

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 59 of 2005

ELIAS MANYENYE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the conviction/judgment of the High Court of Tanzania
at Bukoba)**

(Luanda, J.)

dated 6th day of Decemberr, 2004

in

Criminal Revision No. 2 of 2002

JUDGMENT OF THE COURT

22nd & 28th April, 2008

MBAROUK, J.A:

The appellant and seven others were jointly charged with the offence of armed robbery contrary to Sections 285 and 286 of the Penal Code in Criminal Case No. 12 of 2001 of the District Court of Biharamulo at Biharamulo. It was the appellant alone who was convicted and sentenced to the mandatory sentence of thirty (30)

years imprisonment. Being aggrieved by the conviction and the sentence, the appellant opted to apply for revision instead of appealing to the High Court. The High Court (Luanda, J., as he then was), struck out the revision application for being improperly filed. Dissatisfied, the appellant lodged this appeal.

In this appeal, the appellant appeared in person, whereas the respondent Republic was represented by Mr. Emily Kiria, learned State Attorney.

The memorandum of appeal to this Court contains the following grounds:-

1. That the learned appellate judge erred himself in the matter of law and fact by dismissing the applicant's application (Revision) without taking into consideration that:-
 - (a) The applicant (accused) was not informed of his right to appeal at the trial court.

- (b) The appellant (accused) was not informed of his right to mitigate before the trial court to act on conviction and sentence.
2. That, following the applicant being deprived of his right to appeal the High Court had powers to revise it although the affidavit was defective.

There was no appeal to the High Court after the appellant opted to file the revision application. The High Court, (Luanda,J., as he then was), in arriving at the decision posed a question as to whether a party to criminal proceedings can apply, as a matter of right, for revision in court. Thereafter in his interpretation of Section 44(1) of the Magistrates Courts Act, 1984; Sections 372 and 373 of the Criminal Procedure Act, Cap 20 R.E 2002 he came to the conclusion that those provisions do not confer, as a matter of right, a party to criminal proceedings to apply for revision.

At the hearing of the appeal, the appellant initially had nothing to add and opted to adopt his grounds of appeal without any elaboration.

On his part, Mr. Kiria in resisting the appeal contended that the appellant was supposed to file an appeal and not to apply for revision before the High Court. In support of his contention, the learned State Attorney referred us to Section 359 of the Criminal Procedure Act, Chapter 20 R.E 2002, which directs that any person aggrieved by any finding, sentence or order made or passed by a subordinate court has to file his appeal to the High Court. He said, the appellant is yet to file his appeal before the High Court.

Furthermore, Mr. Kiria asserted that the affidavit in support of the Chamber Application filed before the High Court was incurably defective. The affidavit did not show the person before whom it was sworn. There was no signature of the Commissioner for Oaths. This is contrary to the mandatory provisions of Section 8 of the Notaries Public and Commissioners for Oaths Act, Chapter 12, R.E 2002, Mr.

Kiria observed. This is because, he said, the jurat in the affidavit in support of the Chamber Application did not show the place where it was sworn. He referred us to the decisions of this Court in **Ashura Abdulkadri Versus The Director of Tilapia Hotel**, Civil Application No.2 of 2005 (unreported) and **Rajab Christmas Versus The Republic**, Criminal Application No. 4 of 2005 (unreported).

For those incurable defects in the affidavit in support of the application, there was no affidavit, Mr. Kiria further submitted.

In his response to the complaint that the appellant was deprived of his right to appeal, and mitigation, by the trial Senior District Magistrate, the learned State Attorney agreed that there indeed were such defects. However, he submitted that that does not restrict the appellant to apply for leave to appeal out of time.

After giving dispassionate consideration to the rival arguments of both sides in this appeal, we are of the considered view that the learned High Court judge did not err in reaching the decision, the subject of this appeal.

As correctly pointed out by Mr. Kiria, in terms of Section 359(1) of the Criminal Procedure Act, Chapter 20 R.E. 2002, the appellant was supposed to file an appeal instead of filing a revision application.

Section 359(1) of the Criminal Procedure Act provides that:-

“ Save as hereinafter provided, any person aggrieved by any finding, sentence or order made or passed by a subordinate court other than a subordinate court exercising its extended powers by virtue of an order made under Section 173 of this Act may appeal to the High Court and the subordinate court shall at the time when such finding, sentence or order is made or passed, inform that person of the period of time within which if he wishes to appeal, he is required to give notice of his intention to appeal and to lodge his petition of appeal”.

We are of the considered opinion that the appellant followed the wrong track in submitting his grievances. With respect, we think that the appellant should have filed an application for an extension of time to file his appeal and not a revision application. Furthermore, even his affidavit in support of the revision application by itself was incurably defective for being in contravention of the mandatory provisions of Section 8 of the Notaries Public and Commissioners for Oaths Act, Chapter 12 of the Law of Tanzania which reads as follows:-

“Every notary public and commissioner for Oaths before whom any oath or affidavit is taken or made under this Act **shall** state truly in the jurat of attestation **at what place** and on what date the oath or affidavit is taken or made”.

(Emphasis added).

Truly, the jurat of attestation in the affidavit in support of the revision application did not show the place where the affidavit was

sworn. We think that was contrary to the mandatory provisions of Section 8 of the Notary Public and Commissioner for Oaths Act. The said affidavit also lacked the signature of the Commissioner for Oaths. With respect, we think Mr. Kiria was correct when he said that there was no affidavit before the Court. See, for instance, **Ashura Abdulkadri versus The Director of Tilapia Hotel** (supra).

In the event, we are of the considered view that the appellant's move to file a revision application instead of an appeal before the High Court was a misconceived idea, and improper. He was supposed to file an appeal. However, for being out of time, we think the appellant, if he so wishes, can still file an application for extension of time to file his appeal before the High Court.

In the event, the appeal is dismissed.

DATED at MWANZA this 24th day of April, 2008.

J.H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




S.M. RUMANYIKA
DEPUTY REGISTRAR
COURT OF APPEAL