now R.E. 2022) and supported by the affidavits of the above named applicants. The respondent did not file a counter-affidavit to contest the application. According to the supporting affidavits, the basis of this application is the decision of the District Court of Tunduru at Tunduru (the trial court) which was delivered to them on 30th January, 2023. In the impugned decision, the applicants were convicted with the offence of cattle theft and 1 were sentenced to serve five years imprisonment. The applicants assert to have signed and filed their respective notices of intention to appeal on 1st February, 2023. It is further stated that, the court clerk endorsed to have received the said notices of intention to appeal on 9th February, 2023. In view of the foregoing ground, the applicant filed the present application. During the hearing of this matter, both applicants appeared in persons without representation. On the other side, the respondent was represented by Mr. Gaston Mapunda assisted by Ms. Lucia Bukuku, learned State Attorneys. Arguing the application, the applicants adopted their affidavit to form part of their submissions. They went on praying for the application to be granted. At the outset, Mr. Mapunda expressed his intention of contesting the application for want of good cause. However, after going through the record of the trial court and this Court in DC Criminal Appeal No. 14 of 2023, he supported the application. Making reference to the record of both courts, the learned State Attorney pointed out that: one, the applicants were not present when the decision sought to be challenged was delivered 2 on 02/01/2023; two, the

date on which the applicants were arrested and presented before the trial court after being convicted is not known; three, the remand orders were issued on 31/01/2023; four, on 1/02/2023, the applicants signed the notices of intention to appeal which were filed in the trial court on 9th February, 2023; and five, the applicants lodged a petition of appeal which was struck out by this Court in DC Criminal Appeal No. 14 of 2023, on the ground that the notices of intention to appeal were lodged out of time. It was Mr. Mapunda's contention that the applicants had lodged their notices of intention to appeal within the time specified by section 360(1) of the CPA. Contenting further the fact that the applicants were convicted in absentia was not considered when their appeal was struck out by this Court, the learned State Attorney urged this Court to grant the application. I wish to preface my determination of this application by stating that, in terms of section 361(2) of the CPA, an application of this nature is granted where good case is established. The said section reads: "The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed." 3 From the above cited provision of law, the applicants are duty bound to satisfy this court that their failure to file the notice of intention to appeal and the petition of appeal within the time specified by the law was due to good cause. It is trite law that, in order to exercise its discretion power to extend time, the court takes into account factors like; the cause of the delay, length of the delay, whether or not the period of delay has been accounted for. Other factors are whether there is illegality or an issue of sufficient public intervention in the impugned decision and the degree of prejudice that the respondent stands to suffer if the application is granted. This stance has been underlined by the Court of Appeal in a number of cases, including; *The Principal Secretary, Ministry of Defence and National Service vs. Devram P. Valambhia* [1992] T.L.R 387 and *Lyamuya Construction Company limited v. Board of Young Women Christians Association*, Civil Application No. 2 of 2010 (unreported), to mention but a few. It is worth noting here that, in terms of section 361(1)(a) of the CPA, the time within which to give a notice of intention to appeal is ten days from the date of impugned decision. As stated earlier on, the applicants deposed that the decision subject to this application was 4 delivered on 30st January, 2023. However, as rightly submitted by Mr. Mapunda the trial court record does not show the date on which the applicants were arrested and presented before the trial court. Reading from the remand orders, one may assume that the applicants were informed of the impugned decision on 1/02/2023. Even if it is considered that the applicants appeared before the trial court on 30/01/2023 as stated in their affidavits, the record shows that the notices of appeal were signed or given before the officer in charge of the prison on 1/02/2023. I am alive to aware of the fact that, in its decision dated 30 th May, 2023, this Court arrived at a finding that the applicants' notices of intention to appeal were not timeous. That being the case, I am functus officio to decide on that issue. That notwithstanding, I have considered the fact that the record is silent on whether the applicants were arrested and presented before the trial court after being convicted in absentia. It is my firm view that, such fact raises some issues of sufficient public intervention in the impugned decision. The said issues include whether the applicants were made aware of the conviction and sentence imposed against them and when? and whether the applicants were entitled to the right to be heard after absconding on the date of judgment. Furthermore, nothing to suggest 5 that the respondent stands to suffer if the application is granted. All the above taken into account, I am of the

considered view that this is a good case for the Court to exercise its discretion to extend time. In the upshot of the above, I hereby allow the application. Consequently, the applicants are ordered to file the notices of intention to appeal and the petition of appeal within ten (10) days and forty five (45) days respectively, from the date of this ruling. It is so ordered. DATED at SONGEA this 3rd day of August, 2023. S.E. KISANYA JUDGE 03/08/2023 Ruling delivered this 3rd day of August, 2023 in the presence of the applicants and Mr. Gaston Mapunda, learned State Attorney for the Respondent. 6 S.E. KISANYA JUDGE 03/08/2023 7

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