

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. CRIMINAL APPLICATION NO. 106 OF 2021

(Originating from Resident Magistrate Court of Arusha, Criminal Case No. 129 of 2020)

ALFANI S/O JUMA SEIF1ST APPLICANT

ARISTIDE S/O PAULO SHAYO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

28.07.2022 & 11.08.2022

N.R. MWASEBA, J.

This is the ruling in respect of a preliminary objection raised by the respondent's learned State Attorney on 19th May 2022 that:-

1. This application is incompetent and bad in law for citing wrong provision of the law.

Before this court, the applicants appeared in person, unrepresented whilst the respondent was represented by Ms. Eunice Makala, learned State Attorney. The raised preliminary objection was disposed of by way of

written submission and both parties adhered to the filing schedules set by the court.

Submitting in support of her preliminary objection, Ms Makala argued that the application before the court is for bail pending appeal and the proper provision is **Section 368 (1)(a) (i) of the Criminal procedure Act, Cap 20 R.E 2019** which provides that:

"1. After the entering of an appeal by a person entitled to appeal, the High Court or the subordinate court which convicted or sentenced such person may, for reasonable cause to be recorded by it in writing;

(a) in the case of a person sentenced to a term of imprisonment, order-

(i) that such person be released on bail with or without sureties pending the hearing of his appeal;"

However, the applicants cited **Section 361 (2) of CPA** to move the court to grant bail pending appeal. The section provides: -

"The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed."

She further submitted that the said provision deals with extension of time and not bail pending appeal. So, she prayed for the application to be dismissed.

On their side, the applicants conceded that they cited a wrong provision of the law and prayed for the court to take into consideration the principle of overriding objective for the benefits of the applicants who are laymen. They averred that, although the provision was wrongly cited but the content of their application is all about bail pending appeal. So, they prayed for the preliminary objection to be overruled and the application be determined to its finality.

Having considered the arguments submitted by both parties regarding the raised preliminary objection, the germane issue for determination is whether wrong citation of the provision of law is fatal and renders the application incompetent.

Glancing on the submissions of both sides there is no dispute that the application at hand has been brought under wrong citation. It has been decided in numerous cases that wrong citation of the provision of the law renders the application incompetent. As it was held by the Court of Appeal in the case of **Edward Bachwa & 3 Others Vs The Attorney general and Another**, Civil Application No. 128 of 2006 (Unreported) that:

"... the answer is found in an unbroken chain of authority to the effect that wrong citation of the law, section, sub section and/ or paragraph of the law or non-citation of the law will

not move the court to do what it is asked and renders the application incompetent."

Being guided by the above legal position, it goes without saying that the application at hand is incompetent before this court for being preferred under wrong citation of the enabling provision. The same cannot be cured even by the principle of overriding objective as prayed by the applicants that the court to do away with technicalities. This is due to the fact that the overriding objective principle cannot be applied blindly. As it was held in the case of **Mondorosi Village Council & Others Vs Tanzania Breweries Limited**, Civil Appeal No. 66 of 2017 (CAT at Arusha, Unreported) that:

"Regarding overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case."

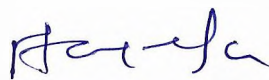
This is due to the fact that wrong citation goes to the root of the matter as such this court has been improperly moved and thus lacks jurisdiction to entertain this application.

In the end result, the preliminary objection is sustained, the application is hereby struck out for being incompetent before this court. No order as to costs.

It is so ordered.

DATED at **ARUSHA** this 11th day of August 2022.




N.R. MWASEBA

JUDGE

11.08.2022