IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CRIMINAL APPLICATION NO. 04 OF 2019

KEYA s/o ISMAIL BONIPHACE ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

RULING

27th April, & 27th May, 2020

ISMAIL, J.

The applicant herein is a convict who is serving a prison term, following convictions in two cases in which he was accused of indulging in the consumption of narcotics. While he is content with one, he is aggrieved by the other, hence his decision to prefer the instant proceedings in which the prayer is to have the Court do the following:

(i) To order revision of the proceedings judgment of the District courts of Nyamagana District in respect of original Criminal Case (s) No. 229 of 2017; and Criminal Case No. 43 of 2018.

(ii) To reverse the judgments and order acquittal of the applicant.

(iii) To grant any other orders/reliefs as the court may deed justified.

The background of the matter as culled out of the essential facts of the case which have given rise to the issue is, happily, not complex. On 5th June, 2017, the applicant was arrested and arraigned in the District Court of Nyamagana, vide Criminal Case No. 229 of 2017, facing charges of consuming substance which was subsequently identified as narcotic drugs. Upon a plea of not guilty, the applicant was released on bail to allow him to battle his charges while he is out. On 24th January, 2018, in the pendency of said proceedings and, while out on bail, the applicant was arrested and charged with the same offence of using narcotic drugs. In these subsequent proceedings, Criminal Case No. 43 of 2018, the applicant alleges that he was charged as Ishumael Lugundamila. The matter was presided over by Hon. Chitepo, RM, whereas the presiding magistrate in the former proceedings was Hon. Moshi, RM, before he was succeeded by Hon. Chitepo, RM. Proceedings in respect of Criminal Case No. 229 of 2017 were preceded by a drug test on his urine sample which tested positive, confirming that the applicant was indeed a consumer of narcotic drugs. The contention advanced by the applicant is that trial proceedings in

Criminal Case No. 43 of 2018 relied on the same sample which was taken in respect of Criminal Case No. 229 of 2017, and that such sample was bound to bring the same result since the applicant would continue to test positive for 7 succeeding years from the first test. In both of the cases, he was found guilty and, upon conviction, he was sentenced to imprisonment for 1 year and 3 years, respectively. His contention is that he has been convicted and sentenced twice in respect of the same offence. This contention constitutes the basis for the instant application.

Hearing of the application was conducted virtually, through audio teleconference that involved the applicant who fended for himself, unrepresented, and Ms. Gisela Alex, learned state attorney, who took the fort for the respondent. Submitting in support of the application, the applicant contended that the urine test used in Criminal Case No. 43 of 2018 was the same as that used in Criminal Case No. 229 of 2017. He asserted that his urine tested positive while he was still attending the first case, and was out on bail in the first case in respect of whose charges he pleaded not guilty to but was convicted based on his confession through the cautioned statement. He was sentenced to imprisonment for three year. It was his contention that his arraignment in court and conviction in

the second case was improper and, since he was convicted and sentenced in the second case, subsequent conviction and sentence in the first case (Criminal Case No. 229 of 2017) amounted to a double jeopardy. He prayed that the Court should look into it and right this wrong through these revisional proceedings.

Mr. Alex's expression of opposition to the application was unreserved. She began by contending that reasons contained in the affidavit are not sufficient to support the application. She argued that, as a general rule, a revision cannot be preferred where an appeal lies. Citing the decision of this Court in ***Dickson Rubingwa v. Paulo Lazaro*** HC- Civil Appeal No. 1 of 2008 (unreported), the learned attorney submitted that the only exception to the general rule is where there are special circumstances to allow institution of revisional proceedings. She contended that the applicant ought to have filed an appeal against the decision in Criminal Case No. 43 of 2018. In this case, he chose not to. Trying to draw a distinction, the learned counsel argued that, while the accused in Criminal Case No. 43 of 2018 was Ishumael Lugundamila, in Criminal Case No. 229 of 2017, the accused was Keya Ismail Boniface. She contended that these are two different names, referring to two distinct persons, and samples

used were for two different persons. In view thereof, the respondent saw no discrepancy in the decisions, arguing further that if any existed, the applicant ought to have raised it during the trial.

The applicant's rejoinder was short. He simply stated that, as a lay person, he was not versed with the legal processes, including the need to take an appeal instead of a revision. With respect to variance in names, the applicant submitted that both of them referred to him. He stated that his full names are Keya Boniphace @ Ishumael Lugundamila.

Before I dwell onto the main point of contention, I need to resolve a nagging question raised by the respondent's counsel on the regularity of preferring a revision instead of an appeal. The respondent's contention is that the right course of action would be an appeal. Fundamentally, this contention raises doubts or questions on the competence or tenability of the application. It is actually a preliminary point of objection which ought to have been raised alongside the other objection which was disposed of on 25th September, 2019. Nevertheless, I will grant some space to have it discussed and resolved.

Revision as a remedy is an option that is exercisable by a party under section 372 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (CPA). This provision states as hereunder:

> *"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court."*

This is the provision which confers powers on the Court, to call for and examine the record of the subordinate court with a view to satisfying itself as to the regularity, legality and propriety of the impugned proceedings. The Court's interference through its revisional powers occurs where the subordinate court has exercised jurisdiction not vested in it by the law; or where it has failed to exercise a jurisdiction vested in it by the law; or where such jurisdiction is exercised illegally or with material irregularity. Most important, as well, is the fact that such order must have finally disposed of the suit or proceedings.

I subscribe to Ms. Alex's submission that revision is a remedy that is resorted to where there is good and sufficient reason for doing so. This

means that revisional proceedings can be instituted even where right of appeal exists (see ***D.P.P v. Salum Ali Juma*** [2006] TLR 193 (CAT-Zanzibar). In ***Hamisi Rajabu Dibagula v. Republic*** [2004], the Court of Appeal quoted with approval, the decision of the defunct Court of Appeal for Eastern Africa, in ***Lobozi s/o Katabalo v. R*** (1956) E.A.C.A 583 and held:

> *"No one can doubt the usefulness of revisional powers, but they should be exercised in appropriate cases.* ***Save in cases where justice requires an obviously improper conviction or illegal sentence to be at once quashed or rectified,*** *revisional powers should not be exercised before inquiry has been made whether an appeal has been or is likely to be lodged."*

Going by the record of the trial proceedings and the application that initiated this matter, it is quite obvious that no appeal was preferred against any of the two decisions of the trial court that convicted and sentenced the applicant. In fact, the application was preferred when time for lodging appeal had expired. What is key, as well, is the fact that, whereas an appeal would lie against a decisional error in the decision sought to be appealed against, the complaint in the instant application is against improper and illegal sentence for an offence in respect of which he

had been convicted and sentenced. This complaint would not be handled by way of appeal as Ms. Alex would want me to believe. What is at stake is the propriety and regularity or otherwise of the proceedings which handed the applicant the second conviction and sentence in respect of the same offence. It is my unflustered view that the path taken by the applicant is, in the circumstances of this case, appropriate and unblemished.

Having resolved the question of competence of the application, the next grand issue relates to the merits or otherwise of the instant application. The applicant decries the trial court's imposition of sentences in respect of the same offence. He takes the view that having been punished in the case that was first decided, he ought to have been acquitted in the second or, better still, he ought to have been discharged from the proceedings in Criminal Case No. 229 of 2017, whose decision came out last. The respondent does not subscribe to this reasoning. She is of the view that the accused in the two cases were different, without any connection to one another.

Deducing from the applicant's affidavit, his contention is predicated on the plea of *autrefois* convict which is a plea to the effect that he was charged of the same crime under substantially same facts in the second

case and that he was convicted for the same offence in the second. This is a defence that is raised by the accused before a trial court by laying facts which support the contention or the defence (See: ***Issa Athumani Tojo v. Republic*** [2003] TLR 199, CAT-DSM; and ***Godison Ndobho v. Republic*** [1993] TLR 287). The niggling question is whether the applicant brought that question to the attention of the trial court for its investigate. This is not apparent in the record and yet this is a question of evidence. If it was raised then we need to know if it was considered or not. If it wasn't raised before the trial court then the applicant has missed the boat. An appellate court, exercising appellate or revisionsl powers cannot deal with an issue which was not raised and addressed by the parties in the court of first instance.

As intimated earlier on, this information ought to have been gathered from the record of the trial proceedings. The record submitted in respect of Criminal Case No. 229 of 2017 – does not contain any such faults. The affidavit sworn in support has not answered this puzzle. The same applies to names of the applicant. While I am not oblivious to the fact that charges are laid against persons in whatever they go and not names, the fact of the matter is that Keya Ismail Boniphace and Ishumael Lugundumila are

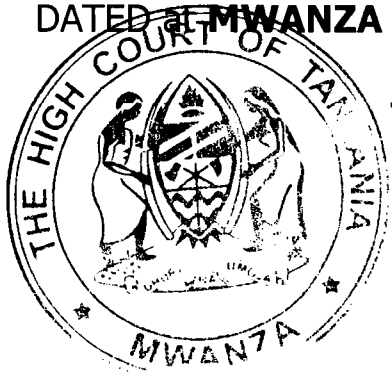
technically two different names. None of the records indicates that these sets of names referred to one and same person. This is only found in the applicant's affidavit. Nothing has been presented to corroborate this contention. Essentially, this allegation would gain credence if affidavits of the Prison's superintendent, a police officer or judicial officers who handled the cases, were sworn or affirmed in support to the effect that these are not different persons. Furthermore, a prisoners' extract record of these convicts and a receipt issued by a trial court during commitment of the convicts would also provide the much needed clarity. Unfortunately, all these are missing and, as it is, the Court is not treated with sufficient material upon which to work on the matter. It is difficult, as well, to state with precision if this is truly this is a typical case of non-observance with the principle of autrefois convict as contended by the applicant. In the absence of all this, my conviction is that this application has been submitted by a person other than those who have been convicted in the cited cases. In this respect, I subscribe to Ms. Alex's contention that Ishumael Lugundamila impleaded and convicted in Criminal Case No. 43 of 2018 is a distinct person from Keya Ismail Boniphace impleaded and convicted in Criminal Appeal No. 229 of 2017.

Looking at the testimony as presented in both cases, it gives me little or no impression that the testimony in either of the cases overlapped to one another as to constitute a case of double jeopardy. These were two different sets of testimony, one involving the cannabis which was impounded, examined by the government chemist and tendered in court, while in the other, it was a urine sample which tested positive and confirmed that the accused in that case consumed cannabis.

In view of insufficiency of facts on which to make a finding on whether the applicant's contention has any semblance of credence, it is my considered view that this is not a fit case in which revisional powers of the Court may be invoked. I order that the matter be struck out with instructions that issues raised herein be expeditiously handled, administratively, by the trial court in collaboration with prisons authorities and the police.

Order accordingly.

DATED at **MWANZA** this 27th day of May, 2020.



M.K. ISMAIL

JUDGE

Date: 27/05/2020

Coram: Hon. M. Ndyekobora, Ag-DR

Applicant:

Respondent: Absent

B/C: B. France

Court:

The matter was fixed for Ruling but parties are absent. The Ruling is hereby delivered this 27.05.2020 in absence of both parties.

THE HIGH COURT OF TA... MWANZA

At Mwanza
27.05.2020

M. Ndyekobora
AG-DR