IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPLICATION No. 32 OF 2019

(Arising from Tarime district court at Tarime criminal case no. 475/2018)

MARTEN VAN DER WALT..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

RULING

7th February & 24th April, 2020

Kahyoza, J.

This application raises a novel question whether the absconded accused person retains a right to legal representation in a trial. Unfortunately, the application could not be heard on merit, following the respondent's preliminary objection that the application for revision has been preferred prematurely.

The background; **Marten** and other three persons were and are still arraigned before Tarime district court with the offence of corrupt transactions contrary to section 15(1)(b) and (2) of **the Prevention and Combating of Corruption Act, No.11/2015**. **Marten, the applicant** was admitted on bail during the pendency of the trial. **He** jumped bail and the court forfeited the bond and discharged the surety. The trial court ordered the trial to proceed in *absentia* of Marten. After he jumped bail and the court ordered trial in *absentia*, Marten engaged two learned advocates who applied before the trial court to represent him despite his wilful absent. The trial court rebuffed the application.

Marten, vide his advocates, Dr. Nguluma and Mr. Ndurumah applied to this Court to call and examine the legality of the trial court's order. The Republic vehemently opposed the application and raised a preliminary point of law that the application was misconceived for being based on an interlocutory order. The applicant's advocates conceded that the order sought to be revised was interlocutory in nature but final and irrefutable in effect as it denied their client's right to legal representation.

The issue is whether the trial court's decision refusing legal representation to the accused, who deliberately absconded in breach of his bail conditions to avoid trial, is an interlocutory or final and conclusive.

There is no dispute that the law as it stands now, prohibits an appeal or application for revision on interlocutory decision or order of a subordinate court to the High Court. See section of **359 (3), 372 (2) and 378 (3) all of the Criminal Procedure Act,** Cap. 20 R. E. 2019 (**the CPA**). The most relevant to the current situation being section **372 (2),** which states that-

> *(2) Notwithstanding provisions of subsection (1),* ***no application for revision shaii lie or be made in respect of any preliminary or interlocutory decision or order*** *of a subordinate court unless such decision or order has the effect of* ***finally determining the criminal charge****. (Emphasis added)*

The above stance was taken by the Court of Appeal in **Kweyambah Richard Quaker vs The Republic,** Criminal Appeal No. 19/ 2002, (CAT, unreported), **D.P.P v Samwel Mnyore @Mamba and Ghati Msembe @Mnanka** Cr. Application No. 2/2012 (CAT, unreported) and the case cited

by both the State Attorney for the Republic and the applicant's advocates of **JUNACO (T) Ltd and Justine Lambert vs. Harlel Mallac Tanzania Limited**, Civil Application No. 373/12 of 2016. In **Kweyambah Richard Quaker vs The Republic,** the Court of Appeal held that-

> *"By that amendment* (the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2002 [ACT NO. 25 of 2002]) *no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit."*

The applicant's advocates and the State Attorney for the Republic, the respondent, are at harmony that no appeal or an application for revision lies against an interlocutory decision or order of a subordinate court. However, the State Attorney is of the firm view that the decision the applicant seeks this Court to revise is an interlocutory one, thus, not subject of revision.

The applicant's advocate submitted emphatically that the decision of the subordinate court though interlocutory, it finally and conclusively determined the applicant's right to legal representation. It is undisputed that the applicant jumped bail and, the court ordered the trial in *absentia* and denied his advocates a right of audience.

The applicant's advocates contend that the district court's order to bar them from representing the applicant, who jumped bail was a fundamental breach of the applicant's right. It was submitted that the court's order violated the applicant's right provided under section 196 of **the CPA**. That section states that the evidence shall be taken in the presence of the accused

save where his presence is dispensed with. He added that the accused has a right to be present when the evidence is given. He further referred the Court to section 197 of **the CPA**. The applicant's advocate further, submitted that the applicant fell sick and that he cannot appear stand trial. They added that the applicant consented the trial to proceed in his absence but in the presence of their advocates. They told the Court that the applicant retained a right to call witnesses and mitigate the sentence despite his absence.

The applicant's advocates averred that although the trial court's order was not final, it was final and conclusive in effect as it denied the applicant his right to legal representation. They referred this Court to the observation of the Court of Appeal in **JUNACO (T) Ltd and Justine Lambert vs. Harlel Mallac Tanzania Limited**, (*supra*) at page 14 of the ruling. Where the Court stated, that *"Neither are we convinced that there was serious violation of the right to be heard which could not wait until the final determination".* They concluded that the debarment of the advocates was a serious violation of a right to be heard, which cannot wait until final determination of the trial. It denied the applicant a right to scrutinize the document tendered as exhibit and to test the veracity of the evidence from the prosecution.

The State Attorney for the Republic insisted that the decision of the trial court was interlocutory and not subject of revision by this Court. He added that since the applicant jumped bail and the trial court order the case to proceed in *absentia,* he cannot be present through his advocates.

As pointed out above, the issue before this court is not whether the applicant retains a right to legal representation after he jumped bail but whether the trial court's order refusing legal representation to the accused

who deliberately absconded in breach of his bail conditions to avoid trial, is an interlocutory or final and conclusive.

The applicant's advocate submitted that the applicant consented the trial to proceed in absence as he is sick as provided by section 197 of the CPA. It is true that section 197 permits a trial to proceed in the absence of the accused person provided that accused is represented and he consented. It reads-

> **197.** *Notwithstanding the provisions of section 196, evidence may be taken in any trial under this Act in the absence of the accused if—*
>
> *(a) N.A*
>
> *(b)* ***he cannot be present for reasons of health*** *but is represented by counsel and has consented to the evidence being given in his absence,*
>
> *and it shall be lawful for the court to continue with the trial and give judgment in the absence of the accused. (emphasis is added)*

I am of the firm view that the applicant cannot take advantage of section 197 (b) of **the CPA**. The applicant is absent not for reason of health but he absconded. Section 197 (b) of **the CPA** is applicable to persons absent from the trial court on account of health and not for any other reasons.

The applicant's advocates beseeched this Court to find that the applicant's right to legal representation is his fundamental right which cannot be easily abrogated.

I totally agree with the applicant's advocates that an accused person's right to legal representation is a constitutional right. Once it is violated the trial becomes a nullity. The right of an accused person to legal representation is inseparable with that person's right to appear in person before the court. The right of the accused person to appear in person before the court is inherent in the notion of fair trial. It is the latter which paves way to the former. There would be no fair trial in the absence of the accused person. However, a distinction may be drawn between the exclusion of the accused from the hearing and the failure of the accused to appear before the court.

If a court or the prosecution excludes an accused person from the trial, the trial is nullity but when the accused person fails to appear is deemed to waive his right to be present. The court is entitled to proceed in the absence of the accused person who absconds.

I am of the decided view that, the deliberate decision of the applicant to abscond in breach of his bail conditions to avoid trial on a serious charge justifies the inference that he had no intention of putting forward a defence at that trial and that therefore he did waive his right to defend himself and to legal representation.

That done, next question is whether the trial court's order was final and conclusive in effect. The Court of Appeal **in JUNACO (T) and Another v. Harel Mallac Tanzania Ltd** (Supra) considered circumstance under which an interlocutory order may have a final and conclusive effect. It reiterated its position in the **Tanzania Motor Services Ltd and Another v. Mehar Sing t/a Thaker Singh**, Civil Appeal No. 115 of 2005 (CAT unreported) by quoting Lord Alverston in **Bozson v Altrinchman Urban District Council** [1903]1 KB 574 at 548, thus-

It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order"

The Court of Appeal, then concluded **in JUNACO (T)** that –

In view of the above authorities it is therefore apparent that in order to know whether ***the order is interlocutory or not*** *one has to apply* ***"the nature of the order test'****. That is, to ask oneself whether the judgment or order complained of finally disposed of the rights of the parties. If the answer is in affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order.*

The Court of Appeal had another opportunity to consider whether given order is interlocutory or otherwise in the **Republic v Harry Msamire Kitilya and Two Other** Cr Appeal No. 126 of 2016 (CAT Unreported). In that case, the trial court struck out the eighth count of money laundering from the charge sheet. The D.P.P. appealed to High Court. The High Court struck out the appeal on the ground that the trial court's order was interlocutory and thus, not subject of appeal.

We have purposely supplied emphasis on the extract of the provisions to demonstrate that the appropriate test for determining whether the impugned order was final or interlocutory is patently discernible from the language of the extract provisions. Thus, in the matter under consideration, the test is whether or not the impugned

had the effect of finally determining the criminal charge. .....Thus, to ***the extent that the trial court's order extinguished the criminal charge of money laundering, we are of he settled view that the same was not an interlocutory order****.*

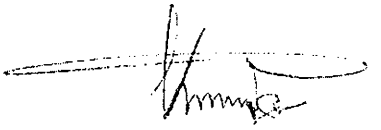
Reverting to the matter at hand, I am of the view that the decision of the district Court did not finally and conclusively reject applicant's right to be heard and to be represented. From the above authorities, it is settled that a decision or an order is final only when **it finally disposes of the right of the parties in the suit** or **it finally determines the criminal charge.** The decision of the trial court did not finally and conclusively determine the applicant's right of hearing or right to legal representation. He (the applicant) retained his right to be heard and represented, once he appears before or after his conviction and adduces sufficient reasons for his absence. That right is enunciated under section 226 of **the Criminal Procedure Act, Cap. 20 R.E. 2019**. It states that-

226*.-(1) If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made,* ***it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present****; and if the complainant does not appear, the court may dismiss the charge and discharge the accused with or without costs as the court thinks fit.*

(2) ***If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on the merit****.*

For reasons stated above, I find the application for revision is invalid and premature. It is an application for revision over an interlocutory decision, which is barred by the law. The district court's decision did not **finally determine the criminal charge** or **seriously violate the applicant's right to be heard.** I sustain the preliminary objection and strike out the application.

It is ordered accordingly.

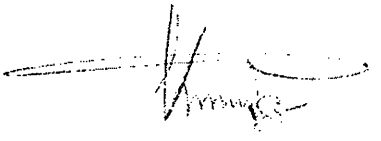


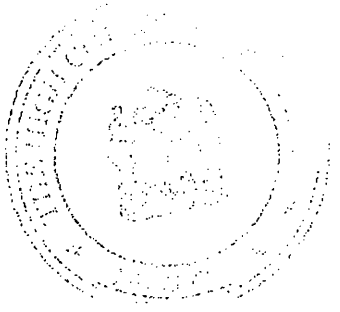
J. R. Kahyoza

JUDGE

24/4/2020

Court: Ruling delivered in the presence of the applicant's advocates and the Respondent, who were not summoned due to COVID-19 outbreak. **Copies of the Ruling to be dispatched to them.** B/C Mr. Charles present.





J. R. Kahyoza

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24/4/2020