

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

**MISC. CRIMINAL APPLICATION NO. 1 OF 2014**

**(CORAM: KIMARO, J.A., MMILLA, J.A., And MZIRAY, J.A.)**

**VICENT DAMIAN ..... APPELLANT  
VERSUS**

**THE REPUBLIC ..... RESPONDENT  
(Application from the decision and Order of the Court of Appeal of  
Tanzania at Arusha)**

**(Hon. Kimaro, JA, Luanda, JA, And Mmilla, JA.)**

**dated the 25<sup>th</sup> day of November, 2013  
in**

**Criminal Appeal No. 16 of 2009**

**RULING OF THE COURT**

16<sup>th</sup> & 20<sup>th</sup> May, 2016

**MMILLA, J. A.:**

In 2008 the applicant, Vicent Damian, was arraigned before the High Court of Tanzania at Moshi for the offence of incest by males contrary to section 158 (1) of the Penal Code Cap. 16 of the Revised Edition, 2002 **(the PC)**. He was tried, convicted and sentenced to a term of 30 years imprisonment. Dissatisfied, he appealed to the Court, but his appeal was dismissed. He has now instituted the present application which is founded under Articles 13 (6) and 117 (1) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time **(the**

**Constitution**), and Rules 4 (2) (a), (b) and 66 (1) (c) of the Tanzania Court of Appeal Rules, 2009 (**the Rules**). We gather from the grounds raised that seeking two prayers; **one** that the Court makes an order to refer his case to the Full Bench of the Court for determination; and **two** that it reviews its previous decision in Criminal Appeal No. 16 of 2009. The application is supported by an affidavit sworn by him. According to the notice of motion, the applicant states follows:-

- “(a) That, the Honorable court be pleased to make and issue an order to refer (his case) to the Full Bench of the Court for it to decide which is the correct position of the law between the applicant and the respondent especially when taking into consideration that;
- (b) The Honorable justice of appeal and their Lordship the justice of appeal (sic) erred in law and fact for failing to note that the Republic did not give to the applicant the defence Advocate as long as at the hearing at when (sic) they gave to him Mr. Lumambo, learned advocate.
- (c) That, the Honorable justice of appeal and their Lordship the justice of appeal (sic) erred both in law and fact for failing to note that the legal right was oppressed (sic), the said incident took place on

3/6/1999 but the trial was conducted on October, 2008 (more than nine years latter).

- (d) That, the Honorable justice of appeal and their Lordship the justice of appeal (sic) erred both in law and fact for holding and making findings to convict the appellant through the weakness of the defense rather than prosecution evidence.
- (e) Unless conclusively resolved by the full bench of the court the decision of the highest court in the land bring about uncertainly and prejudice the smooth and effective administration of the justice in the country.”

Before us the applicant appeared in person and was not defended. He requested the Court to adopt the grounds he raised. Also, he contended that at the level of the High Court, he was defended by an advocate one Lumambo at government expenses. He wondered why such right was not extended to him during the hearing of his appeal by this Court.

On the other hand Ms Sabina Silayo, learned Senior State Attorney, appeared for the respondent Republic. She opposed the application for two reasons; one that this Court has no mandate to refer the applicant’s case to the Full Bench of the Court; two that even considering that he is seeking

for review, that again is misconceived because the grounds he raised are in essence grounds of appeal, therefore contrary to what is contemplated under Rule 66 (1) of the Rules. She urged the Court to dismiss this application.

We desire to begin with the first ground that requires us to refer his case to the Full Bench of the Court. We have traversed the provisions of laws cited by the applicant. We have found out that none of them confer us mandate to refer his case to the Full Bench of the Court. While Article 13 (6) of the Constitution enact for the right to be heard, Article 117(1) refers to the powers of the Court of Appeal generally. On the other hand, while Rule 4 (2) may be invoked by the Court for better meeting the ends of justice, Rule 66 (1) provides the Court power to review its own judgment on the grounds stated thereunder. Thus, these provisions do not confer power to the Court to refer the case to the Full Bench of the Court.

Apart from what we have just stated, we have also satisfied ourselves that, in a proper case, we would have been *functus officio* to perform what he required us to do. The law is clear that once a decision has been reached and made known to the parties, the **adjudicating court** thereby becomes *functus officio*. See case of **Kamundu v.**

**Republic** [1973] E.A. 540 in which the Eastern Africa Court of Appeal held that:-

*"A Court becomes functus officio when it disposes of a case by a verdict of guilty or by passing sentence or making some orders finally disposing of the case."*

In the present matter therefore, since we had made a decision in respect of the applicant's case, we would, as aforesaid, have no jurisdiction to make an order to send the case to the Full Bench of the Court. Thus, his request is misconceived. It is accordingly rejected.

As regards grounds in paragraphs (c) (d) and (e) which we have reproduced at page 2 of this ruling, we share the concern of Ms. Silayo that those grounds are nothing but grounds of appeal essentially calling upon the Court to re-visit and re-determine the sufficiency and weight of the evidence on which his conviction was grounded – See the case of **Ngasa s/o Nhabi v. Republic**, Criminal Application No.2 of 2014. Thus, we dismiss those grounds.

However, in our view ground (b) refers to the right to be represented by advocate or rather fair hearing. It is analogous to the right to be heard, thus in conformity with the grounds spelt out under Rule 66 (1) of the

Rules (we have reproduced that ground on page 2 of this ruling). Rule 66 (1) (b) of the Rules is to the effect that review may be conserved by the Court where a party was wrongly deprived of an opportunity to be heard.

The right to be fairly heard is not only one of the basic principles of natural justice, but is also a constitutional right. We have in mind the provisions of Article 13 (6) (a) of the Constitution which provides that:-

*"To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*

- (a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to **a fair hearing** and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."*

[Emphasis is provided].

See also the case of **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251.

There is no doubt that the right to be represented by an advocate is amongst those which may be interpreted to fit in the provision of the just quoted Article. The right to be represented by an advocate is provided under section 310 of the CPA. It states that:-

*"Any person, accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court **subject to the provisions of any written law relating to the provision of professional services by advocate.**"*

[Emphasis provided]

In our opinion, section 3 of the Legal Aid (Criminal Proceedings) Act Cap. 21 of the Revised Edition, 2002 is one such other laws contemplated by the above quoted section of the Criminal Procedure Act **(The CPC)**. That section provides that:-

*"Where in any proceeding it appears to the certifying authority that it is desirable, in the interests of justice, that an accused should have legal aid in the preparation and conduct of his defence or appeal, as the case may be, and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have such legal aid and upon such certificate being issued the Registrar shall, where it is practicable so to do, assign to the accused an advocate for the purpose of the preparation and conduct of his defence or appeal, as the case may be."*

In our case, the applicant's major complaint is that the District Registrar (now the Deputy Registrar) had satisfied himself that he was

qualified to be provided services of an advocate on government expenses during the trial in the High Court, and it assigned Mr. Lumambo, learned advocate, to defend him. This is the foundation of his contention now that he ought to have similarly been provided such services, again on government expenses, during the hearing of his appeal by the Court. Unfortunately, Ms. Silayo did not specifically respond to this point.

We have seriously deliberated on this point. We think that the applicant cannot be validly faulted on the point because the reason why he was provided an advocate at the High Court level applied also when his appeal was heard by the Court. We think that after his election to appeal as it were, the District Registrar (Deputy Registrar) of the High Court at Moshi ought to have, in terms of section 3 of the Legal Aid Act, provided him with an advocate. Even, we cannot avoid noting that the Court ought to have noticed that omission during the hearing of his appeal. Since that was not done, it is obvious that the applicant was not afforded adequate opportunity to prosecute his appeal, hence our finding that this ground has merit.

In consequence of what we have just said, we vacate the judgment of the Court dated 27.11.2013 and direct that the Deputy Registrar of



him opportunity to be represented, if possible.

We order accordingly.

**DATED** at **ARUSHA** this 19<sup>th</sup> day of May, 2016.

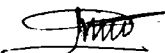
N. P. KIMARO  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

R. E. MZIRAY  
**JUSTICE OF APPEAL**

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



  
P. W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**