

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[IN THE DISTRICT REGISTRY OF ARUSHA]
AT ARUSHA

MISC. CRIMINAL APPLICATION No. 11 OF 2022

(Arising from Economic Case No. 65 of 2016 which is pending in the Resident Magistrate Court of Arusha at Arusha)

DINNA PANTALEO MOSHI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

06th June & 15th July 2022

TIGANGA, J.

This ruling is in respect of the preliminary objection on point of law raised by the respondent, the Republic, in a notice filed in court on 21/03/2022 containing two points of law that;

1. That, the application is incompetent for contradicting section 372 of Criminal Procedure Act [Cap 20 R.E 2019].
2. That, the application is incompetent for being brought under the improper provision of law.

The said preliminary objection, was raised to challenge the application which was filed by the applicant Dinna Pantaleo Moshi, which was filed under certificate of urgency certified by Mr. Peter Michael Madeleka,

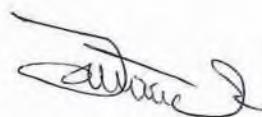


learned Advocate who is representing the applicant. In the certificate of urgency, the applicant's counsel raised two points of concern that;

- (a) The respondent has arbitrarily charged the applicant,
- (b) If the charges against the applicant in the lower court will not be dropped then, the applicant will continue to suffer irreparable loss of her freedom unjustifiably.

In the chamber summons which has been used to move the court, it was preferred under section 372 (1) of the Criminal Procedure Act [Cap 20 R.E 2019] here in after, the CPA, and Sections 2, 44 (1) (a) and 44 (3) of the Magistrates Courts Act [Cap 11 R.E 2019] herein after, the MCA. The orders sought in this application are as follow;

- i. That the court calls for and examine the record of Economic Case No. 65 of 2016 which is pending in the Resident Magistrates' Court of Arusha, at Arusha for the purposes of satisfying itself as to the correctness, legality, propriety of any finding or order recorded or passed and regularity of the said proceedings.
- ii. That this court be pleased to call for and inspect or direct the inspection of the record of the Economic Case No. 65 of 2016 which is pending in the Resident Magistrates' Court of Arusha, at

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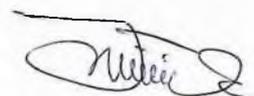
Arusha and give such directions as it considers may be necessary *in the interest of justice.*

- iii. Any other order (s) as this Honourable Court will deem fit, just and equitable to grant.

The chamber summons was filed while supported by the affidavit sworn and filed by the applicant herself in which she deposed, among other things on how she was arrested and arraigned before the Court of Resident Magistrate of Arusha. She also in that affidavit, advance the reasons for the application.

As earlier on pointed out the application was objected by the respondent by filing the above mentioned preliminary objection. Hearing of the preliminary objection was conducted orally. At the commencement of her submission in support of the preliminary objection, Ms. Akisa Mhando, Learned Senior State Attorney, for the respondent, abandoned the second point of objection and only argued the first point.

While arguing the first point of preliminary objection, she submitted that, under section 372 of the CPA, (supra) for the provision to be applicable, the law requires the applicant to attach with the application, an order, ruling, decision or sentence of the court which he/she wants the court to inspect and satisfy itself on the alleged illegality or in correctness

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or impropriety which needs to be revised under section 373 (1) (a) and (b) of the CPA (supra).

She submitted that in the application at hand, the original case file is still going on, therefore, there is no finding, order or ruling given by the trial court which is the reasons as to why there is no order attached with the application as required by law.

In support of her arguments, she relied on the decision of the Court of Appeal of Tanzania, in the case of **The DPP vs. Bookeem Mohamed Ally and 7 others**, CAT – Mwanza at pages 11 – 12 in which it was held inter alia that, for a Court to hold and revise the lower court record, there must be an order, findings or sentence which will need to be corrected under section 373 of the CPA, and since there is no order, finding or ruling, then the court cannot exercise the powers bestowed in it under section 372 of the CPA.

Basing on that submission, she asked the court to dismiss the application at hand, and remit the case file before the trial court for trial.

In reply, Mr. Madeleka, Advocate, learned counsel for the applicant submitted that, the application has been filed under two provisions, **one**, section 372(1) of the CPA, and section 44(1)(a) and 44(3) of the MCA.

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However, the Senior State Attorney for the respondent, challenged the Provision of section 372 of the CPA only, that means she has no problem with the use of section 44(1)(a) and 44(3) of the MCA, therefore if the court finds that section 372 of the CPA is incompetent to move the court, then the application will proceed under section 44(1)(a) and 44(3) of the MCA.

Before Mr. Madeleka, had argued the merit of the preliminary objection, he at first challenged the competence of the preliminary objection, on the ground that, the notice of the preliminary objection has cited section 372 of the CPA which in his view, is a non existing provision something which renders the preliminary objection itself to be incompetent. To substantiate his position, he cited the case of **James B. Rugemelila vs The Republic**, Criminal Application No. 59/2019 of 2017. CAT – at page 9, on the 6th line from the bottom. He submitted that, citing section 372 without citing the subsection which has been violated has put the respondent in dilemma to what exactly he should prepare for. He on that base, prayed for the Court to ignore the preliminary objection and continue to hear the application on merit.

In his view, even if the competent section is section 372 (1) there is no requirement to attach an order if one applies for revision to the High

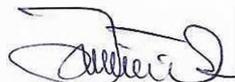
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Court. However, in his view, the word "order" as defined by section 2 of the MCA, includes formal expression of the decision of the court. He said it will be ridiculous for a case which has been to court registry for almost six years has no any order to be revised.

In his view, there are a lot of orders in the subordinate court proceedings which are illegal, irregular and inappropriate to warrant this court to make revision. He said one of the order for which the revision is sought is a remand warrant, which holds the applicant in prison thereby denying her freedom.

He said the case at hand is distinguishable from the case of **DPP Bookeen Mohamed and 7 others** (Supra) as the later refers to the committal order, while in case which this court has been moved to revise it is moved through application.

He cited the case of the **Board of Trustees of National Social of Security Fund vs. The New Kilimanjaro Bazaar Ltd**, Civil Appeal No. 16 of 2004 which has been cited with approval in the case of **Dangote Tanzania Ltd vs. Vodacom Tanzania Limited**, Civil Appeal No. 13 of 2021 CAT – DSM of page 7 where the court held *inter alia* that, where the provision of the law is clear and unambiguous, there is no need to resort to the rule of interpretation.



He submitted that, the wording of section 372 (1) of the Criminal Procedure Act and section 44 of the Magistrate Courts Act, (Supra) is clear and unambiguous which their interpretation does not depend on other sections of the law.

He also referred the Court to Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania of 1977, as amended from time to time. He prayed at the end that, this court be pleased to dismiss the preliminary objection of the respondent for want of merit and to order the hearing of the application on merit.

In rejoinder, Ms. Akisa Mhando, Senior State Attorney submitted that, the preliminary objection and the provision cited therein is competent and the objection raised against the preliminary objection is an imaginary as the applicant has not failed to defend herself. She said failure to cite a subsection is not fatal, as the counsel has extensively discussed.

Regarding the provision of section 44 (1)(a) of the MCA on the supervisory powers of the High court of revision, in her view, this section applies only when the court act *suo motu* in revising the proceedings of the subordinate court.

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She submitted further that, even if section 44 (1)(a) of the MCA, is independent from section 372 (1) of the CPA, it should be noted that, the governing law in criminal matter is the CPA.

She further submitted that, the requisite of revision which the High Court is sought to conduct is under section 372 (1) and 373 (1) (a) and (b) of the CPA. For that reason, according to her, section 44 (1)(a) of the MCA, is not a complete provision to move this court to bring this application for revision.

Regarding an issue as to whether there is an order to be revised, she said and insisted that, there is no order or decision to be revised because a remand warrant is not an order worthy revision which the court can inquire into its legality, correctness and propriety.

In the end, she submitted that, the matter before the trial court was at the hearing stage, therefore the applicant was supposed to let the case reach to an end so that the court can give its decision.

Having noted that the learned Senior State Attorney raised new issues during rejoinder submission, Mr. Madeleka, asked for leave which was granted for him to reply on the new raised issue.

Countering the allegations that, section 44 (1) is applicable only when the court moves itself *suo motu*, he submitted that, it is a wrong interpretation of the law, because in the section the word *suo motu* has not been mentioned.

In his view, the submission and arguments advanced by the learned Senior State Attorney is misleading the court. He insisted that, under both provisions, the allegation that, the High Court should exercise revision after the court has decided, is a misleading statement because, the law is clear, that the High Court may call and examine for the record at any stage, to satisfy itself on the correctness, legality and or propriety of the decision or findings or order, in his view, any stage includes hearing stage.

That presents a summary of the preliminary objection and the arguments made by the parties in support and against the preliminary objection.

Before going to the merit of the preliminary objection, I should first deal with the complaint raised by Mr. Madeleka challenging the competence of the preliminary objection on the basis that the citation of the provision which is alleged to be violated is incorrect for having not cited in the Notice of preliminary objection a specific subsection of section 372 of the CPA.

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These provisions interpreted plainly, the following are true import of the provisions. It is glaringly clear that, under section 372 (1) of the CPA, the High Court may;

- i. Call for the record of the subordinate court,
- ii. It may do so at any state of the proceedings,
- iii. It may do so for purposes of satisfying itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed.
- iv. It may also do so to look into the regularity of any proceedings before subordinate court,
- v. The record so called for that purpose must be of the subordinate court.

From the above exposition, it is clear that, the powers of the High court under section 372 (1) of the CPA, is not only confined on revising the order, finding, sentence, but also to look into the regularity of the proceedings of the subordinate court. Where, the revision is sought regarding the legality, correctness and propriety of the finding, sentence or order recorded or passed, then, the person applying to invoke the powers of the High Court is required, as a matter of practice, to attach the order sought to be revised. However, where the powers invoked is

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seeking the court to satisfy itself on the regularity of the proceedings, then the person so applying cannot have a decision to attach.

That said, it therefore, goes without saying that, it is not mandatory when the application seeks the court to invoke its powers to satisfy itself on the regularity of the proceedings before subordinate court. The applicant prays before this court to examine both, the correctness, legality, propriety of the findings, sentence or order and the regularity of the proceedings.

That being the case, the requirement to attach the copy of judgment, decision or order is not mandatory. In the circumstances of this case, the preliminary objection is devoid of merits. It is thus dismissed for the reasons given herein above.

It is accordingly ordered.

DATED at **ARUSHA** this 15th day of July, 2022




J. C. TIGANGA

JUDGE