IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

CRIMINAL APPLICATION NO. 5 OF 2014

DUDA DUNGALI.....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for extension of time from the decision of the Court of Appeal of Tanzania at Mbeya)

(Bwana, J.A.)

dated the 5th day of May, 2014
in
Criminal Application No. 4 of 2013

RULING

21st & 24th August, 2015

MASSATI, J.A.:

The applicant was charged and convicted of the offence of rape contrary to section 130 of the Penal Code, by the District Court of Mbeya. He unsuccessfully appealed to the High Court, and finally to this Court which dismissed his appeal on 5th May, 2005. On 28th December 2012, he lodged an application in this Court under Rule 10 of the Court of Appeal Rules 2009 (the Rules) for extension of time, in which to file an application for review. That application was heard by Bwana, J.A., and dismissed on 9th May, 2014. Aggrieved, the applicant now intends to have his application determined by

the full Court, and has filed this present application for extension of time to file a reference against that decision.

The notice of motion is made under Rules 4(1) 48(2) 10, 62(1) (a) and 66(1) of the Rules, and supported by the applicant's affidavit. No grounds are set out in the notice of motion as demanded by Rule 48(1), but he may have given that ground in paragraph 3 of his affidavit, which is reproduced: -

> *"3. That I applied an application No. 4 of 2013 for extension of time within which to lodge an application for review out of time, but on the hearing of the said application Hon. Bwana J.A. dismissed the application for weak reasons while the applicant explained good reasons which caused him to delay to lodge an application for review within sixty days allowed by the law."*

The applicant has also annexed several documents Exh. 1 to 6 to his application.

The application was resisted by the respondent/Republic which was represented by Ms Lugano Mwakilasa, learned Senior State Attorney. She did not deem it fit to file an affidavit in reply, but instead filed a notice of preliminary objection to the effect that: -

> *"The application is incompetent for citation of the wrong enabling provisions of the law."*

At the hearing of the application, the applicant appeared in person. Ms. Mwakilasa submitted that the application was bad in law for wrong citation of enabling provisions, some of which, like Rules 62(1) and 66(1) cannot be invoked by a single justice. So the Court has no jurisdiction to determine this application, she argued. She thus urged me to strike it out on an account of incompetency due to the defect. In support she referred me to the decision of the Court in **DPP v ACP ABDALLAH ZOMBE & 12 OTHERS** Criminal Appeal No. 254 of 2005 (unreported). As expected, the applicant had nothing useful to say in response. He simply prayed that his application be heard, as he has been in custody for too long.

I am not quite sure why the learned Senior State Attorney, refered to me the decision in **ACP ABDALLAH ZOMBE's** case, because she did not refer to me any specific relevant passage in the ruling of the Court. I could

only guess that perhaps she meant to refer to a paragraph on page 10 of the Ruling, which reads: -

> *"Incompetence of proceedings takes my forms. It may arise out of the proceedings being time barred; being wrongly instituted, being instituted in the wrong Court or forum, a competent court being wrongly moved, citing a wrong number of the case in which the challenged decision emanates, etc."*

If that is the passage she intended to refer to, together with her submissions in Court, I must take her to mean that by citing a multiple of Rules, the applicant has wrongly moved the Court, for extension of time.

Rule 48(1) of the Rules, requires an applicant to cite an enabling rule under which the notice of motion is based. The general rule governing this Court's powers to extend time is Rule 10. This Rule is cited in the present application. The time line for presenting a reference is set out in Rule 62(1) (a) which is also cited in this application. These two provisions are sufficient to clothe me with jurisdiction to hear the application. The citing of Rule 4(1) and 66(1) (a) which are irrelevant and/or a mere superfluity, does not oust this Court's jurisdiction to hear and determine an application under Rules 10

and 62(1) (a) of the Rules. So, in my opinion, the superfluous citation of the Rules is harmless, particularly so, as the respondent did not say how she was prejudiced thereby.

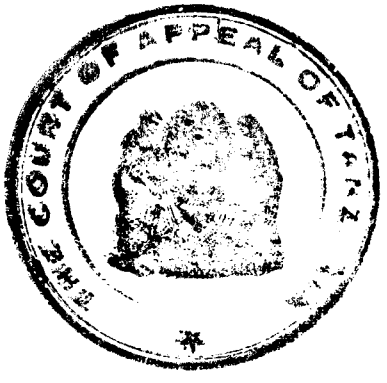
I therefore find that the preliminary objection is devoid of substance, and I accordingly dismiss it. The application shall be set down for hearing on merit on a date to be fixed by the Registrar.

Order accordingly.

DATED at **MBEYA** this 21st day of August, 2015.

S. A. MASSATI
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL