IN THE HIGH COURT OF TANZANIA

AT IRINGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 4 OF 2012

(Original Criminal Case No. 63 of 2003

At the District Court of Njombe)

YOHANA NYAKIBARI AND 22 OTHERS ---------- APPLICANTS

VERSUS

THE REPUBLIC ---------- RESPONDENT

RULING

The Applicants by way of chamber summons supported by an affidavit of Godfrey Ukwong'a, advocate prays for order that;

1. This court be pleased to give directions upon exercising its general powers of supervision by calling for, inspecting, examining as to the correctness of the records of the proceedings of the District Court of Njombe in Criminal Case No. 63 of 2003 between the parties herein wherein the court intends to proceed to defence case on charge sheet that is a nullity and non existing as the court abandoned the earlier charge sheet and substituted its own charge sheet and that the trial was conducted on

a charge sheet that gave the accused benefits of doubts and right to be acquitted unconditionally/discharged.

2. Any other and further just relief the court deems fit be directed or ordered.

The application flows from the following facts. The applicants were arraigned before the District Court of Njombe in Criminal Case No. 63/2003. The applicants were tried on eight (8) counts which were all contained in one charge sheet filed on 23rd March, 2003.

Upon the conclusion of the prosecution case the applicants pursuant to the provisions of Section 250 of the Criminal Procedure Act, Cap 20 RE 2002 made a submission to the effect that the applicants had no case to answer.

Subsequently the presiding Resident Magistrate ruled out that the prosecution had established a case against the applicants and therefore the applicants were to present their defence case. It is upon that ruling the applicants came to this court with the present application.

The matter was argued orally. Mr. Godfrey Ukwong'a learned counsel, represented the applicants while Mr. Mwenyeheri Aristarik, learned State Attorney represented the respondent.

I must admit that both counsels did their homework as lengthy proceedings of their oral submissions bear testimony and these can be summarized as follows.

Adopting his supporting affidavit, Mr. Ukwong'a learned counsel valiantly submitted that the applicants were arraigned on 8 counts but of the ten (10) prosecution witnesses none of them were able to establish a case against the applicants. To drive his point home Mr. Ukwong'a contended that the trial magistrate made the first error and blunder when he mixed up in his ruling as if all the applicants were charged in all the eight counts something which was not the case in point. It is upon the above circumstances Mr. Ukwong'a forcefully argued that the 6th to 23rd applicants were tried on a count that they were not arraigned nor was the common intention proved under count number one.

Further, Mr. Ukwong'a submitted that it is a cardinal principle of criminal trial that one can not be tried for an offence he was not charged and pleaded and therefore the applicants were tried unlawfully.

Mr. Ukwong'a added that in the ruling of the trial magistrate there was no where indicated that the prosecution had proved its case beyond any reasonable doubt.

In support of his oral submission Mr. Ukwong'a invited this court to make reference to **Thuway Akonaay V. Republic** [1987] TLR 92, **Naoche Ole Mbile V Republic** [1993] TLR 253, **Jonas Nkize V Republic** [1992] TLR 213 and **Director of Public Prosecutions V Elias Laurent Mkoba and Another** [1990] TLR 115.

On his part Mr. Mwenyeheri learned State Attorney started by attacking the affidavit which he argued that it was defective as it based upon facts which are found in documents but the deponent did not disclose it hence he sought this court to adopt the course taken in **Serikali ya Mapinduzi Zanzibar V Faridi Mohamed** [1999] TLR 355 where the application collapsed merely because the affidavit had averments based on facts found on documents but which the deponent did not disclose.

Mr. Mwenyeheri further submitted on the substance of the application that this matter has a checkered history and went as far as the Court of Appeal of Tanzania in Criminal Reference No. 1 of 2006 where parties were the same and that the Court of Appeal decided that as the application was interlocutory, Act No. 25 of 2002 was relevant in that there should not be an interference or invocation of the High Court in orders which do not finally and conclusively dispose the matter. Mr. Mwenyeheri went ahead to point out that it was

surprising to note that the applicant came with a new application and intentionally did not even disclose to the court about the previous attempt which went as far as the Court of Appeal.

Finally, Mr. Mwenyeheri argued that for the ruling on a case to answer it suffices for the court to assess whether the prosecution has been able to establish a case which entitles the defence to tender evidence. At that juncture it is not for the court to rule out that the prosecution has established a case beyond any reasonable doubt.

According to Mr. Mwenyeheri that was the gist of the case of **Jonas Nkize** cited by the applicants.

In his brief rejoinder Mr. Ukwong'a contended that Mr. Mwenyeheri is introducing a preliminary objection without a formal notice and in any case the documents annexed to the application are court documents which is the ruling and it would have been improper for the applicants to reproduce all the contents of the ruling in the affidavit.

Admittedly, Mr. Ukwong'a argued that the matter had earlier on went as far as the Court of Appeal and it related to the interlocutory matter but he contended that this is an independent application. However, he insisted that it is upon the court to rule out on a submission of no case to answer

that the prosecution has or has not proved its case beyond reasonable doubt.

Before I embark on the evaluation of the substance of the submissions by the learned counsels, let me make some few remarks.

I should start by saying that the argument on defectiveness of the affidavit as raised by the counsel for the respondent has no merit at this juncture as the same was supposed to be raised at an earliest opportunity and through a formal notice and not through back doors as the counsel for the respondent did which appears to be an afterthought. Nyalali C. J (as he then was) in **The University of Dar es Salaam V Sylivester Cyprian and 310 Others**, Civil Application No. 5 of 1995, Court of Appeal of Tanzania at Dar es Salaam (unreported) had this to say in part;

> *A preliminary objection must be made before the hearing of the application.*

Similarly, I wish to point out at the outset that the proposition by the counsel for the applicants that the court at the stage of giving ruling on the submission of no case to answer was supposed to indicate that the prosecution has proved its case beyond reasonable doubt, with all due respect I find that proposition to be misleading and misguided because

it is only upon considering the evidence of the prosecution and defence that the court can arrive to the logical conclusion on the strength of the evidence on record. Earlier than that it would be premature and an abuse of the court process and denial of the right to be heard if the court will pronounce that the prosecution has or has not proved its case beyond reasonable doubt midway before even the defence has presented its defence case.

It is instructive to say that from the affidavit evidence filed by the parties and the submissions of the learned counsels there is no dispute that the present application emanates from the ruling of the Njombe District Court in Criminal Case No. 63 of 2003 and that the ruling did not finally and conclusively determine the guilt of the applicants.

The applicant sought to move this court to exercise its powers of inspection and revision as provided for under Section 44(1) (a) of the Magistrates' Courts Act, Cap 11 RE 2002. These same powers are conferred to the High Court by Part X of the Criminal Procedure Act, Cap 20 RE 2002 under (b) Revision and which is couched in a more similar manner to Section 44(1) (a) of the Magistrates' Courts Act, Cap 11 RE 2002.

In my considered view, there is considerable merit in Mr. Mwenyeheri's submission that as the current application

emanates from the ruling which did not finally and conclusively dispose the matter the same is barred by virtue of Written Laws (Miscellaneous Amendments) Act No. 25 of 2002 which amended Section 43 of the Magistrates' Courts Act, Cap 11 which reads;

> *"No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District or a court of Resident Magistrate unless such decision or order has the effect of finally determining the criminal charge or suit."*

There have been a number of decisions on what amounts to interlocutory or preliminary proceedings. All of these decisions in essence reveal one thing that of necessity preliminary or interlocutory proceedings must be in relation to a pending matter in court. In **Israel Solomon Kivuyo V Wayani Langoyi and Naishooki Wayani** (1989) TLR 140 the Court of Appeal of Tanzania quoting with approval from **JOWITT'S DICTIONARY OF ENGLISH LAW**, 2nd Edition at page 999 stated;

> *"An interlocutory proceeding is incidental to the principal object of the action, namely, the judgment -----"*

The Court of Appeal of Tanzania has in a number of times had an opportunity to interprete the provisions of Act No. 25 of 2002 and one such occasion is in the case of **Yohana Nyakibari & 22 Others V The Director of Public Prosecutions**, Criminal Reference No. 1 of 2006, Court of

Appeal of Tanzania at Mbeya (unreported) where the court stated that;

> *"It is also common knowledge that these amendments are not without good and sound logic. Unrestricted appeals or applications for revision or interlocutory orders would undoubtedly lead to uncalled for delays, resulting from the time spent while pursuing appeals or application for revision on interlocutory orders which do not finally determine the suit or criminal charge."*

As the decision being impugned was an interlocutory one from which no appeal or revision could lie by virtue of Act No. 25 of 2002 this application has no legs to stand.

For the above reasons and to the extent shown above the application is hereby dismissed and the court file should be expeditiously transmitted back to Njombe District Court for the trial of the defence case for the interest of justice as delayed justice runs the substantial risk of becoming injustice for one side or another.

It is accordingly ordered.

P. F. KIHWELO

JUDGE

08/05/2015