

IN THE HIGH COURT OF TANZANIA

AT BUKOBA

MISC. CRIMINAL APPLICATION NO. 12/2017

(O/F Criminal Case no. 239/2016 and 80/2017 in the District Court of Bukoba)

1. AMANTIUS S/O MSOLE

2. SIMBA UFOO SWAI

-----**APPLICANTS**

VERSUS

THE REPUBLIC-----RESPONDENT

RULING.

06/04 -08/06/2018

BONGOLE, J.

This application is made under Section 372 and 392 A (i) and (2) of the Criminal Procedure Act, Cap. 20 RE: 2002 as amended by Act No. 3 of 2011. The applicants namely Amantius s/o Msole and Simba Ufoo Swai preferred this application seeking the following orders:-

- 1. That the court be pleased to call and examine the records of the two case files from the District court so as to satisfy itself as to the legality of the two rulings dated 28th April 2017 and another dated 3rd May, 2017.*
- 2. That the court may make an order as to the propriety of the continued charging of the two applicants in the same charge sheet.*
- 3. Any other orders this court may deem fit and just to grant.*

The application is supported by an affidavit deposed on by MR. JOSEPHAT SEBASTIAN RWEYEMAMU learned Advocate who champion for the applicants.

The facts as deposed in the affidavit inter alia materially run as follows:-

That the applicants were first charged in the District Court on 29th September, 2016 and as the charge sheet required consent of the Director of Public Prosecution, the same was not read over to the accused persons including the applicants.

That as the said consent from the Director of Public Prosecution was required by law to be filed or withheld within 60 days from the date the accused were arraigned and in this matter **Criminal Case No. 239/2016** such period expired without the filing of the consent for the prosecution.

That on 27th April, 2017 the applicants through their advocate presented a complaint that as the 60 mandatory days had expired and the consent of the DPP was not forthcoming the case was illegally before the court. That the court on 28th April, 2017 did discharge the applicants u/s. **225 (5) of the Criminal Procedure Act Cap. 20 RE: 2002** but the applicants were immediately apprehended and taken to police custody where they were incarcerated up to 2nd May, 2017 as they were denied police bail.

That on the 2nd May, 2017, the applicants were arraigned in court and the charge sheet against them was verbatim the same as the previous one and the only change was the case number which this time became **Criminal Case No. 80 of 2017**. That the said charge sheet was not read over to the applicants on the allegation that the consent of the DPP to prosecute the accused persons had not been obtained. That an objection was raised contending that. That the recharging of the accused persons without a consent from the DPP was unlawfully and bail was also prayed for pending ruling on the issue of illegality of the charge sheet. That bail was refused and the ruling on the issue of illegality was adjourned to 3rd May, 2017 when also bail would be considered by the court.

That on the 3rd May, 2017 while granting bail to the applicants in Criminal Case No. 80/2017 the court stated that the application by the applicant to invoke inherent powers of the court and put an end to the case was a premature step and this finding of the court was on a wrong premise.

That even after the expiry of the statutory of sixty days since the filing of the 2nd charge sheet, the court on the 3rd day of July, 2017 entertained a prayer that they were still waiting for the consent of the DPP and proceeded to adjourn the case.

That in the light of non-compliance with the provisions of **Section 57(1) and (2) of the Prevention and combating of corruption Act, Cap. 329 (RE: 2002)** the court should have invoked its inherent powers to put an end to the prosecution of the applicants.

That it is common ground that continuing with the prosecution of the applicants when the time for issuing the DPP's consent has elapsed in both Criminal cases is illegal improper and an abuse of the judicial process, but it continues to prejudice the applicants in terms of time and costs.

That up to now, the applicants have been attending court four all most eleven months but they have never pleaded to the charge which lacks the consent of the DPP.

That under the law this High Court is vested with revisional powers to order that this case is wrongly and illegally before the court.

When the chamber summons and affidavit were served to the Respondent, **Mr. Hashim Ngole** the Principal State Attorney In-charge of the office of the Attorney General's chambers in Kagera Region filed a Counter Affidavit.

Mr. Ngole denied all the contents of the affidavit save for the contents of paragraphs 1, 3, 9 and 12 of the affidavit which he noted.

When the application was slaughtered for hearing, Mr. Kahigi learned State Attorney appeared for the respondent and whereas Mr. J.S. Rweyemamu appeared/championed for the applicants.

The application was orally argued.

Mr. J.S. Rweyemamu had it that this application arises from two original cases filed in the District Court of Bukoba i.e. **Criminal Case No.**

239/2016 and No. 80/2017. That after filling the 1st case on the 29th September, 2016, the charge was not read to the accused persons as the charge requires consent from the DPP as the 2nd count was laid against the accused persons for contravening **Section 31 of the PCCB Act No. 11/2007.**

That in the said Act, under **Section 57 (10 and (2)** requires consent and when this case was filed the said consent was not there. So he said, they did wait till the expiring of 60 days as required by the law.

That on the 10/1/2017, he raised the issue of the DPP's consent which was not available as 60 days had elapsed in the absence of the DPP's consent.

That on the 27th April, 2017 they were told that the file had been sent to the DPP so the prosecution prayed for an adjournment. That he objected the prayer of adjournment and prayed for the court to invoke its inherent powers and acquit the accused persons. That on 28th April, 2017 a ruling was issued to the effect that the DPP had omitted to comply with the provisions of **Section 57 (1) (2) of Act No. 11/2017** and proceeded to discharge the accused persons under **Section 225(5) of the Criminal Procedure Act No. 20 RE:2002.** That he had prayed for the dismissal of the charge.

That immediately, the accused were arrested in the premises of the court and were sent to police station and were incarcerated and were not seen or be given police bail till the 2nd May, 2017 when they were brought in court with a charge verbatim with the same words except the change of the case number. He said, worse enough, the charge was brought without the DPP's consent. That he referred the court to the previous charge sheet and told the court that it was an abuse of the court processes and tantamounted to torture of the accused persons other than prosecuting them. He said to have prayed for the dismissal of the charge sheet and also prayed for bail.

That on the 3rd May, 2017 the ruling was delivered with an impact that it conceded with the fact that the court has inherent powers but the prayer was pre-mature till the expiry of 60 days as per the requirement under **S. 57(1) of Act No. 11/2017**.

That the accused persons withhold their patience and they were granted bail. That they prayed for an adjournment of 60 days awaiting for the DPP's consent a prayer which was granted.

The case was scheduled for mention on the 3rd July, 2017 a date they expected a consent from the DPP on the 2nd charge. On this date he said the State Attorney stated that they were still waiting for the DPP's consent. It was his anticipation that the court could use its inherent powers as stated earlier by the very same magistrate.

He contended that it was upon the said trend which led him to find the court toothless in using its inherent powers and that is what prompted them to file this application for revision so as this court may look if at all till today no consent from the DPP.

He prayed before this court to use its inherent powers in dismissing the charge sheet citing the case- **R.Vs. Deeman Krispini and Another (1980) TLR. 116** where it was stated that the court has powers to refuse adjournment and has inherent powers to dismiss the charge and discharge the accused persons.

That as there is no any charge read to the accused persons it means there is no charge and that the court ought to set free the accused and order their freedom should not be interfered. He also invited this court to glance in the case of **DPP Vs Yahaya Upanga and Another (1983) TLR 51** where it was held that the court has to invoke its inherent powers by dismissing the charge and acquitting the accused.

He stated to have been aware of the **Provisions of Act No. 3/2011** particularly with **S. 18** which deleted the word Acquittal under **S. 222** and replace the word discharge. That the amendment was made purposely to

affect the mischief which the prosecution was facing. He therefore contend that this situation is not palatable, and the court should make a lea way and that is why he invites this court to use its inherent powers. Referring to Deeman's case (supra) at page 117 he said "the court must have within reason the power to control its own proceedings in order to prevent itself from being emasculated and rendered importantent".

Responding to, Mr. Kahigi submitted that the applicants' application is based on two limbs i.e. First, they are challenging the charge sheet in **Criminal Case No. 239/2016 and 80/2017** and second, the use of inherent powers of the court.

It was his argument that the accused persons were arraigned in court and the charge sheet was read over in court by the language they knew but they were not required to plead due to want of DPP's consent. So he said it is not true that the charge was not read over to the applicants.

That it is true that the applicants were charged in **Criminal Case No. 239/2016** and were discharged for want of the DPP's consent and they were arrested and charged on the same account in **Criminal Case No. 80/2017 at Bukoba District Court.**

He argued that the law gives powers to the DPP to arrest and charge on the identical facts. He said, in the case cited of **DPP Vs. Yahaya Upanga and Another Criminal Application 329/1983 TLR 151**, it allows the DPP to re-arrest the suspects and recharge on the identical facts.

On the irregularity of the ruling in **Criminal case No. 80/2017**, he said it is trite that the court has an inherent power which should be exercised judiciously and that is why the assigned Magistrate adjourned the case and gave more time to the prosecution to secure the consent.

He therefore prays before this court to invoke its powers and order the case to proceed in the subordinate court and consequently dismiss the application.

I owe gratitude beyond measures to the learned State Attorney and the Advocate for their persuasive and insight full arguments.

At the outset, I must portray that writing of a good ruling is in my soul but the quality of a good ruling is in the details. The details are extracted from the facts of the matter and the relevant laws governing the subject matter.

It is worth at this juncture to appreciate in abbreviate the facts that led to this application.

In the year of our Lord, 2016th the 29th of September; the unforgettable date on the part of the applicants and their families; the applicants with two others were arraigned before the District Court of Bukoba at Bukoba charged of two counts in Criminal Case No. 239/2016. The accused persons were:-

1. AMANTIUS S/O MSOLE
2. SIMBA UFOO S/O SWAI
3. KELVIN S/O MAKONDA
4. KARLOS S/O SENDWA

In the first count they were charged of conspiracy to commit an offence c/s. 384 of the Penal code [Cap. 16 RE; 2002].

The particulars of the offence were that Amantius s/o Msole, Simba Ufoo s/o Swai, Kelvin s/o Makonda and Karlo s/o Sendwa on 19th day of September, 2016 within the Municipality and District of Bukoba in Kagera Region did conspire to commit an offence to wit; Abuse of position.

In the second count; **Abuse of Position Contrary Section 31 of the Prevention and Combating of Corruption Act No. 11 of 2007.**

The particulars of the offence were that Amantius s/o Msole, Simba Ufoo s/o Swai, Kelvin s/o Makonda and Karlo s/o Sendwa on 19th day of September, 2016 within the Municipality and District of Bukoba in Kagera Region intentionally did abuse their positions in discharge of their functions for purposes of obtaining an undue advantage for themselves by opening

an account No. 0150225617300 at CRDB Bukoba namely Kamati Maafa Kagera while there was already another Account No. 0152225617300 at CRDB which is authorized and recognized one.

When the charge was read over and explained to the accused persons they were not given a chance to plea as in the 2nd count it was under the PCCB Act which requires prior consent of the DPP.

It is the law i.e. **Section 57 (1) (2) of the PCCB Act.**

Section 57 (1) Except for offences under Section 15, prosecution for an offence under this Act shall be instituted with written consent of the Director of Public Prosecutions.

(2) The Director of Public Prosecutions shall, within sixty days, give or withhold consent for prosecution.

It is with no shadow of doubts that the charge against the applicants in Criminal Case No. 239/2016 was instituted against the applicants without the consent of the DPP as required by the law and upon expiry of the 60 days, the District Court correctly discharged the accused persons.

It is as well not in dispute that upon the discharge of the accused persons, they were arrested and arraigned in court where they were charged in Criminal Case No. 80/2017 on Identical facts save for the change of the case number. Still, this subsequent charge was instituted without the consent of the DPP as required by the law.

This court is invited to look at the orders made in the two rulings dated 28th, April, 2017 and another dated 3rd May, 2017.

As I have stated earlier, the ruling of the District Court dated 28th April, 2017 of discharging the accused was a correct one as that is what the District Court was duty bound to order. Hence, the complaints by the applicants on this ruling is with no legal leg to stand and it must suffer a dismissal order as I hereby do.

The problem I think is on the order/ruling dated 3rd May, 2017 in criminal Case No. 80/2017.

A fact that the court was judiciously noticed that the Criminal case No. 80/2017 its charge sheet when instituted required the consent of the DPP under **S. 57(1) and (2) of the PCCB Act** for 60 days but by the time six months had elapsed with no consent entered by the DPP; and further that on the 28th April, 2017 the accused were discharged on the same ground of want of the DPP's consent; the court ought to have used its powers of dismissing the charge and discharge the accused persons with an order that the DPP must come into the court in accordance with the law.

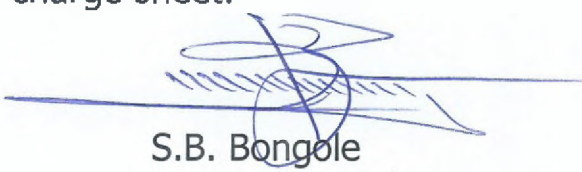
A prayer by Mr. Rweyemamu before the District Court of using its inherent powers of dismissing the charge and acquit the accused persons was a misleading prayer because an acquittal order is issued when the trial had been conducted and the court finds that the prosecution has not established a prima facie case against the accused or has not been proved beyond all the reasonable doubt – whatever the case.

My efforts of research and reading case laws, I could not trace a similar case of this nature. But I believe in myself as a Judge of the High Court, the trend adopted by the DPP in this matter is a blatant abuse of his powers vested to his office under Section 57 (1) and (2) of the PCCB Act No. 11/2007. His abuse of powers were shifted into the court by instituting Criminal Case No. 80/2017 without his consent as required by the law which tantamounted to abuse of the court processes or judicial processes. It should not be found illegal but also it is abominable and an abuse of the legal profession for a respectable office vested with powers and well knowledgeable with the law to circumvent the same law.

That been observed, I find the complaints against the order made on 3rd May, 2017 meritorious and lucid which as I hereby do revise it and substitute it with an order of dismissing the charge and discharging the accused persons in Criminal Case No. 80/2017.

Further for the purposes of preventing and come into halt the abuse of judicial processes, I hereby make an order that the accused persons should not be arrested and charged on identical facts unless the consent of the DPP is attached to the charge sheet.

Accordingly ordered.



S.B. Bongole

Judge

8/6/2018