IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

MISC. CRIMINAL APPLICATION NO. 22 OF 2020

(Originating from Criminal Session No. 60 of 2017, the High Court of Tanzania, Arusha)

OMARY WAZIRI @MOHAMED ..... APPLICANT

Versus

THE REPUBLIC ..... RESPONDENT

RULING

19th April & 21st May, 2021

Masara, J.

Omary Waziri @Mohamed (the Applicant) was arraigned in this Court with the offence of Murder, contrary to section 196 of the Penal Code, Cap. 16 [R.E 2002] in Criminal Session No. 60 of 2017. When the information was read over to him, he pleaded not guilty to the charge but admitted to have killed the deceased unintentionally. The Republic agreed and a substituted charge of Manslaughter, contrary to Section 195 of the Penal Code, was read over to him whereof he pleaded Guilty. He was convicted of the offence as pleaded. The trial Judge, Dr. Opiyo, J, sentenced him to serve nine (9) years in prison. The Applicant was not pleased by the sentence imposed on him. He preferred an application for review in this Court vide Misc. Criminal Application No. 93 of 2019. However, on 13/2/2020, the application was withdrawn for being premised on a wrong provision of the law. On 25/3/2020 the Applicant filed this application moving the Court to review its decision on the sentence imposed on him. The application is preferred under section 2(1) (2), (3) and (5) of the Judicature and Application of Laws Act, Cap. 358 [R.E 2002], sections 172 of the Criminal Procedure Act, Cap. 20 [R.E 2002]

and section 78(1) of the Civil Procedure Code, Cap. 33 [R.E 2002] and any other provisions of the law.

The application is supported by an affidavit of the Applicant. The Republic opposed the application and filed a counter affidavit deponed by Ms. Blandina Msawa, learned State Attorney. On 9/6/2020, the learned State Attorney raised a Preliminary Objection on point of law to the effect that the application is incompetent for failure to move the Court with proper provisions of the law.

On 19/4/2021, when the application came up for hearing, it was ordered that both the Preliminary Objection and the main application be heard simultaneously. The Applicant appeared in Court in person, unrepresented while the Respondent was represented by Ms Tusaje Samwel, learned State Attorney.

Submitting in support of the Preliminary Objection, Ms Tusaje stated that the Applicant premised the application on a wrong provision of the law. She submitted that the application is for review; thus the provisions of the Judicature and Application of Laws Act, the Criminal Procedure Act and Civil Procedure Code are inapplicable. She therefore prayed that the application be struck out, as the governing law does not allow review application for criminal matters decided by the High Court.

In response, the Applicant contended that the Preliminary Objection raised does not qualify to be an objection. That the State Attorney did not cite the provision under which the application should have been preferred

so she cannot say the Application was wrongly premised. He cited the decision of the Court of Appeal in ***Christopher Rioba Vs. Republic***, Criminal Application No. 104/05 of 2019 (unreported) to support his argument. The decision cited was to the effect that in the Court of Appeal when a P.O was raised, the Court added the provision and went on determining the application on merits. He also cited Article 107A (ii) of the United Republic Constitution which emphasizes on doing away with technicalities while determining rights of parties. Further, he referred to Article 108 which gives this Court inherent powers to determine matters ordinarily provided in the Constitution. The Applicant maintained that he applied the JALA provisions since there is no specific provision to bring the application and that he cited the CPA due to the fact that his sentence did not take into account the time he spent in remand.

In a rejoinder submission, the learned State Attorney reiterated that the CPA does not provide for review in the High Court. She also faulted the decision cited stating that it does not apply in this Court since it relates to Review in the Court of Appeal, where review is sanctioned by law.

Before dealing with the substance of the application, I find it imperative to first dispose the Preliminary Objection raised before venturing into the merits of the application. That is whether it has merits or not.

The objection raised is basically on the provisions of the law relied on by the Applicant in filing this application. At the outset, I agree with the learned State Attorney that the provisions and the laws applied in moving the Court to grant the prayers sought are, with due respect, inapplicable.

To begin with, a review application on sentence cannot be premised on the Civil Procedure Code as that law is for civil litigations and suits of like nature. Secondly, the provision of section 172 of the CPA relied on does not specifically deal with review applications. The provision is about releasing a person on bail pending confirmation, powers of the confirming Court and the time when sentence starts to run. That provision provides:

> *"172.- (1) Whenever a subordinate court passes a sentence which requires confirmation, the court imposing the sentence may in its discretion release the person sentenced on bail pending confirmation or such order as the confirming court may make.*
> ***(2) Where –***
> ***(a) a person is committed in custody for sentence by the High Court;***
> ***(b) a person is remanded in custody awaiting the confirmation of his sentence by a higher court; or***
> ***(c) a person has been in remand custody for a period awaiting his trial, his sentence whether it is under the Minimum Sentences Act, or any other law, shall start to run when such sentence is imposed or confirmed, as the case may be, and such sentence shall take into account the period the person spent in remand."*** (emphasis added)

The quoted provision does not state that it can be invoked in order to review an order of sentence given by this Court. On that account, I agree with the learned State Attorney that the Court was not properly moved.

On the prayer made by the learned State Attorney that the Application be struck out, I desist from doing so because the learned State Attorney admits that there is no provision in the CPA that the Applicant could use in moving the Court to review its own decisions. Therefore, I see nothing wrong with the Applicant's decision to invoke section 2 of JALA in moving the Court to exercise its inherent powers and deal with the matter

presented to it substantively. Thus, I find no compelling reasons for not determining the application on merits. The Respondent stands to suffer no prejudice, since this is the second application suffering the same fate. I am therefore inclined to overrule the Preliminary Objection on that basis. I now proceed to determine the application on its merits.

Submitting in support of the Application, the Applicant averred that the learned Judge did not consider the period he spent in prison. He cited two cases: ***Katinda Simbila @Ng'waninana Vs. Republic***, Criminal Appeal No. 15 of 2008 and ***Ilole Shija Vs. Republic***, Criminal Appeal No. 357 of 2013 (both unreported), to underscore his argument that the learned Judge ought to have taken into consideration the period he spent in prison before he was sentenced. The Applicant was also emphatic that his mitigations were not considered. He insisted that had the learned Judge taken into consideration all the time he spent in prison and the fact that he was still a student, the sentence would have been less than the one imposed.

Contesting the application, Ms Tusaje contended that the Applicant has failed to advance reasons that would make this Court to review its own decision, citing the case of ***Said Shaban Vs. Republic***, Criminal Appeal No. 7 of 2011 (unreported). She fortified that the Applicant was charged of Murder but he pleaded guilty to a lesser offence of Manslaughter. The prosecution agreed to reduce the charge, he offered mitigations and the Court took into consideration the mitigating factors and sentenced him to serve 9 years in prison. According to the learned State Attorney, this Court can not interfere with its own sentence unless there is proof that the

Judge overlooked some material factors. She maintained that the Applicant had legal representation. If he was dissatisfied, he had a right to appeal. The learned State Attorney fortified that circumstances under which review can be granted are articulated by the Court of Appeal in ***Said Shaban*** (supra) and they do not exist in the present case. She implored the Court to dismiss the Application.

I have studied the records of the proceedings of this Court in Criminal Session No. 60 of 2017 subject of this review, Affidavits of both parties and the submissions for and against the application. The main issue calling for this Court's determination is whether the Applicant has advanced grounds antecedent for this Court to review its own decision.

In criminal cases, the law is silent on what grounds review can be preferred in this Court, save in the Court of Appeal where review is provided by law. Jurisdiction of this Court on review is also provided in the Civil Procedure Code, when dealing with Civil cases. In criminal matters, the governing authority to exercise review has been developed through case laws. In the case of ***Chandrakavant Joshubhai Patel Vs. Republic*** [2004] TLR 2018, while citing with approval its previous full bench decision in ***Transport Equipment Ltd Vs. Devram P. Valambhia*** [1998] TLR 89 the Court of Appeal articulated circumstances under which review can be preferred. It held thus:

> *"The Court had inherent jurisdiction to review its decisions and that it will do so in the following circumstances. Where* ***resulted in miscarriage of justice; where the decision was obtained by fraud; or where a party was wrongly deprived of opportunity to be heard."*** (emphasis added)

The above conditions were also reiterated in the cited case of ***Said Shaban Vs. Republic*** (supra). In the circumstances of the instant application, neither of the above grounds exist. The only reason the Applicant has called the Court to review its decision is the fact that the period he spent in prison was not considered by the learned Judge while sentencing him. With due respect the Applicant is wrong. I believe that he has misconceived the sentence imposed to him by the learned Judge. Before pronouncing the sentence, the learned Judge gave detailed reasons for sentencing the Applicant to 9 years imprisonment. At page 7 of the proceedings, the learned Judge made the following remarks:

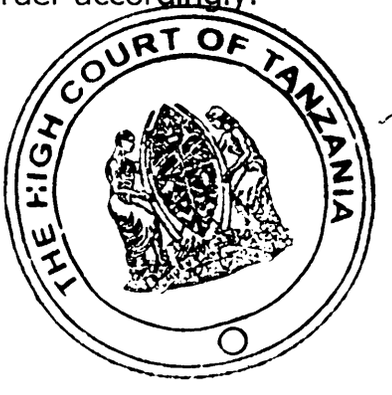
> *"After giving due consideration to the facts of this case that the reason for seriously stubbing the deceased, was immediate demand of refund (sic) of what accused had given to the deceased during their love affair.* ***And also considering mitigating factors that he is still young and a university student by the time of the incident. I am convinced that at his young age what he did was uncalled for, of supposedly investing much on a person whom he was in Love relation with but not serious enough to be his wife. This habit of causing death is getting rampant among our your (sic) students across the country. In my view a stern sentence is required to send a Message across. Also, the way he caused the death of the deceased according to postmortem examination Report (Exhibit P1) was through multiple stub wounds on the chest and Abdomen using the knife he was carrying with him for the reasons best known to himself.*** *From that background, although in accordance to section 198 of the Penal Code (Supra) a person who commits Manslaughter is liable to imprisonment for life, but accused in this case based on the mitigating factors is sentenced to serve a prison term of 9 years."*

From the above, it is obvious that the learned Judge considered the mitigating factors. She also gave detailed reasons for sentencing the Applicant to 9 years imprisonment. It has to be borne in mind that factors to be taken into consideration in sentencing an accused person to a

certain punishment are not limited only to the period the accused spent in prison. Various factors are taken into account; including, the nature the offence and the way it was committed. In the instant application, the learned Judge took into account such factors including the fact that murder cases were prevalent in the society. She also considered the fact that the Applicant being a student failed to concentrate on his studies and indulged himself in love affairs. Further, it is clearly provided under section 198 of the Penal Code that punishment for manslaughter is life imprisonment. By sentencing the Applicant to 9 years, it means that the Judge took into consideration the mitigating circumstances. Therefore, there is nothing this Court can review in that decision. This application is devoid of merits.

From what I have endeavoured to discuss above, it is the finding of this Court that the Applicant has failed to adduce reasons that would compel this Court to exercise powers to review its own decision. The application is therefore bound to fail. I therefore dismiss it in its entirety.

Order accordingly.



Y. B. Masara
JUDGE
21st May, 2021.