IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MANYARA SUB-REGISTRY

AT BABATI

CRIMINAL APPEAL NO. 577 OF 2024

(Originating from Criminal Case No. 179 of 2023 in the District Court of Babati at Babati)

HASHIM ALLY.....APPELLANT

VERSUS

PAULINE PHILIPO GEKUL.....RESPONDENT

JUDGMENT

21st March & 15th April, 2024

KAMUZORA, J.

The Appellant lodged a criminal complaint against the Respondent before the district court of Babati (the trial court). The complaint was laid on the provision of section 128 (2) and (4) of the Criminal Procedure Act, Cap 20 R.E 2022 (the CPA) for the allegation of assault causing actual bodily harm contrary to section 241 of the Penal Code Cap 16 R.E 2022.

It was alleged that on 11th day of November, 2023 the Respondent Pauline Philipo Gekul together with other people not joined in the complaint, while at Babati District within Manyara Region, did summon

Hashim Ally (the Appellant) and through physical force and at gun point; restrained, undressed and assaulted the Appellant by forcing him to sit on an empty bottle so as to let it penetrate through his anus.

It is in record that, while the matter was pending before the trial court, the Director of Public Prosecution (the DPP) entered *nolle prosequi* under section 91 of the CPA and consequently, the trial court issued an order discharging the Respondent herein. The Appellant was aggrieved with the trial court's order hence, preferred the instant appeal on six grounds as follows;

1. *That, the learned trial magistrate erred in law and fact for failure to consider the dictates of the law and Article 13(6)(a) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time, which guarantees the fundamental right to be heard.*
2. *That, the learned trial magistrate erred in law and fact for failure to consider the dictates of the law under Article 59B (4)(a), (b), (c) and (5) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time.*
3. *That, the learned trial magistrate grossly erred in law and fact for failure to consider the dictates of the law under section 228(1) of the Criminal Procedure Act [CAP 20 R.E 2022].*

4. *That, the learned trial magistrate erred in law and fact for failure to consider the fact that at the time he made the order, the accused was not present in court.*
5. *That, the learned trial magistrate erred in law and fact for basing his order on a nolle prosequi which was not properly filed in court.*
6. *That, the learned trial magistrate erred in law and fact to entertain a nolle prosequi which was illegally brought in court by the Director of Public Prosecution who was not a party to criminal case No. 179 of 2023 in the District Court of Babati.*

It is also in record that the Respondent filed a notice of preliminary objection containing three points of objection as follows: -

1. *That, this court lacks requisite jurisdiction to determine the appeal before it.*
2. *That, the appeal is misconceived, misplaced, premature and bad in law for want of exhaust the other remedies available in law.*
3. *That, the appeal is bad in law for emanating from incurable defective notice of appeal.*

It is a well-established practice that once a preliminary point of law is raised, the court is duty bound to entertain the objection first and make a decision thereon before proceeding with hearing of the substantive matter. See, the Court of Appeal decision in **James Buchard Lugemalila Vs. Republic and another**, Criminal Application No 59/19

of 2017. When the matter was called for hearing, this court directed the preliminary objections as well as the grounds of appeal be argued simultaneously for purpose of serving time and avoid inconvenience to the parties. However, based on the above set practice, I will start my deliberation with the preliminary objections before going to the merits or otherwise of the appeal, if need be.

As a matter of legal representation, the Appellant was ably represented by Mr. Thadei Lister, Mr. Peter Madeleka and Mr. Joseph Masanja, learned Advocates while the Respondent was well represented by Mr. Ephraim Kisanga and Mr. Melizedeck Hekima, learned advocates.

Before I deliberate on points of objection, I find it pertinent to address the issue raised by the counsel for the Appellant that the points of objections raised by the Respondents do not qualify as points of law. It was argued by Mr. Madeleka that for the preliminary objection to qualify to be point of law, the person raising the objection must state the provision of the law contravened by the adverse party. He referred the Court of Appeal decision in the case of **James Buchard Lugemalila Vs Republic and another**, Criminal Application No 59/19 of 2017.

The Appellant's counsel contended that, the preliminary objection brought before this court is vague for failure to state the provision of the law that was contravened by the Appellant. That, the Appellant was taken

by surprise as they did not know what the Respondent intended to submit. He therefore prayed for this court to find that what is brought before this court is not preliminary objection on point of law hence, be dismissed. To buttress is submission the Appellant's counsel referred the High Court decision in the case of **Catherine Kyauka Njau Vs. Emmanuel Paul Kyauka Njau and other,** Misc. Civil Application No. 32 of 2023, which cited with approval the Court of Appeal decision in the case of **Shose Sinare Vs, Stabic Bank Ltd,** [2021], TZCA 476 (TANZLII) on what is referred as preliminary point of law. He was of the view that, since the preliminary objections raised by the Respondent did not mention the provision of the law, they refers to the facts which need proof and thus, do not qualify to be points of law. He therefore prayed for the preliminary objections to be dismissed.

Responding to that issue, the Respondent's counsel conceded that subject to the case of **James Lugemalila,** the point of objection must lie on a specific law, principle or decision. He however argued that, it is not the requirement that a point of objection has to mention a specific law. That, what is necessary is for the parties to have chance to prepare and since the Appellant agreed that they were ready to proceed with hearing of the preliminary objection, they were not taken by surprise. He insisted that the Respondent's submission referred the provisions of the law and

case laws on the procedures to be followed by the aggrieved party in the matter at hand.

I have considered arguments by the counsel for the parties. From the Court of Appeal decision in **James Buchard Rugemalila** (supra), the court was referring the procedures for raising preliminary objection under the Court of Appeal Rules of 2019 (the Rules). It is clear that the Court of Appeal rules and specifically, Rule 107 is the procedural law governing procedures for raising preliminary objection before the Court of Appeal. The procedural law for criminal matter before the High Court is the CPA. Rule 107 of the Rules sets the requirement where a party intends to rely upon the preliminary objection to the hearing of appeal or application before the Court of Appeal. Such person is required to comply with the requirement set under that rule as also well discussed in **James Buchard Rugemalila's** case. Since the court in the above case was referring the provision applicable to the Court of Appeal, it was expected for the counsel for Appellant to point out similar provision under the CPA setting out such requirement. But, all in all, I am motivated with the principle that a point of objection need be clear for the other party to understand the nature of objection for purpose of preparing to respond to it. Now the question is whether the objections raised in this matter

were based on points of law and were clear enough to enable the Appellant to understand the nature of objection and prepare to respond.

It is true as argued by the counsel for the Appellant that all three points of objection do not mention a specific provision which was contravened by the Appellant. From the case law, **Catherine Kyauka Njau** that was referred by the counsel for the Appellant, nowhere the court required a party to include the provision of the law contravened as part of the point of objection. Basically, in that case, the point of objection raised mentioned even the provision contravened but still the court dismissed it, not because of failure to include the provision but because it raised matter of fact which needed proof by evidence. The court in that case referred the Court of Appeal decision in **Shose Sinare** (supra) to emphasise on the point that a preliminary point of objection must be free from facts that need evidence for proof or verification.

Going through the points raised as preliminary objection, they intend to challenge the competence of the appeal for contravening the requirement of the law on account that the appeal was moved by an incompetent notice of appeal and the jurisdiction of the court is questionable. It is unfortunate that the counsel for the Appellant did not demonstrate if the points raised in this matter need evidence for proof or verification. The fact that a specific provision which was contravened was

not included in the point of objection, does not in itself make the objection incompetent. In my view, by stating that the notice of appeal was incompetent, the counsel was made aware that the provision governing notice of appeal was not complied with. Likewise, by stating that the court lacked jurisdiction to determine the appeal, the counsel was made aware of the provisions governing appeal to this court. This court is therefore satisfied that the points raised by the Respondent clearly show the nature of objections raised and subject to the decision in **James Rugemalila,** they do not raise any surprises to the court or the Appellant. In my considered view, the Respondent's points of objection meet the criteria of pure points of law. I therefore refrain from the invite by the Appellant's counsel invitation to dismiss the preliminary objection and for that, they will be determined on merit.

Turning to the merits of preliminary points of objection, on the first point of objection, the Respondent is challenging the competency of the appeal. Referring the first and second grounds of appeal filed by the Appellant, the Respondent's counsel submitted that the two grounds state that the trial magistrate did not consider the dictates of the constitution of the United Republic of Tanzania under Article 13 (6)(a) and Article 59B (4)(a)(b)(c) and (5) (herein after referred to as the Constitution). He argued that, based on the above two grounds, this court has no

jurisdiction to hear and determine the appeal brought before it since the appeal is basically challenging the constitution while the trial court when discharging the Respondent was not sitting as a constitutional court. He urged this court to direct itself to the decision of the Court of Appeal in **Luthgnasia Simon Mushi Vumi Vs. Republic** Criminal Appeal No. 209 of 2019 (unreported). That, the court in the above case observed that since the court was not sitting as a constitutional court, the appeal to challenge the sentence on account that it was contrary to the constitution could not stand.

The counsel for the Respondent was of the view that, since this appeal originates from an order of the court allowing the withdrawal of criminal case by the DPP, the proper remedy is not an appeal but judicial review. To buttress his arguments, the learned advocate referred the decision of this court in **Amani S. Shavunza and 3 others Vs. Lamson Sikazwe and 7 others,** Criminal Appeal No 156 of 2020 (unreported), page 13 and the decision of the Court of Appeal of Tanzania in **Attorney General Vs. Dickson Paul Sanga,** Civil Appeal No. 175 of 2020 Court of Appeal of Tanzania (unreported) pg. 68. He maintained that since this appeal is challenging the DPP decision to enter nolle prosequi in a criminal case, this appeal be dismissed for it is not a proper forum to challenge powers vested to the DPP.

On the second preliminary objection, the counsel for the Respondent submitted that this appeal is misconceived, misplaced, premature and bad in law for want to exhaust other remedies available under the law. It was argued that, before the trial court, the Appellant filed complaint under section 128 of the CPA complaining that there was a criminal offence committed. He argued that, the DPP can interfere in any criminal case at any time subject to the provision of section 91 of the CPA. That, the DPP exercised his powers as he interfered and withdrew the case before the trial court.

Referring the fifth and sixth grounds of appeal, the Respondent's counsel argued that, the Appellant is complaining over the powers of the DPP to enter *nolle prosequl* claiming that the powers were illegal. He argued that in view of the above cited cases, the proper forum was to file judicial review and not an appeal. He also referred a foreign decision from Nigeria, **The State Vs. S.O. lori and Others,** by the Supreme Court of Nigeria, S.C.42 of 1982. It was added that, in the case of **Amani Shavunza** (supra), the court observed that where the DPP enters *Nolle prosequi,* the record of criminal case is terminated from the court.

It was also argued that, the case before the trial court had no status of criminal case but a mere complaint. That, since the case has not reached the point of being tried, the only remedy that was available for

the Appellant was to apply for judicial review and not to appeal before this court.

On the third point of objection, the counsel for the Respondent submitted that the appeal is bad in law for being emanating from incurable defective notice of appeal. That, the notice of appeal failed to contain all essential ingredients supposed to appear in a notice of appeal as it does not stipulate the order which the Appellant is aggrieved with. Referring the Court of Appeal decision in Criminal Appeal No 402 of 2013, **Lukelo Uhahula Vs. Republic,** Criminal Appeal No. 402 of 2013 the Respondent's counsel insisted that the notice of appeal before this court is incurably defective and thus, the proper remedy is to strike out the notice. That, upon striking out the notice, the appeal cannot stand before this court and suffers the same consequence for being laid on the wrong foundation.

Replying to the first preliminary objection, the counsel for the Appellant submitted that the jurisdiction of the court is the creature of the statute. That, this court is vested with jurisdiction to hear and determine appeals of this nature under section 359 (1) of the CPA. He argued that the Appellant was right to lodge an appeal to this court as he was aggrieved by the decision made by the trial court.

The Appellant's counsel conceded to have referred the provisions of the constitution in the first and second grounds of appeal but submitted that the constitution was referred to show the source of the Appellant's rights which he was deprived of. He explained that, when referring Article 13 (6)(a) of the constitution, the Appellant was referring his right to be heard which he was deprived of by the lower court. He was of the view that, since this court is superior to the district court, it has powers to protect the infringement of the constitution.

On the Respondent's argument based on the case of **Amani Shavunza** (supra) that the Appellant has to prefer an alternative remedy, the Appellant's counsel submitted that the said case was preferred by way of reference different from the way this appeal was brought to the high court. He insisted that, there is nowhere in the CPA where judicial review is an alternative remedy for the aggrieved party. He pointed out that the case of **the Attorney General Vs. Dickson Paul Sanga** (supra) cited referring the powers of DPP, is distinguishable with the matter at hand because in the instant matter the Appellant does not challenge the powers of the DPP.

Additionally, the Appellant's counsel argued that in the case of **Luthgnasia Simon Mushi Vumi Vs. Republic** (supra), there was constitutional issue in the grounds of appeal which were raised and the

court opted not to determine the said ground but that did not make the court to conclude that it had no jurisdiction. He added that, assuming that there is constitutional matter in the 1st and 2nd grounds, the remedy as per the above case is to disregard those grounds and not to dismiss the whole appeal for want of jurisdiction. That, this should be in consideration that the Respondent's counsel did not state if in respect of the third and fifth grounds the court has no jurisdiction.

In reply to the second preliminary objection, the Appellant's counsel submitted that the procedure in filing criminal appeal is set out by the law and its foundation can be traced under Article 13 (6)(a) of the constitution. He argued that sections 359 to 361 of the CPA do not state if a person aggrieved by the decision in criminal case has to seek other remedies than an appeal. He therefore urged the court to overrule the preliminary objections for want of merits.

On the third ground, the Appellant's counsel submitted that, the Respondent's counsel misdirected himself because the procedures for filing appeal before the High Court is different from the procedures for filing appeal to the Court of Appeal. That, in each court, appeal is governed by different laws and the procedure for appeal before the High Court is governed by section 361 (a) of the CPA. That, the procedure under that section was complied with by the Appellant. That, the case of

Lukelo Uhahula (supra) referred to by the counsel for the Respondent refers the procedure for appeal to the Court of Appeal under the Court of Appeal Rules specifically, Rule 68 (2) which is not applicable to this court. He therefore prayed for the 3rd preliminary objection to be dismissed for want of merit.

In rejoinder, the Respondent's counsel reiterated the submission in chief and added that, section 359 (2) of the CPA limits appeals. That, in the matter at hand, the DPP entered Nole prosequi against the criminal complaint lodged before the court and the court issued interlocutory order meaning, the case was not determined to its finality. That, there was no charge or criminal proceedings before the subordinate court which could be appealed against. To him, the decision challenged here in not the decision of the magistrate rather that of the DPP hence, prays for this court to find the preliminary objection to have merit.

From the pleadings and submissions by the counsel for the parties, the points of objection brought before this court raise a point of competence of the appeal in which three issues can be drawn as hereunder: -

1. *Whether the notice of appeal is defective making the appeal incompetent.*

2. *Whether the trial court's order in Criminal Case No.179 of 2023 is appealable and this court has jurisdiction to determine an appeal originating from that order.*
3. *Whether the grounds of appeal raise a constitutional matter to which this court has no jurisdiction to determine.*

Starting with the first issue that the notice of appeal is defective, this court finds that the grounds used to challenge the notice of appeal is misconceived. Basing on **Lukelo Uhahula's case** the Respondent is challenging the notice of appeal on account that it does not contain all essential ingredients supposed to appear in a notice of appeal by failure to stipulate the order which the Appellant is aggrieved with.

I agree with the Appellant's counsel that the ingredients referred to in **Lukelo Uhahula's case**, refers the procedures for lodging notice under the Rules which govern appeals before the Court of Appeal and not before the High Court. In that case, the court referred the contents to be contained in the notice of appeal under Rule 68 (2) Court of Appeal Rules. Those rules are inapplicable for appeals before the high. Appeal before the High Court is governed by section 361 (a) of the CPA and which does not stipulate the contents of the notice. It only requires a notice of intention to appeal to be lodged within a prescribed time limit. It does not state that the notice of appeal has to state the nature of the decision

intended to be challenged. I therefore find the notice of appeal not defective.

On the second issue, it is the Respondent's contention that the appeal before this court emanated from the decision of the DPP exercising his powers and such decision is not appealable to this court and this court has no jurisdiction to entertain an appeal originating from that order. To him, the available remedy for the decision of the DPP withdrawing the case under section 91 (1) of the CPA is judicial review.

In order to know if the trial court's order is appealable or not, we first need to understand the nature of the matter and the order of the trial court. From the trial court records, a complaint was lodged under section 128 (2) and (4) of the Criminal Procedure Act, Cap 20 R.E 2022 and registered as Criminal Case No.179 of 2023. Such complaint contained a statement of the offence reading, *ASSAULT CAUSING ACTUAL BODILY HARM.* The complaint also contains the particulars of the offence complained of and they read;

> *"PAULINE PHILIPO GEKUL on the 11th day of November, 2023 together with other people not in this complaint, while in Babati within Manyara Region, did summon one HASHIM ALLY and through physical force and at gunpoint, restrained, undressed, assaulted by forcing him to sit down on an empty bottle so as to let it penetrate*

through is anus while knowing that, those acts contravene the laws of Tanzania"

The trial court's proceedings show that after the said complaint was received by the district court, it was admitted and registered as Criminal Case No 179 of 2023. On the date the matter was called in court, the DPP moved the court through *Nolle prosequi* filed under section 91 (1) of the CPA and withdrew the case. The trial court proceeded to discharge the accused thereof. The Appellant is aggrieved by the order of the court discharging the Respondent. The said order reads;

"Upon Nolle prosequi entered by the Director of Public Prosecution, the case is hereby marked as withdrawn under section 91(1) of the Criminal Procedure Act, [Cap 20 R.E 2022]. Accused is hereby discharged."

The question is whether the above order is appealable to this court or not. Basically, the above order was made pursuant to the provision of the law, section 91 (1) of the CPA. The said provision read: -

"91.-(1) ***In any criminal case and at any stage*** *thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a nolle prosequi, either by stating in court or by informing the court concerned in writing on behalf of the Republic that the proceedings shall not continue; and thereupon the accused shall at once be discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed*

to prison shall be released, or if on bail his recognisances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts."

The matter at hand was admitted and registered as a criminal case and it bears a criminal case number and its particulars are criminal in nature. Basically, the DPP is vested with powers in all criminal cases and subject to the above provision, the DPP can withdraw any criminal proceedings. Upon excising such power, the court only invoke the provision of the law by discharging the accused as it was so done in this case. An order discharging the accused under section 91 (1) is in my view, not appealable because the order does not determine the case to its finality. Section 91(1) in itself states clearly that the discharge founded on that provision cannot act as bar to subsequent proceedings against the accused on account of the same facts.

On the argument that the available remedy is judicial review, this court finds that, such remedy does not apply to the matter at hand because the Appellant is not challenging the decision of the DPP rather the decision of the court acting on the DPP nolle prosequi to discharge the Accused/Respondent herein. In that regard, the option for review is misconceived. The decisions in **Aman S. Shavunza** (supra) and **Dickson**

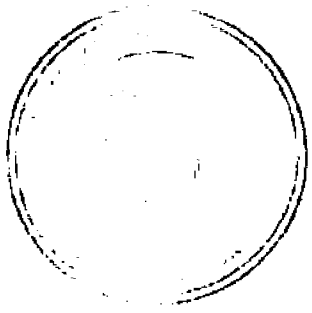
Paulo Sanga (supra) are distinguishable to the matter at hand. In **Aman S. Shavunza** (supra), a party intended to challenge the powers of the DPP to enter *nolle prosequi* by discontinuing private criminal proceedings through reference. This court found that *nolle prosequi* entered by the DPP cannot be challenged by way of reference rather through other available means. Similarly, in **Dickson Paulo Sanga's** case, the party was complaining over the abuse of DPP powers to enter *nolle prosequi.* The Court of Appeal held that the remedy available in any abuse by the DPP is to seek judicial review. As well submitted by the Appellant's counsel, nothing was raised in the grounds of appeal before this court to challenge the DPP powers thus, review cannot be an option in this matter.

Now, the question is, what is the remedy available to the Appellant? The remedy depends on the nature of the decision intended to be challenged before the court. As well pointed out earlier, the order did not determine the case to its finality hence, there can be subsequent proceedings in which a criminal complaint can still be lodged in court. There are two ways of preferring and prosecuting criminal complaint before the court; one, prosecuting the complaint through the DPP office and two, prosecuting the complaint through private prosecution. The procedures for the two options are well stipulated under the law thus, Appellant is at liberality to channel his complaint in either of the option.

Based on the above discussion, it is my settled mind that this court is ousted with jurisdiction to entertain the appeal against an order discharging the accused under section 91(1) of the CPA. I therefore find merit in the first point of objection and that being the case, I will not labour in discussing remained issue which faults the grounds of appeal.

Having sustained the preliminary objection touching the jurisdiction of this court, this appeal cannot stand to be determined by this court. Consequently, the appeal is incompetent and the same is hereby struck out.

DATED at **BABATI** this 15th Day of April, 2024.



D.C. KAMUZORA

JUDGE