

TANZANIA / JUDGMENT

peter michael madeleka vs republic

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA MISC. CRIMINAL APPLICATION NO. 80 OF 2021 (Originating from Economic case No 40/2020 in the Resident Magistrates Court of Arusha at Arusha) PETER MICHAEL MADELEKA..... APPLICANT VERSUS REPUBLIC..... RESPONDENT

RULING

01/12/2021& 16/02/2022 KAMUZORA, J: Before me is an application brought under certificate of urgency by the Applicant one Peter Michael Madeleka. The application has been made under section 194G (2) Of the Criminal Procedure Act [Cap 20 R.E 2019 and Rule 23 of the Criminal Procedure (Plea Bargaining Agreement) Rules, 2021, GN No. 180 of 2021 and support by an affidavit deponed by the Applicant himself. In the chamber application filed by the Applicant, the Applicant prays for the following orders: - Page 1 of 9

- 1) That, this Honourable court be pleased to issue an order setting aside the conviction, sentence or orders made under section 194D
- (5) of the Criminal Procedure Act Cap 20 RE 2019 against the appellant (then 1st accused person in Economic case No 40 of 2020 in the Resident Magistrate's Court of Arusha at Arusha).
- 2) That, this Honourable Court be pleased to issue an order to the effect that the Tshs. 200,000/= (say Tanzania shillings Two hundred thousand) that the Applicant (then 1st accused person) paid to the court as fine be returned to them without any undue delay.
- 3) That, this honourable court be pleased to issue an order to the effect that the Tshs. 2,000,000/= (say Tanzania shillings two million) that the Applicant (then 1st accused person) paid to the Director of Public Prosecution (D.P.P) as a compensation to the Government be returned to the Applicant forthwith.
- 4) Any other order(s) as this Honourable court will deem fit, just and equitable to grant. The application was strongly opposed by the Respondent through counter affidavit deponed by Ms. Lilian Aloyce Mmas, Learned State Attorney and raised a notice of preliminary objection on a point of law that, "this court is incompetent to entertain the application". Submitting in support of the preliminary objection Ms. Lilian argued that, this court is incompetent to

entertain the Applicant's application brought under section 194 G (2) of the Criminal Procedure Act Cap 20 Page 2 of 9 R.E 2019. That, as per paragraph 12 of the Applicant's affidavit in support of the application the Applicant stated that the conviction and sentence by the Arusha Magistrates Court was procured involuntarily and by misrepresentation which is contrary to the law. Ms Lilian explained that, pursuant to Annexure PM M3 to the Applicant's affidavit, the Applicant was party to the plea bargaining and as with regard to the section to which this application was brought, the Applicant was supposed to make this application to the Arusha Resident Magistrate court which passed the sentence or of which the Applicant states that the plea was procured involuntarily and by misrepresentation. In his reply the Applicant one Mr. Madeleka submitted that, a preliminary objection should be on pure point of law and not facts and that the objection raised by the Respondent has no any provision which was cited to enable the Applicant to understand which law was violated. To support his argument, he cited the case of James Buchard Rugemalila v. Republic and another, Criminal Application No. 59/19 of 2017 CAT (Unreported) page 9 The Applicant Submitted further that, the learned State Attorney stated that the application was brought under section 194G (2) without mentioning Rule 23 of the Criminal Procedure (Plea Bargaining Page 3 of 9 Agreement) Rules of 2021. The Applicant referred this court to section 194H of the CPA cap 20 R.E 2019 and stated that in order for section 194G (2) to be implemented it must be in conformity and compatibility with the Rules made under Section 194 H. That, by referring Rule 2 of the Criminal Procedure (Plea bargaining Agreement) Rules 2021, the word court has been defined to mean the High Court and the Court subordinate there to save for the primary court hence this court is competent to try the matter. The Applicant also submitted that, there is nowhere in the Rules where strictly the Resident magistrates Court has been mandated only to determine the application of this nature. He also stated that, the jurisdiction of this court is unlimited and it has original jurisdiction to entertain this application. The Applicant thus prayed that the preliminary objection be dismissed and the application be determined on merit. In a brief rejoinder Ms. Lilian submitted that, in Rugemalila's case there is nowhere the CAT stated that the notice of objection should declare the very section or be brought under a specific provision. She pointed out that, the Respondent has referred the court to section 194 G

- (2) of CPA Cap 20 RE 2019 as being the very law which address the issue of sentence passed by the Court based on involuntariness or Page 4 of 9 misrepresentation. Ms. Lilian insisted that, the present application should be made to the court which passed the sentence to which the Applicant claims that it was involuntary passed or based on misrepresentation. She reiterated that, this court is incompetent to deal with this application and thus prayed for this court to strike out the application. Having considered the arguments made by the parties for and against the preliminary objection, I will first address the issue raised by the Applicant that the preliminary objection is not on pure point of law. It was contended by the Applicant that the Respondent's counsel was unable to point out the provision of the law that was violated by the Applicant thus the preliminary objection was based on facts and not pure point of law. I do agree with the argument by the Applicant that a preliminary objection

should be on pure point of law and not facts. I however, I do not agree with the contention that the objection raised by the Respondent is not a pure point of law. It is true that the notice of objection did not mention the provision that was violated as it only mentioned that the court is incompetent to entertain the application. During submission in support of the objection the counsel for the Respondent referred the provision of section 194 G (2) of the CPA Cap 20 R.E 2019 which was referred by the Applicant in his application as Page 5 of 9 the very provision which prescribe the jurisdiction of the court. Thus, by stating that the court was incompetent to try the matter, it goes to the root of the provision which provides for the jurisdiction. In that regard and subject to the decision in Rugemalila's case this objection is clearly based on point of law. Having determined that, I revert to the determination of the preliminary objection raised by the counsel for the Respondent. The issue calling for the determination by this court is whether this court is competent to entertain the present application. It is not in dispute that this application was filed under section 194G

- (2) of the Criminal Procedure Act [Cap 20 R.E 2019] (the CPA) and Rule 23 of the Criminal Procedure (Plea Bargaining Agreement) Rules, 2021. For easy reference, Section 194G (2) of the CPA Cap 20 R.E 2019 is hereunder quoted: - "An accused person who is a party to a plea agreement may apply to the court which passed the sentence to have the conviction and sentence procured involuntarily or by misrepresentation pursuant to a plea agreement be set aside." {emphasis mine} Page 6 of 9 Whereas Rule 23 of The Criminal Procedure (Plea Bargaining Agreement) Rules 2021 provides for the modality which the application ought to be brought before the court that is; 'J4/? application to set aside a conviction, sentence or order under section 194G of the Act, shall be made by chamber summons supported by an affidavit." Guided by the above provisions, any party who is a party of a plea- bargaining agreement and whom being aggrieved by the plea- bargaining agreement procured involuntarily or by misrepresentation may apply to the court that passed the sentence to set aside the sentence and the application must be made by way of a chamber summons supported by an affidavit. Pursuant to the Applicant's application the prayers in the chamber summons are for the court to set aside the conviction, sentence and order which were passed by the Resident Magistrates Court of Arusha in Economic Case No 40 of 2020 and refund of fine and compensation paid by the Applicant. I agree with the learned State Attorney that, the Resident Magistrate Court of Arusha which passed the sentence is the proper court to determine this application. Page 7 of 9 It is the Applicant line of argument that, the term court as defined under Rule 2 of the Criminal Procedure (Plea Bargaining Agreement) Rules 2021 means the High Court and the court subordinate to it save for the primary court hence this court is a competent court to entertain this application. In my view, the interpretation of the word court under the Rules includes also the Resident Magistrate court and it does not take away the jurisdiction imposed by the main Act under Section 194G

- (2) of the CPA Cap 20 R.E 2019. I therefore shake hands with the counsel for the Respondent that, the proper court to entertain this application is the Resident Magistrates court of Arusha because, it is the court which passed the challenged sentence subject to the provision of section 194G (2) of the CPA. It should also be noted that, jurisdiction is a creature of statute and the court does not assume jurisdiction based on the wishes of a party to the case. While I agree with the submission by the Applicant that this court has unlimited jurisdiction^ I take cognizance of the fact that where the jurisdiction is specifically stated by the law, the court is bound to abide by the law. Thus, by virtue of section 194 G (2) of the CPA Cap 20 R.E 2019 the jurisdiction to hear and determine an application intending to set aside the sentence procured involuntarily or Page 8 of 9 by misrepresentation pursuant to a plea agreement is vested to the court which passed the sentence and in this matter the Resident Magistrate Court of Arusha. In the upshot the preliminary objection raised by the Respondent is found to have merit and it is hereby upheld. The Applicants application is incompetent before this court thus it is hereby struck out. DATED at ARUSHA this 16th day of February, 2022. D.C. KA MU ORA. JUDGE. Page 9 of 9

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