



IN THE MALAWI SUPREME COURT OF APPEAL

5

PRINCIPAL REGISTRY

MISCELLANEOUS CRIMINAL APPEAL NO. 8 OF 2015

(Being High Court Principal Registry Miscellaneous Criminal Application No.

10 **13 of 2013)**

BETWEEN

WYSON KUTHAWE.....1ST APPELLANT

15

AUBREY KUTHAWE.....2ND APPELLANT

AND

20 **THE REPUBLIC.....RESPONDENT**

CORAM: THE HON. MR JUSTICE FE KAPANDA JA

Maele of Counsel for the Appellant

Salamba Senior State Advocate for the State

25

Mr Minikwa Court Clerk

Date of hearing of application: 7 July 2015

Date of judgment: 30 September 2015

RULING

5 **Kapanda JA:**

INTRODUCTION

This is an appeal against the decision of the court a quo refusing to allow the two appellants, Wyson Kuthawe and Aubrey Kuthawe, to appeal out of time. The two were
10 convicted of the offence of robbery by the First Grade Magistrate Court sitting at Mulanje on 5 September 2012. They were then sentenced to an effective prison term of 12 years. Both the conviction as well as sentence was reviewed and confirmed in chambers by the court below.

15 As I understand it, the appellants are currently serving this term of imprisonment but are desirous of appealing against both the conviction and sentence. Thus, they applied for leave to appeal out of time in the court a quo but their application was refused. It is now the wish of the two that this Court should grant them such leave. Their application has come by way of an appeal to a single member of this Court and is therefore a rehearing
20 of the application for leave to appeal out of time that was in the court a quo.

BACKGROUND FACTS

The facts leading to the application before me as well as the court below are not
25 complex. They are in the affidavits of both counsel for the state as well as summarised in the arguments of counsel. The said facts are these:

Wyson Kuthawe and Aubrey Kuthawe were found guilty of the offence of robbery and accordingly convicted. This was after a full trial. The two appellants were then
30 sentenced by the First Grade Magistrate court to serve a custodial term of imprisonment of 12 years. The First Grade Magistrate correctly observed in his judgment that the

starting point of sentence for the offence of robbery is 10 years. Further, the First Grade Magistrate properly observed that the sentence can be upgraded or downgraded depending on aggravating or mitigating circumstances. The magistrate found aggravating factors in the case viz. the appellants were in a group, the victim of the offence was hacked and seriously injured in the course of the robbery.

As is required by the Criminal Procedure and Evidence Code, the appellant's case record was brought before the High Court for review of both the conviction and sentence. On 5 November 2012 Justice Manda summarily reviewed the appellants' case record and consequently confirmed both the conviction as well as the sentence meted out on the appellants. On 18 August 2014, the appellants caused a summons to be issued where they sought to apply for leave to appeal against the decision of the First Grade Magistrate court.

The appellants applied for leave to appeal out of time under Section 349 (4) of the Criminal Procedure and Evidence Code. The application was made returnable before Justice Kalembera. It is common cause that the appellants did not state any reasons for the delay of about two years to lodge an appeal against the decision of the First Grade Magistrate to convict and sentence them accordingly. However, the appellants did indicate that the circumstantial evidence available before the First Grade Magistrate court had so many other conclusions apart from the guilt of the appellants. In addition, the appellants averred that the sentence of 12 years was excessive. Thus, in their opinion if an appeals court reheard their case their conviction might be quashed or the sentence may be reduced.

Justice Kalembera dismissed the application on the ground that it lacked any merit. It was the opinion of the court a quo that the requirements of showing good cause under the said Section 349 (4) of the Criminal Procedure and Evidence Code were not satisfied. It was the finding and conclusion of the court a quo that the appellants failed to show good cause why they should be allowed to appeal out of time. The court a quo

reviewed a number of cases that discusses the law on appeals out of time and aptly commented thus at pages 4-5 of its unreported judgment:

5 “In the matter at hand, I am at pains to find any merit as to why the applicants must be granted leave to appeal out of time. Over two years have passed since the applicants were convicted, and their convictions and confirmed (sic). No explanation has been given as to why the applicants failed to lodge their appeal in time. No reason has been given as to anything that hindered the applicants from appealing on time. In other words, the applicants have not explained this
10 delay in lodging their appeal. It is required that the applicants must give good and sufficient reasons why they must be allowed to lodge their appeal out of time, and after such an inordinate delay. The applicants have not even given any reason to explain this delay. It is as if the applicants think that appealing out of time is a matter of routine. Thus, the applicants having failed to give any reasons
15 for the delay in lodging their appeal within the prescribed time, this court cannot entertain this application.”

The court a quo made its decision on 8 May 2015. The appellants are dissatisfied with the legal basis upon which the lower court declined to grant them leave to appeal out of
20 time. Accordingly, on 26 May 2015 the appellants took out a Notice of Appeal against the lower court’s denial of their application for leave to appeal out of time.

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GROUND OF APPEAL

As stated above, the appellants are dissatisfied and accordingly appealed to this Court against the refusal to grant them leave to appeal out of time. It is the view of the
30 appellants that the court a quo misconstrued the meaning of “good cause” in Section 349 (4) of the Criminal Procedure and Evidence Code by limiting it to good reasons why the appellants did not appeal within time. There is thus one ground of appeal proffered.

The ground of appeal is couched in the following terms: “the lower court misconstrued the meaning of “good cause” in section 349 (4) of the Criminal Procedure and Evidence Code by limiting it to good reasons why the appellants did not appeal within time”.

- 5 The appellants then seek the following relief from this Court on this appeal:
1. A finding that the lower court erred limiting the meaning of good cause to reasons why the appellants did not appeal within time. (sic)
 2. An order the appellants be allowed to appeal out of time. (sic)

In reply, the respondents have filed an affidavit in opposition as well as skeleton
10 arguments in response to the appeal by the appellants. Mr. Salamba has adopted the said affidavit in opposition as well as skeleton arguments. And, in accordance with this Court’s understanding of the law he was allowed to do so only and was allowed to comment on matters of law as opposed to those of fact. The state was thus content to pray that this Court should uphold the High Court order refusing to grant the appellants
15 leave to appeal out of time. As will be shown below, this Court agrees with the state that the finding and conclusion of the court a quo should not be disturbed as over two years have passed since the applicants were convicted, and their convictions confirmed. There has been no explanation given as to why the applicants failed to lodge their appeal in time. Further, no reason has been given as to anything that hindered the
20 applicants from appealing on time. In sum, the applicants have not explained their delay in lodging their appeal. As we this Court understands it, the Court was also right in concluding that that the appellants should have given good and sufficient reasons why they ought to have been allowed to lodge their appeal out of time, and after such an inordinate delay. The appellants did not even given any reason to explain this delay of
25 over two years. So, the appellants having failed to give any reasons for the delay in lodging their appeal within the prescribed time, the court a quo was right in not entertaining their application.

THE LAW RELATING TO APPEALING OUT OF TIME; THE ISSUES AND THE COURT'S CONSIDERATION THEREOF

5 The law relating to appealing out of time and the meaning of good cause in section 349 (4) of the Criminal Procedure and Evidence Code

Section 349 of the Criminal Procedure and Evidence Code provides the time frame within which a criminal appeal will be entertained. It is in the following terms:

10 “(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—

15 (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
20 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
25 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
30 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.” (Emphasis supplied)

As it were, there is a limitation period with respect to the time when an appeal should be
 5 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
 10 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 light heartedly disturbed.
 The other consideration which cannot be ignored is that if sufficient cause for excusing
 15 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**¹ and
Mwaungulu v Malawi News and others,² 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.

20 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
 25 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

¹ [2000–2001] MLR 102

² [1995] 2 MLR 549

facts and it is at this stage that diligence of the party or its bona fides may fall for consideration.

Far away from home but in a jurisdiction like ours, a common law jurisdiction, there is a case authority that is instructive on what a court user should do where there has been a delay before such delay is condoned. Thus, in **Union of India v. Tata Yodogawa Ltd.**,³ the Court while granting some latitude to the Government of India in relation to condonation of delay, still held that there must be some way or attempt to explain the cause for such delay. And, as there was no hint to explain what legal problems occurred in filing the Special Leave Petition, the application for condonation of delay was therefore dismissed.

In Malawi, the provisions of section 349 (4) of the Criminal Procedure and Evidence Code has been the subject matter of judicial scrutiny for considerable time now. Sometimes the courts have taken a view that delay should be condoned with a liberal attitude, while on certain occasions the courts have taken a stricter view and wherever the explanation was not satisfactory, have dismissed the application for condonation of delay. Thus, it is evident that it is difficult to state any straight-jacket formula which can uniformly be applied to all cases without reference to the peculiar facts and circumstances of a given case. It must be kept in mind though that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to provisions which would render the provision ineffective or odious. Once the legislature enacted the provisions of Section 349, with particular reference to section 349 (4) of the Criminal

³ [1988] (38) Excise Law Times 739 (SC); similarly, in the case of Collector of Central Excise, Madras v. A.M.D. Bilal & Co., [1999 (108) Excise Law Times 331 (SC)], the Supreme Court declined to condone the delay of 502 days in filing the appeal because there was no satisfactory or reasonable explanation rendered for condonation of delay.

Procedure and Evidence Code, all these provisions have to be given their true and correct meaning and must be applied wherever called for. If we accept the contention of the Learned Counsel appearing for the appellants that the Court should take a very liberal approach and interpret the provisions of section 349 in particular subsection 4 of the Criminal Procedure and Evidence Code in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all the provision redundant and inoperative. Such an approach or interpretation would hardly be permissible in law.

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.⁴ 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 give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated. This Court finds it unnecessary to discuss the instances which would fall under either of these classes of cases. 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

⁴ P. Ramanatha Aiyar, Advanced Law Lexicon, 2nd Edition, 1997

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.

This Court is of the view that above are the principles which should control the exercise of judicial discretion vested in the Court under the provisions of section 349(4) of the Criminal Procedure and Evidence Code. As it were, where the periods of limitation prescribed in this section have elapsed the explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Indeed, delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the applicant as well as the other party to the proceedings, bona fide reasons for condonation of delay and whether such delay could easily have been avoided by the applicant acting with normal care and caution. The statutory provision dictates that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing an appeal on record, should be rejected unless good reason is shown for condonation of delay.

The High Court as well as this Court has consistently followed the above principles and have either allowed or declined to tolerate the delay in filing such appeals. Thus, it is the requirement of law that these applications should not be allowed as a matter of right and even in a habitual manner. An appellant and/ or applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to excuse the delay. As alluded to earlier by the court a quo, and accepted by this Court, "the applicants have not even given any reason to explain this delay. It is as if the applicants think that appealing out of time is a matter of routine. Thus, the applicants having failed to give any reasons for the delay in lodging their appeal within the prescribed time, this court cannot entertain this application." Accordingly, this Court too would dismiss the application for leave to appeal out of time.

I wish to add that the above decision is informed by what this Court said in some civil matters but the principle of law enunciated are equally instructive in criminal appeals.

Unyolo JA, as he then was, had this to say in **Mwaungulu v Malawi News and others**⁵ which is enlightening:

5 “This is an application made under section 23(2) of the Supreme Court of Appeal Act as read with Order III, rule 4 of the Supreme Court of Appeal Rules for enlargement of time in which to appeal. It is brought before me as a single member of the Supreme Court of Appeal, in accordance with the provisions of section 7 of the said Act....Order III, rule 4 cited above, stipulates that this Court has a discretion to grant an extension of time for filing a notice of appeal, provided there are: (a) good and substantial reasons for the failure to appeal, 10 within the prescribed period, and (b) grounds of appeal which, prima facie, show good cause why the appeal should be heard. In this context, it is trite that what would constitute “good and substantial reasons” is a question of fact, and the phrase must be construed literally and the words given their ordinary meaning. It is trite further that as regards point (b) above, the essential consideration is whether, on the grounds of appeal presented, there are prospects of the appeal 15 succeeding if the period for appealing was extended; frivolous and vexatious grounds of appeal will not do. See *Karim v AMI Rennie Press (Malawi)* MSCA Civil Appeal No. 10 of 1993 (unreported), and see also *Tratsel Supplies Ltd v Mwakalinga* MSCA Civil Appeal No. 19 of 1988 (unreported).

20 And as I understand it, even where there are “good and substantial reasons” for the failure to appeal within time and even where the grounds of appeal are good, the court would be perfectly entitled in its discretion to refuse to grant an extension if the delay in filing the notice of appeal is excessive or inordinate. See *Mbewe v ADMARC* MSCA Civil Appeal No. 10 of 1993 (unreported). In this context, one could imagine a situation, for example, where a respondent was 25 likely to suffer prejudice or injustice in his case by reason of the court granting an extension after such excessive delay. Indeed, as has been observed time and again, if a person chooses to lie by disregarding to take action when he ought to do so, the maxim *vigilantibus non dormientibus jura subveniunt* normally

⁵[1995] 2 MLR 549 (SCA)

applies....I have indicated that one of the requirements for an application for leave to appeal out of time to succeed is that the applicant must show good and substantial reasons for the failure to appeal within the permitted time....”⁶
 (Emphasis supplied by me)

- 5 And, this Court agrees with him on his observations in this dictum. In particular, it adopts the remarks to the effect that where there are “good and substantial reasons” for the failure to appeal within time and even where the grounds of appeal are good, the court would be perfectly entitled in its discretion to refuse to grant an extension if the delay in filing the notice of appeal is excessive or inordinate.
- 10 And, in **Chiume v The Attorney-General**⁷ Kalaile JA, as he then was, had this to say which is also instructive:

15 “Counsel cited the case of *Revici v Prentice Hall* [1969] 1 WLR 157 as authority for stating that the Rules of the Supreme Court regarding time had to be observed since substantial delay had occurred without any satisfactory explanation so that the trial Judge was entitled, in his discretion, to refuse an extension of time. In the *Revici* case, the Court of Appeal was considering an appeal against a refusal to extend time by a judge in chambers. The plaintiff had issued a writ against a third defendant for libel. The court ordered that the order of the Registrar giving leave to serve the third defendant out of the jurisdiction was to be set aside, and the plaintiff was given eleven weeks within which to appeal. The notice of appeal was however, served out of time and upon an application for an extension of time being made, it was refused by the court.

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It was also argued by Counsel for the Attorney-General that the cases of *Atwood v Chichester* [1878] 41 Vic 722 and *Eaton v Stover* [1883] 22 ChD 91, which established that the extension of time should be allowed unless there was

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⁶ Ibid. 551 - 554

⁷ [2000–2001] MLR 102 (SCA)

excessive delay, were distinguished in the Revici case wherein Denning LJ observed at 159 of the judgment that:

5 “Nowadays we regard time very differently from the way they did in the nineteenth century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases when people have not kept rules as to time,”

10 Another pertinent case cited by Counsel for the Attorney-General is *Ratram v Cumarasamy* [1965] 1 WLR 8 which was decided by the Privy Council. In that case, the appellant entered an appeal against judgment. The court record was supposed to be filed within six weeks after entry of the appeal. The prescribed period expired and the appellant applied for an extension of time.

15 The appellant’s affidavit stated that the filing could not be done within time because the appellant’s solicitors had indicated that since they were instructed a day before the expiry period, it was not possible to file within the prescribed time. The appellant had also deposed that, all along, he had hoped that some compromise would be reached.

20 On appeal to the Privy Council, it was held that rules of the court must be obeyed and that, to justify an extension of time for the filing of record; “there must be material upon which the court could exercise its discretion for otherwise a party would have unqualified right to an extension which would defeat the purpose of the rule,” which was to provide a timetable for litigation. The Privy Council further held that the appellant’s affidavit did not constitute material upon which they could exercise their discretion in the appellant’s favour and opined that: “Their Lordships are satisfied that the Court of Appeal was entitled to take the view that
25 this did not constitute material upon which they could exercise their discretion in favour of the appellant. In these circumstances, their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle.” Per Lord Guest at 12.

It was argued by Counsel that the appellant's affidavit did not contain sufficient and acceptable reasons for the delay and, that being the position, there was no material fact upon which the court could exercise its discretion in favour of the appellant.

5 The appellant's application was brought almost two years after the ruling was made and it is perfectly clear that the appellant undertook to be present in Malawi by his letter dated 15 May, 1994. This point is supported by paragraphs 34-36 of his affidavit which state:

10 "34. THAT while I was in Umtata, Transkei in the Republic of South Africa on 2 May, 1994, I met one Mr Sikwese who came from Malawi and informed me he had heard from some other person that the government of Malawi might have issued some kind of proceedings against me but he was not sure whether the information was correct."

15 35. THAT on the same day, I wrote a letter to the Attorney-General expressing to him what I had heard and stating to him if the information was correct as Malawi was rife with rumours. I did request the Attorney-General that if it is true, he should please pend the proceedings as I intended to return home before 15 May, 1994 and that I intended to defend any proceedings they may have in mind.

20 36. THAT I did intimate to the Attorney-General that whatever the case, I will be returning home and, in the interest of justice, he should wait for me. I undertook to get in touch immediately I was in the country. The second letter of 2 May, 1994 is attached hereto and marked "HMM C XII."

25 According to Counsel for the Attorney-General, the cited affidavit does not disclose the date when the appellant returned to Malawi in order to throw light on whether the appellant was indeed outside Malawi at the material time. It was demonstrated that the letter dated 2 May, 1994, which the appellant purportedly wrote whilst in the Republic of South Africa, had a Malawi stamp and bore a Malawi postal frank.

In concluding his arguments regarding the first ground of appeal, Counsel for the Attorney-General stated that the appellant, in his skeleton arguments, contended that the instructions to set aside judgment were given to his lawyers promptly upon his return from the Republic of South Africa in November 1994 (although this fact is not stated in the affidavit). Although Counsel for the appellant argued that the application was delayed because the appellant's office had been closed, and the relevant documents were stored away in a small room making it difficult to access them, this explanation is not acceptable because the appellant had prior knowledge of the proceedings against him as far back as May 1994 as evidenced by paragraphs 34 and 35 of his affidavit.

As between the arguments of both Counsel we find that the arguments by Counsel for the Attorney-General have merit and not those for Counsel for the appellant, especially since the application was brought almost two years later, that is to say in 1996, without any plausible explanation. The first ground of appeal cannot, therefore, succeed.”⁸

It will be seen that the new jurisprudence emerging is that the time within which an aggrieved person is called upon to appeal is of essence. Thus, if there is no plausible explanation for a delay in filing or prosecuting an appeal the courts will almost invariably dismiss an application to extend time within which to appeal. Indeed, where you have a permissive statutory provision allowing condonation of delay the way to interpret such statutory provision is to read it as dictating that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing an appeal on record, should be rejected unless good reason is shown for condonation of delay.

The issues and the court's consideration

⁸ Ibid. 105 - 106

This appeal is about the court a quo's denial to allow the appellants to appeal out of time. Thus, as I understand it, there was only one issue before the court a quo as well as this Court. This is namely whether or not the court a quo misconstrued the meaning of good cause in Section 349 (4) of the Criminal Procedure and Evidence Code or any other law regulating appeals out of time. And, in saying this it is well that particular mention should be made respecting the ground of appeal filed herein that : "the lower court misconstrued the meaning of "good cause" in section 349 (4) of the Criminal Procedure and Evidence Code by limiting it to good reasons why the appellants did not appeal within time."

There was no argument that the court a quo failed to exercise its discretion properly. This Court will not disturb the exercise of discretion by the court below. Indeed, this Court has it on good authority that notwithstanding that there could be "good and substantial reasons" for the failure to appeal within time and even where the grounds of appeal are good, a court would still be perfectly entitled in its discretion to refuse to grant an extension if the delay in filing the notice of appeal is excessive or inordinate.⁹ In this regard, it is well to remember that in the matter before this Court as well as the court a quo it is common cause that the appellants did not state any reasons for the delay of about two years to lodge an appeal against the decision of the First Grade Magistrate to convict and sentence them accordingly. The delay is extreme and no cogent reason has been given for the delay.

As this Court understands it, the position at law is that any person applying for leave to appeal out of time should show that besides acting sincerely, 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. Further, it is the understanding of this Court that where an appellant can show good cause of why he/ she did not file an appeal on time, then the applicant can file a late appeal.

⁹ Mbewe v ADMARC MSCA Civil Appeal No. 10 of 1993 (unreported).

However, it is well to put it here that good cause reasons for filing late are judged on a case-by-case basis, so there is no complete list of acceptable reasons for filing an appeal late. If you think you have a good reason for not appealing on time, then file in your application to appeal out of time with a clear explanation of why your appeal is late.

5 Else, the application and the intended appeal deserves to be thrown out.

This Court is of the view that above are the principles which should control the exercise of judicial discretion vested in the Court under the provisions of section 349(4) of the Criminal Procedure and Evidence Code. As it were, where the periods of limitation prescribed in this section have elapsed the explained delay should be clearly
10 understood in contradistinction to inordinate unexplained delay. Indeed, delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the applicant as well as the other party to the proceedings, bona fide reasons for condonation of delay and whether such delay could easily have been avoided by the applicant acting with normal care and caution.

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We have seen that the appellants are making the mere contention that the lower court erred “the lower court misconstrued the meaning of “good cause” in section 349 (4) of the Criminal Procedure and Evidence Code by limiting it to good reasons why the appellants did not appeal within time.” However, they fall into the error themselves by
20 not giving a good reason why there was this inordinate unexplained delay. This Court finds and concludes that the court a quo applied the law and exercised its discretion properly by refusing to allow the application. This Court too dismisses the application for leave to appeal out of time. There has been an unconscionable and unexplained reason for the delay to appeal against both conviction and sentence. In any event, as regards
25 the intended appeal against sentence it is well to observe that the First Grade Magistrate correctly observed in his judgment that the starting point of sentence for the offence of robbery is 10 years. Further, the First Grade Magistrate rightly observed that the sentence can be upgraded or downgraded depending on aggravating or mitigating circumstances. The magistrate found aggravating factors in the case viz. the appellants
30 were in a group, the victim of the offence was hacked and seriously injured. Thus, it is

doubtful that the appeal against sentence if allowed would have in any event succeeded.

CONCLUSION AND DISPOSITION

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As stated in the introduction to this judgment, the appellants are seeking the following reliefs from this Court on this appeal: firstly, a finding that the lower court erred in limiting the meaning of good cause to reasons why the appellants did not appeal within time. Secondly, and lastly, an order that the appellants be allowed to appeal out of time.

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This Court has established above that the High Court did not fall into any error or at all. It was therefore right in refusing to grant the appellants' prayers. Accordingly, the High Court's decision declining to grant the appellants leave to appeal out of time is sustained.

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For the avoidance of any doubt, this Court hereby orders that the application for leave to appeal out of time is without merit on account of it showing no good reasons for the delay in filling the appeal within the statutory period provided for in section 349 of the Criminal Procedure and Evidence Code. The appeal is consequently dismissed.

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DELIVERED in Chambers at the Supreme Court of Appeal, sitting at Blantyre on 30 September 2015.

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Signed:

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F E KAPANDA
JUSTICE OF APPEAL