

TANZANIA / JUDGMENT

christopher bagen vs attorney general 2021 tzhc 5535 13 july 2021

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IN THE HIGH COURT OF TANZANIA (MAIN REGISTRY) AT PAR ES SALAAM MISCELLANEOUS CIVIL CAUSE NO. 1 OF 2021 (Mlacha, Kulita and Rwizile JJJ) IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 [CAP 2 RE 2019] AS AMENDED FROM TIME TO TIME AND IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT ACT [CAP 3 RE 2019] IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT (PRACTICE AND PROCEDURE) RULES, 2014 BETWEEN SP. CHRISTOPHER BAGENI.....PETITIONER AND ATTORNEY GENERAL..... RESPONDENT

RULING

Date of Last Order; 26/5/2021 Date of Ruling; 13/07/2021 S.M. Kulita, J. The Petitioner herein, is a prisoner held at Ukonga prison. He is waiting for execution of a death penalty imposed on him by the Court of Appeal of Tanzania in the case of DPP v. ACP Abdallah Zombe & 8 others, Criminal Appeal No. 358 of 2013. It can be recalled that the petitioner was originally tried by this court in Criminal Session Case No. 26 of 2006 (High Court, Dar es Salaam District Registry). He was accordingly, along with 7 others acquitted. However, the said decision was reversed by the Court of Appeal where he was sentenced to suffer death by hanging, a sentence yet to be executed. Since the conviction and sentence resulted from the decision of the Court Appeal, the highest court of the land, the petitioner unsuccessfully filed an application for Review against the said judgment through Criminal Application No. 63/1 of 2016. Believing there is not further avenues where to protest his innocence, he has now approached this court with this matter. The petitioner therefore, seeks for the following reliefs to be granted by this court;

- a. To declare that appeal against the petitioner was conducted in the court which is not independent and impartial.
- b. To declare that the petitioner was denied his basic rights.
- c. To declare that the petitioner was unfairly treated and denied of his basic rights of equality before the law.

- d. To declare that the judgment of the court had departed from the principle of the rights to due process as it left the petitioner without means of access to justice through appeal.
- e. To order for any legal redress which the court may deem fit to grant. 2
- f. To order each party to bear its own costs. As part of the Reply to the Petition, the Respondent herein raised the following Preliminary Objections against the Petition;
- i. The Petition is fatally defective for contravening the provisions of Sections 4(5) and 8(2) of the Basic Rights and Duties Enforcement Act [Cap 3 R.E 2019] - BRADEA as amended, as the Petitioner has alternative means of redress. ii. The petition is untenable for being frivolous, vexatious and an abuse of court processes. iii. The affidavit in support of the petition is incurably defective for contravening Order XIX Rule 3 of the Civil Procedure Code [Cap 33 R.E 2019]. The Preliminary Objections were argued by way of written submissions. The Petitioner is unrepresented while the Respondent is represented by Mr. Charles Mtae, State Attorney from the office of the Solicitor General. In his written submission in support of Preliminary Objections, the Respondent's counsel, Mr. Charles Mtae, State Attorney decided to abandon the 3rd preliminary objection. He therefore argued the 1st and 2nd objections. Submitting on the 1st ground of Preliminary Objection Mr. Charles Mtae, State Attorney stated that the petitioner is challenging the decision of the Court of Appeal in the Criminal Appeal No. 358 of 2013 delivered on 13/09/2016 in which the Petitioner was among the eight Respondents. The counsel said that the grounds upon which this application has been brought are that the panel of Justices of Appeal which determined the appeal was not 3 independent and impartial, that he was not accorded a right to appeal, and that he was not treated fairly as he was discriminated; it means he is challenging the decision of the Court of Appeal. On furtherance to that, the petitioner addressed the redress sought which includes this court's declaration that, the conviction and sentence by the Court of Appeal denied the petitioner's access to justice. The State Attorney further stated that the grounds upon which the application hinges, as well as the reliefs sought are not capable of being adjudicated under the BRADEA because the petitioner has the other alternative means of redress under Part III B of the Court of Appeal Rules, 2019, that is filing an application for Review before the Court of Appeal under the provision of Rule 66(1) of the Court Rules. He submitted that the court is precluded under section 4(5) of the BRADEA to entertain this matter prematurely. As for section 8(2) the learned Attorney submitted that this court is not vested with powers to determine the matter in which adequate means of redress for the contravention alleged are available to the petitioner. To strengthen his argument, he cited the case of TANZANIA CIGARETTE COMPANY LIMITED V. THE FAIR COMPETITION COMMISSION AND ANOTHER, Misc. Civil Cause No. 31 of 2010, High Court of Tanzania (unreported). Arguing the 2nd ground of Objection that the petition is untenable for being frivolous, vexatious and an abuse of the court processes, Mr. Mtae submitted 4 that section 8(2) of the BRADEA precludes the court to determine a matter which is frivolous or vexatious. To support his argument the State Attorney cited the case of ADO SHAIBU V. JOHN JOSEPH POMBE MAGUFULI (President of the United Republic of Tanzania) AND 2

OTHERS, Misc. Civil Cause No. 29 of 2018, High Court of Tanzania (unreported) in which it was held that the petition is said to be frivolous when it is without substance, groundless or fanciful, and vexatious when it lacks bonafide claim, it is hopeless or offensive and to cause the opposite party unnecessary anxiety, trouble and expenses. The 2nd reason for this matter to be regarded frivolous and vexatious according to Mr. Mtae, State Attorney is that most of the allegations are levelled against the decision of the Court of Appeal and constitution of the panel of the Court of Appeal which heard and determined the Criminal Appeal No. 358 of 2013. He said that under the circumstances this court cannot sit to review the decision of the Court of Appeal. According to Mr. Mtae, State Attorney the allegations contained in the petition ought to have been raised before the panel of Justices of Appeal and not the constitutional court. He said that this signifies that they are mere afterthought and baseless. The 3rd reason is that this court cannot sit to determine the allegations on the impartiality and independency of the panel of the Court of Appeal while those allegations had never been raised before the panel itself. The learned Attorney, also submitted that it is not within the mandate of this court to grant the reliefs sought by the petitioner which have been mentioned in paragraph 6(a), (b), (c) and (d) of the application. That was the end of submissions by the Respondent's Counsel who concluded by asking this court to dismiss the matter for the petitioner's failure to comply with the provisions of BRADEA. In the reply thereto SP. Christopher Bageni, the Petitioner who is unrepresented submitted on the 1st point of Preliminary Objection in which it is alleged that the petition is fatally defective for contravening the provisions of sections 4(5) and 8(2) of the BRADEA that, upon being convicted and sentenced to suffer death by hanging by the Court of Appeal, he dully filed a Review in Criminal Application No. 63/01 of 2016 which was unsuccessfully. The Petitioner further submitted that the provision of Rule 66(7) of the Court of Appeal rules provides that where an application for review of any judgment had been made and disposed of, a decision made by that court on the review shall be final and, no application for review shall be entertained in the same matter. He submitted that in that regard his alternative means of redress through review is now limited. The petitioner said that in alternative but without prejudice to the foregoing, the jurisdiction of review cannot redress violation of the Basic Rights as provided under articles 12-29 of the Constitution of the United Republic of Tanzania, 1977 (as amended). He referred us to the case of AMI TANZANIA LIMITED V. OTTU ON BEHALF OF P.L. ASSENGA & 106 OTHERS AND 3 OTHERS, Civil Application No. 151 of 2013, CAT at DSM (unreported) and said that the jurisdiction of Review is neither Constitutional nor Statutory, contrary to the requirements of sections 4(5) and 8(2) of the BRADEA which are coached in mandatory terms, that the recourse under the provisions of that Act is subject to exhaustion of all available remedies under any other written laws. The petitioner further stated that the aim of this petition is not to challenge the decision of the Court of Appeal but the allegation for violation of his basic rights in the judgment of the Court of Appeal. He said that article 30(3) of the Constitution of the United Republic of Tanzania, 1977 and section 4(1) of the BRADEA allows any person alleging that any of the provisions of articles 12-29 of the Constitution has been, is being or likely to be contravened in relation to him, to apply to the High Court for redress. He went on submitting that in this

petition, redress and remedies he seeks, are for the violation of articles 13(6)(a); 13(1) and 13(4) of the Constitution which are tenable under the BRADEA. There is no any other law in our country which can redress violation of such basic rights. It is the petitioner's submission that he has not contravened the provisions of sections 4(5) and 8(2) of the BRADEA. He added that since there is no alternative means of redress which he could have exhausted prior to seeking for redress under the provisions of BRADEA, the petition is proper before the court. Regarding the 2nd ground of Preliminary Objection that the petition is untenable for being frivolous, vexatious and, an abuse of court processes the petitioner started to submit by defining the terms frivolous, vexatious and an abuse of court processes. He argued that nothing has been submitted by the respondent to show and/or prove that the petition is frivolous, vexatious and, an abuse of the court processes. SP. Bageni further submitted that this being a Constitutional Court, is not precluded or prevented from hearing and determining the allegation on violation of the Basic Rights made by the Court of Appeal in the course of hearing and determination of the Criminal Appeals. Citing Article 26(1) of the constitution which states that every person has the duty to observe and to abide by the constitution and the laws of the United Republic the petitioner submitted that if the judgment of the Court of Appeal has violated the Basic Human Rights the Constitutional Court has the power to hear and determine such violation and if satisfied that there is violation of human rights, it is empowered to make order(s) as shall be necessary to secure the Petitioner the enjoyment to the basic rights conferred on him under the provisions of articles 12-29 of the constitution which has been violated. The petitioner further submitted that the African Court on Human and Peoples' Rights has been challenging the applicants from Tanzania to plead on the violation of the rights under Articles 12-29 of the constitution prior to exhaust the available local remedies provided under article 30(3) of the constitution and in the BRADEA. He cited the case of ANACLET PAULO V. UNITED REPUBLIC OF TANZANIA, Application No. 020/2016 and GEORGE MAI LI KEMBOGE V. UNITED REPUBLIC OF TANZANIA, Application No. 002/2016 to justify the said legal position. The petitioner concluded by submitting that this petition is not frivolous, vexatious and an abuse of the Court processes. He prayed for the Preliminary Objection to be overruled and the petition be heard on merit. From the submissions in respect of the 1st ground of Preliminary Objection which is that the Petition is fatally defective for contravening the provisions of Sections 4(5) and 8(2) of the Basic Rights and Duties Enforcement Act [Cap 3 RE 2019] - BRADEA as amended, as the Petitioner has alternative means of redress court has the following to say; In his written submission the State Attorney submitted that reliefs sought by the petitioner cannot be adjudicated under the BRADEA because the petitioner has the other alternative means of redress under Part III B of the Court of Appeal Rules, 2019, that is filing an application for Review before the Court of Appeal under the provision of Rule 66(1) of that Court Rules. Actually, the court is precluded under section 4(5) of the BRADEA to entertain the matter which is premature, that is, for having alternative means of redress. Under section 8(2), this court is not vested with powers to hear the matter in which adequate means of redress for the contravention alleged are available to the petitioner. That is a position of the law under the said provision. That position was also reached in TANZANIA

CIGARETTE COMPANY LIMITED (supra). Now, the issue to be determined here is; what is the position of the law if review was already determined by the Court of Appeal? The petitioner is moving this court under Sections 4(5) and 8(6) of BRADEA, the reason behind is that he has already exhausted all alternative means of redress under the provisions of BRADEA. But can the decision made through Review by the Court of Appeal be subject of judicial Review in a constitutional petition? The answer, in actual fact, is, it cannot. The provisions of sections 4(5) and 8(6) of BRADEA are applicable for matters which seem to be uncertain on the face of the law, while further legal action is to be taken, but there is no alternative remedy where the court can be moved. That is where the only forum is filing of the petition under sections 4(5) and 8(6) of the BRADEA. In this matter the last remedy available for the petitioner was to file a Review in the Court of Appeal, the action which was actually exhausted. The decision made by the Court of Appeal on the review is final as per Rule 66(7) of the Court of Appeal Rules which states; "Where an application for review of any judgment and order has been made and disposed of, a decision made by the court on the review shall be final and no further application for review shall be entertained in the same matter" Be it noted that litigations should reach to an end. This was also stated by the famous Indian author for the law books, SARKAR in his book namely SARKAR'S THE LAW OF CIVIL PROCEDURE, 8th EDITION, VOL. 1 at page 53,1 quote; " there should be finality of litigation " 10 This means that as far as his case before the Court Appeal is concerned, he had exhausted all remedies. To seek for another forum is his option if it can be so found. Therefore, the first preliminary objection has no merit. It is dismissed. As for the 2nd limb of Preliminary Objection that the petition is untenable for being frivolous, vexatious and an abuse of court processes; It is undisputable that sections 4(5) and 8(6) of BRADEA are applicable only where there is no alternative remedy for the petitioner, violation of it makes the petition untenable for being frivolous, vexatious and an abuse of the court processes. Before determining the second ground of objection, it is important to venture into the powers of this court in relation to the petition. The Constitution of United Republic gives the High Court powers to hear cases regarding violation/infringement of basic rights which are provided under part III of chapter one of the Constitution. In that case, if the High Court sits to determine for the matter, it is said to be a constitutional court. It is apparent that, such establishment is under Article 30(3) of Constitution of the United Republic of Tanzania which states; "Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been; is being or is likely to be violated by any person anywhere in the United Republic\ may institute proceedings for redress in the High Court" In the case of Director of Public Prosecution Vs. Daudi Pete [1993] TLR 22, before the enactment of BRADEA, the Court of Appeal held that; ii "The Constitution confers upon the High Court original jurisdiction to entertain proceedings in respect of actual or threatened violations of the basic rights and freedoms and, until Parliament enacts the procedure for the enforcement of those rights and freedoms, the same may be enforced using the procedure available in the High Court in the exercise of its original jurisdiction" The powers have now been enshrined in the Basic Rights and Duties Enforcement Act, [Cap 3 R.E 2019] under section 4 which is amended by the Written Law

(Miscellaneous Amendment) Act No. 3/2020, subsection 1 of the said provision states; "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 " Therefore, this court (constitutional court) has original jurisdiction, first, to hear and determine any application made before it, and second, to determine any question in the course of the trial of any case which is referred to, and may give orders or directions whichever desirable for the purpose of securing and enforcing basic rights. The second function of the constitutional court is limited to questions arising in trials from the subordinate courts, as per section 9 of BRADEA. These functions are provided under section 8 and 9 of the BRADEA which states; 12 "8.-(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. 9.-(1) Where in any proceedings in a subordinate court any question arises as to the contravention of any of the provisions of sections 12 to 29 of the Constitution, the presiding Magistrate shall, unless the parties to the proceedings agree to the contrary or the Magistrate is of the opinion that the raising of the question is merely frivolous or vexatious, refer the question to the High Court for decision; save that if the question arises before a Primary Court the Magistrate shall refer the question to the court of a resident magistrate which shall determine whether or not there exists a matter for reference to the High Court" 13 As far as the powers of the High Court under section 4 of BRADEA are concerned, the same was stated in the case of *In Re Dezydelius Patrick Mgoya and Another Vs Attorney General and Others* (Misc. Civil Cause No. 19 of 2019) [2020] HCT 2982; (08 September 2020) at page 15 that; "Basing on the position governing this petition; which as aforesaid, was filed on 23/08/2019\ it is patently dear that the textual presentation of the natural wordings of the quoted provisions above leaves no doubt that, the Court is vested with jurisdiction to adjudge allegations regarding any of the provisions of articles 12 to 29 of the Constitution which has been, is being or is likely to be contravened.... On the other hand, the Court is also vested with jurisdiction to adjudge allegations relating to violation on basic rights and duties emanating from any provision in any law other than articles 12 to 29 of the Constitution which are clearly pleaded under the second part of article 30 and 26(2) of the Constitution amongst others, as the case may be " Despite the functions of the constitutional court provided by the foregoing sections, still there are limitations which are stipulated by the law when the constitutional court exercises its powers conferred to it; One, the court cannot exercise its powers when there are other means of redress provided by other law(s) or if the application is merely frivolous or vexatious; Two, the court can dismiss the application if the application claims infringement

of the basic rights in the proposed Bill which is not yet a Law; Three, no prerogative orders shall be ordered by this court when enforcing rights 14 provided by the Basic Rights and Duties Enforcement Act, the same are provided under section 8(2),(3) and (4) of BRADEA; Four, under the provisions of section 8 and 9 of the BRADEA this court cannot enforce rights, the infringement of which arises in the judicial proceedings/trials in courts other than subordinate to it. In this case at hand, respondent raised an objection that the application before this court is merely frivolous and vexatious. It is important to know what amounts to frivolous or vexatious application. The same is not defined by statutes, however in legal dictionary frivolous or vexatious application is defined to mean, filing a lawsuit with the knowledge that it has no legal basis with its purpose to bother, annoy, embarrass and cause legal expenses to the defendant. It is also stated/explained in several cases like in the case of Commercial Bank of Africa (T) Ltd Vs. Salvatory Mwandu, Miscellaneous Application No. 65 of 2020 whereby this court has this to say; '7/7 the case at hand applicant counsel has filed a total confusing application, lacking certainty and specificity, thus frivolous and vexatious more so, it is an abuse of court process by applicant counsel... [emphasis added]. In the case of Ado Shaibu Vs. Honourable John Pombe Magufuli (The President of the United Republic of Tanzania) and Two Others, Miscellaneous Civil Cause No.29 Of 2018, it was held; "....a petition is said to be frivolous when it is without substance, or groundless or fanciful; and is vexatious when it lacks bona fide cause 15 and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety trouble and expenses" From the foregoing the question to be answered would be, whether this petition is frivolous or vexatious. It has to be noted that, the petitioner is seeking redress against the Court of Appeal's decision in Criminal Appeal No. 358 of 2013 as shown before, he claims that his rights under Article 13(6) (a), 13(1) and (4) of the Constitution were violated. He therefore prayed among other prayers, a declaration that the conviction and sentence of death penalty passed against him denied his right to access justice through appeal. It is on record that, on 16th September, 2016 the Court of Appeal convicted and sentenced to death by hanging the petitioner in Criminal Appeal No. 358 of 2013. In November, 2016 he applied for review through Criminal Application No. 63/01 of 2016 and the same was dismissed in its entirety. Considering the prayers sought, an inference can be drawn that, the petitioner is seeking for this court to review the decision of the Court of Appeal in relation to the decision in Criminal Appeal No. 358 of 2013. It is settled that, when a party is aggrieved by the decision of the court and there is no right to appeal thereon, he/she has to apply for review. Review is therefore done by the same court. To this end, the Civil Procedure Code, [Cap 33 RE 2019] provides under section 78 that; "78. -(1) Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved-

- (a) by decree or order from which an appeal is allowed by this Code but from which no appeal has been preferred; or 16

- (b) by a decree or order from which no appeal is allowed by this Code, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit" The same is also stated under rule 66 of The Court of Appeal Rules, which provides; "66.-(1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds -
- (a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice;
- (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;
- (e) the judgment was procured illegally, or by fraud or perjury. The petitioner after the decision in criminal appeal no. 358 of 2013 had another redress to pursue which he did, he applied for review. Based on the above, it can be stated that One, review is done by the court which made the decision as per Rule 66 of the Court of Appeal Rules, two, the Court of Appeal decision is not appealable but may be reviewed by the same court. Three this court has no supervisory role over the decisions of the Court of Appeal. Before answering the question whether this petition is frivolous or vexatious, let us look at those rights said to be violated. The Petitioner claims that 17 Article 13(1), (4), (6)(a) of the Constitution were violated. The same reads as follows; "13. -(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.
- (2)
- (3)
- (4) No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office. (5)
- (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:
- (a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned" Starting with the right to appeal, petitioner claimed that his right to appeal was denied by the Court of Appeal. We regret to say, this is misconceived as the petitioner was convicted by the Court of Appeal when sitting on appeal. This means, the petitioner's right of appeal under our legal system is not existing because that is the final court of the Land. The only remedy was review which had already exercised. The court of appeal has jurisdiction to reverse or vary the decision of the High Court as per Rule 38 of the Court of Appeal Rules. No other appeal shall lie against the decision of the court of appeal. This is important as it has been shown before that there must be an end to litigation. The remedy available was review which was

exercised. The petitioner also claimed that his right to equality before the law was denied, he said he was discriminated. It is unfortunate there is no evidence of discrimination done against the petitioner. Discrimination under Article 13(5) of the Constitution, is defined that; For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word "discrimination" shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society. 19 For the foregoing reasons, it is our view that, this application is frivolous and vexatious and an abuse of court process for the reason that, it lacks bona fide cause. We dismiss the application for being frivolous, vexatious and an abuse of the court process. No order for costs. L.M.mACHA JUDGE 13/07/2021 r 5 JX / f e t e . j l O f S.M. KULITA \ l i \ H # ' \ \ JUDGE V \ 13/07/2021 A.K. RWIZILE JUDGE 13/07/2021 20

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