

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
(MBEYA DISTRICT REGISTRY)  
AT MBEYA**

**MISC.CRIMINAL APPLICATION NO. 06 OF 2022**

*(Arising from the Judgment of the High Court of Mbeya (Hon. Mongella, J) in PC. Criminal Appeal No. 188 of 2018, dated 3<sup>rd</sup> August, 2020; Rungwe District Court Criminal Appeal No. 26 of 2018 originating from Kiwira Primary Court in Criminal Case No. 265 of 2018)*

**JOAKIM MWASAKASANGA.....APPLICANT**

**VERSUS**

**DANIEL KAMALI..... 1<sup>ST</sup> RESPONDENT**  
**PHILIMON MWAKAJILA.....2<sup>ND</sup> RESPONDENT**  
**SADICK ANGOLILE.....3<sup>RD</sup> RESPONDENT**  
**ASAJILE ANYASIME..... 4<sup>TH</sup> RESPONDENT**  
**SAMWEL DAVID..... 5<sup>TH</sup> RESPONDENT**

**R U L I N G**

*19<sup>th</sup> April, & 23<sup>rd</sup> May, 2022*

**KARAYEMAHA, J.**

The decision of this Court aggrieved the applicant and so seeks to climb the ladder to the Court of Appeal. Essentially, it all started with him filing a Criminal Case number 265 of 2018 before the Kiwira Primary Court (the trial court). In there, the respondents were charged with two counts, namely, threatening violence contrary to section 89 (1) (b) and Malicious damage to property contrary to section 326 both of the Penal Code Cap 16 of the Revised Edition, 2019 (hereinafter the Penal Code). After a full trial the respondents were acquitted. Unhappy, the applicant lodged an appeal

to the District Court of Rungwe (hereinafter the 1<sup>st</sup> appellate Court) which upheld the trial Court's decision. Undaunted, the applicant ascended higher to this Court and lodged a second appeal. Unfortunately, the decision flowed in favour of the respondents. Of relevance to this matter is that this Court found that the charge upon which the proceedings premised was defective but found it improper to order a re-trial as that order would accord the applicant a chance to rectify his mistakes. The applicant harbours the feelings that the 2<sup>nd</sup> appellate Court erred in rendering such a decision. He is intending to appeal to the Court of Appeal but as usually the case must come to this Court to have his points of law certified hence this application.

In this application, the applicant seeks to move the Court to certify that there are points of law worth of determination through an appeal to the Court of Appeal of Tanzania. The intended appeal is against the decision of this Court (Hon. Mongella, J) in respect of PC. Criminal Appeal No. 188 of 2018, dated 3<sup>rd</sup> August, 2022, in which the applicant emerged a loser. The Court found that the charge upon which proceedings were predicated was defective but declined to order a re-trial on the reason that doing so would be according the applicant a chance to rectify his mistakes. She, consequently, upheld the 1<sup>st</sup> ground of appeal but with reservations on the matter being retried. She further dismissed the 2<sup>nd</sup> and 3<sup>rd</sup> grounds

for being unmeritorious. At stake during the trial and in subsequent appeals is the issue of defective charge. The applicant feels hard done by when the courts shrugged off his contentions that the section of the law cited in the charge sheet does not feature anywhere in the Penal Code thus non-existent and eventually declined to order a re-trial. He has hence taken the bold decision to move up the ladder.

The application is preferred under the provisions of **section 6 (7) (b) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019** (hereinafter the AJA) and it is supported by the applicant's own affidavit, setting out grounds on which the prayers are sought. The supporting affidavit sets out details on the reasons for which the prayers are made. Of most relevancy is paragraphs 4 which reveals what he considers to be a point of law that should be certified by the Court for determination in his impending appeal. It states as follows:

- (a) That the Honourable Court Judge erred in law in holding that acquittal emanated from proper charge while the same was defective.*
- (b) That the Honourable Court Judge erred in law in failure to order a retrial while the whole proceeding and judgment of the trial court emanates from defective charge.*

In a swift reply made through a joint counter-affidavit, the respondents disputed the substantial parts of the applicant's affidavit and

insisted that they were not charged under **section 316 of the Penal Code**.

Disposal of the application was ordered to go by way of written submissions, consistent with a schedule which was duly conformed to by the parties. Submitting in support of the application, the applicant contended that, while the Court acknowledged that the charge was defective found that the acquittal was emanated from a proper charge. He held the view that the charge complained of was predicated under section 326 of the Penal Code for the offence of malicious damage to property which according to him does not create the said offence. He said adding that the charge complained of contradicts the dictates of **section 21 (1) (b) of the Primary Courts Criminal Procedure Code** (hereinafter the PCCP).

The applicant held the view that the points of law to be certified are whether the 2<sup>nd</sup> appellate Court holding that a charge was defective it was warranted to conclude that an acquittal emanating there from was proper and whether the denial to order a retrial of the case that emanated from a defective charge was proper.

The respondents were diametrically opposed to the contentions raised by the applicant. Through their submission, they found no fault in the decisions of the Courts and that it was proper for the High Court to

declare the charge defective. They, nevertheless, held the point that the applicant has shown no point of law triggering the intervention of the Court of Appeal because a settled principle is that not always retrial should be ordered as the applicant will get a chance to fill in the gaps.

From these concise submissions, the question to be resolved is whether the decision sought to be appealed against exhibits any point of law worth certifying for consideration by the Court of Appeal. As demonstrated above, the parties are varied in their views. Before I delve into that, let me lay a general foundation on the requirement of certification on a point of law before an appeal is preferred. The legal position is that appeals originating from the primary court can only be filed to the Court of Appeal upon the Court's certification that there is a point of law worth consideration by the superior Court. This is the imperative requirement under section 6 (7) (b) of the AJA which provides as hereunder:

*"7) Either party—*

*(c) 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."*

This position of the law has been restated and emphasized through case law. The Court of Appeal of Tanzania had the following guidance to

offer, in this respect, in **Abdallah Matata vs. Raphael Mwaja**, CAT-Criminal Appeal No. 191 of 2013 (unreported) this requirement was underscored when it was held:

*"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."*

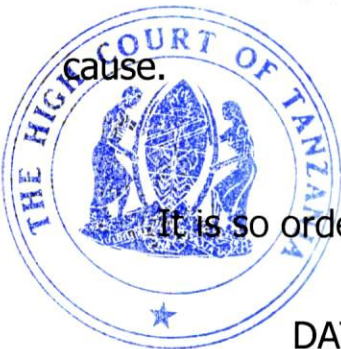
See also: **Omari Yusufu vs. Mwajuma Yusufu & Another** [1983] TLR 29; **Dickson Rubingwa vs. Paulo Lazaro**, CAT-Civil Application No. 1 of 2008; and **Harban Haji Mosi & Another vs. Omari Hila Seif**, CAT-Civil Reference No. 19 of 1997 (both unreported).

Gleaning from the supporting affidavit, what comes out as the applicant's gravamen of complaint is that the High Court found correctly that the charge sheet was defective but erred in finding that the acquittal was proper. He complained further that an order denying a retrial of the case that emanated from a defective charge was improper. This, the applicant contends, went against the provisions of section 21 (1) of the PCCP. The respondents take a different view and they are of the view that the applicant has shown no point of law triggering the intervention of the

CAT because a settled principle is that not always retrial should be ordered as the applicant will get a chance to fill in the gaps.

To cum it all, it is my conviction that from what has been submitted by the applicant and what is gathered from the application, there exist points of law that are worth of consideration on appeal to the Court of Appeal, through the impending appeal. I, therefore, certify that the questions as to ***(a) whether the Court's decision to hold that acquittal from defective charge was proper and consistent with the law*** and ***(b) whether an order denying a retrial of the case that emanated from a defective charge was proper,*** are points of law worth of consideration by the Court of Appeal.

Accordingly, I grant the application as prayed. Costs shall be in the cause.



It is so ordered.

DATED at **MBEYA** this **23<sup>rd</sup>** day of **May, 2022**

A handwritten signature in black ink, appearing to read 'J.M. Karayemaha'.

**J. M. KARAYEMAHA**  
**JUDGE**