IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MZIRAY, J.A., MKUYE, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 160 OF 2016

1. **JAYANTKUMAR CHANDUBHAI PATEL @ JEETU PATEL**
2. **DEVENDRA K. VINOBHAI PATEL**
3. **AMIT NANDY**
4. **KETAN CHOHAN**

..... APPLICANTS

VERSUS

1. **THE ATTORNEY GENERAL**
2. **REGINALD ABRAHAM MENGI**
3. **THE DIRECTOR OF PUBLIC PROSECUTIONS**

..... RESPONDENTS

(Application for review of the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Msoffe, Bwana, Luanda, Massati and Mandia, JJ.A)

dated the 15th day of April, 2016
in
Civil Appeal No. 59 of 2012

.....

RULING OF THE COURT

5th March & 28th May, 2019

NDIKA, J.A.:

This is an application by a Notice of Motion made under Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for review of the judgment of a full bench of the Court (Msoffe, Bwana, Luanda, Massati and Mandia, JJ.A) dated 15th April, 2016 in Civil Appeal

No. 59 of 2012. In support of the application, Mr. Martin Matunda, one of the applicants' advocates, deposed an affidavit. In response, Mr. Richard John Kilanga, a Senior State Attorney, swore an affidavit in reply on behalf of the first and third respondents. In addition, Mr. Kennedy Marco Fungamtama, also an advocate, took out an affidavit in reply on behalf of the second respondent.

Before dealing with the merits of the application, we find it necessary to set out the facts of the case and the context in which this matter has arisen.

In 2008, the four applicants herein were jointly and or severally arraigned in the Court of Resident Magistrate of Dar es Salaam at Kisutu in Criminal Cases Number 1153 of 2008, 1154 of 2008, 1155 of 2008 and 1157 of 2008. They are alleged to have committed the offences of conspiracy to steal huge sums of money from the Bank of Tanzania; forgery of deeds of assignment with intent to defraud or deceive; uttering false documents; and obtaining credit by false pretence. Since 5th November, 2008, these cases have been pending.

Before the trial of the cases commenced, on 23rd April, 2009 the second respondent herein allegedly made a speech televised live whose contents were later reported and commented upon widely in various newspapers. According to the applicants, the speech and its reportage portrayed them to the general public as dishonourable corrupt persons, fraudsters and looters. That they were guilty of the offences with which they stand charged in the subordinate court. That the speech and its coverage allegedly resulted in substantial and uncorrectable prejudice to the conduct of a fair trial before the subordinate court. That their right to presumption of innocence guaranteed under Article 13 (6) (b) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) was abrogated.

In order to seek redress for the alleged violation of their rights guaranteed under Article 16 (4), (5) and (6) (b) and (d) of the Constitution, the applicants filed in the High Court of Tanzania at Dar es Salaam Miscellaneous Civil Cause No. 30 of 2009 under sections 4, 5 and 6 of the Basic Rights and Duties Enforcement Act, Cap. 3 RE 2002 (the Act) petitioning for the following reliefs:

"(a) A declaration that the publications made by the 2nd respondent and other people, through the electronic and other media violated the constitutional rights of the petitioners, and resulted into a mistrial of criminal cases numbers 1153 of 2008, 1154 of 2008, 1155 of 2008 and 1157 of 2008 at the Court of Resident Magistrate at Kisutu, and an order that a mistrial was thereby occasioned in each of those cases.

(b) A declaration that it was the duty of the 3rd respondent to terminate the criminal proceedings in each of the abovementioned cases as soon as it discerned that a mistrial had been occasioned by the impugned publications.

(c) An order that the charges in each of those cases are dismissed and the accused persons in each of the above cases are discharged.

(d) Any other relief as this Honourable Court shall deem meet (sic) the circumstances of the cases."

Apart from resisting the petition through their respective replies, the respondents raised several points of preliminary objection. Of the said points, five were jointly raised by the first and third respondents thus:

"1. That the Petition is misconceived and bad in law for inviting the Court to exercise its powers against the provisions of the Constitution of the United Republic of Tanzania (as amended) and the laws governing criminal prosecutions.

2. That the Petition is incompetent and misconceived as the reliefs sought are not tenable under the Basic Rights and Duties Enforcement Act, Cap. 3 RE 2002.

3. That the Petition is bad in law for contravening section 8 (2) of the Basic Rights and Duties Enforcement Act, Cap. 3 RE 2002.

4. That the Petition is frivolous, vexatious and an abuse of the court process.

5. That the Petition is incompetent for being supported by an incurably defective joint affidavit of Devendra K. Vinobhai Patel, Amit Nandy and Ketan Chohan."

The second respondent, on his part, raised six points as follows:

"a) that being a private person, the 2nd respondent has been and is improperly impleaded and or joined in the Petition;

b) that the petition is bad in law for non-joinder or parties whose joining and presence is legally necessary for a proper, complete and effectual determination of the issues raised and or complained of by the petitioners;

c) that the petitioners' grievances or complaints against the 2nd respondent are matters justiciable in the realm of private law whose redress and remedies are not sought in and grantable by constitutional courts but ordinary civil courts. A constitutional court therefore has no jurisdiction to admit, entertain and determine the petitioners' complaints as against the 2nd respondent;

d) that a constitutional court has no jurisdiction or power or authority to order dismissal or withdrawal of a criminal proceeding instituted and pending trial in the subordinate courts and in particular where public resources and funds are at issue hence of great public interest;

e) that the affidavits including the supplementary affidavit in support of the originating summons are incurably defective for containing speculations, arguments, opinions and conclusions; and

f) that the petition as against the 2nd respondent is an afterthought, frivolous, vexatious and an abuse of the court process."

Having heard the parties on the preliminary objection, a three-member panel of the High Court sustained the points that raised jurisdictional issues. At the forefront, the High Court held that it had no jurisdiction or power under the Act to direct the third respondent to exercise his constitutional powers under Article 59B of the Constitution to terminate the pending criminal proceedings against the applicants on account of the negative publications allegedly made by the second respondent. Secondly, the High Court took the view that the second respondent being a private citizen could not direct the third respondent on how to exercise his prosecutorial powers and discretion and on that score he was wrongly impleaded in the petition as a party. Thirdly, the Court agreed with the respondents that it was not a proper forum for the applicants to seek under the Act a declaration that their right to a fair trial had been abrogated by adverse publications in the media. Instead, the Court ruled that the applicants ought to have sought the intervention of the trial court, which was best placed to determine whether the alleged

excessive publicity in the media about the applicants was prejudicial to a fair trial and amounted to unwarranted interference with the administration of justice.

It is noteworthy that the High Court found no necessity to pronounce itself on the rest of the points of the preliminary objection, namely, that the petition was incompetent on account of being: **one**, frivolous, vexatious and an abuse of court process; **two**, backed up by an incurably defective joint affidavit; and **three**, bad for a non-joinder of proper and necessary parties.

Based on its determination of the jurisdictional issues as summarized above, the High Court, in the end, dismissed the petition with costs.

Being unhappy with the decision of the High Court, the applicants appealed to this Court on seven grounds as follows:

> *"1. The learned High Court Judges grossly erred in law by confining the court venue to a judge or a magistrate, and hence its holding that a judge or a magistrate cannot be influenced by what is said in the media.*

2. The learned High Court Judges grossly erred in law in holding that it is the subordinate court where the petitioners are facing trials, which has adequate means of addressing the complaints which the appellants had by way of petition brought to the High Court.

3. The learned High Court Judges erred in law in holding that the petitioners should have first sought intervention of the subordinate court concerned while the complaints had been preferred under Articles 30 (3) and (4), 108 (2), 107A (2) (a) and (c) of the Constitution of the United Republic of Tanzania of 1977 (as amended) and sections 4, 5 and 6 (a) – (f) of the Basic Rights and Duties Enforcement Act (Cap. 3 R.E. 2002).

4. The learned High Court Judges grossly erred in law in holding that media publicity per se does not constitute of itself a violation of a party's right to a fair hearing without affording the appellants an opportunity to state their case and to show that the media publicity had resulted into a mistrial through evidence.

5. The learned High Court Judges grossly erred in law to hold that resort to the procedure of basic rights under the Basic Rights and Duties Enforcement Act cannot be taken lightly as a matter of course without first giving adequate space to the subordinate court concerned to deal with any complaint.

6. The learned High Court Judges grossly erred in law when they equated the reliefs sought by the appellants in the petition to interference with the constitutional powers of the DPP.

7. The learned High Court Judges grossly erred in law in holding that the High Court has no power to direct the Director of Public Prosecutions to do anything even if he contravenes the rights of persons."

Conversely, the second respondent lodged a notice of six grounds for affirming the decision of the High Court in terms of Rule 100 of the Rules. In essence, he contended that the petition, along with the originating summons, before the High Court was time-barred; that the petition was bad for non-joinder of necessary and proper parties; that the applicants'

complaints were only justiciable in the realm of private law; that the supporting and supplementary affidavits were incurably defective; that the action was wrongly mounted by using both the petition and originating summons; and that the petition was frivolous, vexatious and an abuse of the court process.

By the judgment delivered on 15th April, 2016, now the subject of the present application for review, the Court took the view that the primary question in the appeal was whether while the applicants were being charged in the trial subordinate court they could, at the same time apply, in the High Court for enforcement of their basic rights allegedly abrogated by the negative media publications. The Court went on to hold the petition as being totally misconceived on the reason that there was no lawful recourse to nullification of pending criminal proceedings by way of a civil action. That finding was grounded on the premise that civil and criminal proceedings are two separate regimes anchored on distinct procedures and burdens of proof. In consequence, the Court affirmed the High Court's dismissal of the petition and dismissed the appeal with costs.

As pointed out earlier, the applicants are not contented with the above outcome of their appeal. They have come back to this Court with this application for review of the judgment upon two grounds as follows:

> *"1. The decision was based on a manifest error on the face of the record resulting in miscarriage of justice.*
>
> *2. The applicants were wrongly deprived of an opportunity to be heard."*

In respect of the first ground above, the applicants aver that the judgment of the Court is based on a manifest error on the face of it resulting in miscarriage of justice because the Court erroneously held that an application for redress to the High Court was not lawfully available under section 4 of the Act. It is contended that section 4 of the Act allows a person who alleges a contravention of the provisions of Articles 12 to 29 of the Constitution in relation to him to apply to the High Court for redress, without prejudice to any other action with respect to the same matter that is lawfully available.

The second ground consists of three components: **first**, that the Court's judgment disposed of the appeal without addressing Ground No. 4, which was the main and primary ground in the appeal that the High Court erred in dismissing the petition on the reason that media publicity *per se* does not in itself constitute a violation of a party's right to a fair hearing. **Secondly**, that the Court disposed of the appeal without determining any of the grounds of appeal or any of the grounds for confirmation of the decision of the High Court lodged by the second respondent. **Finally**, that this Court dismissed the appeal on a ground different from the High Court's reasoning for its dismissal of the petition and in the process the applicants were not afforded an opportunity to address the Court on the justiciability of their action for enforcement of their basic rights.

On the strength of the respective affidavits in reply lodged on their behalf, the respondents, in effect, refute the averments made for the applicants. It is claimed in unison that the impugned judgment of the Court contains no error on the face of it and that it was based on sound interpretation of the relevant provisions of the Constitution and the Act.

At the hearing of this matter, Mr. Richard Rweyongeza, learned advocate, teamed up with Messrs. Mpaya Kamara and Alex Mgongolwa, both learned counsel, to represent the applicants. On the other hand, Mr. Killey Mwitasi, learned Senior State Attorney, appeared for the first and third respondents while Mr. Kennedy Marco Fungamtama, learned counsel, represented the second respondent.

At the commencement of the hearing, the Court granted a rather unanticipated prayer by Mr. Fungamtama for being discharged from the conduct of the matter on the ground that his client had disowned having instructed him to act for him in the matter. The Court noted, at that point, that Mr. Fungamtama had already filed an affidavit in reply and written submissions in opposition of the application for review without any protest from the second respondent. Even though we adjourned the hearing for over two hours having asked Mr. Fungamtama to contact the second respondent and procure his appearance in person before the Court, that effort was in vain. In view of the second respondent or his duly instructed advocate failing to appear in the place of Mr. Fungamtama at the resumed hearing of the application to present an oral argument in support of the

written submissions duly filed, we were minded to proceed to the hearing under Rule 106 (18) of the Rules in the absence of the oral argument of the second respondent.

Mr. Rweyongeza took the floor and argued the application for the applicants. He began his quest by adopting the contents of the Notice of Motion, the accompanying affidavit and the written submissions in support of the application. Briefly, he argued generally that although the parties premised their arguments on the seven grounds of appeal as well as the six grounds affirming the High Court's decision and that the said grounds were extensively canvassed in both written submissions and oral arguments at the hearing before this Court, the Court decided the appeal on the distinction between the civil and criminal regimes; that a civil action cannot be a lawful avenue for nullifying or terminating criminal proceedings, both actions being independent and founded upon procedures and processes that are poles apart. Besides faulting the Court for not pronouncing itself on any of the aforesaid grounds, the learned counsel criticised the Court for anchoring its decision on a point that was neither raised by the parties nor canvassed in the contending written submissions

and oral arguments. This course, he argued, amounted to a denial of opportunity to be heard and that the said complaint was justiciable in terms of Rule 66 (b) of the Rules.

Mr. Rweyongeza added that since the Court discovered the issue of separation of civil and criminal regimes in the course of its deliberations after hearing the parties on the appeal, it was necessary for it to reconvene the parties to hear them on the point as happened in **Joseph Wasonga Otieno v. Assumpter Nshunju Mshama**, Civil Appeal No. 97 of 2016 (unreported). For the same proposition, he placed further reliance on another decision of the Court in **Truck Freight (T) Ltd. v. CRDB Bank Ltd.,** Civil Application No. 157 of 2007 (unreported) where the Court, on an application for review, vacated its earlier decision on an appeal not based on the six grounds of appeal lodged but arrived at on a point raised *suo motu* without hearing the parties on it. Finally, Mr. Rweyongeza referred us to a passage at page 13 of the typed decision in **Independent Power Tanzania Limited & Another v. Mechmar Corporation (Malaysia) Berhad (In Liquidation) & Two Others**, Civil Application No. 247 of 2016 (unreported) where, in an application for review of its earlier

decision, the Court acknowledged that the said decision was partly arrived at on an issue on which the parties were not afforded the opportunity of being heard. Accordingly, the Court, in that case, vacated that decision and ordered a re-opening of the hearing on the issue concerned.

As regards the argument that there is a manifest error on the face of the impugned judgment of the Court, it is contended that the Court erred in holding that the applicants' action was not sanctioned by section 4 of the Act because the course taken was not lawfully available. It is argued that in its proper construction, section 4 of the Act allows any person, alleging that any of the provisions of Articles 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, to apply to the High Court for redress without prejudice to any other action that is lawfully available with respect to the same matter. In other words, the pursuit of redress under section 4 of the Act exists independently of other avenues for redress and that such pursuit does not result in loss of any rights nor does it harm or cancel the legal rights or privileges of a party existing in other avenues.

Mr. Mwitasi, on the other hand, had a different view. Relying on the affidavit in reply and the written submissions in opposition to the application, he, in essence, fully supported the Court's judgment. He contended that the question of separation of the civil and criminal platforms upon which the judgment was predicated was adequately canvassed by the parties in their respective written submissions on the second ground of appeal and so the Court was entitled to determine the appeal on that point alone without the necessity of addressing the other grounds of appeal. On that basis, he argued that the complaint that the applicants were not heard on that decisive point was unfounded.

As regards the alleged manifest error on the face of the judgment concerning the construction of section 4 of the Act, the learned Senior State Attorney countered that the right to redress under that section is not automatic but subject to exhaustion of other available remedies as required by section 8 (1) and (2) of the Act, which provides as follows:

> *"(1) The High Court shall have and may exercise original jurisdiction–*

(a) to hear and determine any application made by any person in pursuance of section 4;

(b) to determine any question arising in the course of the trial of any case which is referred to it in pursuance of section 6, and may make such orders and give directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of sections 12 to 29 of the Constitution, to the protection of which the person concerned is entitled.

(2) ***The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law,*** *or that the application is merely frivolous or vexatious."* [Emphasis added]

On the construction of section 8 (2) above, Mr. Mwitasi referred us to the decision of the Court in **Registrar of Societies & 2 Others v. Baraza la Wanawake Tanzania & 5 Others**, Civil Appeal No. 82 of 1999 (unreported). In that case, the Court took the view that the said

subsection qualifies or restricts the High Court's power to hear and determine any matter under section 4 by excluding its application to cases where adequate means of redress is or has been available to the complainant under any law. Further reliance was placed on a decision of a full bench of the High Court in **Tanzania Cigarette Company Ltd. v. The Fair Competition Tribunal and the Attorney General**, Miscellaneous Civil Cause No. 31 of 2010 (unreported). In that case, the High Court construed the words "without prejudice to any other action with respect to the same matter that is lawfully available" contained in section 4 of the Act to imply that a petitioner, pursuant to that section, must have exhausted other available means of redress before having recourse to a petition under that provision.

The learned Senior State Attorney also contended that the present application does not meet the threshold for review of the decisions of the Court as elaborated in the decisions of the Court in **Chandrakant Joshubhai Patel v. Republic** [2004] TLR 218; **Nguza Vikings @ Babu Seya & Another v. Republic**, Criminal Application No. 5 of 2010 (unreported); and **Richard Julius Rukambura v. Issack Ntwa**

Mwakajila & Another, Civil Application No. 3 of 2004 (unreported). It was his submission that none of the issues raised by the applicants justifies a review of the judgment.

The second respondent's submissions largely dovetailed with those of the first and third respondents.

Rejoining, Mr. Kamara countered that the decisions of the Court in **Nguza Vikings** (supra) and **Richard Julius Rukambura** (supra) are inapplicable to the instant case even though he acknowledged the threshold principles enunciated therein on review of the Court's decisions. He maintained that the question of separate civil and criminal regimes was never raised and considered by the parties in the course of addressing the Court on the second ground of appeal. While conceding that the Court could dispose of an appeal upon a single ground of appeal despite an appeal being predicated on several grounds, he contended that the Court may do so only after having heard the parties on the decisive ground concerned.

Before dealing with the substance of this application, it bears restating that a review of a decision of the Court is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. The power of review being residual and circumscribed, is only exercisable upon any of the grounds enumerated by Rule 66 (1) (a) to (e) of the Rules namely: **first**, that the decision sought to be reviewed was based on a manifest error on the face of the record resulting in the miscarriage of justice; **secondly**, that a party was wrongly deprived of an opportunity to be heard; **thirdly**, that the Court's decision is a nullity; **fourthly**, that the Court had no jurisdiction to entertain the case; and **finally**, that the judgment was procured illegally, or by fraud or perjury.

As indicated earlier, the instant application is predicated upon the first two grounds enumerated in Rule 66 (1) of the Rules. We propose to start with the first complaint that there is a manifest error on the face of the record in that the Court erred in holding that the applicants' action was not sanctioned by section 4 of the Act because the course taken was not lawfully available.

What amounts to "a manifest error on the face of record resulting in injustice" is an issue that was fully addressed by the Court in **Chandrakant Joshubhai Patel** (supra) at 225. Having examined several authorities on the matter, the Court adopted from **Mulla on the Code of Civil Procedure** (14 Ed), pages 2335 – 2336 the following summarized description of that term:

> *"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is,* ***an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions****: State of Gujarat v. Consumer Education and Research Centre (1981) AIR GU] 223] ...* ***Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record*** *[Basselios v. Athanasius (1955) 1 SCR 520] ... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]. A mere error of law is*

not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review: Utsaba v. Kandhuni (1973) AIR Ori. 94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin. ***It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established*** *[Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372]."*
[Emphasis added]

See also the decisions of the Court in **Mashaka Henry v. Republic**, Criminal Application No. 2 of 2012, **P.9219 Abdon Edward Rwegasira v. The Judge Advocate General**, Criminal Application No. 5 of 2011 and **Elia Kasalile & 17 Others v. Institute of Social Work**, Civil Application No. 187/18/2018 (all unreported).

In the instant case, it is the concluding portion of the impugned judgment that is alleged to be riddled by a manifest error. We find it instructive to excerpt that part thus:

"Assuming the basic rights of the appellants were infringed, was the course taken to enforce their rights proper? To put it differently, the question is whether the application to nullify the criminal proceedings by way of a civil action is sanctioned by the law. ***We have shown that civil and criminal cases are two separate and distinct matters all together. Each has its own procedure and generally even the burdens of proof are quite different. As such it was not proper to seek redress in the High Court through such a novel method.*** *It follows therefore that* ***the action taken by the appellants was not sanctioned by s.4 of the Act*** *reproduced (supra);* ***it is not lawfully available.*** *"*[Emphasis added]

As indicated earlier, Mr. Rweyongeza mainly contended that the Court erred in holding that the applicants' action was not sanctioned by section 4 of the Act because the **course taken was not lawfully available**. We would hasten to say that we have no quarrel with the other limb of his argument that in its proper construction, section 4 of the Act allows any person, alleging that any of the provisions of Articles 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation

to him, to apply to the High Court for redress without prejudice to any other action that is lawfully available with respect to the same matter. Indeed, that it is consonant with the plain and natural construction of the said provision, which stipulates thus:

> *"If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may,* ***without prejudice to any other action with respect to the same matter that is lawfully available,*** *apply to the High Court for redress."* [Emphasis added]

However, it is our considered view that the Court's conclusion that "the action taken by the appellants was not sanctioned by s.4 of the Act" was not premised on any misinterpretation of section 4 of the Act but the view that the relief sought of nullification of criminal proceedings by an order obtained from a civil court was not lawfully available. It seems implicit to us that in the above-quoted passage the Court recognised, rather than denied, the applicants' right to recourse under section 4 of the Act so as to vindicate their allegedly violated rights except that their pursuit

was a novelty for seeking a legally untenable remedy of an order from a civil court nullifying criminal proceedings.

Perhaps, we should add that, with respect, we disagree with Mr. Rweyongeza's formulation that the pursuit of redress under section 4 of the Act exists independently of other avenues for redress and that such pursuit does not result in loss of any rights nor does it harm or cancel the legal rights or privileges of a party existing in other avenues. We do so as we endorse Mr. Mwitasi's position, on the authority of **Tanzania Cigarette Company Ltd.** (supra) of which we approve, that the phrase "without prejudice to any other action with respect to the same matter that is lawfully available" in section 4 of the Act means that the recourse under that provision is subject to exhaustion of available means of redress. Indeed, that condition is clearly restated by section 8 (2) of the Act that the learned Senior State Attorney referred to.

Even if, for the sake of argument, the Court wrongly held that the applicants' action was untenable on account of not being sanctioned by the law under section 4 of the Act, we are inclined to find that complaint as not being a fitting ground for review. We think that such an error must have

resulted from an incorrect exposition of the law, which, on the authority of **Chandrakant Joshubhai Patel** (supra), may be a ground of appeal but not a justification for review of a judgment of the Court. Moreover, it is noteworthy that the applicants' counsel did not even attempt before us to demonstrate how the alleged manifest error caused injustice to the applicants. Accordingly, we find no merit in the first ground of complaint, which we dismiss.

We now turn to the second ground that the applicants were wrongly deprived of an opportunity to be heard.

In resolving the second ground of review, we reviewed the seven grounds of appeal presented to the Court in the light of the contending submissions of the counsel before us. We think that the thrust of the said grounds was, briefly, as follows: while the first ground assailed the judgment of the High Court on the complaint that the said court erred in holding that a judge or magistrate could not be influenced by a media publication, the second, third and fifth grounds faulted the High Court for holding that the trial subordinate court was competent and the preferred forum to deal with the negative media publications complained of. In the

fourth ground, the High Court was criticized for finding that the alleged media publicity constituted no violation of the applicants' right to a fair hearing without affording the petitioners a hearing to establish through evidence that the alleged negative publicity resulted into a mistrial. The sixth ground protested that the High Court erred in equating the reliefs sought by the applicants in the petition to interference with the constitutional powers of the third respondent. Finally, the High Court was assailed in the seventh ground for holding that it had no power to direct the third respondent to do anything even if he contravenes the rights of other persons.

As hinted earlier, this Court determined the appeal on the reasoning that the applicants' civil action for nullification of the pending criminal proceedings was not sanctioned by section 4 of the Act because civil and criminal proceedings originate from separate legal regimes with distinct procedures and burdens of proof. Having carefully reviewed the thrust of the aforesaid grounds of appeal in tandem with the Court's reasoning in disposing of the appeal, we are inclined to agree with Mr. Rweyongeza that the Court did not effectively deal with or determine any of the grounds of

appeal before it. That reasoning, for example, left unanswered the question whether a trial judge or magistrate could or could not be influenced by a media publication, or whether the trial subordinate court was the only competent and preferred forum to deal decisively with all legal questions arising from the alleged negative media publications. We have no flicker of doubt that the distinction between civil and criminal proceedings provides no answer to the question whether the High Court could lawfully interfere with the exercise of the third respondent's prosecutorial discretion or whether it has powers to direct the third respondent to do anything even where, by his act or omission, he contravenes the rights of others.

At this point, we are constrained to agree with Mr. Rweyongeza that the decisive point in the judgment under review was unearthed by the Court in the course of its post-hearing deliberations. For the said judgment does not give any impression that the said point was either raised by the parties or canvassed by them in their contending submissions to the Court. Had the point been raised and argued by the parties at the hearing of the appeal, the judgment would have indicated their respective submissions on

the point. We thus, with respect, do not agree with Mr. Mwitasi that the said point was argued in the course of canvassing the second ground of appeal.

In view of the foregoing discussion, it is our firm finding that the judgment under review was arrived at without affording the parties an opportunity to be heard on the new matter raised by the Court *suo motu.* What the Court ought to have done upon uncovering the new matter was to re-open the hearing and require the learned counsel for the parties to address it on the issue – see **Independent Power Tanzania Limited & Another** (supra) and **Truck Freight (T) Ltd** (supra) cited by Mr. Rweyongeza. In the latter case, the Court, citing the case of **SGS Sociate Generale de Surveillance S.A. v. VIP Engineering & Marketing Ltd.**, Civil Application No. 84 of 2000 (unreported), stated that:

> *"After the Court closed to deliberate on the submission it came across s.5 (2) (d) of the Appellate Jurisdiction Act, 1979 (as amended by Act No. 17 of 1993) that there is no appeal from interlocutory order or decision of the Commercial Division.* ***This Court re-opened the hearing to***

give the parties an opportunity to address it on that paragraph. *After submissions, the matter was decided, not on merit, but under s.5 (2) (d). We overlooked to do that in the appeal that was before us."* [Emphasis added]

In the instant case, the Court overlooked the need to re-open the hearing so as to hear the learned counsel for the parties on the distinction between the civil and criminal regimes and whether a civil action could be a lawful avenue for nullifying or terminating a criminal proceeding, both actions being independent and founded upon procedures and processes that are starkly different. We are of settled mind that this oversight constitutes a good cause for reviewing the judgment concerned and thus the application is meritorious.

In the upshot of the matter, we grant the application. In consequence, we vacate our judgment dated 15th April, 2016 in Civil Appeal No. 59 of 2012 and, in terms of Rule 66 (6) of the Rules, we order that the appeal be reheard on a date to be fixed by the Registrar. As the criminal cases before the trial subordinate court have been pending since 5th November, 2008; about eleven years ago, awaiting the determination of

this matter in the High Court and this Court, we order the Registrar to prioritise the re-hearing of the appeal. We make no order as regards costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 23rd day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

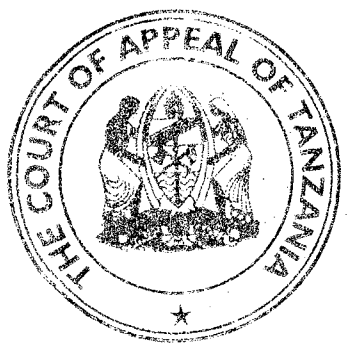
R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL