IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MGONYA, J.A.)

CRIMINAL APPLICATION NO. 37/01 OF 2021

REMMY GERALD SIPUKA ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for Review of the Judgment of the Court of Appeal of Tanzania, at Dar es Salaam)

(Lila, Mwandambo, Kerefu, JJJA.)

dated 23rd day of July, 2021

in

Criminal Appeal No. 67 of 2019

.....

RULING OF THE COURT

7th May, & 21st June, 2024

LILA, JA:

This application invites the Court to pronounce itself on, among other issues, two pertinent novel issues. **One**, whether after the applicant has withdrawn all his grounds of review in his written arguments he can substitute them with another ground without affecting the competence of the application and, **two**; whether the issue of jurisdiction of the trial court can be raised for the first time even at the stage of an application for review.

Before the Court is an application for review. Remmy Gerald Sipuka, the applicant, is before this Court seeking review of the Court's decision

in Criminal Appeal No. 67 of 2017. He failed in that appeal in which he challenged his conviction by the High Court of Tanzania (Corruption and Economic Crimes Division) at Dar es Salaam of the offence of trafficking in narcotic drugs contrary to section 15(1)(b) of the Drugs Control and Enforcement Act, No. 5 of 2015 The DCEA read together with paragraph 23 of the First Schedule to the Economic and Organized Crime Control Act as amended by the Written Laws (Miscellaneous Amendments) Act, No 3 of 2016 (the EOCCA). Consequent upon his conviction, he was sentenced to life imprisonment.

For a reason to be disclosed a little latter, this brief background has a crucial bearing in the course we shall take in the determination of this application. Initially, on 22/9/2021, the applicant moved the Court by way of a notice of motion predicated upon section 4(4) of the Appellate Jurisdiction Act (the AJA) and rule 66(1)(a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) supported by his own sworn affidavit. The application was characterised with two grounds; the first ground being split into four points. Being not relevant in the determination of this application, we desist from reciting them.

Sometime on 3/5/2024 and before the application was scheduled for hearing, the applicant lodged in Court written submission in support of his application. Thereon, the applicant expressly stated that: -

> *"Applicant has opted to abandon all the grounds for review in the notice of motion is hereunder introducing his new ground in which is seeking to incorporate the ground premised under rule 66(1)(d) of the Court of Appeal Rules, 2019 as amended:*
>
> *"The court had no jurisdiction to entertain the case"*

The above remained to be the situation as of the date the matter was placed before us for hearing on 7/5/2024.

Mr. Nkoko, learned advocate, represented the applicant at the hearing of the application before us whereas, Ms. Nura Manja, Mr. Clement Masau and Ms. Eva Kassa, all learned State Attorneys, teamed up to represent the respondent, Republic. They stoutly resisted the application.

As hinted above, the applicant had lodged written arguments which Mr. Nkoko sought leave of the Court to adopt them together with the contents of the supporting affidavit as part of his submissions. He added that, central to the applicant's application is an argument that the

applicant's trial of an economic offence proceeded without a consent from the Director of Public Prosecutions (the DPP) in terms of section 26 of the EOCCA which vests jurisdiction to subordinate courts with jurisdiction to try such offence. It was his view that had the Court sitting on appeal from the High Court in Criminal Appeal No. 67 of 2019 appreciated that infraction, it would have found that the applicant's conviction was illegal, allowed his appeal after declaring the trial court proceedings and the judgment were a nullity. Closely examined, these arguments represent the gist of the applicant's arguments albeit the written arguments covering seven typed pages.

Responding to the Court's concern whether that issue was raised before the High Court and on first appeal before the Court, canvassed and determined, Mr. Nkonko readily conceded that it was not but, relying on cases cited in the applicant's written arguments; **Richard Julius Rukambura vs Isaack Ntwa Mwakajila and Tanzania Railway Corporation**, Civil Appeal No. 2 of 1998 (unreported) and **Fanuel Mantiri Mgunda vs Herman Mantiri Ng'unda and 2 Others**, [1995] T.L.R. 155, was quick to argue that the question of jurisdiction can be raised at any stage of the proceedings, even in a review application. Even after the Court had drawn his attention to the provisions of section 4(4) of the Appellate Jurisdiction Act (the AJA) and rule 66(1) of the Rules

which underscore the position that this Court can review its own decisions, Mr. Nkoko maintained his stance stressing that jurisdiction is the root of the authority of the court to adjudicate upon cases. Moving further, he submitted that, in rare and exceptional circumstances or situations like the present one, this Court can travel beyond its decision and examine the proceedings of the trial court if they were legally conducted. If this is done, he further argued, the Court will realise that no consent from the DPP was issued so as to vest jurisdiction to the trial court hence its proceedings were a nullity, the same also being the case with the appeal proceedings entertained by the Court as it arose from a nullity. He was equally forceful in his arguments that the provisions of rule 66(1)(d) of the Rules refers to the "court" meaning the trial court and not the Court of Appeal which uses an acronym "the Court".

The Court still wished to satisfy itself, from Mr. Nkoko, as to what will the fate of the applicant's application after withdrawing his grounds in his written arguments he had raised in the notice of motion and elaborated in its supporting affidavit and substituting them with the sole and novel ground cited above. In response, Mr. Nkoko admitted that no amendment to the notice of motion and supporting affidavit was done by the applicant to accommodate the new ground, but he referred the Court to the above quoted phrase in the applicant's written arguments

withdrawing the former grounds of review arguing that it amounted to amending his notice of motion. Further responding to a follow-up question by the Court whether the procedure adopted was proper and whether the new ground finds any support from the supporting affidavit, he was not hesitant to concede to the anomaly but urged the Court to consider that the applicant is a layperson and is in prison without any legal assistance. He invited the Court to invoke the principle of overriding objective so as to relax the rules to rescue the applicant's application.

Ms. Manja took the floor to resist the application on behalf of the respondent Republic. She was quite clear and brief. Beginning with the Court's concern on tenability of the application after the applicant had withdrawn his former grounds, she argued that the new ground stood alone without a notice of motion and a supporting affidavit randering it incompetent in view of the provisions of the Rules which require an application be by way of a notice of motion supported by an affidavit. Going further, she argued that, if the applicant wished to amend his grounds of review, he ought to have done so by lodging a formal application. Having not done so, she moved the Court to dismiss the application for being incompetent. Unfortunately, she could not cite any rule to the Court any relevant rule or case decision to that effect.

Responding to Mr. Nkoko's arguments on the merit of the application assuming that it is properly before the Court, she firmly asserted that rule 66(1) of the Rules is limited in scope and does not suggest that, in exercising power of review, the Court is permitted to consider any other document apart from the decision sought to be reviewed. Since the issue of jurisdiction of the trial court was not canvassed before the trial High Court, she insisted, a ground on its respect is novel and cannot be entertained in a review lest the Court be indulging itself with the review of the lower court's documents and proceedings which is not within the purview of review powers of the Court. Otherwise, she was firm that the new ground calls the Court to sit on another appeal as it raises an issue which ought to have been raised in Criminal Appeal No. 67 of 2019. Yet again, the learned State Attorney did not refer to us any rule, law or case decision supporting her views despite the fact that she filed an affidavit in reply and a list of authorities ahead of the date set for hearing of the application consistent with rule 34(1) of the Rules.

We also overhead the learned State Attorney as having suggested that section 26 and 12 of EOCCA should be read together in determining the jurisdiction of a court to try an economic case (competence of the case) and as the trial court found nothing affecting the competence of the

case before it when trying the case, then the matter before it was competent. Finally, she beseeched the Court to dismiss the application.

Besides reiterating his earlier arguments and, in a way, seeking indulgence of the Court on the matter, Mr. Nkoko rested his case.

In our deliberation, we shall start with the competence of the application. As intimated above, before the Court is a formal application for review which, like all other formal applications to the Court under the Rules, are governed by Rule 48(1) of the Rules which imperatively requires it to be made by way of a notice of motion supported by affidavit stating the ground for the relief sought. In terms of Rule 49(1) of the Rules, it is a mandatory requirement that every formal application to the Court must be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts. Affidavits are meant to provide an elaboration of the nature of the application and basis for granting the reliefs sought. Underscoring on the essence of affidavits, in **Zuberi Mussa vs Shinyanga Town Council**, Civil Application No. 100 of 2004, the Court stated that: -

> *"The function of stating the grounds and supplying affidavits is common knowledge. It reduces the amount of time to be spent and costs by taking the place of oral evidence. On the basis of the*

affidavit (counter-affidavits inclusive) the rights of the parties can be conclusively determined beyond any reproach..."

In the light of the above, we are unhesitatingly of the firm view that grounds of review must be stated in the notice of motion and be elaborated in the supporting affidavit. It is for this reason that the Court takes a relaxed position where grounds are not stated in the notice of motion but stated in the supporting affidavit holding that in such circumstances, the grounds for an application may be deduced from the supporting affidavit as we stated in the unreported Criminal Application No. 3 of 2012 between **Gibson Madege and the Republic** that: -

"All the same, contrary to the mandatory requirements of Rule 48(1) and (2) of the Rules, which rule the Court held in Civil Application No. 60 of 1998 between ***Masumbuko R.M. Lamwai and Venance F. Ngula & the A.G.*** *(unreported), (in relation to the then identical Rule 45 of the 1979 Court Rules) to be "vital and go to the root of the matter", the notice of motion does not state the ground or grounds for the relief or orders being sought. Nevertheless, the Court held in the above cited case that such an omission would be held to be fatal only if the supporting affidavit does not disclose that ground or those grounds."*

Having so chosen to formally move the Court, the applicant was duty bound to include, as a ground for review, the new ground in the notice of motion or, at the least, elaborate it in the supporting affidavit instead of raising it in the written arguments. Otherwise, and this being the most appropriate move, the applicant would have opted to amend the application in terms of rule 50(1) of the Rules which permits amendment of any document in the application.

In this application, Mr. Nkoko readily conceded that no application to amend the application was sought and granted but urged the Court to take the words of the applicant in the written argument to have so moved the Court. In the light of the explained legal position such an argument is misplaced. That said, we hold that no ground for review remained for the Court's consideration after the applicant had abandoned the grounds of appeal stated in the notice of motion rendering the application incompetent for the simple reason that, in terms of rule 48(1) of the Rules, an application not stating grounds for the relief sought and not accompanied with a supporting affidavit, is no application at all. Accordingly, the purported application, ought to be strike out.

The above finding would have ordinarily marked the end of our deliberation, but being a novel argument which begs for the Court's

guidance, we think we should move to discuss the second issue for that purpose only. In the first place, we agree with Mr. Nkoko that in a plethora of Court's decisions, the Court has pronounced itself that the issue of jurisdiction is paramount going to the root of the authority of the court to adjudicate cases placed before it and may be raised at any stage, the cases cited by the applicant being among them. Did this mean that even at this review stage such issue of jurisdiction of the trial court may be raised for the first time? This is the question we are asked to provide an answer here.

We do not think Mr. Nkoko was right in his assertion. First, the Court is strictly enjoined in rule 66(1) of the Rules, not to entertain an application for review except on the basis of the five grounds or conditions prescribed therein. Second, in terms of section 4(4) of the Appellate Jurisdiction Act (the AJA) read together with rule 66(1) of the Rules, the review power of the Court is restricted to reviewing its own decisions only. The error sought to be corrected must be apparent on the decision of the Court sought to be reviewed. There is a chain of authorities of the Court's underscoring that position. [see **Chandrakant Joshubhai Patel vs Republic** [2004] TLR 2018 and **Rizali Rahabu vs Republic**, Criminal Appeal No. 4 of 2011 (unreported)] and, third, all that the Court need to have as a record of review is the impugned decision or order subject of

review and not the record of appeal. (See **The Hon. Attorney General vs Mwahezi Mohamed (as an administrator of the estate of the late Dolly Maria Eustace) and Three Others**, Civil application No. 314/12 of 2020). The cited cases underscore the point that the Court is not permitted to go beyond its decision in review applications. In the circumstances, there is no room allowing the Court to consider and determine whether the trial court had jurisdiction to entertain the matter if the same was not raised, canvassed and determined in the appeal before the Court. Upon our serious examination of the Court's decision subject of review, we are satisfied that the issue of the trial court adjudicating the case without jurisdiction was not raised before the Court sitting on appeal and is being raised before this Court for the first time in an application for review. Having realised that the Court's decision is solid in substance, we think, the applicant had to find a completely new ground quite inconsistent with the Rules, a practice long frowned upon by the Court in **Blue Line Enterprises Limited vs East African Development Bank**, Civil Application No. 21 of 2012 (unreported) citing with approval Lord Shaw's observations in **Haystead vs Commissioner of Taxation** [1920] A.C. 155 that: -

> *"parties are not permitted to begin fresh litigation because of new views they may entertain of the*

law of the case or new versions which they present so as to what should be a proper apprehension, by the court of the legal result...If this were permitted litigation would have no end except when legal ingenuity is exhausted..."

In the instant application, ascertainment of the complaint that no consent was issued by the DPP, will definitely involve the Court perusing the trial court's record which is outside the Court's mandate in review applications.

Without losing sight, connected to the above issue, Mr. Nkoko had argued that reference to "the court" under rule 66(1)(d) of the Rules meant a court other than the Court of Appeal (the Court). To him, this was a leeway for the Court to have a look at the whole conduct of the case before the courts below in review applications. We have no doubt that this observation is without merit in view of the restriction imposed by the provisions of section 4(4) of the AJA read together with Rule 66(1) of the Rules that the Court shall have the power to review its own decisions or order only. In our view, reference to "the court" instead of "the Court" under rule 66(1)(c) and (d) of the Rules is a mere clerical error than a reality. It turns out to be plain that all the five conditions or grounds for review prescribed under rule 66(1) should be applied to the Court's decision or order sought to be reviewed and not beyond.

In another angle, Mr. Nkoko prayed that the Rules be relaxed so as to salvage the applicant's application for the reason that he is a prisoner who had no advantage of getting legal assistance in preparing his documents. Having appeared for him, we see no reason why the learned counsel decided to prosecute an application which he found problematic on the pretext of the applicant being a prisoner. He could have applied for amendment of the documents as explained above. Abidance to the rules is not a matter of luxury or a technicality forbidden by Article 107A(2)(e) of the Constitution of the United Republic of Tanzania of 1977 as amended but it is intended to have a smooth administration of justice. The effect of not observing or a total disregard of the Rules has far reaching consequences in dispensation of justice as we stated in the case of **Zuberi Mussa vs Shinyanga Town Council** (supra) that: -

> *"We wish to observe that the objection in Munuo's case, which was based on rule 87 (2) of the rules, was all the same dismissed. Furthermore, in our decided opinion, article 107A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which*

when properly employed help to enhance the quality of justice delivered. It recognizes the importance of such rules in the orderly and predictable administration of justice. The courts are enjoined by it to administer justice according to law only without being unduly constrained by rules of procedure and/or technical requirements. The word 'unduly' here should only be taken to mean "more than is right or reasonable; excessively or wrongfully":

See CHAMBERS TWENTIETH CENTURY DICTIONARY, at page 1469. One cannot be said to be acting wrongfully or unreasonably when he is executing the dictates of the law."

(See also **Mondorosi Village Council and Two others vs Tanzania Breweries Limited and Four Others**, Civil Appeal No. 66 of 2017).

On the basis of the foregoing, we refrain from taking the course suggested by Mr. Nkoko to relax the Rules as that will amount to opening Pandora's box that will allow litigants to bring to Court whatever they find and in whatever manner.

In the final analysis, it is our finding that the threshold for applications of this nature were not met. Consequently, we strike out the purported application.

DATED at **DAR ES SALAAM** this 19th day of June, 2024.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling is delivered this 21st day of June, 2024 in the presence of the Applicant via video link and in the absence of the respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL