

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

CIVIL REFERENCE NO. 6 OF 2022

*(C/F Taxation Cause No 7 of 2020 in the District court of Arumeru at Arumeru
Originating from Criminal Case No 57 of 2018 at Maji ya Chai)*

GRACE MATUROAPPLICANT

VERSUS

ITIKISAELEBAYO RESPONDENT

RULING

20/09/2022 & 28/11/2022

KAMUZORA, J.

This reference was brought under Order 7(1)(2) and (3) of the Advocate Remuneration Order GN No. 264 of 2015. The chamber application is supported by affidavit deposed by Grace Maturo, the Applicant. The application was opposed through counter affidavit deposed by Itikisael Lebayo, the Respondent.

The origin of this matter is Criminal Case No. 57 of 2018 that was heard and determined by the Primary Court of Arumeru at Maji ya Chai. The Applicant was charged, convicted and sentenced to serve 6 months in prison and pay compensation of Tshs. 539,200/= to the Respondent.

The Applicant preferred Criminal Appeal No. 14/2019 before the District Court but the appeal was dismissed with costs for being out of time. The Respondent instituted Taxation Cause No. 7 of 2020 before the District Court that was objected by the Applicant. Among the reasons posed was that the Taxation Cause originated from criminal case hence unmaintainable. The District Court proceeded on allowing the costs and awarded the total amount of Tshs 740,000/= in which, Tshs. 300,000/= was awarded as instruction fees, Tshs. 40,000 as transport costs and Tshs, 400,000 as costs for prosecuting the taxation cause. The allowed costs were termed as costs incurred to defend Criminal Appeal No. 14/2019 and costs of the taxation cause.

The Applicant being aggrieved by the decision of the Taxing Officer in Taxation cause No. 07 of 2020 calls upon this Court to quash and set aside the said decision. The Applicant's argument is that, an appeal which resulted into an order for costs originated from criminal case but the Court applied procedures applicable in civil matters.

As a matter of legal representation, the Applicant was duly represented by learned Advocate Mr. Ombeni Kimaro and the Respondent enjoyed the services of Ms. Francisca Gasper, learned advocate. When the matter was called for hearing parties opted to file

written submissions and they both complied to the schedule save for rejoinder submission.

Arguing in support of application counsel for the Applicant adopted the contents of the affidavit filed in support of chamber application and added that the Respondent claimed a total of Tshs 870,000/= being costs in defending various criminal cases and the Taxing Officer awarded Tshs 740,000/=. It was the Applicant's view that such claimed amount is not awardable in matters originating from criminal cases. He referred the decisions in **Shija Derefa Vs Msobi Namji**, Civil Appeal No 44 of 2019, **Mselemu Kandili Vs. Waziri Thabit**, Misc. Application No 197/2019 and **Mwalizi Mwalisya Vs. Raphael M. Ngeka**, PC Civil Appeal No 02/2020.

It was the Applicant's firm view that since the complaint originated from Primary Court in Criminal Case No. 57 of 2018 then it was illegal for the District Court to award costs as costs are awarded pursuant to Order 2 of the Advocate Remuneration Order GN No. 263 of 2015. He insisted that the District Court erred in awarding costs in criminal cases.

The Counsel for the Respondent submitted that an order for cost was issued in Criminal Appeal No. 14 of 2019 following its dismissal for being filed out of time. That, pursuant to section 345(1) of the Criminal

Procedure Act Cap. 20 R.E 2019 the Court has power to exercise statutory discretion to award costs in favour of a successful party. She insisted that since Criminal Appeal 14 of 2019 was between individual persons, just like in normal civil proceedings, costs can be awarded to successful party.

The Respondent's counsel urged this Court to distinguish the cases of **Shija Derefa** (supra) and **Mwalizi Mwalisya** (supra) because the facts in **Shija Derefa** were based on malicious damage to property and in **Mwalizi Mwalisya** it was a civil case not relevant to the present application which is criminal case originating from primary Court. She insisted that, the trial Court was in a position to grant costs statutorily hence no illegality in the proceedings.

From the above submissions, the bone of contention is whether the Taxation Cause was properly instituted before the District Court of Arumeru. There is no dispute that the said taxation cause was instituted following an order for costs issued in criminal matter, Criminal Appeal No. 7 of 2014. Before the District Court, preliminary objection was raised on the competency of Criminal Appeal No. 7 of 2014. The Court dismissed the appeal with costs on account that the appeal was filed out of time.

Generally, in criminal proceedings the Court can order a convicted person to pay costs of the public or private prosecutor subject to maximum amount stated in the statute. The present matter originated from Primary Court which sentenced the Applicant to imprisonment and issued an order for compensation. The order for cost was awarded on appeal by the District Court on account that the appeal was filed out of time. It is true that such an order was not appealed against but this Court has assessed its legality in the eyes of law. The District Court when awarding such costs, did not direct itself to any provision which allow the award of costs in such circumstances.

I do not agree with the counsel's argument based under section 345(1) of the Criminal Procedure Act Cap. 20 [R.E 2019]. While it is true that in the above provision the Court has discretion to award costs in favour of a successful party, such provision is not applicable to matters originating from primary Court. As opposed to the Applicant's argument, an order for costs can be awarded in criminal cases. Cost is among the ancillary orders that can be issued by Court in criminal proceedings. Tanzania Sentencing Manual for Judicial Officers at 29 provide: -

"In addition to any sentence imposed by the Court, it may make ancillary orders depending on which statutory powers apply to

which offence. In every case, it is good practice for the Court, on completion of sentence, to ask the prosecution which ancillary orders it is seeking out of the case. The accused (or his representative) should be given the opportunity to respond to the prosecution."

The above quotation suggests that ancillary orders will be imposed in addition to sentence imposed by the Court and the parties must be accorded opportunity to be heard before the order is made. In the present matter, the trial Court apart from normal sentence, it issued an order for compensation. The District Court after it dismissed the appeal for being filed out of time again issued an order for costs. There is no record showing that either of the parties moved the District Court to impose ancillary orders or whether the Applicant was heard on the same. In fact, the same was issued when dismissing the preliminary objection and it was not imposed in addition to sentence as the appeal itself was not heard on merit. In that regard, it is hard to state the order for cost was properly imposed and for that reason it cannot result into a proper taxation cause to be filed before any Court.

I understand that this application for Reference intends to challenge the competence of Taxation Cause filed before the District Court. I also understand that the order awarding cost is still intact and it

is the basis of the Taxation Cause as no decision was issued vitiating the same. However, in my view, the said order is tainted with illegality as there is no legal basis established for the award of such order. I therefore invoke revisionary powers of this Court under section 31 of the Magistrates Court Act, Cap. 11 [R.E. 2019] to quash and set aside the illegal order for cost issued in Criminal Appeal No. 7 of 2022. Having set aside the order for cost, the Taxation Cause arising from the illegal order becomes nullity.

In the upshot I find merits in this reference hence it is allowed. The proceedings in Taxation cause No. 7 of 2020 are hereby nullified and ruling thereto is hereby quashed and set aside. No order for costs.

DATED at ARUSHA, this 28th day of November, 2022



D.C. KAMUZORA

JUDGE

