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

**(IN THE DISTRICT REGISTRY OF MWANZA)**

**AT MWANZA**

**MISC. CRIMINAL APPLICATION NO. 24 OF 2021**

***(Arising from the Judgment of the Court at Mwanza (Hon. Mgeyekwa, J) in Criminal Appeal No. 12 of 2021, dated 30th June, 2021.)***

**MICHAEL LADISLAUS ..... APPLICANT**

**VERSUS**

**HUSSEIN RAMADHANI ..... RESPONDENT**

**RULING**

23rd August & 1st November, 2021

**ISMAIL, J.**

The applicant herein was the respondent in PC. Criminal Appeal No. 12 of 2021, which was challenging the decision of the District Court of Ukerewe in Criminal Appeal No. 5 of 2021. The findings in the latter were in the applicant's favour, triggering an appeal to this Court. On 30th June, 2021, this Court (Hon. Mgeyekwa, J) allowed the appeal, and ordered nullification of the proceedings in the 1st appeal. The Court further ordered that the resultant decision be set aside. It is this decision that has bemused the applicant, hence his decision to institute a notice of intention to appeal to the Court of Appeal of Tanzania.

The application before me seeks to move the Court to certify that the impending appeal to the Court of Appeal of Tanzania carries a point of law worth a consideration by the Court of Appeal of Tanzania. The application has hit a snag, imposed through a preliminary objection filed by the respondent. The contention by the respondent is that the application is time barred.

When the counsel entered a virtual appearance before me, they prayed to have the matter disposed of by way of written submissions. Acceding to the prayer, the Court ordered that the objection should be argued alongside the application, and that ruling in respect of both would be delivered together, depending on the merits or otherwise of the objection. With respect to the objection, the contention by Mr. Mussa Nyamwelo, counsel for the respondent, is that the application was filed in contravention of Rule 44 (2) of the Court of Appeal Rules, 2019, which provides as follows:

> *"An application under this rule shall be made within fourteen days from the date when the notice of appeal is lodged."*

The contention by Mr. Nyamwelo is premised on the fact that, whereas the notice of appeal was filed on 28th July, 2021, the instant application was filed on 11th August, 2021, after the lapse of the 14-day period stipulated by

the law. It was his argument that, since the application was filed 15 days after the date of filing of the notice of appeal, then the same is time barred and liable to dismissal.

Mr. Steven Makwega, counsel who represented the applicant has a diametric view on the contention of time bar. While admitting that the time frame for filing applications for certification on a point of law remains to be 14 days from the date of filing the notice of appeal, his contention is that the instant application is timeous. He argued that, counting from 28th July, 2021, but excluding the day of such filing, the application was filed within 14 days set out by law. It was the counsel's view that the law was firmly conformed to, and that the objection is baseless. He prayed that the same be overruled.

In rejoinder, Mr. Nyamwelo reiterated his earlier stance that the application was filed out of time. He urged the Court to dismiss it.

With respect to the application, Mr. Makwega's submission is that points of law exist and that the same should be certified, officially allowing the applicant institute his appeal. Two points have been picked as the basis of his consternation. ***One***, that the issue of a defective charge sheet, which was not the subject of trial proceedings or appeal proceedings in the 1st

appellate court, was used by the Court as the basis for allowing the appeal. It was the applicant's view that this was a new point which ought not to have been used as the basis for the decision. ***Two***, that the charge sheet that founded the proceedings against the respondent had all its ingredients disclosed in the charge. Mr. Makwega held the view that this fact is cemented by the fact the accused person, the respondent, pleaded not guilty to the charge when the same was read over. This means, he contended, the respondent knew the allegations which were levelled against him. The applicant's counsel urged the Court to certify that these two points are weighty enough to warrant the Court of Appeal's intervention. He prayed that the application be granted.

Mr. Nyamwelo's rebuttal was brief. With respect to a defective charge, his contention is that, since the alleged defect is a point of law, the same can be raised at any stage of the proceedings, be it on appeal or trial. He leapt to the Court's defence when it picked that point on second appeal, and he saw nothing blemished in the decision as to require intervention of the Court of Appeal. He prayed that the application be dismissed.

I will begin the disposal by addressing the issue of time prescription raised as point of law. The view held by Mr. Nyamwelo is that the application has failed the test by having it filed after the expiry of 14 days. Mr. Makwega

decries his counterpart's failure to apply proper counting which would enable him to conclude that the application is timeous. What is clear from the rival submissions is that reckoning of the days has drawn a divergence with each of the parties having formula which is based on own interpretation.

In my considered view, this is a contention which can be resolved by looking at Rule 8 (d) of the Rules. This provides an answer to the counsel's rival contentions. It states as follows:

> ***"Where any particular number of days is prescribed by these rules, or is fixed by an order of the Court, in computing the same, the day from which the said period is to be reckoned shall be excluded****, and, if the last day expires on a day when the Court is closed, that day and any succeeding days on which the Court remains closed shall be excluded."*** [Emphasis supplied]

The quoted provision is in sync with what is provided for under section 60 (1) (g) of the Interpretation of Laws and General Clauses Act, Cap 1 R.E. 2019. It provides:

> *"where there is a reference to a number of days not expressed to be clear days or "at least" or "not less than" a number of days between two events,* ***in calculating the number of days there shall be excluded the day on which the first event happens*** *and there shall be*

*included the day on which the second event happens"*
[Emphasis added]

The counsel are not at variance on the date on which the notice of appeal was lodged. It was lodged on 28th July, 2021. Since, as clearly stated in the cited provisions, reckoning of the day excludes the first day, it is clear that the 14-day period will be reckoned from 29th of July, 2021. This means, as Mr. Makwega contended, the application was filed on the 14th day of the period set out for filing such applications. It leaves the application unscathed and, therefore, compliant with the time prescription. Consequently, I hold that the objection raised by the respondent is misconceived, deserving nothing better than a shrug. I overrule it.

Reverting to the substance of the application, the question for determination is whether points of law exist and worth of certification for determination by the Court of Appeal.

It is common knowledge that where matters constituting the subject of appeal originated from primary courts, such appeals must be preceded by certification that points of law exist and are of sufficient importance meriting the attention of the Court of Appeal. With respect to criminal matters, the guiding provision of the law is section 6 (7) (b) of the Appellate Jurisdiction Act (AJA), Cap. 141 R.E. 2019 which states as follows:

*"(7) Either party–*

> *(b) to proceedings of a criminal nature under Head (c) of Part III of the Magistrates' Courts Act may, if the High Court certifies that a point of law is involved, appeal to the Court of Appeal."*

That certification of a point of law is an imperative prerequisite has been restated in many a decision of this Court and the Court of Appeal of Tanzania. One of such decision is ***Abdallah Matata v. Raphael Mwaja***, CAT-Criminal Appeal No. 191 of 2013 (DDM-unreported), in which it was underscored as follows:

> *"In order to lodge a competent appeal to the Court, the intended appellant has to go through the High Court first with an application for a certificate that there is a point of law involved in the intended appeal. It is only when the appellant is armed with the certificate from the High Court, that a competent appeal may be instituted in this Court."*

See also: ***Omari Yusufu v. Mwajuma Yusufu & Another*** [1983] TLR 29; ***Marco Kimiri & Another v. Naishoki Eliau Kimiri***, CAT-Civil Appeal No. 39 of 2012; ***Dickson Rubingwa v. Paulo Lazaro,*** CAT-Civil Application No. 1 of 2008; and ***Harban Haji Mosi & Another v. Omari Hila Seif***, CAT-Civil Reference No. 19 of 1997 (all unreported).

As stated earlier on, the applicant's points of contention touch on four issues as formulated in paragraph 4 of the supporting affidavit. These are:

1. *Whether issues which were not canvassed by the trial court and the 1st appellate court can be raised on the 2nd appeal;*
2. *Whether the particulars of the offence which were levelled against the Respondent failed to show the ingredients of the offence of obtaining money by false pretense;*
3. *Whether the High Court properly directed its mind to decide the case in the Respondent's favour; and*
4. *Whether the order of setting aside the conviction and sentence by the High Court was proper.*

Looking at these issues one question that springs to mind is: Do the questions raised in the proposed issues bring out any points of law worth of certification by the Court? In my unflustered view, the answer to this question is in the negative. With respect to 2nd to 4th issues, it is quite clear that they are questions of fact which touch on the way the Court evaluated factual issues which were raised by the parties right from the inception of the proceedings. They are intended to gauge if the analysis carried out by the Court took into consideration the factual account as presented before it. Propriety of the Court's decision to set aside conviction and sentence; whether or not the respondent was made aware of the ingredients of the charge; and if the Court properly directed its mind when it decided in the

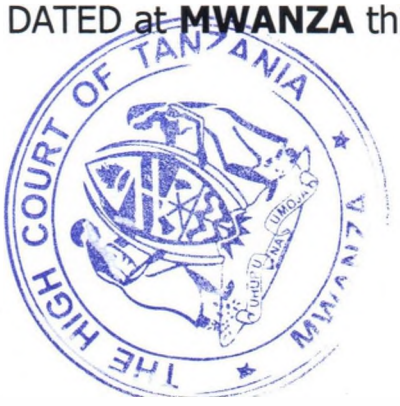
respondent's favour are matters which would require leafing through evidence submitted in Court. They are not legal issues which would require an interpretation by the Court of Appeal. These, in my considered view, fail the test requisite for certification.

Regarding the 1st issue, my conviction is that this is an issue whose position is trite and has been underscored in many a decision. It is neither novel nor is it of significant importance as to engage the Court of Appeal. Allowing it to constitute the basis for an appeal to the Court of Appeal is to go against the public policy which requires that litigation must come to an end. Allowing trivialities to filter and find their way to the apex Court is to contravene that public policy.

In sum, it is my finding that a case has not been made out for moving the Court to issue a certificate on the point of law, and, as a result this application fails. Accordingly, the same is dismissed with costs.

It is so ordered.

DATED at **MWANZA** this 1st day of November, 2021.




**M.K. ISMAIL**

**JUDGE**