

TANZANIA / JUDGMENT

wsembura so kiginga vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA CRIMINAL APPLICATION NO. 12/08 OF 2023 WAMBURA s/o KIGINGA.....APPLICANT VERSUS THE REPUBLIC..... RESPONDENT (Application for extension of time for file review from the decision of the Court of Appeal of Tanzania at Mwanza) (Mkuve, Galeba And Rumanvika JJ.A^ dated the 13th day of May, 2022 in Criminal Appeal No. 301 of 2018

RULING

8th 11th December, 2023 ISSA, J.A.: On 13th May 2022, this Court sustained a conviction on the offence of rape contrary to sections 130(1) (2) (e) and 131(1) and (3) of the Penal Code, and a sentence of life imprisonment imposed on the applicant. The applicant is now before the Court, with an application for extension of time within which to file a review against the judgment. The application was filed under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is supported by an affidavit of the applicant and the main reason given in his affidavit is that after he lost his appeal before the Court he was looking for a lawyer or paralegal to assist him, but it took a long time to get the assistance. Hence, he was out of time to file his application for review. When the application was called on for hearing, the applicant appeared in person and he reiterated the reasons given in his affidavit. He added that his appeal before the Court which he lost, his memorandum of appeal was written by a prison officer. Therefore, he did not want the same officer to assist him in writing his application for review. Hence, he requested from the prison authority to be provided with another person who could assist him. He was told to wait for the officer from Dodoma who arrived in November. Upon his arrival, the time for applying for review had already lapsed, hence, he wrote for him this application for extension of time within which to file for review. Ms. Naila Chamba, and Mr. Mahembega Elias, learned State Attorneys who appeared for the respondent/Republic opposed the application. Ms. Chamba adopted the affidavit in reply sworn by Mr. Mahembega Elias Mtiro, and submitted that the judgment of the Court was delivered on 13.5.2022, while this application was filed on 8.11.2022. There is a delay of 116 days. She added that, rule 66 (3) of the Rules provide that the application for review should be filed within 60 days, and rule 10 allows extension of time upon establishing a good cause, which the applicant failed to establish. Paragraphs 2 and 3 of the applicant's affidavit says the applicant was looking for paralegal to assist him, but it was not mentioned when he got the paralegal. The

applicant was required to account for each day of the delay, but he failed to do so. She relied on our decision in Boniface Alistedes v. Republic, Criminal Application No. 06/08 of 2019 (unreported). Ms. Chamba added that in paragraph 5 of the affidavit the applicant has deposed that there is a manifest error in the impugned judgment, but the applicant did not show the said error. She referred to our decision in Azizi Mohamed v. Republic, Criminal Application No. 84/07 of 2019 where we said that, mentioning an error without elaborating is not sufficient. She prayed for the dismissal of this application. The applicant, in his short rejoinder, submitted that the person who wrote the application told him he will explain the reason at the stage of review. On the issue of delay, he submitted that in prison a person asks for assistance from the prison officer who takes his time in providing the assistance. With respect to the issue of 116 days of delay, I agree with- Ms. Chamba that, the judgment of the Court was delivered on 13.5.2022, but this application for extension of time within which to file for review was filed on 8.11.2022. Rule 66(3) of the Rules provides that the notice of motion for review should be filed within sixty days from the date of judgment or order sought to be reviewed. Therefore, the task before me is to determine whether good cause has been shown by the applicant to entitle him extension of time. The power of the court of justice to extend time is both broad and discretionary. The discretion is judicial and it must be exercised according to the rule of reason and justice and not according to private opinion or arbitrarily. See *Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christians Association of Tanzania*, Civil Application No. 2 of 2010 (unreported). Further, the power under rule 10 is only exercisable if good cause is shown. The Court, in exercising its discretion under the said rule, 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, the 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. See: *The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia* [1992] T.L.R. 387 and *Lyamuya Construction Co. Ltd* (supra). 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. That rule provides:- 66(1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds ~

- (a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice, or,
- (b) a party was wrongly deprived of an opportunity to be heard,
- (c) the Court's decision is a nullity,
- (d) the Court had no jurisdiction to entertain the case or.

- (e) the judgment was procured illegally, or by fraud or perjury. If an application fails to disclose any of the above grounds, it is deemed not to have disclosed a good cause and is liable to be dismissed (See: Juma Swalehe v. Republic, Criminal Application No. 4 of 2010, Azaria Furaha and Another v. Republic, Criminal Application No. 5 of 2009 (all unreported). In this case, the application for extension of time within which to file for review, as mentioned earlier, was filed on 8.11.2022 after 116 days had elapsed from the date the judgment of the Court was delivered. The reason for the delay is that the applicant was waiting for a paralegal to write the application for him, but the applicant failed to account for the period between 12.7.2022 when the application for review was due to be filed to 8.11.2022 when the application for extension of time was filed. The applicant was expected to provide explanation of when he sent his request to the prison authority for assistance in preparing his application, and when that assistance was provided. In that way, he would have accounted the period of delay. The Court in Bushiri Hassan v. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported) stressed that, the party applying for extension of time must account for each day of the delay. It said: "... Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken." I appreciate that, the applicant has indicated in his affidavit that his intended application will be predicated on the ground that, there is a manifest error on the face of record. But as I said earlier, this is not the only consideration. The applicant must also establish a good cause. Both conditions must be met and not otherwise (see: Azizi Mohamed v. Republic (supra)). In the upshot, I am satisfied that no good cause to extend the time within which the applicant can file his application for review has been established, and accordingly, I dismiss this application. DATED at MWANZA this 13th day of December, 2023. A. A. ISSA JUSTICE OF APPEAL Ruling delivered this 14th day of December, 2023 in the presence of the Applicant appeared in person, and Mr. Adam Murusuli, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

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