IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MASSATI, J.A., MMILLA, J.A. And MUGASHA, J.A.)

CRIMINAL APPLICATION NO. 5 OF 2011

P. 9219 ABDON EDWARD RWEGASIRA ..... APPLICANT

VERSUS

THE JUDGE ADVOCATE GENERAL ..... RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania, at Dar es Salaam)

(Munuo, Bwana, Mandia, JJJ.A.)

dated the 18th day of February, 2011
in
Criminal Revision No. 3 of 2010
.....

RULING OF THE COURT

21st November & 2nd December, 2016

MASSATI, J.A.:

The applicant was an officer in the Tanzania Peoples Defence Forces, where he served from March 1999 to 14th April, 2008 when he applied for voluntary release, which was rejected. This triggered off a series of events which eventually led to his dismissal from the services on 28th July, 2008. His complaints to the authorities fell on deaf ears. So he decided to pursue his rights in a court of law. But before could access any civil court, he found himself charged before the General Court Martial with some offences

under section C 64 of the Code of service Discipline (the Code). At the end of the trial, he earned himself one year imprisonment as a result of which he was dismissed from the services, by the Minister of Defence.

However, he took up an appeal against both conviction and sentence to the Court Martial Appeal Court, a creature also created under the Code. On 7/9/2010 the Court Martial Appeals Court handed down its decision, in which it allowed the appeal setting aside the conviction and sentence. That verdict did not amuse the respondent. But section C. 153 of the code prescribes:-

> *"Any determination by the Court martial Appeal Court of any appeal or other matter which it has power to determine under the provisions of this part shall be final and no appeal shall lie from the Court Martial Appeal Court to any other Court."*

This means that by statute, no appeal is allowed from any decision of the Court Martial Appeal Court. So, instead, the respondent wrote to the Chief Justice to see if he could convene the Court of Appeal to revise the decision of the Court Martial Appeal Court. Indeed the learned Chief Justice ordered the institution of revisional proceedings *suo motu*, under

section 4 (3) of the Appellate Jurisdiction Act (the AJA). It was Civil Revision No. 3 of 2010.

When that application came up for hearing, the applicant raised a number of preliminary objections, namely:-

"1. *The Honourable Court of Appeal of Tanzania has no jurisdiction to call for and examine the record of proceedings of the Court Martial Court.*

2. *That this revision is misconceived and incompetent as it is not supported by any good and sufficient reason to justify the calling and examination of record of proceedings of the Court Martial Appeal Court.*

3. *That the composition of the Honourable Court of Appeal of Tanzania is incurably defective for want of impartiality of the friend of the court (**amicus curiae**)."*

After hearing the parties, this Court overruled those preliminary objections on 18th February, 2011. But the applicant is not contended. He has come back to this Court with an application for review.

The application is by way of a notice of motion, taken out under Rule 66 (1) (a) (b) and (2) of the Court of Appeal Rules, 2009 (the Rules) and supported by the applicant's own affidavit. There are two major grounds to support the notice of motion. The first is that, there was a manifest error on the face of the record resulting in the miscarriage of justice. This ground is then broken into four composite elements. The second ground is that the Applicant was wrongly deprived of an opportunity to be heard. This is again broken into two constituent components.

The affidavit of the applicant raises crucial points in paragraphs 12, 13, 14, 15, 16, 17 and 18. In short, the effect of the contents of those paragraphs is that after learning of the reversal of the decision of the Court Martial Appeal Court, the respondent intended to derail it by seeking the interventions of the Court of Appeal by way of revision. Furthermore, that the Court of Appeal intended to hear the said revision had it not been for the objections raised by the applicant. And lastly, that, there are serious points of law on the jurisdiction of the Court of Appeal, which the Court did not and should now address.

Major Christina Rwambabile Ilahuka, a senior counsel in the office of the respondent took out an affidavit in reply. She responded to

paragraphs 1, 2, 7, 9, 11, 12, 13, 14 and 15 by generally noting the same but without admitting them. She also generally admitted the contents of paragraphs 3, 4, 5 and 10 with some qualifications, but strongly disputed the contents of paragraphs 6, 7, 16, 17 and 18 of the affidavit. In short the application was strongly contested. The broad issue posed by these contentions is whether this Court should review its decision dated 18th February, 2011.

At the hearing of the application Mr. Richard Rweyongeza and Mr. Adronicus Byamungu, learned counsel appeared for the applicant, whereas Major Christina Ilahuka, learned counsel, appeared for the respondent.

For the applicant Mr. Byamungu took the floor and argued the application. After adopting his written submission, Mr. Byamungu first took us through the first ground of review. In effect, he submitted that looking at section 4 (3) of the AJA the Court wrongly decided that it had jurisdiction to revise the decision of the Court Martial Appeals Court. Rule 65 (1) and (2) of the Rules alone did not confer such jurisdiction. To expound his argument, the learned counsel argued that under section 4 (3) of the AJA, the Court could only exercise revisional jurisdiction in proceedings from the High Court; which the Court Martial Appeal Court was

not, notwithstanding the wording of sections C 100 (7) 146 (1) and 146 (7) of the Code. This, he said, was a manifest error on the face of record that led into a miscarriage of justice.

But Major Ilahuka, had a different view. She submitted that this being the Supreme Court of the land, it has jurisdiction to revise the proceedings of the Court Martial Appeals Court, and for this purpose, the said Court Martial Appeals Court was the High Court for all purposes and intents. She referred us to section C 146 (7) of the Code which appoints the Registrar of the High Court as the ex officio Registrar of the Court Martial Appeals Court; and section 146 (6) of the Code, which confers on the Court Martial Appeals Court, powers to take new evidence in the course of hearing an appeal. It was thus her view that, there was no manifest error worth attracting this Court's exercise of reviewal powers.

On the second ground of review, Mr. Byamungu's submission was brief but focused. He argued that although the parties had premised their arguments on the Court's revisional jurisdiction on section 4 (3) of the AJA, the Court decided the question of jurisdiction on Rule 65 (1) and (6) of the Rules, without giving opportunity to the parties to address it on the scope

of these Rules. This, he submitted, amounted to a denial of opportunity to be heard and constitutes a good ground for review.

On her part, Major Ilahuka, learned counsel submitted that the Court gave the parties the opportunity to address it on the question of its revisional jurisdiction, but decided to disagree with the applicant, and so disallowed the objection. So, in her view this ground too was devoid of merit, and so urged the Court to reject the application for review.

In the course of our deliberations we were inclined to believe that the resolution of the issues before us depends on the effect of the ouster clause in section C. 153 of the Code, to the jurisdiction of this Court. Since it is a matter of public importance and the parties did not address us exhaustively we decided to reconvene the parties and invite the Honorable Attorney General as *amicus curie*, to address us on this point.

For the applicant Mr. Byamungu submitted that the term "superior court of record" referred in section C. 146 (5) of the Code, meant that there was no other Court above the Court Martial Appeal; and that is why in terms of section C. 153 of the Code, its decisions are final. It is, to that extent at par with this Court and so its decisions cannot be challenged by way of revision by this Court.

Mr. Paschal Malata, learned Principal State Attorney who was invited to appear as an *amicus curie* submitted that although under Articles 4(2), 107(A), 107B, 13 (6) (a) of the Constitution the Court of Appeal is the apex Court in the judicature, section 4 (3) of the Appellate Jurisdiction Act (AJA) is not explicit on whether the Court has revisional jurisdiction over decisions of the Court Martial Appeal Court. The wording of S. C. 153 of the Code is meant to explicitly exclude this Court's revisional jurisdiction over those decisions. He threw a suggestion that perhaps an aggrieved person, could first proceed by way of judicial review.

On her part, Major Ilahuka submitted that by its wording, section C. 146 (5) of the Code, is intended to create the Court Martial Appeal Court as a Court of record, and its decisions could be part of the case law. She went on to submit that under Article 117 of the Constitution, the Court of Appeal's jurisdiction is derived from the Constitution and any written law and neither section 146 of the Code, nor section 4 (3) of the AJA clothes the Court with powers to revise the decisions of the Court Martial Appeals Court. This was even more in the light of the explicit wording of section C. 153 of the Code. She therefore, agreed with Mr. Malata that perhaps, the

most effective remedy was to proceed by way of judicial review, and prayed that this Court order so.

We are alive to the principle that a review is by no means an appeal in disguise, and that it is a matter of policy of respectable antiquity that litigation must come to an end. (**RIZALI RAJABU vs R**, Criminal Application No. 4 of 2011 (unreported)). There is also no doubt that this Court has jurisdiction to **review** its own decision in any given case. This jurisdiction is aimed at ensuring that a manifest injustice does not go uncorrected (See **CHANDRANK JOSHIBHAI PATEL vs R**. (2004) TLR. 218. The grounds on which this Court could review its decisions are circumscribed, and at present limited to only four. Those grounds are listed in Rule 66 (1) (a) to (d) of the Rules namely:-

a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or

b) a party was wrongly deprived of an opportunity to be heard;

c) the court's decision is a nullity; or

d) the court had no jurisdiction to entertain the case.

The present application is brought under Rule 66 (1) (a) and (b).

As we observed in **NGUZA VIKINGS @ BABU SEYA AND ANOTHER vs R.**, Criminal Application No. 5 of 2010 (unreported) there are no hard and fast rules that can be laid down to categorize what may constitute errors apparent on the face of the record. Each case would depend on its own facts, but in each case the basic principle underlying review must be considered; which is whether:-

> *"The Court would have acted as it had if all the circumstances had been known."*

(See **CHANDRANK JOSHIBHAI PATEL vs R.** (*supra*), **MASHAKA HENRY vs R.**, Criminal Application No. 2 of 2012 cited in **SAID SHABANI vs R.**, Criminal Application No. 7 of 2011 (both unreported).

We have dispassionately considered the rival arguments of the parties. We shall begin with the second ground of complaint which is that the party was not accorded opportunity to be heard on the scope of Rule 65 (1) and (6) of the Rules.

We do not think that this point should detain us. As pointed out by the respondent's counsel, we are satisfied that the parties were fully heard on this point. This is reflected on pages 5, 6, 7 and 8 of the Ruling sought to be reviewed. The scope of section 4 (3) of the AJA together with Rule

65 (1) of the Rules, were fully argued, although in the end, the Court did not agree with the applicant. But it is one thing not to be heard, and quite another for the Court not to agree with one's argument. The Court's rejection of one's point of view may be a ground of appeal but not a ground of review under the pretext of not being heard. For these reasons, we reject the second ground of review.

The major issue arising from the first ground of review is whether or not the Court of Appeal's revisional jurisdiction under section 4 (3) of the AJA can be exercised in respect of matters decided by the Court Martial Appeals Court?

As submitted by the learned counsel the Court of Appeal of Tanzania is a creature of the Constitution of the United Republic of Tanzania (the Constitution). It is established under Article 117 (1) of the Constitution which provides as follows:-

> *"117 (1) There shall be a Court of Appeal of the United Republic (to be referred to in short as "the Court of Appeal") which shall have the jurisdiction of the Court of Appeal as provided in this Constitution or any other law."*

For the purposes of our decision, Articles 117 (3) and 117 (4) of the Constitution are also relevant. Article 117 (3) provides:-

> *(3) "The functions of the Court of Appeal shall be to hear and determine every appeal brought before it arising from the judgment or other decision of the High Court or of a magistrate with extended jurisdiction."*

And Article 117 (4) provides:-

> *(4) "A law enacted in accordance with the provisions of this Constitution by Parliament or the House of Representatives of Zanzibar may make provisions stipulating procedure for lodging appeals in the Court of Appeal the time and grounds for lodging the appeals and the manner in which such appeals shall be dealt with."*

The first clue we get from these provisions is that the jurisdiction of the Court of Appeal is derived from the Constitution and/or any written law. To that extent, it is limited. (See also **FAHARI BOTTLERS LIMITED**

AND ANOTHER vs THE REGISTRAR OF COMPANIES AND ANOTHER, Civil Revision No. 1 of 1999 (unreported).

One such written law is the Appellate Jurisdiction Act (the AJA) which sets out in clear terms, how the Court's powers/jurisdiction is to be exercised. The general jurisdiction of the Court of Appeal embodied in Article 117 (3) of the Constitution is reformulated in section 4 (1) of the AJA.

> *4 (1) "The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate Courts with extended jurisdictions."*

For the purposes of our discussion, section 4 (3) of AJA is the most relevant. It provides:-

> *"Without prejudice to subsection 2, the Court of Appeal shall have power, authority, and jurisdiction to call for and examine the record of any proceedings before the High Court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision*

made thereon and as to the regularity of any proceedings of the High Court."

This is the provision which confers revisional jurisdiction on the Court of Appeal over "any proceedings before the High Court." And this is the provision which was used to call for examination the proceedings of the Court Martial Appeal Court for revision. The point of departure and main contention in the present application and the previous application is whether the Court Martial Appeal Court is the High Court contemplated under section 4 (3) of the AJA.

As demonstrated above, both this Court in its ruling under review, and the respondent herein were of the view that for all purposes, the Court Martial Appeals Court is part of the structure of the High Court, as commonly understood, but the applicant thinks not.

In reaching that decision, the Court relied on section C 146 of the Code. After examining sections 146 (2), (3), (4) and (7) of the Code, the Court concluded that these attributes:-

"show that the Court Martial Appeal Court is part of the High Court structure..."

and that therefore:-

> *"the revision initiated by this Court fell under Rules 65 (1) and 65 (6) of the Court of Appeal Rules."*

With respect, we agree with the learned counsel for the applicant, that Rules 65 (1) and 65 (6) of the Court of Appeal Rules only prescribe the mode of initiating application for revisions. They are not a panacea to the question of the Court's jurisdiction, but rather presuppose that the Court is clothed with such jurisdiction. The issue before the Court was whether the Court Martial Appeals Court was "the High Court" for the purposes of section 4 (3) of the AJA.

The term "High Court" is defined in section 3 of the AJA to mean the High Court of Tanzania or the High Court of Zanzibar, as the case may be. Like the Court of Appeal, the High Court is also established by the Constitution; Article 108 (1) of which provides:-

> *"108 (1) There shall be a High Court of the United Republic (to be referred to in short as "the High Court") the jurisdiction of which shall be as specified in this Constitution or in any other law."*

So, like the Court of Appeal the jurisdiction of the High Court is derived from the Constitution and other written laws.

It is true that section C 146 (1) of the Code establishes a Court Martial Appeal Court, and that under section C 146 (2).

> *"The judges of the High Court shall be the judges of the Court Martial Appeal Court."*

but, with respect, we do not think that this wording or any of the remaining parts of section 146 (1) of the Code, is close enough to turning the Court Martial Appeal Court into "the High Court" envisaged under section 4 (3) of the AJA for purposes of conferring revisional jurisdiction on this Court. We hold that view for the following reasons. **First**, under Article 117 (1) of the Constitution, the jurisdiction of the Court of Appeal is either expressly conferred by the Constitution or any other written law. In view of this provision such powers cannot be conferred by implication. **Secondly**, section 4 (3) of the AJA specifically confers revisional jurisdiction to the Court of Appeal over proceedings of the High Court as conventionally understood, not the Court Martial Appeal Court. In our view, the High Court referred to there is that established under Article 108 (1) of the Constitution. **Thirdly**, if the legislature had so intended, it

would have expressly given these powers in the Code. Section C 153 of the Code cited above is a clear indication that the legislature did not intend to do so. This is a total ouster clause. Its effect is to prevent civil courts from performing supervisory judicial function over such administrative tribunals although such clauses do not prevent judicial review (See **ANISMINIC LTD vs FOREIGN COMPENSATION COMMISSION** (1969) 7 AC 147. But the Court of Appeal has no original jurisdiction on judicial review.

Having considered all the above, we have come to the conclusion that this application must succeed in part. We are satisfied that had the Court considered all the relevant circumstances and the relevant law, including the Constitution, the Appellate Jurisdiction Act, the Court of Appeal Rules and the Code, it would not have held that the Court Martial Appeal Court is as good as the High Court sitting in its ordinary jurisdiction and that its proceedings could be revised by this Court under section 4 (3) of the Appellate Jurisdiction Act. In our view, the Court of Appeal has no jurisdiction to revise the proceedings of the Court Martial Appeal Court unless the respective laws are amended to give it such powers.

In the event, we grant the application for review. We accordingly reverse our decision of 18th February, 2011, and substitute it with the order upholding the preliminary objection raised by the respondent therein that this Court lacked jurisdiction to revise the proceedings of the Court Martial Appeal Court whose decision was final and, so the application for revision would accordingly be dismissed.

DATED at **DAR ES SALAAM** this 29th day of November, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL