IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL SESSION CASE NO.77 OF 2017

Originating from Resident Magistrate's Court, of Arusha at Arusha

REPUBLIC.....PROSECUTOR

VERSUS

MEDIAN BOASTICE MWALE.....1ST ACCUSSED

DON BOSCO OOGA GICHANA.....2ND ACCUSSED

BONIFACE THOMAS MWIMBWA..... 3RD ACCUSSED

ELIAS PANCRAS NDEJEMBI .....4TH ACCUSSED

RULING

BEFORE: MAIGE, J

The four accused persons herein above stand charged with 59 charges pertaining to money laundering contrary to sections 12(b), (d) and (e) and 13 (a) of the Anti-Money Laundering Act No. 12 of 2016 and its predicate offences of conspiracy, forgery, uttering false documents and being found in possession of properties suspected of being unlawfully acquired contrary to sections 384,333,335(a) and 337,338,342 and 312(1) (b) respectively of the Penal Code, Cap. 16 R.E., 2002.

Seemingly on the same facts, the accused persons had, vide Criminal Session No. 61 of 2015 ("the previous proceedings") been charged with 54 charges relating to the same offences. The **previous proceeding** was instituted pursuant to the committal order of the Resident Magistrate Court of Arusha dated 25th November 2011 as per Hon. A.K. Rwiza, Senior Resident Magistrate vide Committal Case No. 61 of 2015. The **previous proceeding**, it is common ground, was, on 31st October 2017, marked withdrawnwith the accused persons being discharged on account of the entry of *nolle prosequi* by the Director of the Public Prosecution ("the DPP") in pursuance of section 91(1) of the **CPA**. This is reflected in the ruling of my Lord Mrango J, supplied to me by the defense counsel.

The instant case, it is on the record, was preceded by the Criminal Case (PI) No. 44 of 2017 conducted at the Resident Magistrate Court of Arusha. The order committing the accused persons to the High Court was issued on 10.11.2017.

When the matter came for plea taking on 10th September 2018, the Republic was represented by a team of four state attorneys led by **Mr.Hashimu Ngole**, learned principal state attorney. Other attorneys were

Mr. Materu Maranda, learned principal state attorney, **Mr. Karama Baswa**, learned principal state attorney and **Mr. Pius Hill**, leaned senior state attorney. The first accused was represented by **Mr. Innocent Mwanga**, learned advocate.**Mr. Shiyo**, learned advocate assisted by **Messrs. Mashabaka and Jebri**, represented the second accused. The third accused enjoyed the service of **Emmanuel Mvule,** learned advocate. The fourth accused was represented by **Messrs. Mosses Mahuna** and **Buhere Ngasaka**, learned advocates.

The filing of a fresh committal proceedings has been a subject of a hot debate between the counsel such that it was impossible for the Court to proceed with plea taking without resolving the controversy. Indeed, the counsel for the first, third and fourth accused persons through Mr. Mahona, learned advocate has questioned the maintainability of the instant case on account that it is founded on a nullity committal order. In their understanding of the law, a withdrawal of a charge by the reason of the entry of*nolle prosequi* by the **DPP**, does not extinguish the committal order upon which the case was filed. In their humble opinion, it was wrong for the prosecution to

initiate a fresh committal proceeding while the committal order under PI No. 60 of 2015 was still intact.

In support of their view, the counsel has referred me to the authority of the defunct Court of Appeal for East Africa in **PETER HAROLD RICHARD VS. R, (1960) 1 EA 644** in support of the proposition that an entry of the*nolle prosecui* does not discharge the proceedings at the preliminary inquiry so as to preclude the filing of another charge based on the facts disclosed at the preliminary inquiry. A similar position, the counsel submitted, was made by the same Court in **NOORMAHOMED KANJI VS REX, 1937, EACA**

The initiation of the fresh committal proceedings, the counsel submitted,has the effect of circumventing the withdrawn Criminal Session Case No. 61 of 2015 wherein some exhibits were declared inadmissible by the High Court and the decision thereof upheld by the Court of Appeal of Tanzania. They have invited the Court to strike out the case and order for the maintenance of the *status quo ante*.

Though neither the ruling of the High Court refusing to admit the documents nor the decision of the Court of Appeal confirming the same was availed to me, I find that this argument is out of context. The reason being that the institution of the instant case under the previous committal order, would not revive the **previous proceedings**. In any event, whether the prosecution intends to use the said documents in evidence is a mere speculation. As such there is no factual materials on the basis of which I can determine this question.

On his part, the second accused speaking through Mr. Shiyo learned advocate invited the Court to hold that the preliminary objection has been misplaced. In his view, the cited authority much as it was dealing with a Kenyan law not in *parimateria* with our Criminal Procedure Code is not applicable in the instant case. He submits that the proceeding before this Court is competent.

Submitting for the Republic, Mr. Awamu learned state attorney was of the humble opinion that the authorities referred by the counsel for the first, third and fourth accused persons were relevant when the current Criminal

Procedure Act had not come into force. During that time, the counsel submitted, initiation of original criminal cases in the High Court was preceded by preliminary enquiry by a subordinate court. Unlike in the current committal proceedings procedure, in the previous PI procedure the counsel submitted, the committal court enjoyed power to make a finding whether there was sufficient evidence for which to commit the accused to the High Court. The counsel clarified further that, under the express provision of section 246 of the CPA, once a fresh information is filed, a committal proceeding must be conducted.

The state attorney submitted in the alternative that even if the authorities were relevant, they would have the effect of permitting the prosecution to file a fresh information relying on the committal order but not to prohibit the prosecution to initiate a fresh committal proceedings.

In his rejoinder submissions, Mr. Mr. Mwanga did not agree with the prosecution attorney that the information at hand was different from the withdrawn one. He emphasized further that in the absence of an order setting aside the committal order, the same was still intact and thus the filing of a new committal proceedings was illegal. He differed with the prosecution

attorney on his view that preliminary inquiry has been abolished. He clarified that even the committal proceedings in question are marked in bracket PI. He reiterated his prayer in the submissions in chief.

Having heard the rival submissions, it is high time that I resolve the issue. There appears to be not in dispute between the counsel that; in accordance with the provision of section 244 of the Criminal Procedure Act, Cap. 20, R.E., 2002 ("the CPA"), all criminal cases triable by the High Court must start with committal proceedings in the subordinate court of competent jurisdiction and that, the jurisdiction of the High Court to try the matter is vested upon the accused person being committed to it for trial. The line of contention is whether the withdrawal of a case and discharge of the accused person under section 91 (1) of the Criminal Procedure Code renders the committal order non existent so that the prosecution cannot institute a new information without commencing a fresh committal proceeding

In the authorities of the defunct EACA relied upon by the counsel for the first, third and fourth accused persons, the question has been answered negatively. The prosecution counsel thinks that the cited authority in so far as

it was made under the Kenyan Criminal Procedure Code of 1948 which was at per with our repealed Criminal Procedure Code are irrelevant and thus inapplicable.

I have taken time to read the two authorities in between line. In the former authority, the provision involved was section 82 (1) of the repealed Criminal Procedure of Kenya of 1948 (Cap. 27). The provision is reproduced *verbatim* at page 647 of the Report which for clarity I find necessary to reproduce here below as follows;-

> 82(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney General may enter a *nolle prosequi,* either by stating in court or by informing the court in writing that the Crown intends that the proceeding shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his cognizances shall be discharged ; but such discharge of an accused person shall not operate as a bar to any subsequent proceeding against him on account of the same facts.

Section 91(1) of our **CPA** which provides for *nulle prosequi* provides as follows:-

> 91(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of the Public Prosecution 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 proceeding shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his cognizances shall be discharged ; but such discharge of an accused person shall not operate as a bar to any subsequent proceeding against him on account of the same facts.

Apparent from the quoted two provisions is the fact that save that the *nolle prosequi* under our **CPA** is made by the **DPP** and in the old Kenyan law by the AG, the two provisions are materially at per. I will not agree with the prosecution attorney and the counsel for the second accused that the two provisions are not in *permateria*.

It is a rule of statutory interpretation under common law jurisdiction that; where the same words are used in similar connection in two statutes on the same subject matter, they are intended to convey the same meaning. An earlier decision interpreting a similar provision therefore, is relevant to a subsequent proceeding. On this, the learned jurist D.N. MATHUR has the following to say at page 321 of his **Interpretation of Statutes**, 2013, 4th Edition, Central Law Publications, New Delhi:-

The basis of this rule is the presumption that where the same words are used in similar connection in two statutes on the same subject matter, they are intended to convey the same meaning. Similarly, where the words used in a statute have been once interpreted and certain meaning has been attributed to them and the same word in similar context are again used by the Legislature in a subsequent enactment, then those words must receive same interpretation. But this rule shall not be applicable when the decisions on earlier Act are inconsistent.

In the cited authority, the finding of the EACA was limited to the construction of section 82 (1) of the Kenyan Criminal procedure Code of 1948, as to the effect of entry of *nolle prosequi*. It stated in no uncertain term that; once the proceedings is discontinued and the accused person discharged, its effect is to terminate the proceedings at the High Court and discharge the accused from the charge filed at the High Court and not to invalidate the committal order of the subordinate court.

Therefore, to the extent that it judicially considers the provision of section 82(1) of the Kenyan Criminal Procedure Code of 1948 which is in permateria with our section 91(1) of our CPC, the interpretation of the defunct EACA of the provision is binding to me. I will thus hold as a point of law that once a criminal proceedings is discontinued and the accused discharged by the

reason of *entry of nolle prosequi* by the DPP, the committal order of the subordinate court does not phase out of existence such that if every thing remains constant, the prosecution may initiate a new proceedings on the similar facts without commencing a fresh committal proceedings.

It was submitted that; since the cited authority was dealing with a committal order emanating from preliminary inquiry which is no longer applicable in Tanzania, the same is irrelevant. With deepest respect to the learned state attorney, I will not agree with this contention. In my understanding, what is done by the subordinate court under section 245 and 246 is what is called preliminary enquiry. The Court of Appeal has held as such in **THE REPUBLIC VS. ASAFU TUMWINE, CONSOLIDATED CRIMINAL REVISION NO. 1 DSM.** It stated as follows at page 9.

> This section then , tells it all. It is expressly recognizes the duty of not only holding a preliminary enquiry by a subordinate court but also of making a specific order committing the accused for trial before the High Court.

It was submitted for the prosecution that in view of the current committal procedure contained in sections 244,245 and 246 of the CPA, once the information and the proceedings thereof is withdrawn, the prosecution would not commence a new criminal proceedings without there being a fresh

committal order. The reason being, according to the prosecution attorney that, under section 246 of the CPA, the filed information must be transmitted by the Registrar to the committal Court for compliance of the provision of section 246(2) of the CPA. The counsel for the first, third and fourth accused persons has submitted otherwise.

Before I address the question, a brief review of the law relating to committal proceedings may be pertinent. in accordance with the provision of section 244 of the Criminal Procedure Act, Cap. 20, R.E., 2002 ("the CPA"), all criminal cases triable by the High Court must start with committal proceedings in the subordinate court of competent jurisdiction. Section 245 requires the prosecution upon arrest or on completion of the investigation and arrest of any person in respect of commission of the offence triable by the High Court, to produce him before a subordinate court of a competent jurisdiction with a charge upon which it is proposed to prosecute him. The charge shall forthwith be read and explained to the accused but the accused shall not be requested to make any plea.

After the accused person has been committed to remand prison or released on bail by the subordinate court or upon completion of the investigation, the police officer or any relevant public officer in charge of the respective criminal investigation shall prepare and submit to the **DPP** the

statements of the would be witnesses along with the case file. If the **DPP** is of the opinion that sufficient evidence exists to warrant prosecution of the suspect, he shall prepare and file information to the High Court which shall in turn be transmitted by the Registrar to the committal court. It is after the receipt of the information from the Registrar and the notice that the committal court shall commit the accused person to the High Court for trial after the information together with the substances of the evidence of the intended witnesses and exhibits have been read over and explained to the accused person.

There has been a controversy on when the committal proceeding is said to commence. The prosecution attorneys submits that it is after the information has been filed by the **DPP** to the High Court in pursuit to section 146 (1) of the CPA. I cannot agree with them. My understanding of the law is that the committal proceedings commence from the moment the accused person is produced to the subordinate court under section 245 of the **CPA**. It is initiated by the proposed charge sheet brought under section 245(1) of the **CPA** and not the information transmitted by the Registrar under section 246 of the **CPA**. It is after the presentation of the proposed charge sheet that the file for the committal proceedings is registered at the committal court. The

transmission of the information would only confer jurisdiction to the subordinate court to commit the accused person to the High Court for trial.

The conduct of committal proceedings and committing the accused person to the High Court, it is trite law, is a precondition for commencement of original criminal proceedings at the High Court. A case instituted without due compliance with the committal procedure is null and void. (See for instance, **PASCHAL MAGANGA & EMMANUEL BULEMO @ KADABALAMO VS. THE REPUBLIC, CRIMINAL APPEAL NO. 268 OF 2016 (CAT-TABORA)**.

I was also called upon to hold that the principle in the authority of the EACA under discussion much as it permits the prosecution to file a fresh information based on the previous committal order, does not prohibit the prosecution to commence a new committal order. Again, I cannot accept this submission. The reason being that; if it is possible to file an information on a previous committal order, it would be an abuse of the Court process to initiate a fresh committal proceeding.

It was further submitted that the authority referred by the defense would not apply in the instant case because the new information though founded on the same facts is different from the previous one. The defense counsel think that it is not. I have gone through the ruling of my Lord Mrango as well as both the previous and current committal proceedings. I am satisfied myself that the two proceedings are materially different so that they could not base on one committal order. I will explain the differences hereunder.

In the previous proceedings, the list of the prosecution witnesses whose substances of evidence was read out in terms of section 246(2) of the **CPA** contains 45 witnesses while in the current proceedings 59 witnesses. Besides, whereas the intended exhibits in the previous proceedings were 64, in the current one they are 67. More importantly is the fact that, whereas in he instant case the accused persons are charged with 59 counts, in the withdrawn case they were charged with 44 counts.

With these material differences, it was not possible, in my view, for the prosecution to institute the current case under the previous committal order without offending the mandatory requirements under section 246 of the **CPA.** It is worthy of note that in the authority in **PETER HAROLD RICHARD VS. R*supra***, as revealed in page 649 of the Report, the accused was charged, in

the fresh information, with the offence of murder in the same terms as the first information. Basing on the same fact, the EACA held that the subsequent proceeding was correctly filed pursuant to the previous committal order. In situation like in the instant case, the case would have not been filed under the previous committal order without offending the mandatory requirements of section 246 of the **CPA**. It is on that account that, I will agree with the prosecution that the initiation of a fresh committal proceedings was necessary under the circumstance. Accordingly therefore, the preliminary objection shall not succeed and it is accordingly overruled.

I.MAIGE

JUDGE

At Arusha
13/ 09/2018

Delivered this 13th day of September 2018, In the presence of MerssrsOsward, Hashim Ngole, MaterusiMarando, Awamu and Pius Hilla learned State Attorney for the Republic and Messrs Innocent Mwanga, August Shiyo, Alex Kishakaki, Emmanuel Mvula, Mosses Mahuna and BuheriNgoseki learned counsel for the accused person.

I.MAIGE

JUDGE

13/09/2018