IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 239 OF 2013

THE DIRECTOR PF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

1. **HENRY KILEO**
2. **JUSTINIAN EVODIUS**
3. **SEIF MAGESA** } .....**RESPONDENTS**
4. **OSCAR KAIJAGE**
5. **RAJABU DANIEL**

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

(Lukelelwa, J.)

Dated the 5th day of August, 2013

In

Misc. Criminal Application No. 53 of 2013

JUDGMENT OF THE COURT

15th & 29th April, 2016

MWARIJA, J.A.:

This appeal arises from the ruling of the High Court of Tanzania, at Tabora in Miscellaneous Criminal Application No. 53 of 2013. The facts giving rise to the appeal can be briefly stated as follows:-

On 12/4/2013, the 2nd respondent Evodius Justinian was arraigned before the District Court of Igunga on the charge of grievous harm contrary to section 225 of the Penal Code, Cap 16 of the Revised Laws. It was alleged that on 9/9/2011 at about 23.00 hours at Mwayunge Street within the township and District of Igunga in Tabora region, the said respondent caused grievous harm to one Musa Tesha by splashing chemical substance on his face, eyes, nose, mouth and upper part of his shoulder. The said respondents denied the charge.

Later on through a substituted charge sheet, the prosecution added more accused persons in the case. While on 16/4/2013 the 4th respondent, Oscar Kaijage was joined in the case, on 25/4/2013 the other respondents, Seif Magesa and Rajabu Daniel (the 3rd and 5th respondents respectively), were also joined in the case.

After several adjournments, on 21/6/2013 the four named respondents who had all along been in remand custody were granted bail. The case was then adjourned to 24/6/2013. On that date, when they appeared in court, the prosecution prayed to withdraw the case under Section 98 (1) of the Criminal Procedure Act, Cap. 20 of the Revised Laws,

(the CPA). The prayer was granted and the respondents were accordingly discharged. Their freedom lasted however only for a few hours. The prosecution had on one hand another charge sheet in which apart from consisting of two new counts it had included another accused person, Henry Kileo, the 1st respondent in this appeal. The 1st – 4th respondents were re-arrested and were jointly charged with the 5th respondent. They were charged with the following two counts:-

"1ST COUNT

STATEMENT OF OFFENCE

COMMITING TERRORIST ACT: *Contrary to section 4 (2) (c) (iii) of the prevention of Terrorism Act No. 21 of 2002.*

PARTICULARS OF THE OFFENCE

AVODIUS S/O JUSTINIAN @ BALOILE @ LUGEMALILA, OSCAR KAIJAGE @ KAINDOA, RAJABU DANIEL and SEIF MAGESA KABUTA and HENRY KILEO on 9th day of September, 2011 during night time hours at Mwayunge street within the township and District of Igunga and Tabora Region

with terrorist intention did kidnap one person called MUSA S/O TESHA.

2ND COUNT

STATEMENT OF OFFENCE

ACT INTENDED TO CAUSE GRIEVOUS HARM:

Contrary to section 222 (a) of the Penal Code (Cap 16 R.E. 2002).

PARTICULARS OF THE OFFENCE

AVODIUS S/O JUSTINIAN @ BALOILE @ LUGEMALILA, OSCAR KAIJAGE @ KAINDOA, RAJABU DANIEL and SEIF MAGESA KABUTA and HENRY KILEO on 9th day of September, 2011 during night time hours HAN HAN Forest within Igunga District and Tabora Region with intent to do grievous harm did unlawfully splash chemicals to the face, norse, eye, mouth and upper part of right shoulder of MUSA TESHA as a result the said MUSA TESHA sustained grievous harm."

Since the offence with which the respondents were charged are triable by the High Court, they were not called upon to plead. They had to await their trial by that Court after committal proceedings.

On the date when the fresh charge was read to them, the respondents were represented by two advocates. On their behalf, Mr. Peter Kibatala, learned counsel challenged the "competence" of the 1st count. He argued that the charge was defective for having been filed without the consent of the Director of Public Prosecutions (the DPP). To substantiate his argument, the learned counsel submitted that since under section 34 (2) of the Prevention of Terrorism Act, No. 21 of 2002 (the Act), prosecution of any offence under the Act shall not be done without the consent of the DPP, the 1st count was defective for want of the DPP's certificate. He argued further that the count is defective for another reason, that it did not disclose the terrorist intentions. He contended also that the respondents were charged in the court which did not have jurisdiction because under S. 245 of the CPA, the case should have been filed in the court within whose jurisdiction the respondents were arrested.

Submitting on whether or not the District Court was vested with the power of determining defectiveness or otherwise of the charge sheet, the learned counsel argued that the court had jurisdiction to do so. He cited the High Court decision in the case of **Wilfred Muganyizi Rwakatare and Another v. The Director of Public Prosecutions,** Criminal Application No.14 of 2013

In response, Mr. Juma Masanja, learned State Attorney who represented the appellant Republic in the District Court opposed the point raised by the counsel for the respondents that the 1st count was defective. He submitted firstly, that the District Court did not have jurisdiction to entertain the offences charged because its only role is that of a committal court. Secondly, he argued that the consent of the DPP was not required at that stage of the proceedings. The consent, he said, is mandatory at the stage of instituting the case in the High Court.

The learned State Attorney submitted further that the 1st count discloses the offence charged and that the respondents were properly charged in the District Court of Igunga where the offence was committed.

This, the learned State Attorney argued, is in accordance with the provisions of Section 189 of the CPA.

Having heard the submissions made by the learned counsel for the respondents and the learned State Attorney for the appellant, the learned Resident Magistrate reserved his ruling. When the parties appeared on 8/7/2013 for ruling, they found that the case had been transferred to another Magistrate who proceeded to deliver the following short order:-

> ***"Court:*** *As this Court have no jurisdiction, this matter is hereby deferred for the conduct of the preliminary inquiry for, if the investigation is ready the accused to be committed to the High Court for trial."*

It is implicit from the above quoted order, that the successor magistrate did in essence, decide that the District Court did not have jurisdiction to inquire into the validity or otherwise of the charge sheet.

The respondents were dissatisfied with that order. They therefore applied for revision before the High Court. After hearing the parties, the High Court decided that the successor magistrate, Magori, SRM erred in

taking over the case from Joctan, RM (predecessor Magistrate).The basis of that finding was that the successor magistrate proceeded with the case without assigning any reason for his predecessor's failure to complete his ruling and committal proceedings. As a result of the irregularity arising from the successor magistrate's failure to give reasons for taking over the case, the learned High Court judge quashed the order. The High Court then proceeded to hear and determined the application on merit.

As stated above, after having quashed the successor magistrate's order, the learned judge proceeded to determined the application for revision on merit. He held firstly, that the first count was wrongly filed in the committing court because the filing was done without the certificate of the DPP. He reasoned that by virtue of the provisions of section 9(4) (b) of the National Prosecutions Services Act Cap. 430 of the Revised Laws, the consent of the DPP was mandatory even though the charge was at the stage of the committal proceedings. Secondly, the learned judge found that the 1st count did not disclose the offence of terrorism and that the charge sheet was therefore, defective. The appellant Republic was aggrieved

by the decision of the High Court. It therefore filed this appeal. In its memorandum of appeal, the appellant raised four grounds as follows:-

"1.The honorable judge erred in law and in fact to decide that with coming into force of the National prosecution service act, 2008, offences which by law required to be instituted with the consent of director of public prosecutions should be filed in court including courts conducting committal proceeding with a consent and certificate of the DPP attached therewith.

2. That honorable judge erred in law to conduct revision on the case to the extent of the merit of the case by explaining the meaning of terrorism and finally conclude that the accused did not commit the charged offence while the prosecution was not yet adduced its evidence.

3. The honorable judge erred in law and fact to order that the proceeding be returned in Igunga District

Court with instruction to proceed with committal process in the second count without giving the appellant the right to amend the charge.

4. The honorable judge erred in law and fact to order that the proceedings be returned to Igunga District Court while the court of resident Magistrate have got the power to proceed with the same matter, in that the honourable Judge assumed the power of DPP.

On 15/4/2016 when the appeal was called for hearing, the appellant was represented by Mr. Iddi Mgeni, learned State Attorney. The respondents and their advocate were absent. Mr, Kibatala had written to the court asking for adjournment for the reason that he had to appear on a different date before the Court at Dar es Salaam for another case. We were not satisfied with reason advanced by the learned counsel for seeking adjournment. We thus ordered that the appeal be argued by way of written submissions. The learned counsel for the parties filed their respective submissions.

For reasons which will be apparent herein, we intend to consider only the 2nd ground of appeal. Submitting in support of that ground, the learned State Attorney argued that the learned High Court judge erred in deciding the application on merit and in so doing, determining prematurely, that the respondents did not commit the offence charged in the first count. Relying on what a revision entails, the learned State Attorney argued that the hearing in the High Court should have been based on revising the proceedings on record rather than considering the merits of the case which had not been heard.

In reply, Mr. Kibatala started by raising a point of law challenging the competence of the appeal. He argued that since the appellant did not include in the record of appeal, the withdrawal order of Criminal case No. 54 of 2013, the omission rendered the appeal incompetent. He argued further that the withdrawal of the said case crippled the charge under section 4(2) (c) (iii) of the Act because without the charge under section 222(a) of the Penal Code, the 1St count above cannot stand. According to the learned counsel the two offences are intertwined.

The point raised by Mr. Kibatala need not detain us. The supplementary record containing the order withdrawing Criminal case No.54 of 2013 was filed in Court on 18/3/2016. As to the second limb of the counsel's point, we do not, with respect agree with him that the offence under section 4 (2) (c) (iii) cannot stand without the charge of causing grievous harm under section 222(a) of the Penal Code. Committing a terrorist act is separate offence as provided under the above stated section of the Act. Even if we were to agree with him however the withdrawn charge was preferred under section 225 of the Penal Code. Furthermore the offence referred to by the learned counsel was charged under the 2nd count in Criminal Case No. 75 of 2013. The respondents were therefore charged also with that offence. For these reasons, we do not find merit in the point raised by the counsel for the respondents.

In reply to the submission made by the learned State Attorney, Mr. Kibatala submitted that in conducting revision, the High Court was entitled to ascertain the validity of the charge sheet. Citing another decision of the High Court in the case of **Farid Hadi Ahmad & 21 others v. The Republic,** Misc. Criminal Application No. 35 of 2014 (unreported) and

Wilfred Muganyizi Rwakatare (supra), the learned counsel argued that since, in the 1st count the prosecution did not disclose any terrorist intentions so as to make the alleged kidnapping a different offence from that which is provided in the Penal Code, the 1st count was rightly struck out for being defective.

Having considered the submission made by the learned counsel for the parties on that ground of appeal, for a different reason, we agree with the learned State Attorney that it was not proper for the High Court to proceed to decide the application for revision on merit. As correctly found by the learned High Court judge, the successor magistrate wrongly assumed jurisdiction because he did not assign reasons for his predecessor's failure to complete the ruling and the conduct of committal proceedings.

Under section 214(1) of the CPA, a magistrate who takes over a partly heard case or partly conducted committal proceedings, must disclose in the record, the reasons for his predecessor's failure to complete the trial or committal proceedings. The section provides as follows:

evidence in any trial or conducted in whole or part any committal proceedings is for any reasons unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings."

In this case, after it had revised the proceedings by quashing the order of the successor magistrate, the High Court proceeded to determine the application on merit. Clearly, since the proceedings of the predecessor magistrate remained intact, we find, with respect that the High Court

should not have proceeded to determine the application, given the pendency of the ruling of the predecessor magistrate.

In our considered view, the proper procedure is that the High Court should have returned the case to the committal court so that the predecessor magistrate, who had reserved his ruling, could write and deliver it. In case he had, for any reason, ceased to have jurisdiction, any other magistrate with competent jurisdiction could take over subject to compliance with the law as stated above - See for example the case of **Adam Kitundu v. The Republic,** Criminal Appeal No. 360 of 2014 (unreported). This ground therefore suffices to dispose of the appeal.

On the basis of the above stated reasons, we hereby allow the appeal. The proceedings of the High Court from the stage where the order of Magoni, SR.M. was quashed were erroneously conducted. The same are hereby quashed. The decision which ordered striking out of the 1st count and transfer of the record of the committal court to the District Court of Igunga is set aside. It is ordered that the record of the committal court shall be remitted to that court, for the predecessor magistrate or any other magistrate with competent jurisdiction, subject to the law as stated above,

to proceed to compose and deliver the ruling and, as the case may be, to conduct committal proceedings.

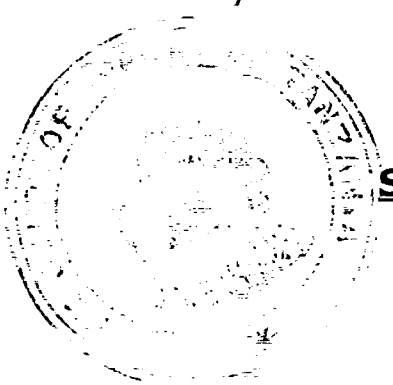
DATED at **TABORA** this 29th day of April, 2016.

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.



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