IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUNUO, J.A., LUANDA, J.A., And MJASIRI, J.A.

CRIMINAL APPEAL NO. 76 OF 2007

MAGWILA MWASHELA.. ..... APPELLANT
VERSUS
THE REPUBLIC..... .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mrema, J.)

Dated the 13th day of July, 2005
in
Misc. Criminal Application No. 70 of 2001

RULING OF THE COURT

12TH & 21st July, 2010

LUANDA, J.A.:

In view of the course we decided to take, we will not discuss and dispose this appeal on merits, hence this Ruling. We will explain.

In the District Court of Mbozi sitting at Vwawa, the appellant was convicted and sentenced to 30 years imprisonment and 12 strokes of the cane for armed robbery. After a period of more than

four years from the finding of the District Court, the appellant lodged a "Chamber Application" supported by an affidavit in the High Court of Tanzania at Mbeya in Miscellaneous Criminal Application No. 7 of 2001 for an extension of time to enable him file his appeal out of time. It is not shown whether he had already lodged his notice of intention to appeal as mandated by section 361 (a) of the Criminal Procedure Act, Cap. 20. Be that as it may, the "Chamber Application" did not cite any enabling provision of the law from which the High Court derived the power to determine the application. In view of the foregoing, we invited Mr. Jason Kaishozi learned Senior State Attorney for the respondent to address us on the competency or otherwise of the appeal as we were of the view that the matter before us was incompetent.

Mr. Kashozi informed us that the learned High Court Judge who heard the application misdirected himself in that instead of deciding the application for extension of time, as presented, he re-evaluated the evidence and came to a conclusion that the appellant was properly convicted. Furthermore, he went on to say that the High

Court was not properly moved as no enabling provision of the law was cited. To buttress up his argument he referred us to the decision of this Court in **Citibank Tanzania Ltd, Tanzania Telecommunications Company Ltd and Four others Civil Application No. 65/2003 CAT (unreported)** where the Court held that a Court is properly moved under proper citation of the law.

It is his submission that since the High Court was not properly moved, he urged us to quash and set aside the High Court proceedings as they are a nullity and strike out the appeal before us. This being a legal issue, the appellant had nothing useful to say.

We have carefully considered Mr. Kaishozi's submission. We shall first consider that of non citation of the law.

As earlier observed the appellant did not cite any provision of the law from which the High Court derived its power to hear the application. In the opening paragraph in his ruling, the learned High Court Judge said, we quote:-

> "This is an application for leave to file [an] appeal out of time. But the application, although it is backed up by the deponent's affidavit hereinafter referred to as the Applicant, **is not indicated as under what law the same is based.**"
>
> (Emphasis supplied.)

It is crystal clear that the appellant did not cite any enabling provision of the law from which the High Court derived its power. As the appellant did not cite any law the question now is: what is the consequence of such failure?

In **Citibank** case cited *supra,* the Bank intended to move the Court under Rule 9 (2) (b) of the Court of Appeal Rules, 1979 for the issuance of an order for stay of execution pending hearing of revisional proceedings. The powers of stay of execution under the aforestated Rule are only exercisable where there is a pending appeal after the lodgement of the notice of appeal. As that was not the applicable Rule, the Court held, *inter alia,* we reproduce:-

> "In the instant case, as already shown, the Court was not properly moved by citation of inapplicable rule. It follows therefore that the application was incompetent."

There is a chain of authorities to the effect that non citation or wrong citation renders the matter before the Court incompetent and is liable to be struck out. **(See NBC. V. Sadrudin Meghji, Civil Application No. 20 of 1997; Interter East Africa V. B & S International** Civil Appeal No. 46 of 1997 **China Henan International Co-Operation Group V. Salvand K. A. Rwegasira** Civil Reference No. 22 of 2005 (all unreported)). Though the principle emanates from civil proceedings, the same is applicable to criminal proceedings as well.

In the instant case, the learned High Court Judge ought not to have entertained the application. With respect, we agree with Mr. Kaishozi that the application before the High Court was incompetent for non citation of the enabling law.

Exercising our revisional powers as they are provided under S. 4 (2) of the Appellate Jurisdiction Act, Cap. 141 the proceedings of the High Court are hereby quashed and orders made therein set aside. In view of the above order, obviously the question of misdirection on the part of the learned judge does not arise.

As regards the purported appeal, the same is struck out under Rule 4 (2) (a) of the Court Rules, 2009. The appellant is at liberty to start afresh his application for leave to appeal out of time in the High Court.

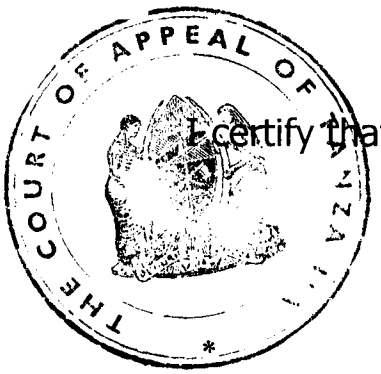
Order accordingly.

DATED at MBEYA this 15th day of July, 2010.

E. N. MUNUO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL



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

I. P. Kitusi
SENIOR DEPUTY REGISTRAR