

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

**MISC. CRIMINAL APPLICATION NO. 9 OF 2023**

*(Originating from the decision of this court in Misc. Application No. 46 of 2022 the decision was delivered on 16<sup>th</sup> December, 2022)*

**BONI SULWA** ..... **1<sup>ST</sup> APPLICANT**

**SEGAGI SAIDA** ..... **2<sup>ND</sup> APPLICANT**

**VERSUS**

**THE REPUBLIC** ..... **RESPONDENT**

**RULING**

*Hearing date on: 07/03/2023*

*Ruling date on: 10/03/2023*

**NGWEMBE, J.**

This ruling is a result of an application for review of this court's ruling made by the applicants under assistance of their advocates Mr. Abraham Hamza Senguji and Henry Kitambwa. However, the application was strongly resisted by the Republic represented by two learned State Attorneys namely Emmanuel Kahigi and Rose Makupa.

From the outset, let me take note that, this application was assigned to my learned brother Judge Gabriel Paschal Malata, however, for good reasons

he decided to excuse himself, thus, for the interest of justice and speedy determination of this application, I decided to proceed with it.

The gist of this application is to invite this court to review its own decision made in Misc. Criminal Application No. 46 of 2022 which decision was delivered by my brethren Judge G.P. Malata on 16<sup>th</sup> December, 2022. In that application, the applicants herein were seeking bail in respect to Economic Crime Case No. 26 of 2022 pending at the Resident Magistrates Court for Morogoro. The applicants herein were also the applicants for bail before Judge Malata and were the accused before the Resident Magistrates Court.

In essence the conditions for bail in respect to offences preferred against them by the Republic are statutory as rightly provided for in section 36 (5) and (6) of Economic and Organized Crime Control Act Cap 200 R.E. 2022. As such the trial judge granted bail in line with the above cited provisions of law. However, and without notice to the trial judge, on the date when this court delivered its ruling, in fact the accused persons at the trial court were facing a different charge all together and the new charge comprised not only two accused persons but were now five of them. Thus, the granting of bail was in respect to a none existing charge sheet. Hence this application for review.

Having such background in mind, the applicants have moved this court to review its own decision under section 392 (1) (2) of **Criminal Procedure Act Cap 20 R.E. 2019**. The chamber summons, in essence comprised one substantive relief, that is to review the bail conditions set forth in

**Misc. Criminal Application No. 46 of 2022.** The application is supported by an affidavit sworn by advocate Abraham Hamza Senguji. In response the Republic countered the application by filing counter affidavit sworn by the learned State Attorney Ms. Mary Lundu.

Even after hearing the rival arguments of both parties, yet I find the crux of the matter in this application is centered on the propriety of the charge sheet in response to the bail ruling delivered by this court. Perusing the proceedings in the Resident Magistrates' Court of Morogoro, it is clear like a brightest day light, that **Economic Crime Case No. 26 of 2022** was preferred by the Republic against the two applicants on 22<sup>nd</sup> November, 2022. The charge had three counts.

The applicants herein, immediate after being arraigned in court, preferred an application for bail under certificate of urgency on 25<sup>th</sup> November, 2022. Such application was appended with a charge sheet pending in the subordinate trial court. While the application for bail was tried in this court, the Republic at the trial Resident Magistrate Court on 28<sup>th</sup> November, 2022 changed the charge sheet by substituting the existing charge sheet with a new one comprising five accused persons. As such, at the time this court delivered its Ruling for bail on 16<sup>th</sup> December, 2022 it had no corresponding charge sheet before the subordinate trial court.

In such circumstances, the fundamental question is whether this court's ruling dated 16<sup>th</sup> December, 2022 was valid and still valid and effective as required by law? When the circumstances before the trial court have changed as discussed above, obvious both the Republic and the applicants

had uncompromised duties to inform this court properly on the changes made before the trial subordinate court. Failure of which led the court to issue an ineffective ruling and order.

In the circumstances alluded above, still the question remains of whether this court has powers to review its own judgement, ruling and order? I am alive as was rightly argued by the learned State Attorney, that this court, under section 2 (1) of the **Judicature and Application of Laws Act Cap 358 R.E. 2019 (JALA)** has unlimited powers over Civil and Criminal matters. For clarity the section is quoted hereunder: -

**Section 2 (1)** *"Save as provided hereinafter or in any other written laws, expressed, the High Court shall have full jurisdiction in civil and criminal matters"*

When the above section is read together with section 392A (1) and (2) of **Criminal Procedure Act (CPA)**, it is clear like a day followed by night, that the applicants took the right cause in coming to this court and this court is ceased with powers to review its own decision. Notably, though the applicants cited section 392 (1) and (2), of CPA, the applicants ought to/ include section 2 (1) of JALA.

Contrary to the rules of the Court of Appeal, which provides circumstances up on which an application for review may be made, (Rule 66 (1) of the Court Rules), this court has no specific rules guiding the court to determine an application of this nature. The Court of Appeal may review its decision if any or all of the following circumstances so dictate: -

- i. *The decision was made on a manifest error on the face of the record resulting in the miscarriage of justice;*
- ii. *A party was wrongly deprived of an opportunity to be heard;*
- iii. *The court's decision is a nullity;*
- iv. *The court had no jurisdiction to entertain the case; and*
- v. *The judgement was procured illegally or by fraud or perjury.*

Though this court has powers to review its own judgement, ruling or orders, yet, such powers are neither constitutional right nor statutory right. Thus, exercised in the rarest of cases. His Lordship Justice of Appeal Massati JA, observed this in the case of **Ngasa Nhabu Vs. R, Criminal Application No. 2 of 2014 (CAT – Tabora)** where the Court set two basic principles, namely *first*, the powers of review is inherent in the court's power. It is neither a statutory nor a constitutional right of a party. As such, it can only be exercised in the rarest of cases; and *second*, an application for review is by no means an appeal in disguise whereby an erroneous decision can be reheard and corrected.

There are numerous authoritative precedents on how review may be involved. Always, review of the court judgement must rarely be involved only on exceptional circumstances. The danger of using review as an alternative to appeal or revision is apparent. When the accused is dissatisfied by the court decision, may attempt to invoke the court's inherent powers to relitigate the matter by way of review instead of either appealing to the superior court or by way of revision. Thus, review is always rarest used against the court's decision. This position was likewise

alluded by the Court of Appeal in the case of **James @ Shadrack Mkulingwa & Another Vs. R, Criminal Application No. 1 of 2012** where the Court held: -

*"It is settled law that a review of the judgement of the highest court of the land should be an exception. The review jurisdiction should be exercised in the rarest of cases and in the mist deserving cases which meet the specific benchmarks stipulated in rule 66 (1). A review application, therefore, should not be lightly entertained when it is obvious that what is being sought therein is a disguised re-hearing of the already determined appeal..."*

In the same vein, the Court of Appeal discussed thoroughly on this issue in the case of **Salehe Siasa Vs. R, Criminal Application No. 22 of 2020** that the danger is apparent that, the court may be called to conduct a once again and rewriting judgement.

In similar vein, **Justice Lugakingira, JA** in the case of **Chandrakant Joshubhai Patel Vs. R, [2004] T.L.R, 218 (CAT – Dar)** deeply considered similar application of review and in its consideration, derived three areas of concerns, namely; **first**, review may only be revoked when the decision was obtained by fraud; where a party was wrongly deprived of the opportunity to be heard; and where there is a manifest error on the record, which must be obvious and self-evident, and which resulted in a miscarriage of justice; **second**, consideration of additional evidence material to the decided case which constituted an error on the face of

record; and **third**, failure or omission to follow certain procedures during trial does not constitute a good ground for review.

Being mindful on the above guidance, I have deeply revisited the records of both cases before this court and the subordinate court, I am satisfied with no iota of doubt, this application for review is rightly brought in this court.

Equally important is to note that, court orders must be capable of being executed and must be executed. In the same manner and principle, a court judgement or ruling which is incapable of being executed may be reviewed, or revised by a superior court or on appeal. In a like manner, the ruling and order passed by this court in Misc. Criminal Application No. 46 of 2022, is not capable of being complied with, for obvious reason, that the corresponding charge sheet was substituted by another charge sheet without notice to this court. Even if the accused would comply with the bail conditions, yet they would not be bailed out, because as of now are faced with a different charge involving five accused persons.

I accordingly proceed to grant the application for review, consequently, the ruling of this court dated 16<sup>th</sup> of December, 2022 is hereby vacated and the applicants are at liberty to apply afresh for bail as per the current charge sheet.

**It is so ordered.**

Dated at Morogoro in chambers this 10<sup>th</sup> March, 2023.

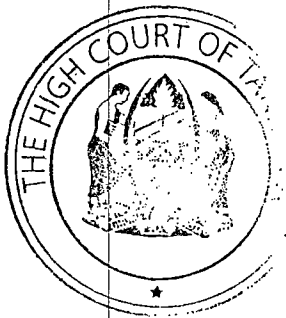


**P.J. NGWEMBE**

**JUDGE**

**10/03/2023**

**Court:** Ruling delivered at Morogoro in chambers this 10<sup>th</sup> March, 2023 in the presence of Mr. Abraham Senguji and Henry Kitambwa Advocate for the applicants and Mr. Emmanuel Kahigi, State Attorney for the Respondent.



**P.J. NGWEMBE**

**JUDGE**

**10/03/2023**

ORIGINAL