IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 20 OF 2019

(Originating from Criminal Case No. 82 of 2016 at Ilala District Court)

IDDY JOHN NG'WANI @ NGWANGULE ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING

S. M. MAGHIMBI, J:

The application beforehand was lodged under the provisions of section 373 (1) (2) of the Criminal Procedure Act Cap. 20 R.E 2002 ("the CPA"), read together with section 44 (1) (a) of the Magistrate Court Act Cap 11 R.E 2002 ("the MCA"). The applicant is moving the court for an order in the following terms:-

1. That, this Hon. Court be pleased to revise judgment and proceedings of the convicting court vide Criminal Case No. 255 of 2015 and issue appropriate order (s).
2. That this Hon. Court be pleased to call proceedings of the convicting court vide Criminal Case No. 255 of 2015 revised and issue appropriate orders suiting the applicant's prayer.

3. That, this Hon. Court be pleased to quash the conviction and set aside the remaining sentence due to failure by the subordinate court to forward the proceeding within the prescribed time.
4. Any other order(s) or relief this court may deem fit and just equitable to grant.

The application is supported by the affidavit of the applicant sworn on 08th January, 2019. Before me, the applicant appeared in person at all times while the republic was represented by Ms. Noora Manja, learned State Attorney. The matter was disposed by way of written submission, both parties filed their submissions accordingly, hence this ruling.

In his submissions to support the application, the applicant stated that he was charged with three others of the offence of Armed Robbery contrary to section 287A of the Penal Code Cap. 16 R.E 2002 ("the Penal Code"). However, his fellows were released after the prosecution had no intention proceed with prosecuting them and they were discharged. He was charged alone, convicted and sentenced to serve 30 years imprisonment via a judgment dated 27th January, 2017.

The applicant further submitted that he filed a notice to appeal through prison authority and several times wrote letters to the trial court seeking for the records of the court so as he could pursue his right of appeal but the same were not availed to him. That more efforts were

employed by seeking the Deputy Registrars intervention, but still the said records were not availed to him. It was after the fruitless attempts that the applicant states to have been advised to file this application for revision before this court.

The applicant cited the provision of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania as amended from time to time emphasizing on his right to appeal. He also cited the cases of **Christan Shaban @Ngahomana vs. Republic, Criminal Application No. 90 of 2015** and **Jackson John vs. Republic, Misc. Criminal Revision No. 2018**, in these two cases the court ordered that the accused's were to be acquitted for failure of their records to be availed to them. The applicant herein hence prayed for this court to apply the same reasons that was employed by the Judges who heard the above case and order that, for failure of being availed with the trial court records, the trial court's decision be quashed and the conviction be set aside and he be set at liberty.

In reply, Ms. Manji submitted that the applicant made four prayers in his chamber summons in support of his application. **One,** that the judgment be revised, **two,** that the proceedings of the convicting court be called for by this court, **three,** that this court quashes the conviction

and set aside the remaining sentence and four any other relief the court deems fit.

Moreover, since the applicant had the intention of exercising his right to appeal and the effort tracing the court which could enable him to pursue his appeal proved failure, the conviction of the trial court be quashed and the sentence be set aside and the same set at liberty. His argument was based on the cases cited of which we find the same not to be binding but persuasive. She argued that the Judge ruled that the acquittal was on the reasons that there was no possibility of reconstructing the file hence justice demanded the application be granted.

The learned State Attorney also submitted that this court has not exhausted the legal requirements available, therefore making the hearing of this application premature as the records does not show whether reconstruction of the file was done by the court before hearing of this application. She supported her submissions by citing the case of **Maruma Papi Vs. Republic, Criminal Appeal No. 104 of 2011** where the said position was held.

Having gone through the submission of the parties, I have in knowledge that before me is an application for revision. Going through the Chamber Summons and the affidavit in support of the application, under paragraph 4, I find that the intention of the applicant was to file an

appeal against the decision of the trial court. The averments of paragraph 4 are cemented by the prayers of the applicant as well as his submissions in support of the application. His argument is that he had applied copies of the judgment and proceedings so as to seek his right of appeal and that it was after efforts to secure the court records proved futile that he was advised to file this instant application.

I have considered the respondent's submission that following failure of being supplied with the said records, there is no order of this showing a move to have the reconstruction of the file was attempted. Despite the numerous calling for records order made by this court, there is no order whatsoever that reveals that the reconstruction of the file was intended to be done. In fact, this could only be done if the applicant had lodged an appeal.

Moreover, considering the records are so clear that the intention of the applicant is to exercise his right of appeal, but he took his own alternative to file revision for the reasons stated, it just not justify the competence of the application before me. Since the trial ended and determined the rights of parties, the only remedy available to the applicant was to lodge an appeal. It is trite law that an application for revision cannot be exercised as an alternative to an appeal. The position was also stated in the case of **Abdallah Hassani Vs. Juma Hamisi**

Sekiboko, Civil Appeal No. 22 of 2007, the Court of Appeal at Tanga, (unreported) where the Court of Appeal has this to say:-

> *"We turn to the merits of the appeal. The High Court moved under Section 44 (1) (b) can only revise the proceedings where there is an error material to the merits of the case involving injustice. Throughout, the court would act to rectify that error apparent on the face of the record and not that it sits in its appellate capacity as if on appeal, to evaluate evidence. And neither can it perform both roles (revision and appeal) simultaneously.*
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> *With respect to the High/Court Judge (Shangali, J) what is depicted by the record supports ground one of the appellant's complaints. The learned judge overstepped from the arena of revision into that of appeal, confusing the process in the end as she branded what was before her as a 'revision' and at the same time as an 'appeal'. "And this brings us to our next finding that apart from the error of treating revision proceedings as an appeal, the court also erred ..... We think the principles guiding revision proceedings before this court, that is that revision should not be a substitute for an 5 appeal and that the court should be satisfied that in the interest of justice a revision should be employed rather than an appeal, should as well guide the High Court in applications for revision made under section 44 (1) (b) of the Magistrates Court Act, No. 2 of 1984".*

From the above holding, a revision cannot be filed as an alternative to an appeal. Since the case at hand is a revision instead of an appeal, the same is incompetent before this court. What the applicant ought to have done is lodge his intended appeal and leave the issues of availability of the records to this court. The court, on appeal, could have then exercised its revisional powers and make proper orders and not to initially move the court by way of revision.

Consequently, having found that the application is incompetent before me, the same is hereby struck out. However, having considered the length of time that the applicant has been pursuing his right of appeal and the fact that he is in prison custody, I hereby give the applicant a chance to lodge his intended appeal before this court if he is still so interested. The intended appeal should be lodged in this court within 30 days from the date of this ruling.

Dated at Dar es Salaam this 18th day of July, 2023.

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S. M. MAGHIMBI

JUDGE