IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A. And LUANDA, J.A.)

CRIMINAL APPLICATION NO. 6 OF 2012

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT

VERSUS

ELIZABETH MICHAEL KIMEMETA @ LULU ..... RESPONDENT

(Application for Revision from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Twaib, J.)

dated the 28th day of May, 2012

in

Misc. Cr. Appeal No. 46 of 2012

RULING OF THE COURT

17th September &

LUANDA, J.A.:

This is an application for revision from the proceedings and order of the High Court of Tanzania sitting at Dar es Salaam (Twaib, J). The application has been made under section 4 (2) and (5) of the Appellate Jurisdiction Act, Cap. 141 RE. 2002, Rule 65 (1), (2) and (3) of the Court of Appeal Rules, 2009 (henceforth the Rules).

Briefly, the historical background giving rise to this application as can be gathered from the record is to the following effect. In the Resident

Magistrate's Court of Dar es Salaam at Kisutu, **ELIZABETH MICHAEL KIMEMETA @ LULU** (henceforth the respondent) is provisionally charged with murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002. We are saying so because in terms of section 164 of the Criminal Procedure Act, Cap. 20 R.E. 2002 subordinate courts to the High Court, save those with Extended Powers, have no jurisdiction to adjudicate offences of this nature. The offences of this nature are triable by the High Court. Subordinate courts in which the accused person is provisionally charged have powers to conduct committal proceedings and thereafter forward the case to the High Court for trial.

In this case, before the committal proceedings were conducted and dispatched to the High Court for trial, the respondent through Mr. Kennedy Fungamtama, Mr. Fulgence Massawe and Mr. Peter Kibatala, learned Counsel, filed a chamber summons supported by their joint affidavit in the said Resident Magistrate Court for an order of stay of committal proceedings so that the age of the respondent be determined. The application was made under sections100 (2) and 113 (1) of the Law of the Child Act, 2009 (Act No. 21 of 2009). In the affidavit in support of the application, it is deponed, *inter alia,* that the respondent was 17 years and

not 18 years as stated in the charge sheet. The Resident Magistrate who presided over the proceedings refused to grant the order sought saying she had no jurisdiction to entertain the application and told them to make such application, if they wished, in the High Court of Tanzania. The respondent through her advocates filed an application in the High Court of Tanzania.

When the application came up for hearing in the High Court, the present applicant through Ms. Elizabeth Kaganda and Mr. Shadrack Kimaro learned State Attorneys, raised two preliminary points of objection, namely-

(i) the application is misconceived, and

(ii) there is no provision that empowers the High Court to grant the prayers sought.

After hearing the parties, the High Court sustained the preliminary points raised. Under normal circumstances, the High Court ought to have ended there. The High Court did not end there. It invoked section 44 (1) of the Magistrates' Courts Act, Cap. 11 R.E. 2002 (henceforth the MCA) which the learned Judge found to have vested him with revisional powers. He quashed and set aside the decision of the Resident Magistrate's Court which refused to entertain the application and stated categorically that that Court had jurisdiction to entertain the matter - to determine the age of the

respondent. However, considering the seriousness of the charge the respondent is facing and urgency of the matter, the learned Judge observed, it was proper to determine the correct age of the respondent himself pursuant to section 113 of the Law of the Child Act, Act No. 21 of 2009. That decision prompted the applicant to file these revisional proceedings.

In these revisional proceedings, Mr. Faraja Nchimbi learned Senior State Attorney, assisted by Mr. Shedrack Kimaro leaned State Attorney appeared for the applicant; whereas Mr. Kennedy Fungamtama, Mr. Fulgence Massawe and Mr. Peter Kibatala, learned counsel, appeared for the respondent.

Arguing in support of the application, Mr. Nchimbi told the Court that once the learned Judge had found out that the application was not properly brought before the High Court, then he should have struck out the application and remitted the record to the Resident Magistrate's Court to proceed with committal proceedings and not to proceed further as was done in this case.

As regards section 44 (1) of the Magistrates Courts Act, Cap. 11 R.E. 2002, he said the learned Judge misconstrued the section. The section does not vest the High Court with revisional powers. The High Court is empowered to call for records from the Resident Magistrate's Court and give directions whereby the aforesaid court is required to comply with those directions and not to revise. He went on to say even if it had powers, the learned Judge ought not to have stepped into the shoes of the subordinate court. In any case, there is no need to determine the age of the respondent at that stage. He accordingly invited this Court to exercise its powers of revision as they are provided for under the aforestated section by quashing and setting aside the High Court proceedings and order the case to be remitted to the subordinate court for committal proceedings.

Responding, Mr. Kibatala informed the Court that for the interests of justice it is necessary to determine the age of the respondent at this stage that is, before committal proceedings are conducted so that the provisions of the Law of the Child Act 2009 in particular to "charge" the respondent in Juvenile Court could come into play. When he was asked by the Court whether really the said law will assist the respondent in any way because

she is facing a murder charge which is triable by the High Court, Mr. Kibatala answered in the affirmative that it will assist!

Be that as it may, in the course of hearing these revisional proceedings, it transpired that the Court was not properly moved in that the notice of motion cited a wrong provision of the law which does not apply under the circumstances of this application. Section 4 (2) of the Appellant Jurisdiction Act, Cap. 141 R.E. 2002 which is cited in the notice of motion empowers this Court to exercise its revisional jurisdiction in the course of hearing the appeal. This means the appeal must first be in existence before resorting to those revisional powers. The section reads:-

> *4 (2) For all purposes of and incidental to the hearing and determination of* ***any appeal*** *in exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall in addition to any other power, authority and jurisdiction conferred by this Act,* ***have the power of revision*** *and the power, authority vested in the Court from which the appeal is brought.*
>
> *[Underscoring ours]*

Since no appeal has been instituted, the Court cannot exercise its revisional power under the aforestated section. The Court, therefore, was not properly moved. Normally the non – citation or wrong citation renders the proceedings incompetent (see **Edward Bachwa & Three Others v The Attorney General and Another** Civil Application No. 128 of 2008 (unreported).

Apart from the above observation, even the grounds for relief sought were not stated at all in the notice of motion. That omission goes contrary to Rule 48 (1) of the Court of Appeal Rules, 2009 which is couched in mandatory terms. The Rule provides:

> *48 (1) Subject to the provision of sub – rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit. It shall cite the specific rule under which it is brought and state the ground for relief sought.*

In view of the foregoing therefore, the application for revision is incompetent.

Having ruled out that the application is incompetent, ordinarily we would have proceeded to strike it out. However, we would not do that owing to the illegality which is clear on the face of the High Court's record. We will explain.

Earlier on, we have said that after the learned Judge had sustained the preliminary points raised by the applicant which was purely on a point of law, he ought to have dismissed the application and remit the record to the subordinate court to proceed with committal proceedings. Unfortunately that was not done. Instead the learned Judge purported to invoke section 44 (1) of the MCA, revise the proceedings and step into the shoes of the subordinate court to determine the age of the respondent. With due respect, the learned Judge had no such powers under S. 44 (1) (a) of the MCA.

Section 44 (1) (a) of the MCA reads:

> 44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court:-

(a)shall exercise general powers of supervision over all District Courts and court of resident Magistrate and may, at any time, call for and inspect or direct the inspection of the records of such court and give such directions as it consider may be necessary in the interest of justice, and all such courts shall comply with such direction without undue delay.

In **John Mgaya & 4 Others v Edmund Mjengwa & 6 Others** Criminal Appeal No. 8 (A) of 1997 (CAT) this Court had the occasion to interpret the above section. It said:-

"From our reading and understanding of this section, it seems to us plainly clear that in addition to its other powers, the High Court is empowered to ***supervise*** *district and resident magistrates courts... Furthermore, it is also crystal clear from this section that in inspecting the records the High Court is empowered to give directions to the courts of district and resident magistrates' courts which directions these courts are obliged to comply with. In our view, what is envisaged under this provision*

is direction of the nature of guidance from the High Court to subordinate courts...."

Indeed to "supervise" is not one and the same thing as to "revise." According to the **Oxford Advanced Learner's Dictionary –** the word "supervise" means to watch or otherwise keep a check; whereas "to revise" is to re – examine in order to correct or improve.

From the foregoing therefore, it is crystal clear that the Judge also erred in revising the proceedings of the Dar- es Salaam Resident Magistrate Court purported to have been made under S. 44 (1) of the MCA, Cap. 11. What should be done?

Before we discuss what should be done, we wish to point out that up to now we have yet to strike out the application. We did so with a purpose. The purpose is that we remain seized with the High Court's record so as to enable us intervene on our own and revise the illegalities pointed out by invoking section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002, otherwise the High Court decision will remain intact. This approach is now gaining momentum as per the decisions of the Court in **Tanzania Heart**

Institute v The Board of Trustees of National Social security Fund Civil Application No. 10 of 2008 (unreported); **Chama cha Walimu Tanzania v The Attorney General** Civil Application No. 151 of 2008 (unreported). So, it is the practice now that if it is shown that the Court was not properly moved by non – citation or wrong citation of the law so as the Court to exercise its powers of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002 hence the proceedings are incompetent but on the face of the record it shows the same to have been tainted with illegality, the Court will not normally strike out that incompetent application. Instead the Court will be taken to have called the record and proceed to revise the proceedings under Section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002. Adopting the above approach, we take it that the record of the High Court to have been called by the Court in terms of section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002.

We have shown earlier on that the High Court record is marred by illegality in that after it had sustained the preliminary points raised, it ought to have dismissed the application. Furthermore, it had no power to revise the proceedings in terms of section 44 (1) of the MCA, Cap. 11 R.E 2002.

Now exercising those powers under the above stated section, we quash the proceedings of the High Court and set aside all the orders made therein. We direct that the record of the subordinate court be remitted to the Dar es Salaam Resident Magistrate's Court, Kisutu for continuation of committal proceedings.

Order accordingly.

DATED at DAR ES SALAAM this 2nd day of October, 2012.

JUSTICE OF APPEAL

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