

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

(CORAM: LUANDA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CRIMINAL APPLICATION NO. 1 OF 2012

**JAMAL MSITIRI @ CHAIJABA APPLICANT
VERSUS
THE REPUBLIC RESPONDENT**

**(Application for Review from the Decision of the Court of Appeal of Tanzania at
Tanga)**

(Rutakangwa, J.A., Kimaro, J.A., And Mandia, J.A)

dated 6th day of July 2015

in

Criminal Appeal No. 102 of 2010

RULING OF THE COURT

4th & 10th July 2017

NDIKA J.A.:

Jamal Msitiri @ Chaijaba, the applicant herein, stood charged before the District Court of Lushoto at Lushoto with the offence of armed robbery contrary to the provisions of section 287A of the Penal Code, Cap. 16 RE 2002. He was convicted of the aforesaid offence and sentenced to thirty years imprisonment with twelve strokes of the cane. Besides, he was ordered to pay TZS. 800,000.00 as compensation to the victim of the crime. His first appeal against the aforesaid conviction and sentence was dismissed by the High Court sitting at Tanga. He was also unsuccessful in his further appeal, which this Court dismissed in its entirety in its judgment dated 9th July 2012.

Undeterred, the applicant lodged this application under rule 66 (1) (a), (b) and (c) of the Tanzania Court of Appeal Rules, 2009 (“the Rules”) seeking review of the aforesaid decision. The application is supported by the applicant’s affidavit made on 14th August 2012, in terms of rule 48 (1) of the Rules.

At the hearing of the application, the Court had to deal with a preliminary objection on which the respondent Republic had duly lodged a notice under rule 4 (2) (a) of the Rules. The said objection was:

“That the affidavit in support of this application is incurably defective for contravening the provisions of section 8 of the Notaries Public and Commissioners for Oaths Act [CAP. 12 R.E. 2002]”

In arguing the above point, Ms. Rebecca Msalangi, learned State Attorney, appearing for the respondent, assailed the supporting affidavit on the account that its jurat of attestation contains no statement of the place at which the affidavit was made. The omitted statement, she said, was a mandatory requirement of section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12 RE 2002.

With leave of the Court, Ms. Msalangi further attacked the supporting affidavit on the ground that its verification clause does not contain a specific confirmation of the authenticity and source of each of the paragraphed depositions made therein.

Accordingly, the learned State Attorney prayed that the supporting affidavit be struck out along with the notice of motion whose legal existence is depended upon being anchored on an unblemished affidavit. To buttress her argument, Ms. Msalangi relied upon two unreported decisions of this Court: **Simplisius Felix Kijuu Issaka v The National Bank of Commerce Limited**, Civil Application No. 24 of 2003 and **Ashura Abdulkadri v The Director Tilapia Hotel**, MZA Civil Application No. 2 of 2005. She placed further reliance upon **Wananchi Marine Products (T) Ltd v Owners of Motor Vessels**, High Court of Tanzania, Dar Es Salaam District Registry, Civil Case No. 123 of 96 (unreported).

Replying, the applicant supposedly acknowledged the flaws raised by the learned State Attorney but cast the blame to the prison authorities who drew up the said affidavit and arranged for its attestation before a Resident Magistrate at Tanga as Commissioner for Oaths. He prayed for the Court's

indulgence, saying that he ought not be censured for an error he did not commit himself.

Before we determine the objection, we think that it is instructive that we reproduce hereunder the contents of the impugned affidavit:

**“ THE UNITED REPUBLIC OF TANZANIA
IN THE COURT OF APPEAL OF (T) AT D’SALAAM
MISC. CRIMINAL APPLICATION OF (T) AT TANGA
CRIMINAL INTENDED APPEAL NO. 102’2010**

BETWEEN

JAMAL MSITIRI @ CHAIJABA APPLICANT

V/S

THE REPUBLIC RESPONDENT

AFFIDAVIT

**IN THE MATTER OF APPLICATION FOR REVIEW OF
JUDGMENT (MADE UNDER RULE 66 OF THE COURT
OF APPEAL RULES, 2009)**

I the applicant, adult, Tanzanian and convict of maweni Central Prison, Tanga do hereby make oath and state as follows:

- 1. That I am conversant with all the facts of the offence I stood charged with. I was charged with and convicted of armed robbery and sentenced to a term of thirty (30) years imprisonment in the District Court of Lushoto.*
- 2. That my appeal to the High Court of (T) at Tanga was dismissed.*
- 3. Further that I decided to appeal to the Court of Appeal of Tanzania whereby the Court of Appeal of Tanga (sic!) dismissed my appeal against conviction and upheld the sentence of thirty (30) years imprisonment.*
- 4. That I am preparing this application seeking for a permission of my NOTICE OF MOTION for review to be*

granted on the ground that the Court's decision was with some irregularities on the matters of law.

VERIFICATION

I the applicant in the name of Jamal Msitiri do solemnly and sincerely declare that the above information of application for review of judgment is mine. And that I the applicant make this declaration conscientiously believing the same to be true and in accordance with the provisions of the Oaths and Statutory Declarations Act, Cap. 34 RE 2002.

(Thumbprint)

**CONV. NO. 687'2008 JAMAL MSITIRI –
APPLICANT**

CERTIFICATION

This declaration is made and subscribed by the application (sic!) himself who has been identified to me by the Officer in Charge, Maweni Central Prison the latter being known to be personally this 4th day of September the year 2012.

Before me: M. Nason

Qualification: RM

Address: 97, Tanga.

(sgd and rubber stamp affixed)

COMMISSIONER FOR OATHS"

The discernible question before us is whether the affidavit as reproduced above is valid or not.

We find it convenient to state that the position of the law on what is a valid affidavit is fairly settled. For example, in **The Director of Public Prosecutions v Dodoli Kapufi and Patson Tusalile**, Criminal Appeal No. 11 of 2008 (unreported), this Court stated that:

"The essential ingredients of any valid affidavit, therefore, have always been:-

- (i) the statement or declaration of facts, etc, by the deponent;*
- (ii) a verification clause;*
- (iii) a jurat; and,*
- (iv) the signatures of the deponent and the person who in law is authorized either to administer the oath or to accept the affirmation."*

Of the above-enumerated elements, the jurat of attestation and verification clause are relevant to this matter. The jurat of attestation is a certification added to an affidavit or deposition stating when, where and before what authority the affidavit was made. In that respect, section 8 of Cap. 12 (supra) states 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]

We would also wish to underscore that section 10 of the Oaths and Statutory Declarations Act, Cap. 34 RE 2002, is relevant in attestation of an affidavit. It provides, in mandatory terms, the form that statutory declarations (including affidavits) must take. Such declarations must be in the form prescribed in the Schedule to Cap. 34 (supra). The aforesaid Schedule specifically directs that the Commissioner for Oaths must indicate in the declaration either to have known the deponent personally or the deponent before him must have been identified to him by a person known to him personally.

As regards the verification, it is a clause in the affidavit that shows the facts the deponent asserts to be true of his own knowledge and/or those based on information or beliefs. In other words, it shows the source of each of the facts deposed in the affidavit. It is legally accepted practice that the verification clause must be signed and dated separately by the deponent.

The consequences of non-compliance with section 8 of Cap. 12 (supra) are dire. As held in **Dodoli Kapufi** (supra):

"Total absence of the jurat, or omission to show the date and place where the oath was administered or the affirmation taken, or the name of the authority and/or the

signature of the deponent against the jurat, renders the affidavit incurably defective.”

The same position was taken, for example, in **D.P. Shapriya & Co. Ltd v Bish International BV** [2002] E.A 47; **Zuberi Musa v Shinyanga Town Council**, Civil Application No. 100 of 2004 (unreported); **Wengert Windrose Safari (T) Limited, and Two Others v Biduga And Company Limited and Another**, Civil Appeal No. 39 Of 2000 (unreported) and **Paul Makaranga v The Republic**, MZA Criminal Application No. 3 of 2010 (unreported).

The same ominous consequences would arise if an affidavit lacks verification or if the verification provided is unsigned by the deponent or undated or if such verification suffers from failure to specifically authenticate the deposed facts whether they are true of the deponent’s own knowledge and or they are based on information or beliefs. [See, for example, **Paul Makaranga** (supra); and **Wananchi Marine Products (T) Ltd** (supra)].

Having examined the impugned affidavit in light of the position of the law as we have elucidated, we are satisfied that the aforesaid affidavit is incurably defective. First and foremost, although the jurat of attestation shows that attesting officer (whose name is indicated as M. Nason, Resident

Magistrate) signed the affidavit on 4th September 2012, the place at which he did so is evidently omitted. That is not all. The deponent, who was supposed to have appended his signature before the attesting officer, did not do so. Secondly, the affidavit is also anomalous that the name of the person who purportedly identified the applicant as deponent to the attesting officer was omitted. We have no doubt that the identification of that person only by his official designation as "the Officer in Charge, Maweni Central Prison" was legally insufficient. Thirdly, what is provided in the impugned affidavit as a "verification clause" and signed by the applicant as deponent is materially deficient. That is so because it does not specifically authenticate the facts deposed in the affidavit as to whether they were true of the deponent's own knowledge and or whether they were based on information received and believed to be true.

At this point, we find it necessary to recall that the applicant prayed for the indulgence of the Court, saying that he ought not be censured for the defects in the affidavit, because it was the creation of the prison authorities, not him. He may have had the temerity to disclaim authorship of that document, but it remains undoubted that the prison authorities acted for and on his behalf. We would, then, simply say on his plea that the law governing

affidavits, as we have summarized earlier, leaves no room for concessions or exemptions. We are, therefore, constrained to apply it as it is.

In the final analysis, we sustain the preliminary objection that the affidavit is incurably defective and proceed to strike it out. In the absence of any supporting affidavit required by rule 48 (1) of the Rules, the notice of motion is rendered incompetent. The application for review is consequently struck out.

DATED at **TANGA** this 6th day of July 2017.

B.M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL