

IN HIGH THE COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

MISCELLANEOUS CRIMINAL APPLICATION NO.39 OF 2021

(Originating from Ruangwa District Court at Ruangwa in Criminal Case No.115 of 2020)

FADHILI JUMA LIWAWA..... APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of Last Order: 14/2/2022

Date of Ruling: 2/3/2022

LALTAIKA, J.

This is an application for extension of time to file an appeal against the judgment of the District Court of Ruangwa at Ruangwa in Criminal Case No.115 of 2020. The application is brought under section 361(2) of the Criminal Procedure Act [Cap. 20 R.E. 2019]. The application is supported by an affidavit of the applicant outlining reasons for the application.

The respondent Republic, on her part, filed a counter affidavit to oppose the application. The counter affidavit is sworn by Mr. Lugano B. Mwasubila, learned State Attorney. The counter affidavit is accompanied

by a notice of Preliminary Objection on a point of law from the respondent. In the preliminary objection, the respondent averred that the affidavit in support of the application was incurably defective as the applicant who is a Moslem took oath instead of making an affirmation as a deponent to the affidavit.

Establish legal practice in our jurisdiction direct that whenever a preliminary objection is raised, the same must be disposed of first before going into the merits of the application. Premised on this legal position, this court invited submissions on the preliminary objection from both parties. The hearing commenced.

As expected, the applicant, being a lay person, didn't have much to say on the preliminary objection raised. He chose instead, to address the court of the anticipated appeal whose time was yet to come. As I went through the court file however, it came to my attention that the applicant had filed a reply to the notice of preliminary objection. In the reply, the applicant referred this court to Section 9 of the Oaths and Statutory Declarations Act. He also cited the cases of **Asha Huruma vs Republic**, Criminal Appeal No.74 of 2005 (unreported) and **Hassan Bacho Nassoro vs Republic**, Criminal Appeal No.264 of 2020 CAT at Mtwara.

In view of those authorities the applicant is of the view that if a witness affirms instead of taking an oath and vice versa the contradiction does not occasion any miscarriage of justice since the aim is to enable a witness to tell the truth. Having so opined, the applicant prayed this court to disregard the preliminary objection.

In response, Mr. Ndunguru submitted that the applicant who is a Muslim, had sworn instead of making an affirmation. Mr. Ndunguru stressed that although there was no any other defect on the affidavit, the one he had pointed out was fatal. The learned Senior State Attorney referred this court to the Oaths and Statutory Declarations Act, [Cap. 34 R.E. 2019] without citing a specific section. It is Mr. Ndunguru's submission that the applicant's affidavit had two conflicting statements on the faith or religion of the applicant and it was not clear which one to go by thus making the entire application incompetent.

Mr. Ndunguru referred this court to the case of **Kafuba Mwangilingi vs Republic**, Crim App 3 of 2013 CAT at Mwanza. In this case, the Court of Appeal had an opportunity to address the issue of the affidavits of a Christian who affirmed instead of swearing. The Court struck out the application on the ground that it was based on an affidavit whose contents were untrue. In view of that holding of the

Court, Mr. Ndunguru prayed for this court to strike out the application so that the applicant could refile with the necessary corrections.

Having considered submissions by both parties including case law and provisions of the law cited, I am inclined to determine whether the preliminary objection should be upheld.

At this juncture relevant questions that come to mind are what is an affidavit? Does it really matter if one swears or affirms as deponents to an affidavit? The apex court of this country namely the Court of Appeal of Tanzania addressed these questions in the case of **Kafuba Mwangilindi vs Republic** (supra). The Court quoted the Oxford Advanced Learner's Dictionary which defines an affidavit as "a written statement that you swear is true; and that can be used as evidence in a court of law".

On whether it mattered that one affirmed instead of swearing and vice versa, the reasoning of the court of appeal was that information contained in an affidavit needed to be true. The court held: -

"Since the applicant has deposed in his affidavit that he is a moslem but informed the Court in his oral submission in support of his application that he is Christian this renders the whole affidavit to be untrue. In such a situation the notice of motion is defective for not

being supported by an affidavit. Consequently, the application is struck out for not being competent.”

The apex court proffered that an affidavit, being a part and parcel of evidence submitted in court, needed to be based on truthful information. Facts in an affidavit must be extracted thoughtfully and noted down in a language that enables the deponent to own the affidavit. Lack of that ownership points a picture that the affidavit was simply put together by a drafter of legal documents and had very little or nothing at all to do with the deponent except his name and thumb print or signature.

In view of that observation, I subscribe to what Mr. Ndunguru opined that the application should be struck out. Therefore, I hereby strike out the application for being incompetent.

It is so ordered.

E.I. LALTAIKA



JUDGE

2.3.2022



This ruling is delivered under my hand and the seal of this Court on this 2nd day of March, 2022 in the presence of the Mr. Wilbroad Ndunguru, learned Senior State Attorney and the applicant who has appeared in person, unrepresented.

E.I. LALTAIKA



E.I. Laltaika

JUDGE

2.3.2022