IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL REVISION NO. 6 OF 2019

(Originating from Misc. application No. 1 of 2019 of the Resident Magistrates Court of Dar es Salaam at Kisutu)

FRANK ANASTAS LUI.....APPLICANT

VERSUS

THE MINISTER FOR CONSTITUTIONAL AND LEGAL AFFAIRS.....1ST RESPONDENT

THE DIRECTOR FOR PUBLIC PROSECUTION.....2ND RESPONDENT

RULING

Date of last order: 03/09/2019
Date of Ruling 07/10/2019

NGWALA, J.

The preliminary objections on point of law raised by the respondents against this application for revision are predicted on the grounds that; the court is not properly moved. The application for revision is bad in law for being overtaken by events and that, the affidavit is incurably defective, as it contains points of law, prayers and arguments.

At the hearing of the preliminary objections, the applicant was represented by Mr. Nickson Ludovick the learned counsel, while the 1st and 2nd, respondents were represented by Miss. Veronica Matikila, assisted by Batilda Mushi learned State Attorneys.

Miss Matikila submitted that, the provisions of Section 31 (1) of the Magistrate's Court Act [Cap 11 R.E. 2002], Section 373 (1) (b) and 372 of the Criminal Procedure Act, [Cap.20 R.E. 2002] and Section 24 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2011) are inapplicable in this matter. The offences alleged to be committed by the applicant are regulated by the Extradition Act [Cap. 368 R.E. 2002]. It was argued that, Extradition Proceedings have their own rules and law, regardless of being criminal in nature. There is no provision in the Extradition Act that allows Revision as a remedy to a party who is dissatisfied with the decision of the court. It was averred that, the Extradition law has a "*lacuna*". The only automatic remedy to a dissatisfied party is the constitutional Right of Appeal provided under, Article 13 (6) of the Constitution of the United Republic of

Tanzania. Revision in Extradition matters is not automatic.

The learned State Attorney fortified her argument by citing the case of **Hamis Rajabu Dibagula v. Republic. Criminal Appeal No. 53 Of 2011. (CAT) and Halais Pro-Chemis vs. Wella-Ag (1996) TLR at pg 269**.by the Court of Appeal of Tanzania that held.

> *"...the party to proceedings in the High Court could invoke the revisional jurisdiction of the Court where the appellate jurisdiction has been blocked by judicial process".*

It was maintained that in the circumstance, the applicant was never blocked by judicial process to appeal hence , the present Application is misconceived.

On the second and third grounds of preliminary objection, Miss Batilda Mushi submitted that, the applicant has already been extradited. This application therefore has been overtaken by events.

On the third limb that the affidavit is bad in law as it contains points of law, prayers and arguments; it was submitted that, it is a trite law that affidavits should not

contain prayers, as they become incurably defective. This position is held in the case of **Ignazio Messina v. Willow Investment SPRL, Civil Application No. 21/2001 the Court of Appeal of Tanzania**. Lugakingira J. (as he then was) stated that:-

> *"We are not impressed first; rules governing the form of affidavits cannot be deliberately flouted, in hope that, the Court can always pick the seed from the chaff, but could be an abuse of the court process. The only assistance the court can give in such a situation is to struck out the Affidavit".*

For those arguments, the learned State Attorneys, implored the court to struck out this Application for Revision.

In reply, Mr. Ludovick stated that, the cited provisions of the law in this matter are applicable on revision. The argument that, Extradition Act does not allow the use of other laws is misconception of law, because; Extradition Proceedings are Criminal Proceedings in nature. The use of Criminal Procedure Act and other laws is a proper procedure, elaborated by the Appeal of Tanzania of Tanzania in the case of **DPP vs. Peter Roland Vogel**

(1987) TLR at page 4 that, Extradition Act is a Penal statute. Thus, the application of criminal laws is proper.

The learned counsel for the Applicant however, conceded that, the Extradition Act, do not provide for either Revision or Appeal. The only remedy by an aggrieved party is to come by way of Revision as it is the only available remedy when it comes to correction of procedural errors which do not touch the merit of the case.

The learned Counsel for the Applicant distinguished that, the cases cited by the respondents support their application, because, one can go for revision where an appeal is blocked by judicial process, therefore in his view, revision is an appropriate remedy.

On the point that, the application is overtaken by events, the counsel termed it, as a misconception of law because it is not a preliminary objection on point of law based on statutory authority or case law.

To the third ground of objection that, the affidavit is incurably defective, as it contains points of law, prayers and arguments especially paragraphs 12, 13 and 14 of the affidavit in support of Revision, Mr. Ludovick contended

that, those are facts capable of being proved in the due course of hearing and not prayers. They are not incurably defective. It is upon the applicant to prove injustice and inconveniences that will be occasioned. The cited case of **Ignazio Messina** (supra) was considered by the counsel for the applicant that it is an outdated legal position. In his view the current position is that, if an affidavit is defective, it can be expunged from the record and not to strike out the entire application.

Cementing on this, the cases of **Rashidi Elisihani v. Musa Haji Kombo (1988) TLR 530** and the case of "**Chama cha Walimu" v. Attorney General Civil Application No. 151 of 2008** were cited. In those cited two cases, the Court of Appeal of Tanzania held that, if the respondent say the applicant is wrong, or has cited improper provision, he is bound to tell the court the proper legal position.

For the said reasons, the counsel prayed for the objections to be overruled and the application be heard on merit.

The learned State Attorney rejoined by reiterating their submission in chief. They maintained that Extradition Act does not provided for the procedure for a person who has

been extradited to be returned back. For those reasons, an order to sustain their objections was prayed.

Having heard the rival submission by the counsels for the parties, to start with the first ground, the argument by the respondents have been conceded by the respondent, that The Extradition Act do not provide for an appeal or revision for extradition proceedings. The provisions of Section 31(1) 0f the Magistrates Court Act (Cap 11 R:E 2002), Section 373 of the Criminal procedure act [Cap.20 R.E. 2002] and Section 24 (1) of the Written Laws (Miscellaneous Amendments)Act No.3 of 2011 is quoted for purposes of clarity that,

> *Section 31 "(1) In the exercise of its revisional jurisdiction under this Part, the High Court shall have all the powers conferred upon it in the exercise of its appellate jurisdiction under this paragraph including the powers to substitute a conviction or a conviction and sentence for an acquittal or an acquittal for a conviction or to make a declaratory order; and the provisions of the proviso to paragraph (b) of section 29 shall apply in relation to an order*

quashing proceedings and ordering a rehearing which is made in the exercise of the High Court's revisional jurisdiction as they apply in relation to any such order made in the exercise of its appellate jurisdiction".

Section 373(1)(b) of the Criminal Procedure Act,[Cap 20 R:E 2002] also provides that,

" (b) in the case of any other order other than an order of acquittal, alter or reverse such order, save that for the purposes of this paragraph a special finding under sub-section (1) of section 219 of this Act shall be deemed not to be an order of acquittal"

The above cited authorities show the mandate of the High on revision and appeal. Both parties have submitted that, the Extradition Act does not have such remedies. The counsel for the applicants have so far argued that the only remedy is revision where there is no room for an appeal, while the respondents argues that, an appeal being a constitutional right; the applicant cannot file a Revision in lieu of an Appeal. The counsel for the applicant argued as well that, extradition Proceedings being of criminal nature,

citing the Magistrates court Act and the Criminal procedure Act, is proper.

In the case of **Halais Pro-Chemie vs. Wella AG** (supra) it was held that, one must first exhaust that remedy provided by law, before invoking the revisional jurisdiction of the Court.

In the view of the above authority, I am in entire agreement with the counsel for the applicant that, where there is no express provision for an appeal, the only remedy is revision under which the inherent powers of the court to correct error of the lower courts can be exercised as held in the case of **Halais Pro-Chemie v. Wella AG (supra)**. This case is relevant in this case because there is no revisional powers in the **Extradition Act [Cap. 368 R.E. 2002]**. The Extradition Act does not provide for a Right of Appeal or Revisional right. The cited provisions of laws are in this respect relevant, there can never be complete exclusion of the cited laws.

It is my findings therefore, that the first ground of objection is devoid of merit. It is accordingly overruled.

The second ground of Preliminary Objection that, the application is bad in law for being overtaken by event; it is my considered view that there is no law which has been violated. In fact; this is not a preliminary objection in the light of the position by the landmark case of **Mukisa Biscuits Manufacturing vs. West End Distributors Ltd (1969) EA 696** that, a preliminary objection should be on pure point of law capable of disposing off a suit. This ground is not in all the fours of this category. In that light this ground too, is also overruled.

The third ground that, the affidavit is incurably defective for containing points of law, prayers and arguments as argued by the counsel for the applicants that, the current legal position is to the effect that, once an affidavit contains some defective paragraphs, the remedy is not to struck out the whole affidavit, but is to strike out the only clauses found to be defective. That position is not supported by any relevant authority. The arguments by the respondents that the affidavit supporting the application is incurably defective as it contains grounds of appeal, prayers and arguments instead of statements of fact is correct in law.

An affidavit is a formal legal document, sworn to be true and it is evidence that the facts it sets out are true and in the deponent's knowledge. It is insisted that the contents of the affidavit must be statements of facts, which should be based on the personal knowledge of the deponent or from information which the deponent believes to be true. Thus, an affidavit should also not contain extraneous matters by way of objection, prayer, legal argument or conclusion. In that regard, they should be well drafted by parties/lawyers. This was emphasised in the case of **Uganda v. Commissioner of Prisons, ex parte Matovu [1966] E.A.514** it was stated that:

> "...as a general rule of practice and procedure and affidavit for use in court being a substitute for oral evidence should only contain statements of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion. "

In the instant application, the averments in sub-paragraphs (i), (ii), (iii), (iv), (v), (vi), (vii), (viii),(ix) and (x) of paragraph 12 of the applicant's affidavit, fit to be grounds

of appeal in a memorandum of appeal rather than being a revision. For instance, the Honourable Magistrate erred in law and in fact by believing the tendered documents were enough to establish the applicant had a case in Zambia. Those cannot be said to be the statement of facts in the applicant's own knowledge, but the wording purely amounts to grounds of appeal. These are extraneous matters offending the principles set out in **the Commissioner of Prisons, ex parte Matovu's case.**

As paragraphs 12, 13 and 14 of the affidavit are the gist of this application and grounds upon the whole application for revision rests, severance of them from other paragraphs will cripple the whole application.

In this matter I have given consideration and reflection to the application for Extradition that were initiated by the order for issuance of warrant of arrest and Detention of a fugitive Criminal, under Section 5 (1) of the Extradition Act, Cap. 368 R.E. 2002, that was made on 4th December 2018, by the Minister responsible for Legal Affairs in the United Republic of Tanzania, commonly, known as the Minister for Constitutional and Legal Affairs. That order to surrender the alleged fugitive to Zambia which was issued

by the said Minister is a quasi Judicial matter, which on the other hand cannot be entertained by way of Revision or Appeal, as it has its procedure which is judicial Review. That is this matter could come by way of judicial review.

The applicant's affidavit is incurably defective and cannot support this application. Since every application must be brought by way chamber summons supported by an affidavit and this court having found that there is no affidavit supporting this application, the application is incompetent.

With those reasons, the first and second grounds of preliminary objection are overruled. The third ground of the respondent's preliminary objection is sustained. This disposes of the preliminary point as this application is incompetent before this court. Accordingly this application is struck out.

A.F. Ngwala

JUDGE

07/10/2019