IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MASSATI, J. A., MUSSA, J. A. And MWARIJA, J. A.)

CRIMINAL APPEAL NO. 156 OF 2015

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

1. **MUSSA LYAMHELO @ SEBA AKUJIWE**
2. **MARIAM SHAMSHI ..... RESPONDENTS**

(Appeal from the Order of the High Court of Tanzania at Tabora)

(Rumanyika, J.)

dated the 15th day of October, 2014
in
Criminal Session Case No. 7 of 2012

.....

JUDGMENT OF THE COURT

6th & 11th April, 2016

MASSATI, J.A.:

The Director of Public Prosecutions (the Appellant or the DPP) was aggrieved by the Order of the High Court sitting at Kahama in Criminal Sessions Case No. 7 of 2012, dated 15th October, 2014, in which the Respondents were discharged, and ordered not to be rearrested until the prosecution witness(s) appeared and testified in the then ongoing court sessions. In doing so the trial judge said that he was compelled to do so because, in view of the constant prayers for adjournment to enable the

appearance of the remaining prosecution witness, the DPP must be deemed to have withdrawn the charges under section 91 (1) of the Criminal Procedure Act (the CPA).

At the hearing of the appeal, Ms Jane Mandago, learned Senior State Attorney, appeared to argue the appeal. The respondents who were not in court, despite substituted service by publication in Uhuru and Mwananchi newspapers of 22/3/2016 and 25/3/2016 respectively were represented by Mr. Kamaliza Kayaga and Mr. Mussa Kassim respectively.

After hearing, we asked Ms Mandago about the presence of two memoranda of appeal; one lodged on 1/12/2015, and another lodged on 30/3/2015. Her reaction was that the one lodged on 30/3/2015 was meant to be a supplementary one, but in view of the fact that no prior leave of the Court was obtained to lodge it in terms of Rule 73 (1) she asked the Court to ignore it, and so rested her arguments on the grounds contained in the first Memorandum of Appeal lodged on 1/12/2015.

The relevant Memorandum of Appeal contains two grounds namely:-

1. *That the High Court Judge erred in law and facts when he withdraw (sic) the charge against the respondent before prosecution side closed their case.*
2. *That the High Court Judge erred in law and facts by not gave (sic) enough time prosecution side to call their key witnesses.*

Ms Mandago, submitting on the first ground argued that it was wrong in law for the trial judge to use section 91 (1) of the CPA to mark the prosecution case withdrawn. She pointed out that in terms of section 91 of the CPA these powers can only be exercised by the DPP. The learned counsel went on to criticize the trial court for giving an order of not rearresting the respondents, which was in excess of his jurisdiction, because even in terms of section 91 (1) of the CPA an accused person discharged under that section could be recharged.

On the second ground Ms Mandago submitted that given the circumstances of the case, where there were only 4 adjournments in 4 consecutive days, it was too impatient for the judge to have given such an

order. This was more so as PW4 was a very important witness to the prosecution.

She went on to argue that although the trial judge had discretion under section 284 of the CPA to adjourn or not to adjourn the case, the most he could have done if he decides to refuse adjournment was to order the prosecution case closed, decide on whether or not there was a case to answer and if there was, call upon the respondents to enter their defences. By discharging the respondents without the parties, the trial judge conducted an unfair trial as the order was prejudicial to the prosecution. She therefore prayed that the order be set aside, and the respondents be ordered to centime with the trial, from where it was left.

On the other hand, Mr. Kayaga submitted, at first that the judge's decision was right because the judge was stuck in a dilemma on what he could do with the incensant adjournment. However when his attention was drawn to section 284 of the CPA, he readily recoiled and submitted that indeed there was a provision of the law to cater for the situation, and that it was totally wrong for him to resort to section 91 (1) of the CPA. He also conceded that the learned judge had no power to prohibit the respondents'

rearrest. He also conceded that the learned judge should have allowed counsel to address him before he gave the adverse order.

On the way forward, Mr. Kayaga suggested that there should be no order for retrial for it is not practical to reconvene the respondents.

On his part, Mr. Kassim began his address by agreeing with Mr. Kayaga's submission. He argued that the trial judge's order was partly right and partly wrong. He agreed that it was wrong for the trial judge to have gone further and decide to discharge the respondents. Instead if he was minded not to grant the adjournment sought, he should have ordered the prosecution case closed, and if there was a case to answer, call upon the respondents to enter their defence. However, he did not think that the judge used section 91 (1) of the CPA in discharging the respondents after withdrawing the case. Reading the Order between lines, it is clear, according to the learned counsel, that the learned judge was at a loss, as to what was the governing provision, so he did not think that it was right to impugn the Order on the ground of abuse of section 91 of the CPA, be concluded.

At the end of his submission Mr. Kassim sought and obtained leave to raise a point of law, which he should have raised by way of notice of

preliminary objection, but which he couldn't because he was served with the documents late. We granted him leave to raise his points(s).

Initially he had two points. **One** that the notice of appeal was defective but he promptly withdrew it after some promoting from the bench. **Two**, that the second Memorandum of Appeal served on him was filed under a wrong provision, and it had not prayers, thus making it defective. He thus sought that the Memorandum of Appeal be struck out. He complained that he was not served with the one lodged on 1/12/2015, but did not make any further arguments about that omission.

On her part, Ms Mandago repeated by submitting that it was true that the Memorandum of Appeal lodged on 30/3/2016 was filed under Rule 73 (1) and not 72 (1) but the latter one was a supplementary one, although no leave of the Court was obtained. However, the appeal was still competent because it was still supported by the memorandum lodged on 1/12/2015. But even if the Court agrees that the supplementary memorandum was defective, it has discretion under Rule 72 (5) to entertain or not to entertain the appeal.

On his part, Mr. Kayaga had nothing to say on the apparent defects in the notice of appeal and Memorandum of Appeal raised by Mr. Kassim. He left it to the Court.

We wish to begin by the points of law belatedly raised by Mr. Kassim. The main thrust of his point of law is that the Memorandum of Appeal was filed under a wrong provision, and did not contain a prayer.

It is true that the "Memorandum of Appeal" lodged on 30/3/2016 was filed under Rule 73 (1) of the Rules. Mr. Kassim thinks that the proper provision would have been Rule 72 (1). Ms Mandago informed the Court that the Memorandum in question was meant to be a supplementary to the one lodged on 30/3/2015.

In our view, Rule 73 (1) applies to the filing of a supplementary memorandum of appeal which could only be done with leave of the Court. Since no leave was first had and obtained, the Memorandum of Appeal lodged on 30/3/2016 improperly found its way into the record. So it has no place there. It should, as were hereby order, be expunged from the record.

The appeal is therefore based on the memorandum of appeal lodged earlier on, on 1/12/2015, on whose basis Ms Mandago argued the appeal.

But Mr. Kassim believes that the Memorandum of Appeal contains no prayers, so it is purposeless, so to speak. We agree with him that the Memorandum contains no clause for prayers for orders or reliefs.

However, we think that Mr. Kassim's arguments are misguided. The contents of a Memorandum of Appeal in Criminal Appeal is set out in Rule 72 (2). The Rule is reproduced below for ease of reference:-

> *72 (2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law, which are alleged to have been wrongly decided.*

It is directed in subrule 4 that the Memorandum shall be substantially in the form C in the First Schedule to the Rules.

Looking at Rule 72 (2) and Form C, closely, there is nowhere, the appellant is required to disclose what he/she seeks as the intended reliefs. Unlike in Criminal appeals, the case is different with civil appeals. Rule 93 (1) of the Rules clearly sets out, the contents of the Memorandum of Appeal, to include:-

> *"the nature of the order which it is proposed to ask the Court to make"*

Likewise Form F in the First Schedule which is a sample of what a Memorandum of Appeal in Civil Appeals should be, requires the Appellant to conclude by setting out:-

> *"It is proposed to ask the Court for an order...."*

Very clearly then the processes in appeals in Criminal and Civil Appeals are different. They are governed by different provision of the Rules and prescribed forms.

All said, we find no merit in Mr. Kassim's objections, and we dismiss them.

Before we embark on the substance of the appeal, a short expose of the material facts would be appropriate. The respondents were respectively the husband and wife. The 1st respondent was the biological father of the deceased children; whereas the 2nd respondent was their step mother. They were all residents of Katoma village, Bukombe District, Shinyanga Region. On 4/4/2008 the 1st respondent was given groundnuts by his mother. He asked the 2nd respondent to cook them. After consuming them, the children/deceased's' died immediately. The respondents were charged for their murder.

When the prosecution began, four witnesses testified for the prosecution. The last witness was an official from the Chief Chemist Agency – Mwanza. Several adjournments were granted to enable the prosecution the attendance of her witness. At the end, the judge became impatient and decided to mark the charges as withdrawn. In the course of his order he referred here and there, section 91 (1) of the CPA. It is against this background, that we now turn to the grounds of appeal.

The first ground relates to the power of the High Court to "withdraw" a criminal charge.

Criminal trials in Tanzania are generally governed by the CPA, or such specific statute that may be passed by the Parliament. But in this judgment we shall confine our discussion to the powers of the High Court under the CPA as far as withdrawal of charges is concerned. When it comes to trials, in the High Court, the Court is regulated by Part VIII of the CPA. It contains sub parts (a) to (h) and sections 264 to 299. Although it has provisions for the Court to postpone or adjourn hearing of trials, there is nothing in that part which gives powers to the High Court to order the withdrawal of a charge.

On the other hand, control of Criminal Proceedings is set out in Part IV of the CPA which has Parts A and B. It is there that the powers to withdraw charges may be found. These include the DPP's power to discontinue any criminal proceedings under section 90 (1) (c) and to enter *nolle prosequi* under section 91 (1) of the CPA.

We appreciate the force of Mr. Kassim's argument that the judge in this case did not specifically use section 91 (1) of the CPA to discharge the accused persons. Even without such express words however there are several indications in his Order which show that he had that provision in mind. We shall illustrate:-

On page 33 of the record; the learned judge said:-

> *"Or else, having not procured his attendance, they are deemed to have withdrawn the matter quietly. Save that the State Attorney does not wish to invoke the provisions of section 91 (1) of the CPA..."*

Then on p. 34 of the record, he is on record that:-

> *"It follows therefore, that whereas there is no fast and harden (sic) rule as to when exactly shall the provisions of s. 91 (1) of the CPA, the legislature in my view, intends thus ..."*

On page 35 of the record, the learned judge remarked:-

> *"that the DPP been presumed, quietly though, as it appears to have been the case, failed to bring a witness, to have withdrawn the charge under s. 91 (1) of the CPA."*

This was the last straw. Because after those premises the learned judge went on to mark the charge withdrawn discharged the accused person

and further ordered that "any rearresting and or further detention of the accused with respect to those charge shall be unlawful."

We wish to categorically state that under the scheme of the CPA a judge of the High Court, siting on trial, has no powers, express on inherent, to withdraw criminal charges. Powers of withdrawal are vested in the prosecution, not the courts. (See **DPP vs MTANDA AND ANOTHER**, Criminal Appeal No. 92 of 1991 (unreported). That is not to say however that the High Court has no control over the proceedings before him as the learned judge in this case thought. He has the power to postpone or adjourn and section 284 of the CPA as rightly submitted by counsel. If, as in the present case, the court feels that it could no longer grant an adjournment it has, we think, inherent powers and in its discretion call upon to the prosecution to close its case, and if the prosecution refuses, to order the prosecution case closed, and if need be to, call upon the accused to enter their/his defence, or make such other order as might meet the justice of the case. (See **DPP vs MARTIN NGUMA AND OTHERS**, Criminal Appeal Nos. 48 & 69 of 1976 (unreported) decided by the defunct East African Court of Appeal).

So, what, the learned judge did in this case was clearly wrong.

But the most disturbing feature in this appeal, is that, even if the learned judge had such power and could issue the orders, he did so without first hearing the parties. This is borne out by the record.

On 15/10/2014, the State Attorney appeared and prayed for an "adjournment for interest of injustice". Mr. Kaunda, learned counsel who appeared for the accused was not asked. Instead, after the State Attorney's prayer, the Court ordered that it would deliver its Order at 11:00 A.M. at 15:10 p.m. the trial court convened to deliver its "order" discharging the respondents.

No one needs to be told that this order was adverse to the prosecution, and was the least it expected. The most legitimate expectation was either a grant or a refusal to grant an adjournment.

But the trial court made such an adverse decision, without according any of the parties, the right to be heard. This is a contravention of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, which provides that:-

"To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles:-

(a) When the rights and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing..."

In the present case, although the State Attorney was heard on his prayer for adjournment, neither he nor the respondents' counsel were heard on the strange order that finally discharged the respondents.

The right to a fair trial is one of the cornerstones of any just society. That is, it is regarded as a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their rights and freedoms (See **MABULA LUHENDE vs R.,** Criminal Appeal No. 281 of 2014 (unreported).

In the absence of any statutory authority, the order of the High Court, in this case is nothing but arbitrary and cannot be left to stand.

is necessary to go into the second ground of appeal.

In the event, this appeal is allowed. The order of the High Court "marking the case withdrawn" and the attendant order in respect of the respondents' arrests are set aside. We order that the respondents be rearrested and placed under remand custody to await their trial. The case file is to be remitted to the trial court and is to be reassigned to a different judge and a different set of assessors, for continuation of the hearing of the prosecution case, from where it was left.

Order accordingly.

DATED at **TABORA** this 8th day of April, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL