**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)**

**CRIMINAL REVISION NO. 1 OF 2006**

**THE REPUBLIC ..... APPLICANT**

**VERSUS**

**ASAFU TUMWINE ..... RESPONDENT**

**(Revision from the Order of the High Court of Tanzania at Bukoba)**

**(Mlay, J.)**

**dated the 30th day of September, 2002**
**in**
**Criminal Sessions Case No. 40 of 2002**

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**ORDER OF THE COURT**

**RUTAKANGWA, J.A.:**

These revision proceedings were prompted by an order of the High Court of Tanzania (Luanda, J.) at Bukoba, dated 23rd August, 2006, in Criminal Sessions Case No. 40 of 2002. The respondent Asafu Tumwine, stood charged with the offence of murder c/s 196 of the Penal Code. The order of Luanda, J. forwarded that court's record to this Court for revision or directions for the reasons shown therein.

In order to appreciate fully the propriety of the High Court order, we have found it appropriate to give the necessary background which led the learned judge to make the order.

The respondent, Asafu Tumwine, was first arraigned for the murder of one Nzechibikile s/o Gachibayo, in the District Court of Karagwe District at Kayanga on 17th December, 1999. He was jointly charged with Dominic Bitachunda, now deceased. Ordinarily, the offence of murder is only triable by the High Court in terms of sections 4 (1) and 164 of the Criminal Procedure Act, 1985 (the Act hereinafter) save where the High Court, after committal proceedings, acting under s. 256A of the Act, transfers the case to a Court of Resident Magistrate, to be tried by a Resident Magistrate vested with extended jurisdiction.

After the completion of the necessary investigations, the Director of Public Prosecutions (D.P.P.), under s. 245 (6) of the Act, duly filed in the High Court at Bukoba information for murder against the respondent. Thereafter the District Registrar delivered a copy of the information to the District Court of Karagwe. Upon receiving the said copy the District Court of Karagwe, presided over by Mr. P.D.

Ntumo, Resident Magistrate, conducted a preliminary inquiry under sections 246 – 9 of the Act, with a view to committing the respondent to the High Court for trial. This was on 31st October, 2001.

During the preliminary inquiry proceedings, the learned Resident Magistrate read over and explained to the respondent the information filed against him as well as the contents of six statements and some documents containing the substance of the evidence of witnesses whom the D.P.P. intended to call at his trial before the High Court. Thereafter the respondent told the committing court that he did not kill the deceased and indicated that he intended to call only one witness at his trial. Assuming that all was over and well done the learned Resident Magistrate made the following order:-

> "Order: 1. Proceedings to be typed and supplied to accused persons.
>
> 2. Proceedings to be supplied to the District Registrar, Bukoba, to await for trial by the High Court, as soon as practicable. A.F.R.I.C.
>
> Sgd. P.D. Ntumo, RM
> 31/10/2001".

The proceedings were indeed sent to the High Court Bukoba and hence Criminal Sessions Case No. 40 of 2002.

The High Court, presided over by Mlay, J., under the provisions of s. 192 of the Act and the Rules made thereunder, conducted a preliminary hearing on 30th September, 2002. At the conclusion of the preliminary hearing, the learned judge ordered the trial of the respondent to be held at "the next High Court Sessions to be arranged by the District Registrar". The trial was eventually scheduled to commence on 23rd August, 2006 before Luanda, J.

On 23rd August, 2006 before the trial took off, Mr. Ndjike, learned State Attorney, had this to tell the court:-

> "My Lord, after going through the record we discovered (sic) the committal court did not commit the accused for trial in this court as mandated by s. 246 (1) of CPA, Cap. 20. Further Hon. Mlay, J. conducted a preliminary hearing. As this court proceeded with the case, this court cannot order the committal court to conduct a fresh committal proceedings. We pray the case be sent to CAT for revision."

Mr. Kabunga, learned advocate, representing the respondent concurred with this observation and prayer. The learned judge was of the same view. Since he could not quash the committal proceedings as Mlay, J. had already conducted a preliminary hearing which again he could not quash, he accordingly referred the matter to this Court for revision or directions. Hence these revision proceedings.

In these proceedings Mr. Feleshi, learned Senior State Attorney appeared for the Republic, while the respondent appeared in person.

At the hearing of this matter it was common ground that the District Court did not make a specific order formally committing the accused/respondent to the High Court for trial. The issue, therefore, is whether or not that omission was fatal to the subsequent proceedings in the High Court before both Mlay, J. and Luanda, J., in view of the undisputed fact that all the other essential steps required to be taken by the committing court under sections 246, 247 and 249 of the Act, were taken. Mr. Feleshi, while conceding that there is no specific section in the Act identical with s. 221 of the now repealed Criminal Procedure Code, which directs the committing court to make

such a formal order, gallantly submitted that such a requirement was implicit in s. 246 (1) of the Act.

For easy reference we shall reproduce s. 246 (1) here. It reads as follows:-

> "246 – (1) Upon receipt of the copy of the information and the notice, the subordinate court shall summon the accused person from remand prison or, if not yet arrested, order his arrest and appearance before it and deliver to him or to his counsel a copy of the information and notice of trial delivered to it under sub-section (7) of section 245 and commit him for trial by the court, and the committal order shall be sufficient authority for the person in charge of the remand prison concerned to remove the accused person from prison on the specified date and to facilitate his appearance before the court" (emphasis is ours).

Predicating his contention on this provision of the Act, Mr. Feleshi strongly urged us to accept his proposition that an accused person is not properly before the High Court (being a sessions court) in a murder trial in the absence of a formal committal order by the

committing court. He sought authority in support of this proposition in the decision of this Court in **D.P.P. v. Ally Nur Dirie** [1988] TLR 252, which decision was based on the Economic and Organised Crimes (Control) Act, 1984. He accordingly submitted that as long as the accused/respondent was not formally committed for trial to the High Court, his appearance before Mlay, J. on 30th September, 2002 was highly irregular. He further submitted that the preliminary hearing which was conducted on that day was of no legal effect as the accused was not properly before the High Court for trial. On this premise he urged the Court to nullify, quash and set aside the proceedings in the High Court from 30th September, 2002 to the stage when the plea of the accused was re-taken on 23rd August, 2006 before Luanda, J. ready for commencement of the trial, and thereafter order the Karagwe District court to formally commit the accused as expeditiously as possible.

As already indicated above, the respondent was unrepresented. Not only that, he is also a layman. As such, this being an issue of law on which he was briefed by the Court, he had nothing useful to tell the Court.

We have given due consideration to the submission by Mr. Feleshi on the issue. We have also given ourselves ample time to study objectively the wide provisions of the entire s. 246 of the Act, as well as the decision of this Court in **D.P.P. v. Ally Nur Dirie** (supra). While we have found little to assist us from the decision in **Dirie's** case, we are of the firm view that Mr. Feleshi is perfectly correct in his construction of s. 246 of the Act. Luckily, the position of Mr. Feleshi coincides with that of Luanda, J.

We have decided to agree with Mr. Feleshi not out of personal preference, a course not permissible in judicial inquiries. We did so because we found no rationale for the law to require the subordinate court to hold a preliminary inquiry if at the end of the day the accused remains within the jurisdiction of the same court. It is our decided opinion that a subordinate court in a case triable only by the High Court ceases to have jurisdiction over the case after it has formally committed the accused in the case for trial by the High Court. The mere reading of the information and the contents of the statements of potential prosecution witnesses, as well as the recording of the statement by the accused, if any, and listing the witnesses for both sides do not, in our view, amount to an order of

committal. They are only steps with the intention of committing the accused. It is only a specific order of commitment at the end of this exercise which formally and properly submits an accused to the jurisdiction of the High Court. In other words, an order of commitment is a pre-requisite for the High Court as a court of session, taking cognizance of an offence as a court of original jurisdiction, as Mr. Feleshi correctly submitted. This proposition, in our view, finds support in section 178 of the Act.

The said s. 178 reads thus:-

> "178. The High Court may inquire into and try any offence subject to its jurisdiction in any place where it has power to hold sittings; and except as provided under s. 93, no criminal case shall be brought under cognizance of the High Court unless it has been previously investigated by a subordinate court and the accused person has been committed for trial before the High Court" (emphasis is ours).

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

High Court. That is also why it is plainly provided in s. 249 (1) and (2) of the Act, that "a person who has been committed for trial before the High Court" shall be entitled to have a copy of the committal proceedings free of charge and shall be informed of this right at the time of being committed for trial.

In view of the above, we are now settled in our minds that a purposive construction of sections 178, 246 (1) and 249 of the Act makes it explicit that the scheme and spirit behind the law in making provision for the holding of preliminary inquiries in cases of this nature presupposes the making of a specific order committing the accused for trial before the High Court. Where there is no such order as was the case in P.I. case No. 37 of 1999 of the District Court of Karagwe, there is no proper commitment and the High Court cannot try the case.

For the reasons given above, we agree with Mr. Feleshi, learned Senior State Attorney, that since the District Court of Karagwe never made any order committing the accused Asafu Tumwine for trial before the High Court, the entire proceedings and orders in the High Court in Criminal Sessions Case No. 40 of 2002

before Mlay, J. of 30.9.2002 were a nullity. The same are hereby quashed and set aside. The District Court of Karagwe, which has all along retained jurisdiction over P.I. case No. 37 of 1999 is hereby directed to hold, as expeditiously as possible, a fresh preliminary inquiry and commit the accused Asafe Tumwine for trial before the High Court in accordance with the law. It is so ordered.

DATED at MWANZA this 23rd day of February, 2007.

D. Z. LUBUVA
**JUSTICE OF APPEAL**

J. A. MROSO
**JUSTICE OF APPEAL**

E.M.K. RUTAKANGWA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.


(S. M. RUMANYIKA)
**DEPUTY REGISTRAR**