

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPLICATION NO. 4 OF 2015

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

VERSUS

FARUKU MUSHENGA RESPONDENT

**(Application for Review from the decision of Court of Appeal of Tanzania
at Bukoba)**

(Rutakangwa, J.A., Luanda, J.A. And Juma, J.A.)

dated the 18th day of February, 2015

in

Criminal Appeal No. 356 of 2014

RULING OF THE COURT

3rd & 6th September, 2018

MKUYE, J.A:

The applicant, the Director of Public Prosecutions (the DPP) lodged the present application seeking this Court to review part of its decision in Criminal Appeal No. 356 of 2014 (Rutakangwa, J.A, Luanda, J.A, and Juma, J.A.) dated 18-02-2015 for being a nullity and illegal on the grounds that:



"(1) The Honourable Court did not consider that the amendment made in section 286 through Act No. 4 of 2002 did not do away with the minimum sentence provided under section 5(1)(a)(i) of the Minimum Sentences Act, [Cap. 90 R.E. 2002].

(1) The Honourable Court erred in law in deciding that with effect from 14/4/2004 trial courts have discretion in imposing sentence for the offence of robbery from one day to 15 years imprisonment subject to the general sentencing powers."

The application is made under Rules 48(1), 66(1) (c) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit deposed by Hashim Ngole, the learned Principal State Attorney. The respondent, has not filed any affidavit in reply.

When the application was called on for hearing the applicant was represented by Mr. Athuman Matuma, Senior State Attorney;

whereas the respondent did not enter appearance though he was duly served as per the process sever affidavit availed in Court.

Upon being satisfied that the respondent was duly served, we allowed the application to be heard in his absence by virtue of Rule 63(2) of the Rules.

Before commencing with hearing, we wished to satisfy ourselves on the propriety of the application as we noticed that it was accompanied with an affidavit which contains a defective jurat attestation. We noted that the jurat attestation does not have a hand written name of the attesting officer.

Mr. Matuma submitted that it is a requirement of the law for a jurat attestation to indicate the name, signature, place where and the date when it was attested. He said, the jurat attestation was quite proper as it indicated in the jurat the attesting officer being certain Lyimo. He said that, though the said name might look as a signature, some people write their names in that way. He adamantly urged the Court to look at the decided cases and law and see as to which was the position of the law before the position of the law was changed.

Section 8 of the Notary Public and Commissioner for Oaths Act Cap. 12 R.E. 2002 (the Act) provides for the requirement of jurat attestation. Before its amendment vide Written Laws (Miscellaneous Amendments) (No. 2) Act, 2016 (Act No. 4 of 2016), (the Amendment Act, 2016) which came into operation on 8-7-2016, the attesting officer was required to indicate in the jurat attestation the place where, and the date on which the oath of affidavit is taken or made.

Before the amendment of the said provision the Court had an opportunity to canvass as to whether or not the name should also be indicated and two schools of thought emerged. One school propounded that the name should be indicated and omission to show in the jurat attestation when, where and the name or authority before whom the oath is administered renders the affidavit incurably defective, (See **D.P. Shaprya & Co. Ltd v. Bish International BV**, [2002] E. A. 47; **Felix Francis Mkosamali v. Jamal A. Tamim**, Civil Application No. 4 of 2012; **Fares Munema v. Munema**, Civil Application No. 9 of 2003; **M/S Bulk Distributors Ltd v. Happyness William Mollel**, Civil Application No. 4 of

2008; **The Government of the Great Socialist Peoples Libyan Arab Jamahiriya and another v. Meis Industries Limited**, Civil Application No. 147 of 2010; **Rajani Industries Ltd v. Consolidated Holding Corporation**, Civil Application No. 53 of 2008; and **Sharifa A. Kaidi v. Magreth Massawe**, Civil Application No. 6 of 2011 (all unreported).

For instance, in the case of **M/S Bulk Distributors Ltd** (supra) where the affidavit filed in support of the application had a signature of the attesting officer in the jurat thereof without the name of the said attesting officer, the Court held as hereunder:

"As matters stand, a person or authority before whom the affidavit accompanying the application was sworn in unknown. The name before whom the affidavit accompanying the application was sworn cannot be validly substituted by the name appearing in the advocate's rubber stamp. After all, such rubber stamp is never part of the jurat attestation."

Regarding the requirement to show the name, the Court in the same case of **M/S Bulk Distributors Ltd.** (supra) stated further that:

*"It is now settled that omission to show, in the jurat attestation, **when, where, and the name or authority** before whom the oath is administered renders the affidavit incurably defective."*

[Emphasis added]

The other school of thought advocated that inserting the name of the attesting officer in the jurat attestation was not necessary. They made reliance on section 8 of the Act as at that time it did not provide so. For instance, in the case of **Arcopar (OM) S.A v. Harbert Marwa and Family Investment Co. Ltd and 3 others**, Civil Application No. 94 of 2013 (unreported) the Court held as hereunder:

"... So, in our view until such time as the full bench would convene to resolve the conflict, or the statute is amended, the position of the law on this point, should be that, the absence of an

attesting officer's name in the jurat of affidavit by itself, is not an incurable defect."

It is worthy to note that in the case of **Sharifa Kaidi** (supra) both positions of the law were discussed and the Court came up with the position requiring of the name of the Commissioner for Oaths to be indicated in the jurat attestation.

On our part, we subscribe to the position that was taken in the said case in which the Court stated as follows:-

*"... we wish to take note of the opinions made by the two Hon. judges in the case of **Samwel Kimeno v. Hidaya Didas** (supra). We highly respect their views which are founded on consideration of the scope of section 8 of the Act. However, we agree with Mr. Makange that the decisions in the case of **Felix Mkosamali v. Jamal A. Tamim and M/S Bulk Distributors Ltd v. Happyness William Mollel** (supra) in which the Court restated the*

requirement to indicate the name of the attesting officer on that portion of the jurat attestation is good law. In our view, it is not enough for the attesting officer to just sign and impress a rubber stamp thereat."

The Court went further to justify the need of showing the name of the attesting officer in the jurat as follows:-

"The rationale is that not all commissioners for oaths and notary public listed under section 10 (2) of the said Act have personal stamps. The list of commissioners under that provision include any person employed by the Government of the United Republic and who, under the provisions of section 3 of the Advocates Act are entitled to practice as advocates of the High Court; any persons employed by the Tanzania Legal Corporation established by the Tanzania Legal Corporations (Establishment) Order, and who, under the provisions of section 3 of the

*Advocates Act, are entitled to practice as advocates of the High Court; the Registrars of the Court of Appeal, the Registrars of the High Court and every Deputy Registrar; magistrate and Administrative Officers in the Service of the Government of the United Republic. In our firm view, the rubber stamps impressions of many of them without more will be meaningless. **It is an unhealthy situation for affidavits signed by such commissioners without disclosing their names to be acted upon for that way, there will be no easy way of braving or overcoming deceit or treachery. Such a situation has attracted us to accept it as a fact that the previous position should be followed at least until when, perhaps, the said provision of the law, may have been reassessed."***

[Emphasis added]

Incidentally, in a wake of resolving the conflicting decisions, section 8 of the Act was amended vide the Amendment Act, 2016 and it put a mandatory requirement that the name of the attesting officer must be indicated in the jurat.

There is no gainsaying that in the jurat attestation under consideration there is only a signature of the attesting officer. Of course, there is a rubber stamp as well. Though Mr. Matuma said some people write their names in that style, apart from not availing us with an authority to support his stance, he was not quite sure that it was his name. On our part we are satisfied that what Mr. Matuma is suggesting to be a name of the attesting officer is not a name but a mere signature. It renders the jurat attestation defective, which in turn makes the affidavit in support of the notice of motion incompetent.

In the case of **Felix Fransis Mkosamali** (supra) and M/S **Bulk Distributors Ltd** (supra) the Court struck out the respective applications for being accompanied by incompetent affidavits for failure to indicate the names of the attesting officers in their jurat.

On the basis of the above cited cases, we also find the omission to indicate the name of the attesting officer in the jurat renders the affidavit incurably defective. As it is, it cannot support the application.

Since the application is supported by an incurably defective affidavit, it is incompetent before the Court. Hence, we hereby accordingly strike it out.

DATED at BUKOBA this 6th day of September, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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


E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL