

IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

MISCELLANEOUS CRIMINAL REVISION NUMBER 2 of 2010

(Originating from Criminal Case 68/2001 in the Primary Court of Mlimba-S.S. N. Ngaliwata-PCM; Criminal Appeal Number 7 of 2001 in the District Court of Kilombero- L.N.B. Ngovongo-SDM and High Court DSM PC Criminal Appeal Number 18 of 2002-Mihayo, J.)

SALUM HALID @ MASUDI

APPLICANT

VS

REPUBLIC

RESPONDENT

RULING

Last Order: 02-08-2011

Date of Ruling: 06-09-2011

JUMA, J.:

By a Chamber Summons which was filed on 21 April 2010 the applicant SALUM HALID @ MASUDI is moving this Court asking it to review the records of Primary Court of Mlimba and those of the District Court of Kilombero at Ifakara and quash the conviction and set aside the sentence and set him free. The applicant has employed section 372 and 216 of the **Criminal**

Procedure Act, Cap 20 and Article 13-(6) (a) of the **Constitution of United Republic of Tanzania**. This application was strongly opposed by the respondent Republic. In a Counter Affidavit the applicant filed on 3rd June 2011 the respondent noted that since on in May 2005 the High Court dismissed the applicant's appeal against the decision of the district court as a court of first appeal, the applicant cannot in law come back to this same High Court to seek the revision of the decisions of the same subordinate courts.

It is important to look back at the Background facts giving rise to this interesting application before this court. The applicant SALUM HALID @ MASUDI was convicted on 28th February 2001 by the Primary Court of Mlimba of the offence of robbery with violence (c/ss 285, 286 of the **Penal Code, Cap 16**). The Primary Court presided by S.S. N. Ngaliwata-PCM, sentenced the applicant to thirty years in prison. He appealed to the District Court of Kilombero at Ifakara in Criminal Appeal Number 7 of 2001. The presiding L.N.B. Ngovongo-SDM of the District Court not only dismissed his appeal; but added an additional punishment of 12 strokes of the cane on top of the 30 year prison sentence. Further appeal to the High Court was not

successful when on 3rd May 2005, Mihayo J. in PC Criminal Appeal No. 18 of 2002 found that his plea at the primary court was unequivocal within section 360 (1) of the **Criminal Procedure Act, Cap. 20** and confirmed the decision of appellate District Court in enhancing the sentence.

When this application seeking the review of the decisions of lower courts came up for hearing for the first time on 12th July 2010, Mr. S. Mihayo- the learned State Attorney who was representing the respondent Republic asked the presiding Judge (Wambura, J.) to refer the applicant to mental examination under section 219 of the **Criminal Procedure Act, Cap. 20**. This court (Wambura, J.) granted the request. The applicant was ordered to undergo medical examination on his mental status and the results were ordered to be filed accordingly in this court. No medical report has so far been furnished to this court. Meanwhile following the transfer of Wambura, J., this application was re-assigned to me on 10th November 2010.

After one adjournment occasioned by the absence of the applicant; the application came up for hearing on 11th April 2011. The applicant appeared in person whereas the respondent

was represented by Mwanamina Kombakono, the learned State Attorney. The learned State Attorney informed the court that the respondent has not seen the medical report as ordered by this Court and hastened to express her doubt whether the court should in the first place have referred the applicant for medical examination to determine his mental status through the avenue of section 216 of the **Criminal Procedure Act, Cap 20**. The learned State Attorney sought the directions of this court on how to move the process forward. In his reply, the applicant reiterated that he would like this court to grant him the prayers he filed under his chamber application.

I revisited section 216 of **Criminal Procedure Act** which Mr. Mihayo the learned State Attorney employed to move this Court into ordering the medical examination of the applicant. The relevant section 216 provides,

219.-(1) Where any act or omission is charged against any person as an offence and it is intended at the trial of that person to raise the defence of insanity, that defence shall be raised at the time when the person is called upon to plead.

On 02 May 2011 I delivered my ruling wherein I found that section 219 of the **Criminal Procedure Act** which Mr. Mihayo employed to ask this court to refer the applicant to mental examination cannot apply at appellate level. This court vacated its order dated 12th July 2010 requiring the applicant to be sent for medical examination to determine his mental status.

At the hearing of his application for the revision of lower courts the applicant who could hardly open his mouth; brought along his relative Issa Halid Masudi to speak on his behalf. Respondent was represented by Mr. Mihayo, the learned State Attorney. Mr. Masudi brought with him a written submission wherein he contended that under the Third Schedule Part II of the **Magistrates Courts Act, Cap 11** the Primary Court of Mlimba had no jurisdiction to hear cases of armed robbery. Mr. Mihayo had very few words, basically submitting that there is nothing for this Court to revise.

After hearing the two opposing sides I must at the very outset point out the affidavit which the applicant took out in support of this application was asking this court to exercise its power of revision because his plea of guilty at the primary court was entered during the time of his mental illness. The ground that

the primary court had no jurisdiction to hear armed robbery cases which was raised during the submissions was not part of the affidavit supporting this application. The issue whether the primary court lacked jurisdiction to hear cases of armed robbery was an afterthought and it should have been raised when the applicant's appeal to this Court was heard in 2005 by Mihayo, J.

One main issue for my determination is whether in light of the judgment of Mihayo J. in PC Criminal Appeal No. 18 of 2002 confirming the decision of appellate District Court; this court can still call and examine the decisions of subordinate courts whose appeal have already been heard by this Court. The power of this Court to call for and examine records of any criminal proceedings before subordinate courts is provided for under section 372 of the **Criminal Procedure Act, Cap. 20**:

372. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.

With due respect to the applicant, the power of this Court under section 372 of CPA to call for and examine the record of any

criminal proceedings before any subordinate court does not apply to situations where High Court has already exercised appellate jurisdiction over the decision of that subordinate court sought to be revised.

I earlier pointed out that on 3rd May 2005 this court through Mihayo J. in PC Criminal Appeal No. 18 of 2002 confirmed the decision of the appellate District Court of Kilombero following an appeal by this applicant. It therefore follows that this court cannot exercise its power of revision over a subordinate court on same matters where another High Court Judge had already made a decision on appeal. The only remedy available to the applicant was an appeal to the Court of Appeal within the prescribed period.

The mental status of the applicant was also a matter of deep concern of this court. If the conduct of the applicant is to go by, he needs urgent medical attention of the medical officer responsible for Ukonga Prison which holds this applicant. In terms of section 20-(2) of the **Prisons Act, Cap 58** medical officers are responsible for the health of all prisoners in a prison.

For the foregoing reasons, the Miscellaneous Criminal Revision Number 2 of 2010 clearly lacks merit. It is hereby dismissed in its entirety. The Medical Officer in Charge of Ukonga Prison is directed to cause the applicant to be medically examined for purposes of treatment.

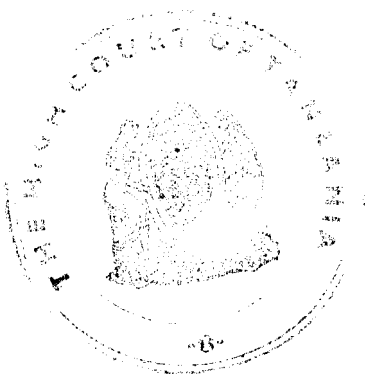


I.H. Juma,

JUDGE

06-09-2011

Delivered in presence of the applicant (Salum Halid @ Masudi) and Mr. Hyera, (State Attorney) for Respondent.



I.H. Juma,

JUDGE

06-09-2011