

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB-REGISTRY
AT MBEYA

MISC. CRIMINAL APPLICATION NO. 61 OF 2023

(Arising from the High Court of Tanzania at Mbeya in PC. Criminal Appeal No. 13 of 2022 and from the District Court of Mbeya at Mbeya, in Criminal Appeal No. 3 of 2022 Originated in the Primary Court of Mbeya District at Urban in Criminal Case No. 783 of 2021)

EXPERANSIA OCTAVIUS.....APPLICANT

VERSUS

SALUM ABSOLOM.....RESPONDENT

RULING

Date of Last Order: 22/09/2023

Date of Judgement: 19/02/2024

NDUNGURU, J:-

EXPERANSIA OCTAVIUS (the applicant) is seeking the certificate of this Court that points of law are involved in the intended appeal to the Court of Appeal of Tanzania. He filed the application under section 6 (7) (b) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019. On the other side, **SALUM ABSOLOM** (the respondent) opposed the application contending that there no legal issues for the Court of Appeal to consider.

A brief background is that; the High Court (this Court) allowed a second appeal filed by the respondent vide PC Criminal Appeal No. 13 of 2022 that challenged the decision of the District Court of Mbeya in Criminal Appeal No. 3 of 2022. In the first appeal it was the same respondent who appealed against the decision of the Urban Primary Court which convicted him of the offence of stealing contrary to sections 258 and 265 of the Penal Code, Cap. 16 R.E 2019 (Now RE 2022). Aggrieved by the decision of this Court, the applicant intends to appeal to the Court of Appeal. He filed the application under section 6 (7) (b) of the Appellate Jurisdiction Act, which requires him to obtain a certificate that a point of law is involved in the intended appeal. It stipulates that-

*"6 (7) (b)- Either party to proceedings of a criminal nature under Head (c) of Part III of the Magistrates' Courts Act, **may, if the High Court certifies that a point of law is involved, appeal to the Court of Appeal,**"(emphasis added).*

The duty of this Court under the above cited law is to scrutinize or critically consider whether there are issues/points of law to be dealt by the Court of Appeal. This duty was pronounced by the Court of Appeal

(CAT) in **Dorina N. Mkumbwa vs Edwin David Hamis** Civil Appl. No.53/2017 CAT (unreported), that:

"... It is therefore self-evident that applications for Certificates of the High Court on points of law are serious applications. Therefore, when High Court receives applications to certify point of law, we expect Rulings showing serious evaluation of the question whether what is proposed as a point of law, is worth to be certified to the Court of Appeal. This Court does not expect the certifying High Court to act as an uncritical conduit to allow whatsoever the intending appellant proposes as point of law to be perfunctorily forwarded to the Court as point of law..."

On the above guidance, the issue for consideration is whether there is point of law to be considered by the Court of Appeal.

The application was disposed of by way of written submissions. Both parties were unrepresented. The applicant deponed and submitted that there are points of law to be considered by the Court of Appeal. She raised five points in her affidavit, however, in her submissions she dropped two of them thus remained with three points as follows:

- (a) Whether the High Court Judge erred for not considering the documentary exhibits tendered by the applicant.*
- (b) Whether the High Court Judge erred for not taking into consideration the principle of possession of stolen properties found to the respondent.*
- (c) Whether the High Court Judge erred for not taking into consideration that failure to call a person who issue(sic) receipt led the wrong decision.*

On the first point, the applicant argued that there was error when this Court failed to consider documentary exhibits as the result reached to the biased decision. Thus, that the error squarely fits within the point of law to be certified for consideration by the Court of Appeal.

As to the second point she stated that interpretation of the principle of possession of stolen properties found to the respondent is a pure point of law needs the intervention of the Court of Appeal because it involves interpretation of legal principle or statute under which the point falls. She continued that the respondent did not in his evidence establish how he came into possession of the stolen items.

On the third point the applicant submitted that failure by the respondent to call a person who issued receipt of the stolen properties

found into his possession is another point of law worth for certification. She prayed this Court to certify that there are points of law.

In response, the respondent submitted that no point of law was raised, rather are matters of facts. According to him when facts are proved and conclusively determined by the lower courts the same cannot constitute points of law to be certified for consideration by the Court of Appeal. To reinforce his argument, he cited the case of **Hezron M. Nyachiya vs Tanzania of Industrial and Commercial Workers & Another** Civil Appeal No. 79 of 2001.

The respondent went on that, facts like documentary exhibits were not considered, the respondent did not bring a person who issued the receipt of the property found in possession of the respondent's house were well delt by this Court. Thus, that the application be dismissed with costs as no point of law is involved to be determined by the Court of Appeal.

In rejoinder, the applicant insisted her earlier submission and added that it is not true as argued by the respondent that no point of law was raised. She also challenged the cases cited by the respondent on an account that they are distinguishable with the instant matter at hand.

I have considered the parties' submissions. The applicant has argued a clear position of the law and cited the decision of the CAT in the case of **Herban Hajimosi & Another vs Omary Hilal Seif & Another** [2001] TLR 409 that a certificate of law is necessary with appeal relating to the matter originating in Primary Court. Now, are the three points posed by the applicant involving points of law worth for certification of this Court.

The answer may well be derived from another decision of the Court of Appeal in the case of **Agnes Severini vs Mussa Mdoe** [1989] TLR 164 (TZCA) where the Court observed that:

*"We wish to observe at the outset that this was an unsatisfactory way of certifying a point of law. That certificate is capable of two interpretations. It could mean posing the question **whether there was any evidence at all to support the concurrent decisions of the courts below.** It could equally mean to ask the question **whether the evidence as adduced was sufficient to support and justify those decisions.** How, this distinction is imported. The*

*question whether there was any evidence at all to support the decision is a question of law which can properly be certified for the opinion of this court. But whether the evidence as adduced was sufficient to support the decision is a question of fact which could not properly be the subject of a certificate for the opinion of this court. For, this court takes the view that if there was some evidence on which the courts below could have arrived at the decision they did, then this court will not interfere, even though had this court itself tried the case it might have come to a different decision. **Those who are called upon to certify points of law should, therefore, keep this distinction in mind in order to ensure that only the correct questions are certified for the opinion of this court.**" (emphasis supplied).*

In the matter at hand the first and third points which are questioning whether this court was proper for not considering the documents adduced by the applicant in her evidence and whether it was proper for failure to consider that the respondent did not call witnesses

to testify if they issued receipt to him are as good as asking whether the evidence adduced was sufficient to support and justify the decision of this Court which overturned the decisions of the two lower courts. Being guided by the decision of the CAT in **Agnes Severini** (supra), I am of the considered view that the two points in para (a) and (c) as above posed they are not points of law which require the attention of the Court of Appeal. Specifically, the applicant complained that this Court was not proper when failed to consider the documents he tendered as the result came to a biased decision. They are mere facts which presupposes the Court of Appeal to rescrutinise the evidence adduced in the Primary Court the duty of which ended at this Court.

That being said, I have left with the point under para (b) in the above sequence which is whether this Court erred for not considering the principle of possession of stolen properties. The applicant was insistent that this is pure point of law since is a legal principle. I failed to grasp it correctly but I consider the applicant had in mind with the doctrine of recent possession of stolen property which neither this Court nor the lower courts dealt with. What this court observed was that the applicant did not give description of the properties alleged to be hers found at the respondent's house. Considering the position of the

doctrine of recent possession of stolen property and the way this Court was trying to evaluate evidence adduced in the trial Court, certifying it as a point of law is as good as wishing to take back the Court of Appeal to revisit the evidence. This is to say, if certified as point of law, the Court of Appeal would be compelled to find whether there was evidence to prove if the properties found in possession of the respondent were proved to be the applicant's properties. Reverting into evidence is not a duty of the third appellate Court, the highest Court in our Court system. It is a fact-finding exercise. Issues of facts end at the first appellate court and to a limited extent to the second appellate court. In nowhere factual issues should find their way to the third appellate Court. In the circumstances, I find this point under consideration raised for this Court to certify as point of law to be considered by the Court of Appeal, unmaintainable.

In the end, I find the applicant has not raised points of law worth to be considered by the Court of Appeal. I hereby dismiss the application with no order as to costs.

Ordered accordingly.




D.B. NDUNGURU,
JUDGE
19/02/2024