

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 114 OF 2021

(Arising from the decision of the District Court of Bagamoyo at Bagamoyo, in Criminal Case No. 110 of 2020, by Hon. M.B MMANYA-RM dated 17th day of February, 2021)

BETWEEN

ALLY HAMISI LYUMBA.....APPLICANT

AND

THE REPUBLICRESPONDENT

RULING

Date of Last Order: 4/8/2021

Date of Ruling: 25/8/2021

ITEMBA, J:

In the District Court of Bagamoyo, the applicant one Ally Hamis Lyumba was charged and convicted with the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Chapter 16 of the Revised Edition 2002. He was sentenced to serve thirty (30) years of imprisonment.

The applicant upon being dissatisfied with the decision thereof, lodged the instant application seeking for an order of extension of time to lodge a notice of intention to appeal against the impugned decision as well, for any other order (s) this court may deem fit just to grant.

The application was met with two points of preliminary objections. The preliminary objections were to the effect;

1. That, the court is not properly moved.

2. That, the applicant's affidavit is incurably defective.

At the hearing of the respective objections, the applicant was unrepresented, whereas the respondent Republic had the services of Ms. Rehema Mgimba, learned State Attorney.

In respect of the 1st preliminary point of objection, Ms. Mgimba argued that there was a wrong citation of law in the applicants' chamber summons. She contended that section 361 (2) of the Criminal Procedure Act, [Cap 20 RE: 2019] is the proper law which ought to have been cited by the applicant as it empowers this court to extend time to file a Notice of Appeal out of time. She further explained that, section 11 (1) of the Appellate Jurisdiction Act, [Cap 141 R.E 2002] which was cited by the applicant in the Chamber Summons, is applicable where the applicant seeks for extension of time to file a notice of appeal before the Court of Appeal. Thus, specifically the said section is applicable before this court or the Resident Magistrate court with extended jurisdiction, for application of seeking an extension of time to the Court of Appeal of Tanzania. Ms. Mgimba then expressed her stance that the court has not been properly moved.

In the second point of preliminary objection, the learned State Attorney argued that the affidavit in support of the application is incurably defective as paragraph 3, states words uttered by the 'Head of Prisons', and that was hearsay evidence contrary to the law.

It was further argued by Ms. Mgimba that paragraph 6 of the applicant's affidavit contains prayers while the law allows neither prayers nor arguments in the affidavit. To support her position, she invited the court to refer the decision of **MMG GOLD LTD vs. HERTZ TANZANIA**

LTD, Misc. Commercial Cause No. 118 of 2015, HCT (Commercial Division) at Dar es salaam (Unreported) which provides *inter alia* that affidavits should not contain prayers or opinions.

For that reason, she stressed that the said paragraph 3 of the applicant affidavit, being the only paragraph which shows a good cause, is incurably defective, henceforth the affidavit should be expunged and the application should be dismissed in it's entirety.

In reply, the applicant had no much to say rather than distancing himself from being responsible for preparing the instant application. He stated that he is a layman who was assisted to draft the same by prison officers.

In her brief rejoinder, Ms. Mgimba emphasised on what she had submitted prior in her submission in chief and supplemented that the applicant, despite of being a layman, he is not excused from compliance with legal procedures as provided by the law.

I have considered the submissions by both parties. Having so done, the central issue for determination by this court is ***whether the preliminary objections have merit.***

Starting with the first preliminary objection, the instant application is made under section 11 (1) of Appellate Jurisdiction Act, [Cap 141 RE: 2002]. The said provision reads;

11 (1)- Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a

certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired. [Emphasis added]

Based on the wording of the above provision itself, I am in agreement with the learned State Attorney that this section gives mandate to this court to extend time for lodging the notices of appeal, specifically on appeals which are preferred to be instituted before the Court of Appeal of Tanzania.

It was the contention of the learned State Attorney that section 361 (2) of the Criminal Procedure Act (supra) is the proper provision which empowers the court to extend time for the appellant to lodge his notice of appeal preferred before the High Court.

I do fully subscribe to such contention. The said provision reads;

361.-(1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the appellant-

(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and

(b) N/A

(2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed. [Emphasis added]

From the above provision, it is undoubted fact that sections 361 (2) ought to have been relied by the applicant to seek for an extension of

time as prayed under his chamber summons. For that reason, it is prudent to state that section 11 (1) of the Appellate Jurisdiction Act (Supra) cited, is the wrong provision of the law.

I must say that the law regarding wrong citation of law is well settled. It is to the effect that the wrong citation as well non citation of the enabling provisions renders the application incompetent. This has been well decided in a number of decisions when the court was confronted with similar circumstance as this one at hand. For instance, in the case of **Hussein Mgonja vs. The Trustees of Tanzania Episcopal Conference**, Civil Revision No. 02 of 2002, CAT (Unreported), the Supreme Court of the land when striking out an application on the ground of incompetence stated that;

"If a party cites a wrong provision of the law, the matter becomes incompetent as the court will not have been properly moved."

See also the cases of **Robert Leskar v. Shibesh Abebe**, CAT-Civil Application No. 4 of 2006; **Anthony Tesha v. Anita Tesha**, CAT-Civil Appeal No. 10 of 2003; **Fabian Akonaay v. Matias Dawite**, CAT-Civil Application No. 11 of 2003; **Aioyce Mseiie v. The N.B.C. Consolidated Holding Corporation**, Civil Application No. 11 of 2002 (all unreported) and **China Henan International Cooperation Group v. Saivand K.A. Rwegasira** [2006] TLR No. 220]

I am alive with the oxygen principle which was introduced to our jurisdiction through the Written Laws (Miscellaneous Amendments) Act No. 8 of 2018. The principle encourages courts to consider substantive justice as opposed to legal and procedural technicalities. However, this

principle cannot be invoked blindly especially in situations where noncompliance goes to the root of the case. See the case of **SGS Societe Generale de Surveillance SA and Another vs. VIP Engeneering & Marketing Ltd and Another**, Civil Appeal No. 124 of 2017 (Unreported) where the court held that;

"The amendments by Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of court or to turn blind to the mandatory provisions of the procedural law which goes to the foundation of the case".

From the above stated position, it is my conclusion that the court was wrongly moved by the applicant. The wrong citation of enabling provisions goes to the root of the matter and makes this application incompetent.

Having discussed above, I hold that the first point of objection regarding the wrong citation of the enabling provision is meritorious and it is therefore sustained. I will not go to the second point of preliminary objection as the first disposes the application. I hereby do the same by striking it out. The applicant is at liberty to re-institute a competent application.

It is so ordered.



A handwritten signature in blue ink, appearing to read "L. J. Itemba".

**L. J. ITEMBA,
JUDGE
25/8/2021**

Ruling delivered at Dar es Salaam this 25th day of August, 2021 in the presence the applicant in person, Ms. Mgimba State Attorney for the Respondent and Ms. Masilamba Court Clerk.

Right of appeal explained.



A handwritten signature in blue ink, appearing to read "L. J. Itemba".

L. J. Itemba

JUDGE

25/08/2021