IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: LUANDA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CRIMINAL APPLICATION NO. 4 OF 2011

RAJABU ATHUMANI OMARI ..... FIRST APPLICANT
KANUNI RAMADHANI ..... SECOND APPLICANT
ABEDI ALLY ..... THIRD APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Application for Review from the Decision of the Court of Appeal of Tanzania at Tanga)

(Lubuva, J.A., Nsekela, J.A., And Kaji, J.A)

dated 16th of March 2004
in
Criminal Appeal No. 60 of 2003

RULING OF THE COURT

12th & 14th July 2017

NDIKA J.A.:

The applicants herein were in 1998 convicted by the Primary Court of Handeni District at Chanika of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code. Each of them was sentenced to the mandatory prison term of thirty years. The District Court of Handeni District and the High Court sitting at Tanga upheld the convictions and sentences meted out.

Still aggrieved, the applicants appealed to this Court in Criminal Appeal No. 60 of 2003. As it turned out, that appeal was on 16th March 2004 struck out on account of its incompetence that it was made without the requisite certificate that it involved a point of law. The position of the law is that in terms of section 6 (7) (b) of the Appellate Jurisdiction Act, Cap. 141 RE 2002, an appeal to this Court in proceedings of a criminal nature under Head (c) of Part III of the Magistrates' Courts Act, Cap. 11 RE 2002 can only be entertained if certificate on point of law was granted by the High Court.

The applicants subsequently moved the High Court sitting at Tanga in Miscellaneous Criminal Application No. 2 of 2006 under the provisions of section 6 (7) (b) of Cap. 141 (supra) for a certificate that their intended appeal to this Court involved a point of law. They were yet again unsuccessful as the High Court dismissed their application on 19th May 2006 on the ground that their intended appeal contained no points of law for the consideration by this Court.

Still undeterred, the applicants returned to this Court, this time through this application by notice of motion made under the provisions of rule 44 (1) and 66 (1) (d) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). Although the contents of notice of motion are not easily comprehensible, the crux of this application seems to be twofold: first, the applicants appear to be

moving the Court for the grant of either certificate on point of law or leave to appeal to this Court against the decision of the High Court that sustained their respective convictions and sentences. Secondly, the applicants seem to be moving the Court under rule 66 (1) (d) of the Rules to review its decision in Criminal Appeal No. 60 of 2003 dated 16th March 2004 on the ground that the trial court had no jurisdiction to try the offence of armed robbery. The application is supported by the applicants' joint affidavit. The respondent opted to lodge no affidavit in reply.

Contesting the application, the respondent duly lodged a notice of preliminary objection under rule 4 (2) (a) of the Rules contending that:

> *"1. The application is time-barred by contravening Rules 44 (2) and 66 (3) of the Tanzania Court of Appeal Rules, 2009.*
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> *2. The joint affidavit of Rajabu Athumani Omari, Kanuni Ramadhani and Abedi Ally in support of the application is incurably defective for contravening sections 8 and 10 of the Notaries Public and Commissioners for Oaths Act, [CAP. 12 RE 2002].*
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> *3. The joint affidavit of the applicants in support of the application is incurably defective for containing matters of law."*

In her submissions on the first point of the preliminary objection, Ms. Shose Naiman, learned State Attorney appearing for the respondent, argued that as the notice of motion indicated that the applicants were seeking leave to appeal, the application was incompetent because being a matter originating from the criminal proceedings before a Primary Court required no leave of this Court but a certificate of the High Court that it involves a point of law. She further argued that if the application was intended for review of the decision of this Court of 16th March 2004, then this application was clearly time-barred as it was lodged on 8th July 2011, which was more than seven years beyond the period of sixty days prescribed by rule 66 (3) of the Rules. Having so submitted, the learned State Attorney abandoned the second and third points of preliminary objection but prayed that the application be struck out pursuant to the provisions of rule 4 (2) (a) of the Rules on the strength of the first point of objection.

On their part, the applicants largely conceded to the anomalies mentioned by Ms. Naiman although they initially appeared to be oblivious of the requirements of the law. Yet still, they beseeched the Court to interfere with their convictions and sentences, which they perceived to be illegal.

In dealing with the preliminary objection, we begin with the supposed first limb of the application, which is the prayer for either certificate of point of law or leave to appeal to this Court.

As is evident from the summarized facts of this case, the applicants could not appeal to this Court to challenge the decision of the High Court in Criminal Appeal No. 10 of 2000 originating from a Primary Court without a certificate that there is a point of law involved in their intended appeal. As indicated earlier, the requirement of certificate is clearly spelt out by section 6 (7) (b) of Cap. 141 (supra), read together with section 25 of Cap. 11 (supra) that an appeal to this Court in respect of proceedings of a criminal nature under Head (c) of Part III of Cap. 11 (supra), can only be entertained if certificate on point of law was granted by the High Court. It should be emphasized that what has been specified by the law is certificate on point of law, not leave to appeal.

At this point, we recall that the applicants, having had their appeal struck out by this Court on 16th March 2004, moved the High Court in Miscellaneous Criminal Application No. 2 of 2006 under the provisions of section 6 (7) (b) of Cap. 141 (supra) for a certificate that their intended appeal to this Court involved a point of law. As already indicated, that application was unsuccessful, as it was dismissed by the High Court on 19th

May 2006 on the ground that there was no point of law involved in the intended appeal. The effect of that decision of the High Court was to end the applicants' intended pursuit of appeal. For it is the exclusive jurisdiction of the High Court alone, under section 6 (7) (b) of Cap. 141 (supra), to entertain an application for a certificate that a point of law is involved in respect of matters of criminal nature originating from the Primary Court. In other words, this Court has no concurrent powers to issue certificates on point of law. [See, for instance, the decisions of this Court in **Omari Yusufu v Mwajuma Yusufu and Another** [1983] TLR 29; and **Auguster Salanje v Mussa Mohamed Pemba** [1992] TLR 62, which interpreted similar provisions of section 5 (2) (c) of Cap. 141 (supra) requiring certificate on point of law for civil appeals to the Court originating from the Primary Court].

On the foregoing analysis, we agree with Ms. Naiman that the applicants' prayers from this Court for certificate on point of law or leave to appeal to this Court is manifestly misconceived.

We now move on to the competence of the applicants' entreaty for review of the decision of the Court dated 16th March 2004, as indicated on the notice of motion.

At this point, we wish to remark that we are mindful that the decision of this Court sought to be reviewed was rendered on 16th March 2004 at the time

when the Court of Appeal Rules, 1979, G.N. No. 103 of 1979, were the applicable rules regulating all matters before this Court. We so observe as we are aware that the current rules of this Court (the Tanzania Court of Appeal Rules, 2009) revoked and replaced the 1979 Rules and that they came into force on 1st December 2010. Although under the 1979 Rules there was no prescribed limitation period for lodging an application for review of this Court's decision, the Court stated in **James Masanja Kasuka v George Humba**, TBR. Civil Application No. 2 of 1997 (unreported), that it imposed a sixty days limitation period for any application for review in a criminal matter. We reproduce the relevant passage thus:

> *"In an application for review in a criminal matter, Criminal Application No. 6 of 2000 The D.P.P. VS. PROSPER MWALUKASA, we clearly explained why we were imposing a time limit of sixty days for applying for review. We think, however, that it is proper and reasonable that we should impose the same time-limit for matters such as this one. We accordingly set the time limit of sixty days in civil applications as we have for criminal applications for review."*

Since the decision of this Court sought to be reviewed was delivered on 16th March 2004, the applicants, in terms of the 1979 Rules, ought to have

lodged their application for review by 15th May 2004 when the sixty days limitation period elapsed. That they did not do so is undisputed as the parties are concurrent that the matter was lodged on 8th July 2011. It is, therefore, unmistakable that they were out of time under the 1979 Rules to pursue a review before this Court.

The applicants' present pursuit for review is similarly time-barred under the current Rules, as it ought to have been lodged within the same limitation period of sixty days from the date of delivery of the decision sought to be review in terms of rule 66 (3) of the Rules. For easy reference, we reproduce the aforesaid sub-rule thus:

> *"The **notice of motion for review shall be filed within sixty days** from the date of the judgment or order sought to be reviewed. It shall set out clearly the grounds for review."*
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> [Emphasis added]

It is settled that any application for review lodged out of time is liable to be struck out for being incompetent: see, for instance, the following unreported decisions of this Court in **Thomas Mlambivu v Republic**, Criminal Application No. 1 of 2011; **Charles Barnabas v Republic**, Criminal Application No. 13 of 2009; **Benjamin Mpilimi and Others v Republic**, Criminal Application No. 1 of 2011; **Henibo Samweli and Another v**

Republic, Criminal Application No. 4 of 2010; and **Joseph Mukwano and Another v Republic**, Criminal No. 6 of 2013.

In final analysis, we find that the present application, lodged on 8th July 2011, was filed more than seven years beyond the prescribed sixty days limitation period, which is reckoned from 16th March 2004 when the decision of the Court sought to be reviewed was delivered. On that basis, we sustain the preliminary objection on the first point and proceed to strike out this application for its incompetence.

DATED at **TANGA** this 14th day of July 2017.

B.M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL