IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. CRIMINAL APPLICATION NO. 10 OF 2001

(Original Criminal Case No. 81 of 2000 of the District Court of Rungwe at Tukuyu)

1. ALINANINE MWAISUMO)
2. FREDDY MWAFUNGO)
3. NABOTH MWAMALUSI) ..... APPLICANTS
4. GILBERT MWAMBEMBELE)

VERSUS

THE REPUBLIC ..... RESPONDENT

R U L I N G

MACKANJA, J.

The applicants stand trial jointly on a charge of disturbing a religious assembly c/s 126 of the Penal Code. Having lost faith in the learned trial District Magistrate on alleged bias, they have applied for a revisional order by which the trial court's order may be undone. Mr. Naali, learned counsel, acts for them.

The record of proceedings shows that the prosecution closed their case on 14th September, 2002. Thereafter the accused persons were called upon to make their defence, which they did on 3rd October, 2002. They called one witness, Ambukege Mwangosi (DW.5), to testify in their defence. The record sho further that Mr. Naali, learned counsel, was instructed to defend the applicants after DW.5 had testified. Immediately after taking up the conduct of the defence Mr. Naali applied for and was supplied with, a copy of the record of proceedings. That upon receiving the copy of the trial court's record of proceedings Mr. Naali applied for the disqualification of the trial magistrate on grounds of bias because, having read the proceedings he claimed that his clients were disputing the correctness of that record. None of them filed an affidavit to show which part of the record was wanting. As the learned trial magistrate says in his ruling, Mr. Naali did not lead evidence to show which part of the record had been doctored. In the end the application was dismissed.

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Soon after the application was dismissed Mr. Naali indicated that he was going to appeal. Of course he ought to have known that his clients have no right to appeal against an interim order in a criminal proceeding. So he has brought this application so that the order by which the trial magistrate refused to stand down from the trial be revised so also the order of trial court refusing to recall DW.5.

Mr. Naali contends in his final submissions that the application has been brought to forest all miscarriage of justice because the applicants do not believe that they will receive justice from the learned trial District Magistrate.

On his part Mr. Mulokozi, learned Senior State Attorney, submits that the application is as misconceived as it is untenable in law. He contends that the purpose of sections 43 and 44 of the Magistrates Courts Act and section 372 of the Criminal Procedure Act are not unlimited. According to learned counsel section 372 of the C.P.A. limits the exercise of revisional jurisdiction of the High Court for purposes of "... satisfying itself as to the correctness, legality or propriety of any finding, sentence or order ... and as to the regularity of any proceedings ...". It is his further submission that a magistrate trying a case has discretion to withdraw or not where his position is impugned. In sum it is the Republic's submission that nothing was done that justified granting the applicant's desire to have him withdraw from the trial of the case. Nor was there any incorrectness, irregularity or impropriety. That the applicants having closed their defence without external influences or pressure had to convince the magistrate whether at that stage it was necessary to recall a witness. A mere statement that the advocate was to prepare a proper defence was not good cause to have the defence start de novo. It is also learned Senior State Attorney's contention that the applicants have not proved any distortions in the record of proceedings.

As indeed it is clearly obvious, the application is supported by the

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affidavit of Mr. Augustino Rajab Mohamed Naali, learned counsel for the applicants. That affidavit is not free from fatal irregularities. I will point them out. Firstly, he swears in paragraph 3 that "... I was informed that tho evidence of DW.5 one AMBUKILE MWANGASI was faulted". DW.5 did not swear an affidavit to verify if his testimony was incorrectly recorded or if anything he said was not recorded. Paragraph 3 is, therefore, hearsay. Secondly, he swears in paragraph 4 that "... the accused persons told me of their discontent ...". None of those accused persons swore to verify and discontent they had, if at all. It is now settled law that no court in this country will act on an affidavit which is sourced from information provided by third persons if those persons do not swear affidavits of their own on those facts.

In paragraph 7 Mr. Naali swears that if the decision of the trial court is upheld it may occasion grave miscarriage of justice as the applicants will be condemned unheard. Well, this argument lacks merit because the applicants gave evidence in their defence and called DW.5 to that effect. Eve if they had not been given the opportunity to be heard, paragraph 7 is a submission on a point of law, it is not a fact which can be contained in an affidavit. Similarly, paragraph 9 contains legal arguments. Paragraph 10 is a prayer, not a fact.

What remains of the supporting affidavit, therefore, are paragraphs 5 and 6 regarding the right to recall DW.5 and the allegation that the trial court omitted to record citations of section 147 (4) of the Evidence Act, 1967, and section [redacted] of the Criminal Procedure Act, 1985.

There is no controversy at all that section 147 (4) of the Evidence Act bestows discretion on a trial court to grant permission that a witness be recalled either for further examination-in-chief or for further cross-examination. Of course the exercise of any discretion shall not be capricious; discretion must be exercised fairly and judicially. Reasons must be given in all cases the court accepts or declines to exercise it. In the instant case the

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trial court declined to exercise its discretion because Mr. Naali did not cite any procedural law that entitled his clients to re-open their defence in order to recall DW.5. That being an application, it matters not that it was made orally, learned counsel was required to cite the procedural law which empowers a trial court to re-open the defence for purposes of recalling a witness. It is now settled law that an applicant must cite the correct law under which he brings his application, failing which the application shall not be entertained: Mbeya-Rukwa Autoparts & Transport Ltd. v. Jestina George Mwakyoma (CA) Civil Appeal No. 45 of 2002; N.B.C. v. Sadrudin Meghji (CA) Civil Application No. 20 of 1977 and Almas Iddie Mwinyi v. N.B.C. & Another (CA) Civil Application No. 88 of 1998. It follows that since learned counsel for the applicants did not cite any statutory provisions which entitled him to put the provisions of s. 147 (4) of the Evidence Act into play, the application was a nullity. Since the application before me is for an order to revise a nullity, it is itself a nullity as well; it would fail as a result.

The application for revision is dismissed for reasons contained herein. It is directed the trial court's record be remitted thereto to conclude the trial.

Delivered.

Sgd. J. M. MACKANJA
JUDGE
27/6/2002

Mr. Materu/Mr. Naali, Adv.: For accuseds.

Mr. Boniface, S.A.: For D.P.P.

Certified true copy of the original Ruling.

DISTRICT REGISTRAR
MBEYA