**Mabalanganya v Sanga**

**Division:** Court of Appeal of Tanzania at Mbeya

**Date of judgment:** 2 June 2004

**Case Number:** 1/02

**Before:** Ramadhani, Nsekela and Msoffe JJA

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*[1] Appeal – Appellate jurisdiction – Power of review – Procedure in exercise of such power – Whether*

*High Court has power of review of decisions of primary courts.*

**JUDGMENT**

**Ramadhani JA**: This matter started as Primary Court civil case number 15 of 2000. The applicant was unsuccessful and appealed to the Songea District Court (Civil appeal number 2 of 2001). That, too, was barren of results, and, so the applicant went to the High Court at Songea with civil appeal number 10 of 2001, which was summarily rejected by Manento J on 29 September 2001. The applicant went back to the learned Judge for a review but it was dismissed on 26 July 2002. The applicant has come to this Court seeking revision. We have found a disturbing practice here in Mbeya of resorting to the powers of revision of this Court after a review of an order of summary rejection of appeal emanating from the primary court has been dismissed by the High Court. So, at the start of hearing the application we placed three questions to Mr Justinian *Mushokorwa*, learned Counsel for the applicant. First, we wondered whether the record before us was complete for revision purposes. Two, we wanted to know why the applicant did not appeal to this Court against the order of summary rejection but instead preferred a review by the High Court and we asked whether after that had been dismissed it was proper to come to this Court for revision. Lastly, we asked the learned advocate whether the application for revision does not circumvent the statutory requirement of a certificate of the High Court that there is a point of law to be considered by this Court in respect of a matter emanating from a primary court. Mr *Mushokorwa* conceded that the record before the court contains only the notice of motion, his affidavit and the ruling of Manento J, dismissing the application for review. However, he pointed out that there is no rule providing for what a record for revision should contain. He said that the existing rules deal with appeals and applications. However, he asked for time to bring the record of proceedings of the lower courts. Mr EO *Mbogoro*, learned Counsel for the respondent, objected to granting leave to rectify the records. We may as well deal with this matter first. Admittedly, the Tanzania Court of Appeal Rules of 1979, are silent as to revision. But what does revision entail? Before we come to that and for the avoidance of doubt, we had better say that section 4 of the Appellate Jurisdiction Act of 1979, (hereinafter referred to simply as the AJA of 1979) confers upon this Court powers of revision. The court can exercise those powers in one of two ways: one, under section 4(2) the court can revise proceedings in the course of hearing an appeal and two, under section 4(3) the court may on its own motion call for and examine the record of any proceedings before the High Court. Through case law (*Halais Pro-Chemie v Wella AG* [1996] TLR 269] this Court has extended subsection (3) to cover instances where the court is moved to exercise its jurisdiction of revision. Here the applicant is moving the court to exercise its powers of revision. So subsection (3) applies which provides as follows: (3) Without prejudice to subsection (2), the court shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court. So, to answer the question we had posed earlier, revision entails examination by this Court the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings before the High Court. So, the record of proceedings of the High Court, and in the case of appellate jurisdiction of the High Court, then the record of proceedings of the lower court or courts, must be before this Court. This is glaringly certain from the very definition of what revision entails and if the court is to perform that function, this does not depend on the existence of any rules to that effect (*sic*). The rules, if any, will just state the obvious. Now, when the court acts on its own motion it will have to call for those records itself. But when the court is moved, as in this case, then the one who moves it will have to supply those records. Mr *Mushokorwa* dutifully conceded that the records are missing in this case and we agree with Mr *Mbogoro* that we cannot at this stage give time to Mr *Mushokorwa* to do what he should have done years ago. This is enough to dispose of the application but we are of the decided opinion that we better deal with the other issues in order to prevent the abuse of the process of the court and as a directive to learned advocates. As to our second question, why the applicant preferred review by the High Court instead of appealing to this Court against the summary rejection of appeal, Mr *Mushokorwa* simply said that both avenues were open to the applicant and that he chose the former and not the latter. However, when further quizzed, Mr *Mushokorwa* conceded that appeals from the primary courts are dealt with under the Magistrates’ Courts Act of 1984, (hereinafter referred to simply as the MCA of 1984) and that there are no provisions for review under that Act, but they chose review under the provisions of the Civil Procedure Code Act of 1966, (hereinafter referred to simply as the CPA of 1966) to suit their convenience. Mr *Mbogoro* submitted that the proper avenue for the applicant was to appeal to this Court against the summary rejection of the appeal. He went further to say that even if there were no reasons given by the learned Judge for summarily rejecting the appeal, then that omission to give reasons should have been the ground of appeal. Section 28 of the MCA of 1984, provides for power of the High Court to reject appeals summarily. Subsections (1) and (2) deal with criminal appeals and three conditions are imposed before summary rejection can be resorted to. Subsection (3) provides as follows: (3) A judge may, if satisfied that an appeal in any other proceeding is without substance, summarily reject the appeal. This subsection deals with appeals other than criminal appeals, and so, includes civil appeals. Unlike criminal appeals, no conditions have been imposed for the exercise of the powers under this subsection. However, we are of the firm view that it is imperative, in both criminal and civil appeals, for a judge to give reasons for rejecting an appeal summarily. This Court has said so in no uncertain terms in *Idd Kondo v R* criminal appeal number 46 of 1998 (UR). But even if no reasons have been assigned, then that is a ground of appeal, as Mr *Mbogoro* submitted. Now, when an appeal is summarily rejected, what is the remedy available to the appellant? The applicant here used review by the High Court. In our opinion review is not a remedy for the aggrieved party. There is no provision for review in the MCA of 1984. Part III (C) of the MCA of 1984 deals with “Appellate and Revisional Jurisdiction of the High Court in Relation to Matters Originating in Primary Courts”. There is no mention of review. The decision of the High Court in a matter emanating from a primary court under Part III(*c*) is subject to appeal to this Court under section 5(2)(*c*) of the AJA of 1979. The decision does not go back to the High Court for a review. Admittedly, the High Court has the power of review under section 78 of the CPA of 1966, but the CPA of 1966, does not apply to primary courts. That is very clear from the provisions of section 2 of the CPA of 1966, that: 2. S ubject to the express provisions of any written law, the provisions of this code shall apply to all proceedings in the High Court of the United Republic, courts of resident magistrates and the district courts. Thus, primary courts are not mentioned in this section defining the scope of application of the CPA of 1966. Moreover, section 3 of the CPA of 1966, defines “court” to mean those three courts mentioned in section 2. Thus, the law which provides the High Court with the power of review does not apply to the primary courts and, therefore, the High Court does not have power of review on matters emanating from the primary courts. So, the application of the applicant for review, by the High Court in this case was misconceived. The High Court had no jurisdiction of review and in the purported exercise of review it did not affect in any way the summary rejection of appeal, there is nothing for this Court to revise. The application ought to be struck out. Lastly, we come to the issue of the requirement of a certificate on point of law to be dealt with by this Court. As already said, this Court is empowered to hear appeals on matters emanating from primary courts by section 5(2)(*c*) of the AJA of 1979. That paragraph requires such appeal to have a certificate of the High Court that there is a point of law that has to be considered by this Court. Now, an application seeking this Court to revise a decision of the High Court on a matter emanating from a primary court is not accompanied by a certificate that contravenes the AJA of 1979. Therefore, this Court cannot entertain such an application for revision. This Court can only deal with an appeal on certificate of point of law. This application is misconceived and must be struck out. For the reasons given above, the application is struck out with costs under rule 3(2)(*c*) for preventing an abuse of the process of the court. It is so ordered. For the applicant:

*Mr Justinian Mushokorwa*

For the respondent:

*Mr EO Mbogoro*