

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: KOROSSO, J.A., KITUSI, J.A. And KHAMIS J.A.)**

**CIVIL APPLICATION NO. 302/01 OF 2022**

**HAMZA BYARUSHENGO ..... APPLICANT**

**VERSUS**

**FULGENCIA MANYA ..... 1<sup>ST</sup> RESPONDENT**

**GAUDENCE HYERA ..... 2<sup>ND</sup> RESPONDENT**

**EDITHER MAYEMBA ..... 3<sup>RD</sup> RESPONDENT**

**TUMAINI RADIO STATION ..... 4<sup>TH</sup> RESPONDENT**

**THE REGISTERED TRUSTEES OF THE  
ARCHDIOCESE OF DAR ES SALAAM ..... 5<sup>TH</sup> RESPONDENT**

**(Application for review of the Judgment of the Court of Appeal of Tanzania  
at Dar es Salaam)**

**(Mugasha, Korosso & Makungu JJ.A.)**

**dated the 14<sup>th</sup> April, 2022**

**in**

**Civil Appeal No. 246 of 2018**

.....

**RULING OF THE COURT**

7<sup>th</sup> & 20<sup>th</sup> February, 2024

**KITUSI, J.A.:**

The applicant, Hamza Byarushengo, unsuccessfully sued the respondents for defamation, vide Civil Case No. 113 of 2013 at the High Court, Dar es Salaam Registry. His appeal to the Court, Civil Appeal No. 246 of 2018, (Mugasha, Korosso and Makungu, JJA) was also barren of fruits. He has preferred an application for review but this ruling is in respect of a preliminary matter that was raised by the applicant and

argued. The applicant stood in person while Ms. Blandina Harrieth Kihampa, learned advocate from ASYLA Attorneys, appeared for the respondents.

The applicant's motion which is the subject of this ruling, is for recusal of one member of this panel who also took part in Civil Appeal No. 246 of 2018. His prayer is for the application to be considered by a completely new set of justices whose minds will not be tainted by what he considers to be prejudices and biases against him.

Ms. Kihampa was opposed to the motion, submitting that in terms of rule 66 (5) of the Tanzania Court of Appeal Rules, 2009, (the Rules), the ideal situation is for, where possible, the same justices to sit in an application for review of their own decision. She pointed out that some of the grounds submitted in support of the application for review are the same as those supporting this motion for recusal. She prayed that the motion be disallowed.

In a short rejoinder, the applicant submitted that the provisions of rule 66 (5) of the Rules require the same justices to sit on review but that may only be the case where possible. He insisted that this application should be treated as an exception to the rule because he has no faith in the members of the previous panel.

We have had great difficulty in comprehending the essence of the applicant's motion for recusal of one member of this Court, intimating his desire for constitution of a different panel with a totally new set of members. This comes despite our previous decisions on similar matters. We are aware that, the applicant's prayer for a panel other than that which heard the appeal under scrutiny, is part of his prayers in the application for review. For that reason, we shall address the instant prayer without considering the merits of the application. We shall merely refer to our previous pronouncements in similar situations.

In **Elia Kasalile & 17 Others v. The Institute of Social Work**, Civil Application No. 187/18 of 2018 (unreported) there was an application that the same panel that heard the appeal should consider the application for review. The Court had this to say:-

*"Mr. Safari has indicated that he is alive to the provisions of Rule 66 (5) of the Rules which require a review application as far as practicable to be heard by the same justice or bench of justices that delivered the judgment. We entirely agree with him that his contention is the correct position of the law. We should, however, quickly inform him that assignment of cases to justices and constitution of panel of justices is purely an*

*administrative function vested with the Honourable Chief Justice. We are unable to speculate why he decided to constitute the panel the way he did. However, like Mr. Vedasto, we see no harm with the change of members of the panel particularly so when we consider that one of those justices who sat in that appeal has prevailed. After all, the law permits such change."*

In another case; **Golden Globe International Services & Another v. Millicom (Tanzania) N. V. & Another**, Civil Application No. 195/01 of 2017 (unreported), the applicant prayed, like in the instant application, for constitution of a different panel excluding any justice who had taken part in the appeal. In refusing that motion, the case of **Issack Mwamasika & 2 Others v. CRDB Bank Ltd**, Civil Revision No. 6 of 2016 (unreported) was cited. In the said case, the Court reproduced a paragraph from the case of **Tridoros Bank N. V v. Dobbs** [2001] EWCA Civ. 468 cited in **Otkritie International Investment Management Ltd and 4 Others v. George Urumov** [2014] EWCA Civ. 1315 in which the Court insisted the importance of judges being reluctant to recuse easily. In the language of that Court, it said:-

*"It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved ... But it is important for the judge to resist the temptation to recuse himself simply because it would be more comfortable to do so."*

In resisting the motion for recusal in the case of **Golden Globe** (supra) the Court also relied on the provisions of rule 66 (5) of the Rules which Ms. Kihampa also cited in her brief submissions. The said rule 66 (5) provides:-

*"An application for review shall as far as practicable be heard by the same Justice or Bench of Justices that delivered the judgment or order sought to be reviewed."*

In our interpretation of the above rule, the legislature intended that an application for review should be considered by the same panel that delivered the impugned decision, where it is practicably possible. The opposite being suggested by the applicant cannot be the case.

The applicant submitted and invited us to treat his motion as special or an exception to the above rule. With respect, we do not see anything warranting a departure from that rule and the applicant, whom we understand to be a practicing advocate, did not allude to any such

special circumstances. If be worthy referring to, the applicant has alleged bias, one of the grounds for suspecting so being that the learned justices did not refer to some of his arguments and authorities. This, we are afraid, suggests that judgments should carry all small details like minutes of a board meeting. That cannot be the case. We pronounced ourselves on this in the case of **Registered Trustees of Social Action Trust Fund & Another v. Happy Sausages Ltd & Others** [2004] 264 at page 269:-

*"There is no doubt that relevant authorities will be considered and either followed, distinguished, rejected or simply ignored as irrelevant. The point we would like to underscore here is that the mere fact that a point made or an authority mentioned by an advocate is not specifically referred to in a ruling/judgment is not a circumstance indicative of bias on the part of the learned judge."*

For the foregoing reasons, we reject the applicant's motion for change of panel or for the recusal of one of us because that is against the clear provisions of rule 66 (5) of the Rules. Besides, the applicant has not demonstrated to us that the circumstances of this case warrant the recusal of one of the members of this panel.

However, for the reason that it is not practically possible to consider this application for review within the remaining time of the ongoing sessions, we are constrained to adjourn it to the next sessions of the Court as shall be fixed by the Registrar.

It is so ordered.

**DATED at DAR ES SALAAM this 19<sup>th</sup> day of February, 2024.**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

A. S. KHAMIS  
**JUSTICE OF APPEAL**

The Ruling delivered this 20<sup>th</sup> day of February, 2024 in the presence of Ms. Blandina Harrieth Kihampa, learned Counsel for the Respondents and also holding brief for the Applicant is hereby certified as a true copy of the original.

  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**