

IN THE HIGH COURT OF TANZANIA
AT BUKOBA

MISC. CIVIL CAUSE No. 7 OF 2009

In the matter of petition to enforce a constitutional basic
right under the Basic Right and Duties Enforcement Act
(Cap.3 R.E. 2002)

AND

In the matter of Article 13(1) (3) 4, 6 A & 26 Of the
Constitution of the United Republic of Tanzania, 1977 (as
amended)

AND

In the matter of petition to challenge as unconstitutional
the Administrative Omission of the
District Court of NGARA at NGARA.

BARTHOLOMEO ALPHONCE.....PETITIONER

VERSUS

1. PRINCIPAL DISTRICT MAGISTRATE,
DISTRICT COURT NGARA

2. THE ATTORNEY GENERAL

} ...RESPONDENTS

23/8/10-23/8/10

BEFORE: (MJEMAS, LYIMO, MZUNA, JJJ. :)

RULING

MZUNA, J. (delivered the following considered Ruling of the court):

The Petitioner, above mentioned, lodged this Petition to this court under Section 4 of the Basic Rights and Duties Enforcement Act, (Cap 3 R.E.2002) praying for the following orders:

- "1) To declare the administrative omission orders(s) that (sick).
- 2) To immediately supply the petitioner with the copies of proceedings and judgment.
- 3) Costs to follow the event and
- 4) Any other order(s) relief (s) that would suit the circumstances of the case and ensure equality adherence in future administration of justice at the discretion of this honourable court."

Mr Kinuno, Learned State Attorney who appeared for the first and second respondent raised two preliminary objections, couched in the following words:

- "1. The procedure used by the applicant of blending the affidavit together in the petition is inadmissible in civil proceedings.

2. The affidavit in the petition is incompetent it includes matters of law."

He prayed for this application to be dismissed with costs. It became evident that, the petitioner was convicted and sentence to 30 years on Rape charge. There is no evidence adduced by him that he has copy of notice of appeal. Then he applied for a copy of judgment and proceedings which were not supplied, but letters to that effect could not be produced. He then lodged a complaint letter to the Hon. Judge Kiongozi. Then communication was made between him and other administrators within the Judiciary including the District Registrar and the DM i/c Ngara. Before he could know the reply from the DM i/c he resorted to this petition in which he prays for the above said orders and which he believes is a violation of basic human rights. He was even more specific that:

"The petitioner's applications have been sidelined while the same court has been issuing copies of judgment to other prisoners convicted later than the petitioner which fact depicts discrimination".

Before we could go into the merits of the preliminary objection and the application which is before us, we found it ideal to resolve on one important point of law,

has addressed us that this
other alternative
to address us. The answer
State Attorney addressed us that this
ought pre-maturely. The applicant has not
alternative remedies like the appeal under SS. 362
of the **Criminal Procedure Act** Cap. 20 (R.F.)
S. 362 (1) States the appeal must be accompa
memorandum of appeal and copy of judgment
edings. The petitioner alleges have not been given
the past 9 years while others have been given
argument that there is no discrimination as alleged
assuming he was discriminated
like revision as he was
C.P.A Ca
of the

that is whether a Constitutional Court is vested with the powers which the petitioner has addressed us to, specially so where there is other alternative remedies? Parties were given chance to address us. The answer to this was as follows:

Mr. Kinuno, Learned State Attorney addressed us that this application was brought pre -maturely. The applicant has not exhausted the alternative remedies like the appeal under SS. 362 (1) and 359 of the **Criminal Procedure Act** Cap. 20 (R.E. 2002). That S. 362 (1) States the appeal must be accompanied by Memorandum of appeal and copy of judgment and proceedings. The petitioner alleges have not been given same for the past 9 years while others have been given. It was his argument that there is no discrimination as alleged.

That even assuming he was discriminated he has other alternative remedies like revision as he was expected to apply for revision under S. 373 (1) **C.P.A** Cap 20 (R.E 2002) read together with Section 44 (1) (a) of the **Magistrates' Courts Act** Cap. 11 (RE. 2002).

Further that the Basic Duties and Rights Enforcement Act CAP 3 under Section 8 (2) specifically state that the constitutional court

should not deal with the matter where alternative remedies have not been exhausted.

That, since there is no evidence that an alternative remedy of appeal and revision was fully exercised, this petition should be dismissed.

In reply, the petitioner who was not defended insisted that to his view he has exhausted all the remedies.

From the above points we deduce the following:

First that the petitioner was convicted and sentenced. The machinery dealing with appeals is the **Criminal Procedure Act** cap 20 (R.E 2002) and **the Magistrate Act** Cap 11 R.E 2002. That machinery for appeal and revision have not been fully exhausted as provided for under section 8 (2) of **the Basic Rights and Duties Enforcement Act** (Cap 3 R.E 2002). The said provision reads as follows:

"8. Jurisdiction of High Court

(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.

(2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious."

(Emphasis ours.)

So we find that this petition is not properly before this court.

Another point which has made us come to that conclusion is based on the nature of the orders sought. Actually it seems the petitioner is seeking for declaratory orders which is not the basis function of this court (see section 8 (4) of the said **Act** (cap 3 R.E 2002). Similar view was expressed in the case of **The Registrar of Societies and 2 others v. Baraza la Wanawake Tanzania**

Court of Appeal, Civil Appeal No. 82 of 1999 (unreported). The court held that:

"Under the provisions of ss.5 and 8(4) of Basic Rights and Duties Enforcement Act a complainant of human rights violations should not invoke the procedure or ask for prerogative orders like certiorari, available under the Law Reform Ordinance. This does not mean that the respondent, if he succeeds is without remedy. The High Court has wide powers under s. 13(1) and (3) of the Act to grant appropriate remedy."

We asked ourselves if this is the first time convicts face a similar problem though if at all it exist, we do not condone it. We found an answer to other case laws. In the case of **Cosmas Athuman Vs R** (1967) HCD no. 120 the record of the trial court was not traced after the appellant had appealed and filed a copy of judgment. The court, Said, J. (as he then was) ordered for a retrial after quashing the conviction. That was the same approach which Cross J (as he then was adopted) in the case of **Andrea Ndibalema Vs. R** 1967 (HCD) no. 291. We would urge the petitioner to adopt the same position though the facts in this case does not suggest that there is and affidavit to prove the alleged loss from the court official who keeps the record.

We find as indeed was held in the case of 1.Federation
of Mines of Associations of Tanzania
2.The Arusha Regional Mines Association
3. Femata Miners Corporation Ltd. Vs. M/S Africa Gem Resources
(Afgem) and 7 others Misc. Civil Cause No. 23 of 2001 High Court, Arusha
Registry unreported where Msumi J (as he then was) held that:

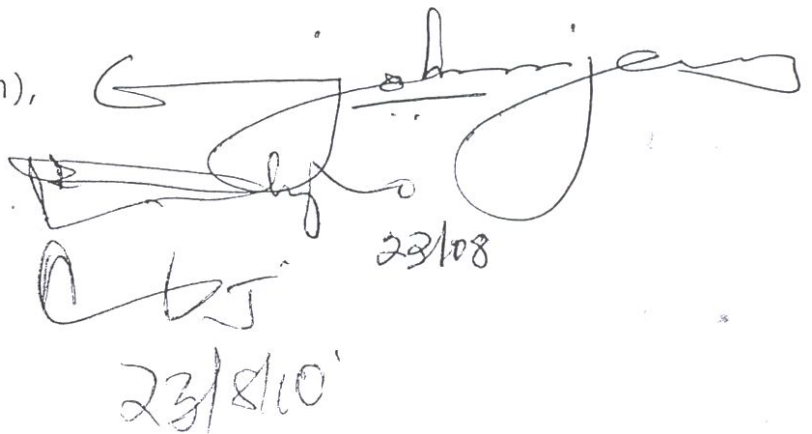
"...these allegations are basically not constitutional matters. The objection that the petitioners have adequate alternative means of redress for the alleged violations is therefore sustained."

We therefore dismiss this petition for being improperly before this court. No order for costs.

Signed Mjemas, J (Chairman),

Lyimo,J (member),

Mzuna ,J (member)



Handwritten signatures and dates of the judges. The signature of Mjemas, J (Chairman) is at the top right, with the date 23/10/08 written below it. The signature of Lyimo, J (member) is in the middle, with the date 23/8/10 written below it. The signature of Mzuna, J (member) is at the bottom left, with the date 23/8/10 written below it.

court record are the powers of the DR. S. 8 (4) of the Basic Rights and Duties Enforcement Act Cap. 3 (RE. 2002).

That is all.

M.G. Mzuna, Judge.

23/8/2010

Order: Ruling reserved till at afternoon of today the 23rd August 2010.

M.G. Mzuna, Judge.

23/8/2010

Date: 23/8/2010

Coram: Hon. G.J.K. Mjemmas, J.

Hon. V.K.D. Lyimo, J.

Hon. M.G. Mzuna, J.

Petitioner: Present

1st Respondent: }

2nd Respondent: } - Mr. Kinuno, State Attorney

B/C: Grace

Court: Ruling delivered in the presence of the parties. Right of Appeal explained.

M.G. Mzuna, Judge.

23/8/2010

Signed: Mjemmas, J (Chairman),

Lyimo, J (Member),

Mzuna, J (Member

