IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISC. CRIMINAL APPLICATION NO. 14 OF 2019

(Originating from Criminal Session No. 48 of 2018)

EDWARD ISAACK SHAYO ---------- 1ST APPLICANT

LABAN ELIMA NABISWA ---------- 2ND APPLICANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

RULING

MUTUNGI .J.

Mr. Gwakisa K. Sambo, Learned Advocate who represents the Applicants herein, has before this court submitted in writing as ordered, an elaborative and strongly researched piece of work in support of the consolidated applications (consolidated criminal application No. 14 and 15 of 2019).

Briefly the Applicants have already had their day in court and their matter determined in Criminal Session No. 48 of 2018. The two together with one other (Hamis Chada @ Wisane) were

charged with the offence of Murder Contrary to Section 196 of the Penal Code Cap 16 R.E. 2002. At the end of trial, they were found liable for the offence of accessory after the fact Contrary to Section 387 (1) of the Penal Code. After the trial Judge considered their mitigation and the circumstances prevailing as per the adduced evidence, sentenced the two Applicants to four years imprisonment.

It is now that the two have come to court under Section 264 and 391 of the Criminal Procedure Act Cap 20 R.E. 2002 seeking inter-alia for the following: -

1) That, the Honourable Court be pleased to grant an order for the deduction of the period spent by the Applicant in lawful custody when waiting for the already determined criminal case.
2) That, any other order(s) or relief(s) this court may deem fit and just to grant.

In his submission the Learned Advocate has also prayed that the Applicant's sworn Affidavits and the Advocate's two replies to the Counter Affidavit be adopted to form part of his submission. The Advocate averred that, it is settled in our

criminal jurisprudence that, the time which the Applicants or accused person spent while in prison for criminal justice to take its course is to be deducted. To support his stance the Learned Advocate has invited the court to the decisions of the High Court **Republic V. Beatus s/o Michael Kimaro, Criminal Session number 36 of 2018** and **Josephine Mmumbi Waithera V. Republic No. 28 of 2013** and the authoritative decisions of the supreme court of this land **Katalinda Simbili @ Ngwaninanu V. Republic Criminal Appeal No. 15 of 2008** (CAT-TABORA) (Unreported) and **Juma Bakari V. Republic, Criminal Appeal No. 362 "B" of 2009** (CAT-Dar es Salaam) (unreported).

The Learned Advocate impressed upon the court that, in line with the authorities cited, the court had a duty to deduct or minus the time of the convicted Applicants as already indicated. In his settled opinion failure to do so is missing an opportunity to make certainty and uniformity in the decisions of the court, to be inconformity with the court of appeal decisions. What the court has done will be tantamount to sentencing the Applicants to more than four years (five years

and nine months) which definitely will cause injustice to the Applicants.

In conclusion the Applicants' Advocate prayed to the court to review its own decision and proceed to deduct the time spent by the Applicant as already elaborated earlier in the ruling.

Miss Lucy Kyusa, Learned State Attorney in reply thereto strongly argued in her written submission that, the cited cases had the sentences challenged by way of appeal and not review. Further the Learned State Attorney faultered the citing of Section 264 and 391 of the Criminal Procedure Act (Supra) in support of the instant application. She contends that, these two do not confer jurisdiction to this court to determine the filed applications. To be precise, she elaborated Section 391 refers to orders of writ and Section 264 confers jurisdiction to this court to regulate its own practice in exercise of its criminal jurisdiction. Considering that there is no provision of law in our land that governs the like application, for review in the High Court for sentences passed by the court, this court's hands are tied.

To cap it all, the Learned State Attorney reminded the court of what had transpired during the trial specifically during mitigation. She prayed the court should revisit the court's record and find at page 75 of the proceedings, the same Advocate had pleaded that the applicants had languished in custody for one year and seven months, which factor should be looked into by the court. Indeed, the court did that which it had been asked to do and reduced the sentence to four years imprisonment. She further pointed out and in line with the case of **Karim Kiara V. Republic, Criminal Application No. 4 of 2007, (CAT)**, litigation must have finality. Be as it may praying for a review connotes that, there is an error on the face of the record that occasioned injustice to the Applicants. In this case there is no such error apparent on the face of the record. In view of the foregoing the Learned State Attorney prayed to the court to dismiss the application.

In rejoinder, the Applicants' Advocate raised his concern as to the way the Learned Attorney was misleading the court. It is not true that the two cases he cited were challenged by way of appeal but these were cases arising out of original jurisdiction of the High Court in Criminal cases. What was of

importance is that in both cases the trial Judge considered the time spent by the accused and deducted it from the sentence passed.

The Learned Advocate insisted further that, the Section cited in the chamber summons (Section 264 and 391 of the C.P.A) confer jurisdiction to the court as there is no specific provision of law provided.

In the upshot the Learned Advocate prayed the application has merits and all the prayers as prayed in the chamber summons be granted. The court should proceed to deduct the time that the Applicants spent in prison waiting for their trial.

In view of the submissions by the two camps, the court has first to consider or ascertain its jurisdiction in this matter. Having gone through the chamber summonses and the corresponding respective Affidavits, it is crystal clear that, what the Applicants are seeking for is a review by this court of its own decision by excluding all the time they had spent

in court while waiting for the administration of the criminal machineries to cause the case to commence for hearing. What then is the enabling provision to move the court to do that which it is asked to do. The Applicants' Counsel called upon the court to invoke Section 264 and 391 of the Criminal Procedure Act Cap 20 R.E. 2002 (Supra). For the sake of reference Section 264, states: -

> ***"The High Court may, subject to the provision of this Act and any other written laws, regulate its own practice in the exercise of its criminal jurisdiction."***

The definition of "regulate" as per the Oxford English Dictionary 2nd Edition is; *"To control or maintain the rate or speed of (a machine or process) so that it operates properly."*

Reading from the above quotation, this would be referring to the administration of the High court trials.

Further Section 391 (supra) for the sake of clarity is coached in the following words: -

"The High Court may in the exercise of its criminal jurisdiction issue any "writ" which may be issued by such court."

I have consulted the Black Law Dictionary, 8th Edition and the meaning of "writ" is;

"a court's written order in the name of the state or other competent legal authority, commanding the addressee to do or refrain from doing some specified Act."

Considering the above definitions for any stretch of imagination the scope of application of the same does not relate to a review as envisaged by the Applicants. On the same footing the respective provisions of law do not confer jurisdiction to this court to make a review of its decisions in criminal matters.

Be as it may, the cited cases decided by Hon. Fikirini .J. had sentences which she meted out while exercising her judicial discretion, the same way the trial Judge did in the present matter.

The foregoing notwithstanding Mr. Gwakisa Sambo had an opportunity of mitigating for the second accused (the Applicant) in Misc. Criminal Application No. 14 of 2019 and at page 75 of the Judgment had this to say: -

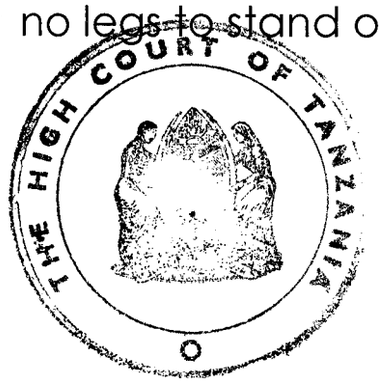
> *"Fourthly your honourable court should consider the period he has been in remand prison one year and seven months."*

The Judge responding to the same stated at page 80 that: -

> "After considering the mitigating factors, I sentence the second and third accused to four years imprisonment."

The court in the given circumstances can no longer interfere with its own sentences since its hands are tied and as already observed earlier in the ruling the provisions cited do not cloth the court with review powers. It would seem the Applicants were aggrieved by the sentences hence as properly hinted by the Learned State Attorney they were to go for an appeal before the Supreme Court of this land.

Having elaborated as above the application is found to have no legs to stand on and is consequently dismissed.



B. R. MUTUNGI

JUDGE

26/03/2020

Read this day of 26/03/2020 in presence of Mr. Gwakisa Sambo the Applicants' Advocate, the 2nd Applicant and Mr. Omari Kibwana (S.S.A) for the Respondent.

B. R. MUTUNGI

JUDGE

26/03/2020

RIGH OF APPEAL EXPLAINED

B. R. MUTUNGI

JUDGE

26/03/2020