

TANZANIA / JUDGMENT

abdallah hamis kazuba vs attorney general and 4 others 2022 tzhc 14453 30 september 2022

COURT
TZHCDECIDED
30 September 2022

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IN THE HIGH COURT OF TANZANIA IN THE DISTRICT REGISTRY OF DODOMA AT DODOMA
MISC. CRIMINAL APPLICATION NO. 27 OF 2022 ABDULLAH HAMIS
KAZUBA..... APPLICANT VERSUS THE ATTORNEY GENERAL INSPECTOR
GENERAL OF POLICE DIRECTOR OF CRIMINAL INVESTIGATIONS^..... RESPONDENTS
REGIONAL POLICE COMMANDER, DODOMA THE OFFICER COMMANDER INCHARGE

RULING

22ndAugust&30thSeptember,2022 MDEMU, J.: The Applicant preferred this application under certificate of urgency seeking this Court to order that, one, he be released from unlawful custody of the second and fifth Respondents, two, appearance of the Respondents in this Court to show cause why the Applicant is unlawfully detained and, three, prohibiting the second to fifth Respondents from unlawfully detaining the Applicant for longer period than that permitted by law. The application was made by way of chamber summons and supported by an affidavit deposited by one Fred Peter Kalonga on 20th July, i

2022. The application was opposed by the Respondents who filed a counter affidavit deposited by Assistant Inspector Leonard E. Mashamba sworn on 04th August, 2022. Together with that counter affidavit, the Respondents filed a notice of preliminary objection which reads: - This application is untenable for containing hearsay. The Said preliminary objection was heard by way of written submissions. The Applicant was represented by Mr. Fred Kalonga, learned Advocate whereas the Respondents were represented by Mr. Camillas Ruhinda, learned Senior State Attorney. Submitting in support of the preliminary objection, Mr. Ruhinda submitted that, the affidavit in support of the application sworn by Applicants Advocate one Fred Kalonga contravened rules of evidence and procedures regarding affidavit. He said that, in paragraph 1, the deponent stated to be conversant with all material facts and issues relevant to this application. However, under paragraph 4, information that the Applicant was arrested on 14th February, 2021 in his shop at Msimbazi street by Police Officers from the third Respondent has not been supported by the affidavit of the said Workmen. It also contains information which is untrue regarding the identity of

the said Policemen as to their names and ranks. He cited the case of Mariam Kha I ifan Mtoro vs. Shirika la Umeme Tanzania (TANESCO), Civil Application No. 301/18 of 2020 (unreported) where the Court of Appeal quoted the case of Mariam Khalifan Mtoro vs. Principal Secretary, Ministry of Health, Civil Application No. 31 of 2000 (unreported) that, if the affidavit mentions another person, then that other person has to swear an affidavit in circumstances where such information is material evidence without which would be hearsay. It was his submissions further that, in paragraph 5 and 6 of the Applicants affidavit, the deponent deposed information from the wife of the Applicant regarding her conduct after the Applicant's alleged arrest, including the fact that, she was told by the Zonal Police Officer of Dar es salaam that "Ndugu yenu ni mtu mzima atarudi tu". He said that, these facts were to be found in the affidavit sworn by Applicant's wife. That notwithstanding, in the verification clause, the deponent proceeded to verify those facts stated in paragraphs 2,3,4,5,6,7,8 and 9 being according to the information supplied to him by Sada Jumanne, the wife of the Applicant. In his view, these facts require a supplementary affidavit to substantiate those allegations. It was his further argument that, under paragraphs 9 and 10 of the Applicant's affidavit, the deponent stated on how his office tried to locate the whereabouts of the Applicant in the 5th Respondent's cell In vain. It was his view that, these statements require corroboration and proof,

without which they remain hearsay. In conclusion, he submitted that, the application is incompetent for being supported by a defective affidavit for containing hearsay. The remedy he observed is to struck out the application. On this, he cited the case of Rustamali Shivji Karim Merani vs. Kamal Bhushan Joshi, Civil Application No. 80 of 2009 (unreported). In reply, Mr. Kalonga submitted that, the preliminary objection raised is not within the parameters laid down in the case of Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd (1969) EA 696 where a preliminary objection must be on a pure point of law. In this, he thought, there is no preliminary objection on pure point of law. He added that, in the entire submissions, there is neither case laws nor provisions of law cited making worth to strike out the application. It was his further submissions that, submissions of the Respondents' Counsel attacking paragraphs 4,5 and 6 of the Applicant's affidavit has no substance. The need to have supplementary affidavit to back up such facts is immaterial. He said that, the test has been misplaced as the Applicant, if need arises, may file supplementary affidavit but as of now, he said, the fact stated suffices to back up the prayer. In the counter affidavit under paragraph 6, information on missing of the Applicant at the police station; tracing of the Applicant physically by the police officers together with the Applicant's wife and other relatives and also via his mobile transactions, do not require supplementary affidavit. He thus prayed the objection be overruled paving way for the application to be heard on merits. Having carefully considered submissions by the learned Counsels in their written submissions and closely examined the affidavit and counter affidavit, the issue is whether the affidavit in support of the application is defective for containing hearsay information. From the outset, the law is well settled that, affidavits should contain nothing but factual matters stating evidence as provided for under Order XIX, Rule 3(1) of the Civil Procedure

Code, Cap. 33. A person swearing an affidavit or counter affidavit has to state facts which are in his personal knowledge or else has to disclose the source of such knowledge/information. It is also trite law that, once a deponent in an affidavit relies upon information supplied by another party or deposes facts which are not within his knowledge; it becomes imperative for the said party mentioned to file a supplementary affidavit to back up such assertions. Otherwise, the deposition so made would be rendered nothing other than containing hearsay information. In *Tanzania Milling Co. Ltd vs. Zacharia Amani t/a All Gold Company and Another*, Civil 5 Application No. 415 of 2018 (unreported), the Court of Appeal while quoting with approval its previous decision in *Benedict Kimwanga vs. Principal Secretary, Ministry of Health*, Civil Application No. 31 of 2000 (unreported), held that:- "if an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that, that is where the information of that person is material evidence because without that other affidavit it would be hearsay." See also the case of *NBS Ltd vs. Superdoll Trailer Manufacturer Co. Ltd*, Civil Application No. 13 of 2002 (unreported), *John Chuwa vs. Antony Ciza* [1992] T.L.R. 233 and the case of *Sabena Technics Dar OLtd vs. Michael J. Luwunzu*, Civil Application No. 451/18 of 2020 (unreported). In *Sabena's case* (Supra), the Court of Appeal stated that, an affidavit which mention another person is hearsay unless that other person swears as well. Mr. Ruhinda argued that the affidavit in support of the Applicant's application is defective for containing hearsay evidence. He specifically referred to paragraphs 4,5,6,7,8,9 and 10 where it is deposed as follows:

4. That, on 1st February, 2021 in the morning the Applicant was arrested in his shop at Msimbazi street in Kariakoo by the officers who introduced themselves as officers of police from the 3^d Respondent and told his workmen that, if they want more details of the Applicant they have to go to the police headquarters in Dodoma.
5. That, immediately after his arrest the Applicant's wife Sada Jumanne went to Msimbazi Police Station whereby she was told that the Applicant is not there and she was given RB with reference number MS/RB/1183/2021 which she used to search the Applicant in all police posts without success.
6. That, thereafter she went to the police officer of the Zonal police office of Dar es salaam whereby she was told that "nduguyenu nimtu rhzima atarudi tu" and they should stay calm.
7. That, the wife of the Applicant was told by workmen of the Applicant that the Applicant was to be transferred from Dar es salaam to Dodoma police station for further investigation the fact which she believes to be true as the Applicant is not found in any police post in Dar es salaam and ever since the headquarters of the Police are in Dodoma hence this application.
8. That, from 14th February, 2021 the officers of police in Dar es salaam and in Dodoma Central Police have not given relevant reasons as to why and where they have detained the Applicant and from 14th February, 2021 they denied the relatives of the applicants right to police bail nor see the Applicant.

9. That, upon visiting our office have tried to ask the whereabouts of the Applicant in 5[^] Respondent cell in vain hence this application.
 10. That, the wife of the Applicant told me that the Applicant was forcibly arrested and taken in a white police car by armed officers. Looking at the above quoted paragraphs, several people have been mentioned namely Applicant's wife one Sada Jumanne, Applicant's Workmen, and Applicant's relatives. Affidavits of all those mentioned were to be deposed supporting what was asserted by Mr. Kalonga in his affidavit as required by the above cited law and case laws on affidavits. Since the Applicant's wife, workmen and relatives never filed supplementary affidavits to back up Mr. Kalonga's assertion, the deposition so remain hearsay information. The impact of swearing facts which are not in the deponent's own knowledge in an affidavit was stated in the case of Lalago Cotton Ginnery and Oil Mjllls Company Ltd vs. The Loans and Advance Realization Trust (LART), Civil Application No. 80 of 2002 where the Court held: - "It is obvious, therefore, that an affidavit or a counter affidavit which contains hearsay statements or arguments instead of facts is incurably defective." Furthermore, in the case of Tanzania Breweries Ltd vs. Herman Minja, Civil Application No. 118 of 2019 (unreported) it was held that, an Advocate, as it is in this application, can swear and file an affidavit •) in proceedings in which he appears for his client but on matters which are within his personal knowledge. These are the only limits which an advocate can make an affidavit in proceedings on behalf of his client. That said and done, I find that the affidavit in support of the Applicant's application is incurably defective and as such the defect renders the entire application incompetent. It is hereby struck out. Gerson J.Mdemu judge
- • 30/09/2022 DATED at DODOMA this 30th day of September, 2022 JUDGE 30/09/2022 9

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