

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 55 OF 2023

(Originating from Criminal Case No. 53 of 2022 of Moshi District Court)

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

BEATA HILLARY BIDUGA RESPONDENT

JUDGMENT

17/04/2024 & 29/04/2024

SIMFUKWE, J.

The respondent, Beata Hilary Biduga was arraigned before the District Court of Moshi (the trial court) facing a charge of obtaining money by false pretence contrary to **section 302 of the Penal Code [Cap 16 R.E 2019]**. However, after hearing three prosecution witnesses, the trial court dismissed the charge under **section 226(1) of the Criminal Procedure Act** [Cap

20 R.E 2019] and acquitted the respondent on the reason that the prosecution failed to call witnesses. The DPP was aggrieved, he preferred the instant appeal on one ground, that:

- 1. That, the learned trial Magistrate erred in law and in fact to acquit the accused person by using section 226 (1) of the Criminal Procedure Act [Cap 20 R.E 2022] instead of discharging her.*

At the hearing of this appeal, the appellant was represented by Ms. Bora Mfinanga, learned State Attorney and the respondent enjoyed the service of Mr. Stephen Mushi, learned counsel. The appeal was heard orally.

Submitting in respect of the raised ground of appeal, Ms. Bora faulted the trial court for acquitting the accused person instead of discharging her, under a wrong provision of the law. That is **section 226(1) Of the Criminal Procedure Act** (supra). She explained that, **section 226 (1) of the Criminal Procedure Act** (supra) may be used where the complainant is absent. The learned state attorney buttressed her assertion by quoting **section 226(1) of the Criminal Procedure Act** (supra).

Based on the above provision of the law, Ms. Bora relied on the words "*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*". She

continued to explain that, **section 2 of the Criminal Procedure Act** (supra) states the meaning of complainant to mean, in private prosecution, means a private prosecutor or the person making the complaint before the court while in public prosecutions it means the person representing the case on behalf of the Republic before the court.

The learned State Attorney referred this court at page 32 of the trial court typed proceedings where on 17th May 2023 there were three prosecutors before trial court namely: Frank, Amina and Angela who were representing the Republic. In that regard, Ms. Bora said that it was wrong for the trial magistrate to use **section 226(1) of the Criminal Procedure Act** (supra) to dismiss the case and acquit the accused person. She also referred this court at page 38 and 39 of the typed proceedings of the trial court where the trial magistrate stated the reasons for dismissing the case to be failure by prosecution to call witnesses. Ms. Bora submitted further that the proper provision to dismiss the case if the prosecution failed to call witnesses was section **225 (5) of the Criminal Procedure Act** (supra). Ms. Bora was of the view that, the trial Magistrate should have applied **section 225(5) of the Criminal Procedure Act** and not section 226(1) of the same Act.

Furthermore, Ms. Bora referred page 34 and 35 of the typed trial court

proceedings which show that, on the same date PW1 was recalled before the trial court to testify. She continued to aver that according to **section 225 (4) of the Criminal Procedure Act** (supra) the court cannot dismiss the case if the last witness appeared for not more than an aggregate of sixty days. The learned state Attorney insisted that, the trial magistrate was not supposed to dismiss the case he should have adjourned the matter until next date of hearing.

Ms. Bora concluded by urging this court to set aside the dismissal order issued by the trial court and order this case to be remitted back to the District Court for continuation of the trial of the matter.

Opposing the appeal, Mr. Mushi for the respondent submitted on the appropriate provision which should have been invoked by the trial court. Whether the trial court should have invoked **section 225(5) of the Criminal Procedure Act** (supra) or **section 226(1) of the Criminal Procedure Act** (supra)? On the allegation that, it was wrong for the trial court to use **section 226(1) of the Criminal Procedure Act** (supra) because the prosecutors were present on that date; the respondent's counsel opined that, the provision used by the trial magistrate was correct because the issue was presence of witnesses in court. Mr. Mushi averred

that, the prosecution failed to comply to the last order dated 8th May 2023 on which the trial court ordered the prosecution to bring all witnesses which was last adjournment. That, the prosecution failed to comply with the trial court's order that is why the trial magistrate dismissed the charge and acquitted the accused person.

Mr. Mushi explained that whether an order was made under **section 225 (5)** or **section 226 (1) of the Criminal Procedure Act** (supra) was immaterial as both sections have the same effect of dismissing the charge and acquitting the accused person. That, whether the order was proper or not, on their side they were of the opinion that it is always the principle of law that, the trial court has inherent powers to control its own proceedings including the power to dismiss the charge and acquit the accused person. To bolster his argument, Mr. Mushi cited the case of **D.P.P vs Yahya Upanga and Another [1983] TLR 151**, in which when the High Court of Tanzania had similar situation, had this to say:

"(ii) if the court refuses to adjourn the case after an application for adjournment whether or not the case was ready for hearing on the day on which the refusal is made and if the circumstances of the case are exceptional, the court may invoke its inherent power by dismissing the

charge and acquitting the accused person.”

The learned counsel continued to submit that, the same position was followed by the High Court in the case of **D.P.P V Haji Nyenje Kenyelule and 3 Others**, DC Criminal Appeal No. 13 of 2022, H.C at Songea and averred that, the two cases were dealing with exceptional circumstances.

On the strength of the above authorities, Mr. Mushi applied the same principles to consider whether there were exceptional circumstances which made the trial court to dismiss the charge and acquit the accused person. According to Mr. Mushi, the exceptional circumstances in this matter were that this matter was initially instituted as Criminal Case No.53/2022. He made reference at page 31 of the typed proceedings of the trial court when the Republic was praying for adjournment, the trial court made the following order:

"Despite the fact that defense side have no objection, prosecution side ought to consider that this case has been in court for long time. We are left with only two months for this case to be backlog. Further this matter was born from the previous case, being dismissed for lack of witnesses. To abide with back stopping, prosecution side are given last chance to summon all remained witnesses."

From the above order, the learned counsel explained that after the dismissal order the case was restored again with the same number Criminal Case No. 53 of 2022, which is subject of this appeal. He elaborated that; in the said case the issue of witnesses was still an issue until on 8th May, 2023 when the trial court ordered the prosecution to bring all witnesses as last adjournment. That, on 17th May, 2023 when the matter was coming for hearing, despite the fact that the last adjournment was ordered, still the prosecution failed to call all witnesses. Instead, they recalled PW1. It was on that date that they were refused. In that regard, Mr. Mushi observed that this was exceptional circumstance and the trial court ought to invoke its inherent power to control its own proceedings.

Based on the case laws which he cited, Mr. Mushi believed that it was proper for the trial court to dismiss the case and acquit the accused person bearing in mind that, the trial court was required to reduce backlog cases and the prosecution had failed to comply to the last order of adjournment. Taking into account that, it was not the first case, the prosecution should have prepared witnesses in accordance to the order of the court. Failure by the prosecution to do so, meant that they were not ready to prosecute their own case. Thus, the trial court was right to invoke its inherent power to dismiss

the case and acquit the accused person.

Mr. Mushi prayed this court to dismiss the appeal and the trial court's order remain as it is.

In her rejoinder, concerning the argument that **section 225 (5) and 226 (1) of the Criminal Procedure Act** (supra) have the same effect; Ms. Bora reiterated that the said provisions do not have the same effect. That, under **section 226(1) of Criminal Procedure Act** (supra) when the matter is dismissed, the complainant cannot refile the same matter before the court. While under **section 225(5)** of the same Act, when the matter is discharged and the accused is discharged, the complainant or Republic may refile the same case against the accused after collecting evidence.

Ms. Bora objected the assertion that they had failed to call witnesses as three witnesses had already testified. Thus, the trial magistrate was not supposed to dismiss the matter neither under **section 226(1) of the CPA** nor **section 225(5) of the CPA** (supra) as there was no reason to do so. Secondly, Ms. Bora agreed that the court had inherent power to control its own proceedings by dismissing the charge and acquitting the accused person. However, she contended that, the inherent power must be exercised pursuant to the rule of law and not prejudice either party occasioning failure

of justice. She continued to state that, in this case the trial magistrate did not comply with the law as she did not use a correct provision of the law. That, the magistrate used the provision which provides that the matter should be dismissed if the complainant is absent. She stated that, in this matter the prosecutors were present and they had a witness.

Concerning the issue of prejudice, Ms. Bora submitted that, the order of the trial court prejudiced the prosecution side as the matter was not determined to its finality. There was no way that the prosecutor could have refiled the matter.

Distinguishing the cited case of **Yahya Upanga** (supra), Ms. Bora stated that at page two of the said case at the last paragraph the complainant was absent when the case was dismissed while that is not the case in the instant case. That, the complainants were physically present as seen in the trial court proceedings.

Also, Ms. Bora distinguished the case of **Haji Nyenje** (supra) on the reason that, it is not relevant to this case. In the said case, the matter was dismissed under **section 225(5) of Criminal Procedure Act** (supra) and acquitted the accused person because they had no witness, while in this case there was a witness who was present before the court when the case was

dismissed.

Regarding the issue of presence of exceptional circumstances, the learned State Attorney averred that, the fact that the previous case was dismissed and Criminal Case No. 55 of 2023 was filed, was not exceptional circumstances because the same were two different cases before the court. She said that it was wrong for the trial magistrate to use a previous case to dismiss the case which was before the court.

Concerning the reason of reducing backlog cases, Ms. Bora stated that the Constitution of the United Republic of Tanzania encourages determination of cases on merit.

The learned State Attorney reiterated her prayer for an order that the matter should be remitted to the trial court for continuation of trial of the matter. Having examined the submissions of both parties the issue for determination is whether this appeal has merit.

In this appeal the learned State Attorney faulted the trial magistrate for relying on **section 226(1) of the Criminal Procedure Act** to dismiss the charge and acquit the accused person instead of discharging her. She further stated that, the trial Magistrate wrongly acquitted the accused person while the prosecution side were present in court together with their witness (PW1)

who was recalled to testify and he testified. Mr. Mushi learned counsel for the respondent was of the view that whether the trial court relied on **section 226 or section 225 of the Criminal Procedure Act** (supra) was immaterial as the court can use its inherent power to dismiss and acquit the accused where prosecution side fails to call witnesses.

I have gone through the records of the lower court, the records speak loudly that, after hearing three prosecution witnesses, the trial court dismissed the charge and acquitted the respondent under **section 226(1) of the Criminal Procedure Act** (supra) on the reason that the prosecution failed to call witnesses. The record reveals further that, on the date of dismissal which is 17th May, 2023, the prosecution was represented by three State Attorneys namely: Frank, Amina and Angel and PW1 testified on that date. From the foregoing observation, the sub-issue is whether the dismissal and acquittal by the trial court was justifiable? **Section 226(1) of the CPA** provides that:

226.-(1) Where 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.”

Guided by the above provision, with all due respect to the trial magistrate, the position of the law is so settled where the prosecution does not appear in court. In the present matter as stated earlier, on the date of dismissal, the prosecution was present. Thus, the trial magistrate misdirected himself for dismissing the charge and acquitting the accused person.

I am of strong opinion that even if the prosecution had failed to appear, the trial magistrate was supposed to dismiss the charge and discharge the accused person and not acquit her as he did.

Be as it may, since the learned State Attorneys were present and three prosecution witnesses had already testified before the trial court, as rightly submitted by Ms. Bora, the trial magistrate was supposed to invoke **section 225(5) of the Criminal Procedure Act** (supra) to proceed with the hearing. In case the prosecution was unable to proceed with the hearing, the trial magistrate should have discharged the accused person and not to acquit her under the wrong provision of the law which barred the appellant to refile the case. Alternatively, the trial court should have ordered the prosecution to close their case as three prosecution witnesses had already

testified and produced exhibits.

Advocate Mushi contended that the trial court has inherent power of dismissing the charge and acquitting the accused person where the prosecution has failed to call witnesses on the date fixed for hearing. With all due respect to the learned counsel, the court cannot use inherent power where the law is very clear on that aspect. In this case, since the position of the law under **section 226(1) of Criminal Procedure Act** is well settled that the trial magistrate should dismiss the charge and discharge the accused person, then inherent power could not be invoked to dismiss the charge and acquit the accused person.

In the circumstances, I hereby nullify the order of the trial court dated 17th May, 2023 and remit the case file to the trial court before another Magistrate of competent jurisdiction to proceed with trial of the matter where it ended. Appeal allowed. It is so ordered.

Dated and Delivered at Moshi this 29rd day of April, 2024.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

29/04/2024

