IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CRIMINAL REVISION NO. 14 OF 2019

(Originating from Misc. Criminal Application No. 5 of 2018 before Hon. A.A Mwingira-RM and Misc. Criminal Application No. 2 of 2019 pending before Hon. Isaya –SRM at Resident Magistrates Court of Kinondoni)

SILVER SENDEU ..... **APPLICANT**

VERSUS

BETTY HUBER ..... **RESPONDENT**

RULING

Date of Last Order: 1st June 2020
Date of Ruling: 26th June 2020.

E. E. Kakolaki, J

By a chamber summons made under Section 372,373 (1)(b) of the Criminal Procedure Act, [Cap. 20 R.E 2002], the applicant, **Silver Sendeu**, is moving this Court to call, inspect and examine the proceedings of the Resident Magistrates Court of Kinondoni in Misc. Criminal Application No. 5 of 2018 and Misc. Criminal Application No. 2 of 2019, and satisfy itself as to the correctness, rationality of jurisdictional powers exercised by the trial Magistrate in determining the said applications and any other orders as it may deem fit and just to grant. The application is is supported by the affidavit sworn by **Silver Sendeu**

the applicant. In opposition the respondent filed the counter affidavit vehemently challenging the merits of this application.

Briefly the applicant was once charged and convicted of the offence of forgery by the Resident Magistrate Court of Kinondoni in Criminal Case No. 311 of 2013 in which the Director of Public Prosecution of behalf of the Republic was a prosecutor. He was sentenced to one year conditional discharge and ordered to pay the complainant (Respondent) compensation of Tshs. 20,000,000/= within a year. The Director of Public Prosecution being discontented with the sentence meted on the applicant unsuccessfully appealed to the High Court in Criminal Appeal No. 133 of 2014. The respondent being a complainant and beneficiary of the court's order for compensation in Criminal Case No. 311 of 2013 vide Misc. Criminal Application No. 5 of 2018, under sections 99, 392A (1) and (2) of the Criminal Procedure Act, [Cap. 20 R.E 2002] successfully applied to be permitted to conduct prosecution for execution of the compensation order in Criminal Case No. 311 of 2013 by the applicant to the tune of Tshs. 20,000,000/=. After that permission the respondent filed an application in the same Court Misc. Criminal Application No. 2 of 2019 seeking for orders of attachment and sale of the applicant's house in unsurveyed land at Mji Mpya Street, Busara area in Karanga ward within Ubungo District Dar es salaam Region to realize the said Tshs. 20,000,000/=. In the alternative she prayed for orders of arrest of the applicant and committing him into prison as civil prisoner till payment of the said compensation amount. It is from those applications the applicant preferred this application inviting the Court to call, inspect and examine the proceedings of the two application and satisfy itself as to the correctness, rationality of jurisdictional powers exercised by the trial Magistrate.

Parties in this application are represented. Whereas the applicant is represented by Mr. Frank Kilian learned advocate, the respondent has the services of Mr. Charles Alex learned advocate. When the matter was called for hearing on the 24/04/2020 both parties agreed and craved leave of the court to have the application disposed by way of written submission in which the filling schedule was complied with.

Submitting in support of this application Mr. Kilian for the applicant argued that private prosecution is not instituted merely because the DPP has declined to prosecute but because the police has refused to take action against the alleged offence committed by offenders. He contended that in this application Criminal Case No. 311 of 2013 and later on appeal Criminal Appeal No. 133 of 2014 being purely Public Prosecuted matters duly initiated by the DPP it was not correct for the respondent to chip in at the execution stage on assertion that the DPP had declined to finalise the execution procedure. And that worse still in Misc. Criminal Application No. 8 of 2018 the DPP was not made a party to counter the application as his powers were usurped and there was no evidence tendered in court to prove that he had refused to process the execution of the said compensation order as asserted by the respondent. Citing the case of **Fanuel Msengi Vs. Peter Mtumba** (1992) TLR 109 concluded that it was incorrect for the trial court to grant the respondent with powers of private prosecution as the case was not privately prosecuted.

Mr. Kilian went on to argue that the magistrate never tested the existence of prima facie case before granting the leave to prosecute privately to the respondent the decision which resulted into institution of Misc. Criminal Application No. 2 of 2019. He stressed that the trial magistrate ought to have satisfied that there were reasonable and probable causes for mounting a private prosecution as it was held in the case of **Edmund**

Mjengwa and Six Others Vs. John Mgaya and Four Others (2004) TLR 200. And that there was no charge presented by the respondent to prove that there was reasonable and probable cause for the court to grant the prayers sought as the charge was supposed to establish the necessary ingredients of the offence. He also relied on the case of **Amina Mpimbi Vs. Ramadhani Kiwe** (1990) TLR 6. He therefore prayed the court dismiss the two applications.

Challenging the merits of the application Mr. Alex for the respondent was of the view that the trial magistrate was correct to grant the leave for private prosecution to the respondent as section 99 of the CPA does not limit grant to the fresh cases only but also includes the concluded one like the case at dispute. So there is nothing to show that the court failed to exercise jurisdiction vested on it or illegally assumed jurisdiction or there is material irregularity to be entertained under this revision. In support of his stance he cited the case of **Matemba Vs. Yamulinga** (1968) 1 EA 43 at page 645 where the Court stated:

> *"...it is settled that where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even of law."*

Mr. Alex added that it is a position of the law that revision is not an alternative to appeal. That if the applicant felt aggrieved with the decision of the Court in Misc. Criminal Application No. 5 of 2018 his first remedy was to appeal and not to challenge by way of revision. He stemmed his argument with the case of **Registered Trustees of Social Action Trust and Another Vs. Happy Sausages Ltd and Others** (2004) TLR 285.

With regard to Mr. Kilian's submission that DPP's powers were usurped Mr. Alex was of the reply that no power was usurped since the DPP can take over at any time under section 10(1)(b) of the National Prosecution Services Act, 2008. And that the provision of section 128(1) of the CPA relied on by the applicant to support the assertion that there is no probable and reasonable cause shown by the respondent to believe that an offence was committed to warrant grant of leave of private prosecution, Mr. Alex said the same was inapplicable in the circumstances of this case as the charge was prepared and case prosecuted by the DPP. What had remained was the execution part of compensation order which the applicant defied to comply to. He said the only remedy to the respondent was to resort to the application of section 349 of the CPA for realization of the compensation order the provision which does not mandate the DPP to proceed with exercise of execution. And further that since there is no clear provision for execution of the compensation order of the court then refuge was to be taken under Order XXI Rule 9 of the Civil Procedure Code [Cap. 33 R.E 2002]. It is from that course he submitted that even the case of **Fanuel Msengi** (supra) relied upon by the applicant is inapplicable here because there is no appeal in this matter by the respondent but rather the applications for private prosecution and execution in Misc. Applications No. 5 of 2018 and No. 2 of 2019 respectively. He therefore invited this court to find the application devoid of merits and dismiss the same.

Having navigated through the submissions from both sides, I now turn to consider the merits of the application. It has been submitted by Mr. Alex citing the case of **Registered Trustees of Social Action Trust and Another** (supra) that revision as preferred by the applicant is not an alternative to appeal and that the applicant being aggrieved with the

decision of the Court in Misc. Criminal Application No. 5 of 2018 which gave birth to Misc. Criminal Application No. 2 of 2019 ought to have appeal instead of coming by way of revision. In his rejoinder the applicant submitted that, that contention is unfounded because he had two avenues to pursue his rights. The first one he said was through appeal and the second is through revision which he has opted under section 372,373 (1)(b) of the Criminal Procedure Act, [Cap. 20 R.E 2002]. It is true and I agree with Mr. Alex that revision is not an alternative to appeal. It is common knowledge that under section 372,373 (1)(b) of the Criminal Procedure Act, [Cap. 20 R.E 2002] this court has powers to exercise its revisional jurisdiction. However, it can only do so suo motto or when moved by the applicant upon meeting three conditions. The said conditions were well spelt in the case of **Moses J. Mwakibete Vs. The Editor –Uhuru, Shirika la Magazeti ya Chama and National Printing Co. Ltd** (1995) TLR 134 (CA) when the court held:

> *"The Court of Appeal can be moved to use its revisional jurisdiction under S. 2(3) of the Appellate Jurisdiction Act, 1979, only where there is no right of appeal, or where the right is there but has been blocked by judicial process, and lastly, where the right of appeal existed but was not taken, good and sufficient reasons are given for not having lodged and appeal."* See also the case of **Kezia Violet Mato Vs. National Bank of Commerce and 2 Others**, Civil Application No. 127 of 2005 (CAT-unreported) and **Halais Pro-Chemie Vs. Wella A.G** (1996) TLR 269 (CA).

In this application the applicant has not met even one of the said conditions to be entitled to move this court by way of revision. First, he has failed to prove to the satisfaction of the Court that the decision which

he is seeking to be revised Misc. Criminal application No. 5 of 2018 is not appealable. Secondly, there is no evidence led by the applicant to prove that he was blocked from appealing by judicial process. Third and lastly, no reasons have been advanced by the applicant for not exhausting the available remedy of pursuing the matter by way of appeal apart from saying that he opted for revision. It is trite law that where there are available remedies for a party to pursue the same must be exhausted first before resorting to others or conditional ones. I am of the finding that the applicant's failure to exhaust the available remedy and opt for revision which is a conditional remedy without satisfying the mandatory conditions renders this application incompetent.

This issue having disposed of the matter I cannot consider and determine the grounds of revision for the application is incompetent before the court.

In the circumstances and for the foregoing reasons I hold that this applicant is incompetent and is hereby struck out. The only remedy available for the applicant is to appeal to this court subject to limitation of time.

I order no costs as the application is of criminal nature.

It is so ordered.

DATED at DAR ES SALAAM this 26th day of June, 2020.

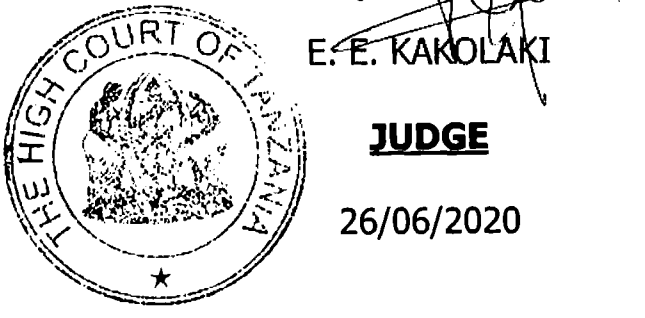
E. E. KAKOLAKI

JUDGE

26/06/2020

Ruling delivered today 26th day of June, 2020 in the absence of both parties and Ms. Lulu Masasi, Court clerk.

Right of appeal explained.



JUDGE

26/06/2020