IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUANDA,J.A., MWARIJA,J.A., And MKUYE, J.A.,)

CRIMINAL APPEAL NO. 393 OF 2015

JOSEPH STEVEN GWAZA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Muruke, J)

Dated 4th day of March, 2015
in
Criminal Session Case No. 1 of 2011

JUDGMENT OF THE COURT

24th April & 31st May, 2017

LUANDA, J.A.:

The above named appellant was formally charged in the High Court of Tanzania (Dar es Salaam Registry) with Trafficking in Narcotic Drugs Contrary to Section 16(1) (b) (i) of the Drugs and Prevention of Illicit Traffic in Drugs Act, Cap. 95 RE 2002 after he was committed for trial by the Dar es Salaam Resident Magistrate's Court sitting at Kisutu. The case was assigned to Muruke, J. The learned trial judge conducted the trial. She heard both the prosecution and defence case. She also summed up the case to the

gentlemen assessors and took their opinions on 10/7/2014. She then reserved the judgment on a future date but she committed herself that the said judgment shall be delivered not later than 30/9/2014. For one reason or another the judgment could not be delivered as promised.

On 26/2/2015, a period of more than six months, Muruke, J could not deliver the judgment; it was not ready. On that day the learned trial judge ordered the case to come on 4/3/2015 for necessary orders. But, the record does not show the reason why the learned trial judge made that order. Indeed on that day the Director of Public Prosecutions (the DPP) through Mr. Edwin Karokola learned Principal State Attorney informed the trial High Court that the Republic was not interested to prosecute the case. He prayed, in terms of S. 91(1) of the Criminal Procedure Act, Cap. 20 R E 2002 (the CPA) to withdraw the case. The High Court sustained the application. The charge was withdrawn and the appellant was discharged. The appellant was aggrieved by the withdrawal of the case at the instance of the DPP at that stage. This is because the

same charge was filed again at the Dar es Salaam Resident Magistrate's Court at Kisutu and currently he is a remand prisoner, hence this appeal.

In his first memorandum of appeal he filed on 26/8/2015 the appellant raised five grounds of appeal. But on 15/3/2017 he filed supplementary grounds of appeal containing two grounds. He indicated therein that the additional grounds were filed pursuant to Rule 73(1) of the Court of Appeal Rules, 2009 (the Rules). Since the Republic did not object to it, we allowed him also to argue his supplementary grounds. However, having carefully read the grounds of appeal, we think the seven grounds raised in the first and the supplementary memoranda of appeals, can be condensed into two grounds namely:-

(1) That the learned trial judge erred in law and fact in granting the DPP leave to withdraw the case under S. 91 (1) of CPA when the case was already heard and adjourned for delivery of judgment.

(2) That the DPP was wrong to institute a new charge against the appellant basing on the same facts as the court was functus officio.

In this appeal, the respondent/Republic had the services of Mr. Edwin Kakolaki, Principal State Attorney assisted by Ms Veronica Masikila, learned Senior State Attorney. The appellant was unrepresented and so he fended for himself.

Arguing his appeal, the appellant said the learned trial judge was wrong to allow the DPP to enter a *nolle prosqui* at that stage when the case was adjourned for judgment writing. The DPP should have left it to the trial High Court to decide. He went on to say that the decision of the DPP goes contrary to the spirit of S. 8 of The National Prosecution Service Act, Cap. 430 which, *inter alia,* demands that the DPP should not abuse the legal process. By instituting a similar charge No. 30 of 2015 at Kisutu Court it amounts to abuse of legal process. He went further and said the High Court is *functus officio* to entertain the same matter. He prayed that his appeal be

allowed by quashing the order of Muruke, J. and remit the case for judgment writing.

In reply Mr. Kakolaki said the judge was not wrong in granting the order of withdrawal as that is permissible under S. 91(1) of CPA. The Section empowers the DPP to withdraw the case before the delivery of judgment and the High Court had no reason whatsoever to refuse the application.

Responding whether a person discharged under S. 91(1) of CPA can be recharged, Mr. Kakolaki said that is also permissible under the same section. Turning to the matter to be *functus officio,* he said it is not. The Court is *functus officio* when already it had handed down a decision. Since no decision was made, the High Court was not *functus officio*.

Reacting to S. 8 of The National Prosecution Service Act. Cap 430, Mr. Kakolaki said there is no such abuse of legal process with a view to causing injustice. It was at that stage where the Court

prompted him as to why they took such a step. Mr. Kakolaki told the Court that they discovered there is a confusion or mix up as to the Court which tried the appellant. Mr. Kakolaki said that in this case the record shows that "Economic Case No. 1 of 2011" and "Criminal Session Case No. 1 of 2011" were referred to interchangeably. The two are not one and the same thing. There are legal requirements and implications involved. For instance in Economic offences, normally the consent of the DPP is required before the trial commences. To commence hearing an economic case without the consent of DPP is a fatal irregularity.

It is from the foregoing that there was a need to make sure that justice is done, hence the withdrawal. He said there is no abuse of legal process as contended by the appellant. The appeal has no merit. The same should be dismissed, he concluded.

From the facts of this case, it is clear that the High Court withdrew the charge at the stage of judgment writing. The issues for decision and determination are:-

(i) Whether the withdrawal at the stage when judgment is pending and therefore not delivered is sanctioned by law.

(ii) If the above issue is answered in the affirmative whether the withdrawal is a bar to recharge the appellant in the subsequent case on the same facts.

(iii) Whether the High Court was functus officio.

The starting point is section 90 of the CPA which enumerates the general powers of the DPP and how he should exercise those powers. The section reads:-

90- (1) The Director of Public Prosecutions shall have powers in any case in which he considers it desirable so to do:-

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence

alleged to have been committed by that person;

(b) to take over and continue any criminal proceedings that have been instituted or undertaken by any other person or authority; and

(c) ***to discontinue any criminal*** *proceedings instituted or undertaken by him or any other authority or person.* [Emphasis supplied]

(2) *The powers of the Director of Public Prosecutions under subsection (1) of this section may be exercised by him in person or through officers of his department acting in accordance with his general or special instruction.*

(3) The powers conferred on the Director of Public Prosecutions by paragraphs (a) and (b) of subsection (1) shall be vested in him to the exclusion of any other person or authority, save that where any other person

or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the Court.

(4) In the exercise of his powers under this Act the Director of Public Prosecutions shall have regard to the public interest, the interests of justice and the need to prevent abuse of the legal process.

On the other hand s. 91(1) of the CPA explain specifically at what stage in the proceedings the DPP can exercise his powers to discontinue any criminal proceedings. S. 91(1) of the CPA reads:-

"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 recognizances 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".*** [Emphasis supplied]

From the above extract, it is clear that the DPP has powers to enter a *nolle prosequi* to terminate any criminal proceedings at any stage before verdict or judgment is given. Upon *nolle prosequi* entered, the court concerned shall discharge the accused person. But such discharge is not a bar to any subsequent proceedings against him based on the same facts. This is what took place in this

case. So the withdrawal of the charge at the stage of judgment writing is sanctioned by law. And further the withdrawal is not a bar to any subsequent proceedings based on the same facts. Furthermore, in view of the explanation offered by Mr. Kakolaki we are satisfied that the DPP did not act *mala fide.* It was done in order to see justice is being done. That is in line with the guiding principles as spelt out under S. 8 of the National Prosecutions Service Act, Cap. 430 which reads:-

> *8. In the exercise of powers and performance of his functions, the Director shall observe the following principles:-*
>
> *(a) the need to do justice;*
>
> *(b) the need to prevent abuse of legal process, and*
>
> *(c) the public interest.*
>
> *(d) Control of Criminal Proceedings.*

Indeed S. 8 of the above cited law is a replica of sub-section (4) of Section 90 also cited supra.

Next is the issue of *functus officio.* At what point in time a court becomes *functus officio.* In **Kamundu V R** [1973] E A 540 the then Eastern Africa Court of Appeal held thus:-

> *" A Court becomes functus officio when it disposes of a case by a verdict of guilty or by passing sentence or making some orders finally disposing of the case".*

In **Bibi Kisoko Medard V Minister for Lands, Housing and Urban Development and Another** [1983] TLR 250 the High Court (Mwakibete, J) gave a description which, in our view reflects a correct position. He held that:

> *"In matters of judicial proceedings once a decision has been reached and made known to the parties; the adjucating tribunal thereby becomes functus officio."*

In our case, the High Court is yet to dispose of the case by a verdict of guilty or otherwise. It cannot be said therefore that the High Court is barred from entertaining the case. The High Court was and still yet to discharge its duty. It is not *functus officio.*

In fine, the appeal is devoid of merit. The same is dismissed.

Order accordingly.

DATED at **DAR ES SALAAM** this 25th day of May, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL