

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SONGEA DISTRICT REGISTRY)**

**AT SONGEA.**

**MISC. CRIMINAL APPLICATION NO. 01 OF 2021**

*(Originating from Criminal Case No. 23 of 2020 of the District Court of Songea)*

**SALUM HASHIMU MTAMILA @ CHOKO..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

*Date of last order: 17/03/2021*

*Date of Judgment: 27/04/2021*

**RULING**

**I. ARUFANI, J.**

The applicant filed in this court the application at hand seeking for leave to lodge in the court the notice of intention to appeal and petition of appeal out of time. The applicant intends to appeal against the decision of the district court of Songea delivered in Criminal Case No. 23 of 2020 dated 22<sup>nd</sup> October, 2020. The application is made under section 361 (2) of the Criminal Procedure Act, Cap 20 R.E 2019 and is supported by the affidavit of the applicant. The respondent filed in the court a counter affidavit together with a notice of preliminary objection which states the affidavit supporting the application bears a defective verification clause.

During hearing of the raised point of preliminary objection the applicant was represented by Mr. Lazaro Simba, learned advocate and the respondent was represented by Ms. Jeneroza Montano, learned State Attorney. The State Attorney told the court that, an affidavit is a substitute of oral evidence and is required to contain only facts which the deponent know on his own knowledge. She said when the facts are deposed basing on information received and believed to be true the deponent is required to disclose the source of that information in the verification clause.

She argued that, the verification clause of the affidavit supporting the application of the applicant shows the deponent states all what is stated in paragraphs 1 to 10 of the affidavit are true to the best of his knowledge and belief without specifying which facts are deposed on the knowledge of the deponent and which are deposed on the belief of the deponent. She said that is contrary to what was stated by the Court of Appeal of Tanzania in the case of **Anatol Peter Rwebangira V. The Principal Secretary, Ministry of Defence and National Service & Another**, Civil Application No. 548/04 of 2018. She said the Court of Appeal stated in the above cited case that, law does not allow a blanket or rather a general verification that the facts contained in the entire affidavit are based on the knowledge and

belief of the deponent without specifying which paragraphs are based on the knowledge and which are based on the belief of the deponent.

She argued that, as the verification clause of the applicant is not specifying which paragraphs are verified basing on the knowledge of the deponent and which are based on his belief the verification clause of the affidavit of the applicant is defective and it renders the whole affidavit defective. She submitted that, as the affidavit supporting the chamber summons is defective the whole application is defective and prayed the same to be struck out.

In his reply the counsel for the applicant told the court that, the point of preliminary objection raised in the case of **Anatol Peter Rwebangira** (supra) was based in Order XIX Rule 3 (1) of the Civil Procedure Code, Cap 33 R.E 2019. He said under that provision of the law a deponent of an affidavit is required to specify the facts deposed basing on the knowledge of the deponent and which are based on the belief of the deponent. He said the stated requirement is not provided under the Criminal Procedure Act, Cap 20 R.E 2019 which governs criminal proceedings. He argued that, where it happened a specific provision is provided in the Civil Procedure Code such provision cannot be used in the criminal proceedings.

He submitted that, the defect stated is in the affidavit of the applicant of not specifying which paragraphs are deposed on the knowledge and which are deposed basing on the belief of the deponent can be cured by using overriding objective principle for the purpose of doing justice to the applicant. He stated that, it is true that the verification clause of the affidavit of the applicant shows the applicant deposed all paragraphs of the affidavit on his own knowledge and belief.

He however argued that, the requirement to specify which paragraphs are deposed on facts obtained from another source is applicable where there are paragraphs in the affidavit showing are information obtained from another source. He submitted that, as there are no facts deposed in the affidavit of the applicant basing on information obtained from another source which is not in the knowledge of the applicant then the case of **Anatol Peter Rwebangira** (supra) is distinguishable from the application at hand. In fine he prayed the point of preliminary objection raised by the respondent to be overruled.

In her rejoinder, the learned State Attorney told the court that, although the case she has cited of **Anatol Peter Rwebangira** is a civil case and the matter at hand is a criminal matter but there is no distinction

in verifying an affidavit to be used in civil cases and the one to be used in criminal cases. She stated the principle of verifying affidavit is the same in both civil and criminal cases. She stated further that, the case she has cited is explaining the principle used in affidavit in general without specifying is used in civil cases only.

She argued that, the counsel for the applicant has misled the court as he has stated the case of **Anatol Peter Rwebangira** (supra) is distinguishable from the case at hand as in the affidavit used in the cited case there were paragraphs deposed on information obtained from other sources while that was not true. She said the defect found in the affidavit used in the above cited case was that the verification clause was verified on the knowledge and belief of the deponent as it was done in the verification clause of the affidavit supporting the application at hand.

She submitted that, the defect in the verification clause of the applicant is serious and goes to the root of knowing the truth of what is deposed in the affidavit of the applicant. At the end she prayed the court to strike out the application as there is no affidavit to support the application.

After giving due consideration to the submissions made to the court by the counsel for both sides and after going through the impugned verification clause of the affidavit of the applicant the court has found that, as rightly argued by the counsel for the parties there is no dispute that the verification clause of the affidavit of the applicant shows all what are deposed thereon are true to the knowledge and belief of the applicant. The impugned verification clause of the affidavit of the applicant read as follows:-

*"All what is stated in paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 above are true to the best of my own knowledge and belief."*

That being how the affidavit of the applicant is verified the court has found the issue to determine here is whether the quoted verification clause is defective and it renders the whole affidavit defective. The court has found as rightly argued by the State Attorney and stated in several cases an affidavit for use in court is a substitute for oral evidence. The court has also found it was stated in the case of **Uganda V. Commissioner of Prisons, Ex Parte Matovu**, [1966] EA 514 that, an affidavit is required to contain statements of facts and circumstances to which the witness deposes either on his own knowledge or from information which he

believes be true. As stated in a book by **C. K. Takwni** titled **Civil Procedure**, Fifth Edition at page 21, where an averment is not based on personal knowledge, the source of information should be clearly disclosed.

The court has found further that, as stated in the case of **Anatol Peter Rwebangira** (supra) cited to the court by the State Attorney the law does not allow a blanket or rather a general verification that the facts contained in the entire affidavit are based on what is true according to the knowledge and belief of the deponent without specifying the respective paragraphs. That being the position of the law the court has found the verification clause of the affidavit supporting the application of the applicant which is not specifying which paragraphs are verified on the knowledge of the deponent and which are verified on the belief of the deponent was not properly verified.

The court has found the counsel for the applicant argued that, the case of **Anatol Peter Rwebangira** (supra) was decided basing on Order XIX Rule 3(1) of the Civil Procedure Code which requires a deponent to specify the facts deposed on his own knowledge and the facts deposed on information received from another source and believed to be true. He said

the referred law is not applicable in the matter at hand as that matter was a civil matter while the matter at hand is a criminal matter and there is no such a similar provision in the Criminal Procedure Act which governs criminal matters.

The court has found that, as stated in the case of **DPP V. Dodoli Kapufi and Another**, Criminal Application No. 11 of 2008 (Unreported), verification clause in an affidavit is one of the essential components of a valid affidavit. When the Court of Appeal of Tanzania was dealing with the issue of an affidavit containing a defective verification clause in the case of **Lisa E. Peter V. Al-Hushoom Investment**, Civil Application No. 147 of 2016, CAT at DSM (unreported) it stated that, the importance of verification clause in an affidavit was laid down by the Supreme Court of India in the case of **A.K.K. Nambiar V. Union of India** (1970) 35CR 121 where it was held that: -

*"The reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit evidence of rival parties. Allegations may be true to information received from persons or allegation may be based on records. **The importance of verification is to test the genuineness and authenticity of allegations and also to***

***make the deponent responsible for allegation.*** In essence, verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. In the absence of proper verification, affidavits cannot be admitted in evidence.”[Emphasis added.]

I have bolded part of the above extract to underscore the premise that, it is imperative for an affidavit not only to be verified but to be verified properly as if is not verified properly it cannot be admitted in a case as evidence to prove what is intended to be proved before the court. Therefore as rightly argued by the State Attorney whether an affidavit is intended to be used in civil matter or criminal matter is required to be verified properly. The proper verification of an affidavit as stated in the case of **Anatol Peter Rwebangira** (supra) is by specifying the facts the deponent asserts to be true of his own knowledge and those based on information or beliefs.

The counsel for the applicant tried to distinguish the case of **Anatol Peter Rwebangira** (supra) from the case at hand by stating that, while the affidavit filed in the said case had paragraphs containing information from another source while in the affidavit of the applicant there is no paragraph containing information from another source. The court has

found as rightly argued by the State Attorney the counsel for the applicant is not telling the court the truth.

The court has found the verification clause of the affidavit filed in the case of **Anatol Peter Rwebangira** (supra) as reproduced at page 7 of the cited decision shows the deponent verified all paragraphs of his affidavit cumulatively and stated are true to the best of his knowledge and belief as it was done in the affidavit supporting the application at hand. The court has found there is nowhere stated in the cited case that there were paragraphs containing information obtained from another source and were not specified. To the contrary the court has found what is stated in the said case is that, the verification clause of the affidavit filed in that case was verified on the knowledge and belief of the deponent without specifying the facts deposed on the knowledge of the deponent and the facts deposed on his belief as it was done in the verification clause of the affidavit supporting the application at hand.

The court has considered the invitation made to the court by the counsel for the applicant to use the principle of overriding objective to do justice to the applicant in the matter at hand but find that, the said principle cannot be used to cure the defect found in the verification clause

of the affidavit of the applicant. The court has arrived to the above finding after seeing that, the said principle is not required to be used to circumvent the mandatory procedures of the court. The above finding of this court is getting support from the case of **Martin D. Kumaliya and 117 Others V. Iron and Steel Limited**, Civil Application No. 70/18 of 2018 where the Court of Appeal stated that:-

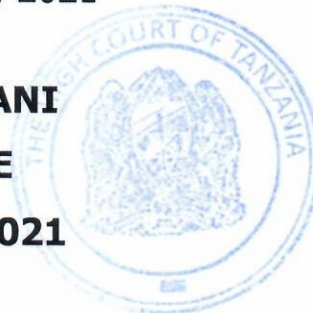
*"While this principle is a vehicle for attainment of substantive justice, it will not help a party to circumvent the mandatory rules of the court."*

Therefore the principle of overriding objective cannot be used to circumvent the requirement of the law relating to proper verification of affidavit deposed by the deponent on his own knowledge and belief without specifying which paragraphs are deposed on his own knowledge and which are deposed on his belief. It is because of the above stated reasons the court has found the point of preliminary objection raised by the respondent in the matter that the verification clause of the affidavit supporting the application of the applicant is defective for not specifying the paragraphs deposed on the knowledge of the deponent and those deposed on his belief is meritorious and deserve to be upheld.

Having found the verification clause of the affidavit supporting the application of the applicant is defective the court has found as stated in the case of **Salim Vuai Foun V. Registrar of Cooperative and Three Others**, [1995] TLR 75 it renders the whole affidavit defective and it cannot be acted upon by the court. As the affidavit supporting the application is defective it is as night follow the day that the application is incompetent for being supported by defective affidavit. In the premises the application of the applicant is hereby struck out for being incompetent. It is so ordered.


Dated at Songea this 27<sup>th</sup> day of April, 2021

  
**I. ARUFANI**  
**JUDGE**  
**27/04/2021**



**Court:**

Judgment delivered today 27<sup>th</sup> day of April, 2021 in the presence of the appellant in person and in the presence of Mr. Hamimu Nkoleye, learned Senior State Attorney. Right of appeal is fully explained to the parties.

  
**I. ARUFANI**  
**JUDGE**  
**27/04/2021**

