



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 14 OF 2021

(Being Criminal Case No. 570 of 2020 before the Senior Resident Magistrate Court Sitting at Blantyre and also Confirmation Case No. 5 of 2021)

THE REPUBLIC

V

RICHARD CHUMA

Coram: Justice Vikochi Chima

Mr Fostino Maele, Counsel for the applicant

Mrs Moyo, Court Clerk

ORDER ON APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

Chima J

This is an *ex parte* application for leave to file an appeal out of time under Section 349 (4) of the Criminal Procedure and Evidence Code. The accused was, after a full trial, convicted of aggravated robbery contrary to section 301 (2) of the Penal Code and was sentenced to ten years imprisonment with hard labour. The conviction and sentence were made on 17 December 2021. The lower court's decisions were confirmed by Honourable Kachale J on 4 May 2021. The application is supported by an affidavit dated 3 September 2021. The applicant desires to appeal against the conviction.

Section 349 of the Criminal Procedure and Evidence Code states that:

'(1) No appeal to the High Court shall be entertained from any finding, sentence or order unless the appellant shall have given notice in writing to the High Court of his intention to appeal within ten days of the date of the finding, sentence or order appealed

Provided that—

- (a) where an appellant in custody delivers to any person in whose custody he has a notice in writing of his intention to appeal, for transmission to the High Court, he shall be deemed to have given such notice to the High Court;

(b) if an appellant is unrepresented and states his intention to appeal in the court by which the finding, sentence or order was made and at the time thereof, such statement shall be deemed to be a notice in writing to the High Court of his intention to appeal.

(2) If the appellant, at the time when he gave notice of his intention to appeal, asked for a copy of the finding, sentence or order appealed against, the appellant shall enter a petition, in accordance with section 350, within thirty days of the date of his receipt of such copy, or his appeal shall not be entertained.

(3) If the appellant, at the time when he gave notice of his intention to appeal, did not ask for a copy of the finding, sentence or order appealed against, the appellant shall enter a petition in accordance with section 350, within thirty days of the date of the finding, sentence or order appealed against, or his appeal shall not be entertained.

(4) Notwithstanding the other provisions of this section, the High Court may, for good cause, admit an appeal although the periods of limitation prescribed in this section have elapsed.'

In *Kuthawe and another v Rep*,¹ Kapanda JA said as follows concerning the considerations that courts should ponder in applications for leave to appeal out of time:

'As it were, there is a limitation period with respect to the time when an appeal should be filed. Else, it will not be allowed unless certain conditions are satisfied. What is this Court's understanding of the scheme of section 349 in particular section 349 (4) of the Criminal Procedure and Evidence Code?

The first is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties (the state and the appellant). In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to disregard the delay and admit the appeal. As has been observed by this Court in *Chiume v The Attorney-General* [2000-2001] MLR 102 and *Mwaungulu v Malawi News and others* [1995] 2 MLR 549 this discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice.

However, it is necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 349 (4) of the Criminal Procedure and Evidence Code. If sufficient cause is not proved nothing further has to be done; the application for excusing delay has to be dismissed on that ground alone. If sufficient cause is shown, then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration... As I understand it, a liberal construction of the expression "the High Court may, for good cause, admit an appeal although the periods of limitation prescribed in this section have elapsed" in section 349 (4) of the Criminal Procedure and Evidence Code is to begin with merely permissive and intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. Thus, this Court accepts that there can be instances where the Court should tolerate a delay; equally there would be cases where the Court must exercise its discretion against an applicant for want of any of these ingredients or where it does not reflect "good cause" as understood in law. It is the understanding of this Court that the expression "for good cause" implies the presence of legal and adequate reasons. And, the word means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The "good cause" should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. This provision gives the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the

¹ MWSC 471 (30 September 2015)

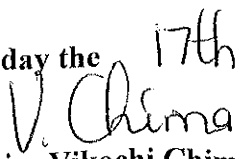
purpose of enacting such a law does not stand frustrated... The person applying for leave to appeal out of time should show that besides acting bona fide, the applicant had taken all possible steps within his/ her power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is good enough that it could not have been avoided by the person by the exercise of due care and attention.'

The applicant has not shown good cause why the appeal should still be heard despite over eight months having elapsed after the time period within which he would have appealed as of right. He has not even given any reason to explain why he delayed to lodge his appeal. I see no reason to grant the prayer.

Made in open court this day the

17th

of September 2021


Justice Vikochi Chima