


**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUSSA, J.A., MUGASHA, J.A., And MKUYE, J.A.)

CIVIL APPLICATION NO. 19 OF 2006

JOHN WILLIAM MPAI APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Application for review from the decision of the
Court of Appeal Tanzania
at Dar-es-salaam)**

(Ramadhani, Munuo, And Nsekela, J.J.A.)

dated the 12th day of October, 2006

in

Criminal Appeal No. 31 of 2003

RULING OF THE COURT

7th & 15th May, 2018

MKUYE, J.A.:

This is an application for review brought by the applicant, John William Mpai. The applicant is moving this Court to review its decision dated 12/07/2006 (Ramadhani, J.A., Munuo, J.A. and Nsekela, J.A.). It is supported by an affidavit sworn by the applicant himself.

The background giving rise to this application can be briefly stated as follows:

The applicant was arraigned before the High Court at Mtwara (Lukelelwa, J.) for an offence of murder. It was alleged that the applicant

murdered one Fatuma d/o Akule Luhunde, the mother of his neighbour, Shaibu Nassoro at Chinangwe "B" Village within Ruangwa District and the Region of Lindi. After a full trial the High Court was satisfied that the applicant committed the offence and hence, he was convicted of the offence of murder and sentenced to suffer death by hanging.

Aggrieved with that decision he preferred an appeal to this Court, Criminal No. 210 of 2004 but it was dismissed. Still undaunted, he has lodged this application to this Court on the grounds which do not come out clearly, that:

- 1) *This Hon. Court may be pleased to review the decisions of both the High Court and the Court of Appeal.*
- 2) *To clarify the points of law raised regarding the alleged evidence.*

At the hearing of the application, the applicant appeared in person and unrepresented whereas; the respondent Republic was represented by Ms. Dorothea Massawe, learned Senior State Attorney.

When the applicant was availed an opportunity to elaborate his application he did not have anything to add but he sought to adopt his Notice of Motion together with the affidavit attached to it.

On her part, Ms. Massawe submitted that the affidavit accompanying the Notice of Motion is defective. She clarified that the jurat attestation does not show the place at which it was taken and the date when the same was sworn. She added that, that anomaly contravened the provisions of Rule 49(1) of the Tanzania Court of Appeal Rules 2009 (the Rule), the effect of which is to render the application not supported by any affidavit. In that regard, Ms. Massawe urged the Court to strike out the entire application.

In his rejoinder, the applicant contended that he was not the one to blame as the application was prepared by the prisons authority officers who just called him to sign it.

It is now settled law that an application to this Court must be by way of a Notice of Motion supported by an affidavit or affidavits. This is in accordance with Rule 48(1) of the Rules which provides as follows:

"48(1) Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit. It shall cite the specific rule under which it is brought and state the ground for the relief sought".

[Emphasis added]

Likewise, Rule 49(1) of the Rules requires the application lodged to the Court to be supported by one affidavit or more affidavits of the applicant or some other persons who have the knowledge of the facts in question. The said provision states as follows:

"49(1) Every formal application to the Court shall be supported by one or more affidavits of the applicant or some other person or persons having the knowledge of the facts".

[Emphasis added]

As to how the affidavit can be valid, section 8 of the Notary Public and Commissioner for Oaths Act, Cap 12 R.E. 2002 (the Act) sets requirements of attestation in the jurat attestation. The said section reads as follows:-

*"8. Every Notary Public and Commissioner for Oath before whom any oath or affidavit is taken or made under this Act **shall state truly in the jurat attestation at what place and on what date the oath or affidavit is taken or made**".*

[Emphasis added]

Under the above provision the attesting officer is mandatorily required to indicate in the jurat attestation the place where, and the date when the oath or affirmation was made (See ***D.B. Skapriya and Co. Ltd Vs. Bish International B.V.***; Civil Application No. 539 of 2002 (unreported)).

In the case of ***South Freight and Export Company Ltd Vs CRDB Bank Ltd***, Civil Application No. 96 of 2016 (DSM) (unreported), the Court went along to explain the circumstances which can lead to a defective affidavit. For clarity, we feel instructive to quote what the Court stated:-

"Where such Notice of Motion is defective may be from lacking supporting affidavit or being supported by an incurably defective affidavit, the application is

rendered incompetent and the Court lacks jurisdiction to entertain and/or adjourn it.

*An affidavit can be incurably defective on account of many aspects. It may totally be argumentative or be primarily based on beliefs whose source(s) is/are not disclosed; if it is not signed by the deponent; if it has no jurat attestation; if it is not affirmed or sworn before a Commissioner for Oaths, etc. **A jurat attestation may be incurably defective if it does not show the date and/or place where the affidavit was taken or the name of the Commissioner for Oaths, who administered the Oath or affirmation**".*

[Emphasis added].

Yet, in the case of ***Agakhan Education and Another Vs. Aloysius Mboya***, Civil Application No. 101 of 2013 (unreported) this Court struck out the notice of motion which was supported by an incurably defective affidavit for a reason of not indicating the date when it was taken. In striking out the said notice of motion the Court stated as follows:

*"The affidavit in support of the notice of motion is incurably defective. **The jurat is not dated***

contrary to the mandatory requirement of section 8 of the Notary Public and Commissioner for Oaths, Cap 12. *As correctly contended by Mr. Makarius Tairo, learned Advocate for the respondent, the defect in the jurat renders the affidavit incurably defective and the application incompetent”.*

[Emphasis added]

The Court went on to say that:

"In the circumstances, this incompetent application which can neither be dismissed nor adjourned is hereby struck out with costs as urged by Mr. Tairo."

Our perusal of the affidavit of John William Mpai. (the applicant) has revealed that it is not shown in the jurat attestation the place where, and the date when the oath was taken. In this regard, it is logical that, failure to indicate in the jurat attestation the place where the oath was made and the date when the same was taken, was an obvious contravention of the mandatory provisions of the Act. This renders the purported affidavit incurably defective. It cannot by any means support the application as provided for under Rule 48(1) and 49(1) of the Rules. This anomaly is serious as it has the effect of rendering the application incompetent. (See

South Freight and Export Company Ltd (supra); and **Agakhan Education and Another** (supra).

In the result, we agree with Ms. Massawe that the application is accompanied by an incurably defective affidavit which render the same to be incompetent. Hence, we hereby accordingly strike it out.

Order accordingly.

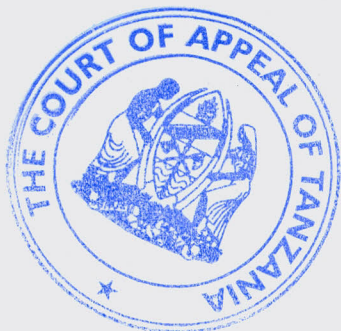
DATED at **DAR-ES-SALAAM** this 10th day of May, 2018.


K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL