

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TABORA**

**(CORAM: MWANGESI, J.A., MWANDAMBO, J.A., And LEVIRA, J.A.)**

**CRIMINAL REVISION NO. 2 OF 2018**

**THE REPUBLIC ----- APPLICANT**

**VERSUS**

- 1. ELIAS MICHAEL @ LUHIYE-----1<sup>st</sup> RESPONDENT**
- 2. MASHAKA RAJABU-----2<sup>nd</sup> RESPONDENT**
- 3. MOHAMED HAMISI ----- 3<sup>rd</sup> RESPONDENT**
- 4. MHOZYA DOTTO-----4<sup>th</sup> RESPONDENT**

**(Revision from the proceedings and order of the High Court of  
Tanzania at Tabora)**

**(Utamwa, J.)**

**dated the 9<sup>th</sup> day of February, 2017**

**in**

**Criminal Sessions Case No. 71 of 2015 and No. 3 of 2016**

**RULING OF THE COURT**

17<sup>th</sup> & 23<sup>rd</sup> November, 2020

**MWANGESI, J.A.:**

In Criminal Sessions Case No. 71 of 2015 and No. 3 of 2016 in the High Court of Tanzania at Tabora District Registry; both of which had originated from murder case No. 2 of 2014; which was instituted in the District court of Urambo, the respondents, ELIAS MICHAEL @ LUHIYE, MASHAKA RAJABU, MOHAMED HAMIS and MHOZYA DOTTO, stood charged

with the offence of murder contrary to the provisions of section 196 of the Penal Code Cap 16 R.E. 2002 ( now 2019) **(the Code)**. It was the case for the prosecution that on the 23<sup>rd</sup> day of December, 2013 during night hours, at the village of Mbangale in Songambebe ward within Urambo District in the Region of Tabora, all the respondents jointly and together murdered one ERASTO S/O CHARLES.

All respondents were committed for trial by the High Court of Tanzania at Tabora in the first instance, on the 14<sup>th</sup> day of August, 2015 leading to registration of their case as Criminal Sessions Case No. 71 of 2015. On the 28<sup>th</sup> September, 2016 they appeared before honourable Mrango, J. (hereinafter to be referred to as the previous Judge), where they all entered a plea of not guilty to the information which was put to them. Thereafter, a preliminary hearing was conducted by the Judge, to establish matters which were not in dispute, before the case was adjourned to a session which would be set for their trial.

On the 1<sup>st</sup> March, 2016 when the case was called on for their trial, the respondents appeared before the very Judge who took their pleas and conducted the preliminary hearing. Nonetheless, before the trial of their

case could commence, an attention was drawn to the previous Judge by the prosecuting State Attorney, that the committal proceedings of the case which was before him, were problematic on account that they did not tally with the information which was lodged in the High Court by the Director of Public Prosecutions (the DPP). The variance was on the number of witnesses to be called by the DPP during trial of the case and the exhibits which would be tendered. In the circumstances, the learned State Attorney argued that the case was not ripe for trial. He therefore, requested the previous Judge to direct for fresh committal proceedings.

Upon both the learned State Attorney and the learned defence counsel, making their submissions on the pointed out anomaly, the previous Judge retired to compose his ruling in which he agreed with the learned State Attorney that indeed, the committal proceedings were improper. He therefore made the following orders which read *verbatim* that: -

*"One, the deputy District Registrar of the High Court of Tabora, to remit back the subordinate court record to Urambo District court so as to conduct the committal proceedings as per the information filed by the Director of Public Prosecutions as provided under section 244 of the Criminal Procedure Act Cap*

*20 R.E 2002 and commit the accused persons to this court as provided under section 246 (1) (2) and (3) of the Criminal Procedure Act Cap 20 RE 2002.*

***Two,** The High Court record in Criminal Session No. 71 of 2015 is hereby marked closed and the Deputy Registrar is hereby directed to open a new case file from the information filed by the Director of Public Prosecutions.*

***Three,** it is further directed that plea and preliminary hearing shall be conducted afresh in the new case file after the proper committal proceedings from Urambo District court."*

After the District court of Urambo had expeditiously but partially complied with the directives of the previous Judge, on the 21<sup>st</sup> March, 2016 re-committed the respondents for trial before the High Court whereby, Criminal Sessions Case No. 3 of 2016 was opened. This time, the respondents' case was assigned to Honourable Utamwa, J. (thenceforth, referred to as the latter Judge), for plea taking and conduct of the preliminary hearing.

When the respondents appeared before the latter Judge on the 3<sup>rd</sup> March, 2016 for plea taking and conduct of the preliminary hearing, at the

very outset, the prosecuting State Attorney presented to the Court a *nolle prosequi* wherein, he prayed to withdraw the charge against the second, third and the fourth respondents, a prayer which was granted. In terms of the provisions of section 91 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (**the CPA**), the second, third and fourth respondents, were discharged and set at liberty.

With regard to the remaining respondent, ELIAS MICHAEL @ LUHIYE, there cropped yet another setback. The learned State Attorney, raised a concern in regard to the orders of re-committal proceedings, re-plea taking and re-preliminary hearing, which had been issued by the previous Judge in Criminal Sessions Case No. 71 of 2015, which still subsisted. For that reason, he argued that the matter was improperly before the Court. On this account, the latter Judge invited the learned State Attorney and the counsel for the respondent, to address him on the status of the proceedings which were before him.

From the submissions made by the counsel of either side, the latter Judge was of the view that there was no way in which the proceedings of the case before him could proceed. This was from the fact that the

proceedings in Criminal Sessions Case No. 3 of 2016 which was before him, co-existed with Criminal Sessions Case No. 71 of 2015 both of which were in respect of the same offence against the same accused person. At that point, the latter Judge found himself stuck and as a result, he resolved to forward the records of both Criminal Sessions to this Court so that it could exercise its revisional powers to issue the appropriate direction. In so doing, the latter Judge placed reliance on the decision of the Court in **the Republic vs Asafu Tumwine**, Criminal Revision No. 1 of 2006 (unreported).

Upon the record of the proceedings reaching the office of the honourable Chief Justice, his Lordship basing on the stalemate of the proceedings in Criminal Sessions No. 3 of 2016 expressed by the latter Judge, directed for the opening *suo motu* of revisional proceedings in terms of the provisions of section 4 (3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (now 2019) (**the AJA**), for consideration by the Court.

When the application was called on for hearing before us on the 17<sup>th</sup> November, 2020 Mr. Tito Ambangile Mwakalinga, learned State Attorney, entered appearance to represent the applicant, whereas, the respondent enjoyed the services of Mr. Kamaliza Kamoga Kayaga, learned counsel.

Upon the learned State Attorney taking the floor to address us on the tenability of the application, he pegged his submission on two issues which arose from the orders which were issued by the previous Judge in Criminal Sessions Case No. 71 of 2015, that is: -

***First**, whether or not, it was legally proper for the previous Judge, to close the proceedings in Criminal Sessions Case No. 71 of 2015, which were before him and he had already taken the pleas of the accused and conducted the preliminary hearing.*

***Second**, whether or not, it was legally sound for the previous Judge, to direct for fresh committal proceedings to the respondent, in murder case No. 2 of 2014 while the previous committal proceedings as well as the proceedings in the High Court regarding the said case, still subsisted."*

Starting with the first issue, Mr. Mwakalinga submitted that after the previous Judge had discovered that there were shortcomings in the committal proceedings concerning Criminal Sessions Case No. 71 of 2015 which he was handling at the hearing stage, as reflected on page 38 of the record of appeal, he ought to have stopped there and forwarded the record of the proceedings to the Court of Appeal, for guidance on the way forward.

In his view, the previous Judge lacked the requisite mandate to close the proceedings which were before him and that, the order which he made was illegal.

With regard to the second issue, it was the submission of Mr. Mwakalinga, that the previous Judge, was as well legally improper to order for fresh committal proceedings to the respondent in murder case No. 2 of 2014, because the previous committal proceedings were still subsisting as they had not been nullified. Furthermore, even the proceedings of the High Court concerning the said previous committal proceedings were still in existence.

In view of the irregularities which he pointed out above, Mr. Mwakalinga implored us to invoke our revisional powers under the provisions of section 4 (3) of **the AJA**, to quash the proceedings in Criminal Sessions Case No. 71 of 2015 and set aside the resultant orders which were issued by the previous Judge.

Submitting on the proceedings in Criminal Sessions Case No. 3 of 2016, the learned State Attorney, was at one with the latter Judge that he was correct in referring the record of the proceedings to this Court so that



it could exercise its revisional powers for guidance, because there was no way in which he could have dealt with the case placed before him, which co-existed with Criminal Sessions Case No. 71 of 2015 that was dealt with by his learned brother enjoying concurrent jurisdiction. He therefore urged us to invoke our revisional powers under the provisions of section 4 (3) of **the AJA**, to quash the proceedings in Criminal Sessions No. 3 of 2016 on account that it was a nullity for emanating from illegal orders. In lieu thereof, he asked us to direct for the conduct of fresh committal proceedings to the respondent in murder case No. 2 of 2014 in strict compliance with the law, and commit him for trial before the High Court.

On his part, Mr. Kayaga on behalf of the respondent, was in full agreement with his learned friend, that there were serious irregularities occasioned in the proceedings leading to Criminal Sessions No. 3 of 2016, and that the latter Judge had no option other than forwarding the proceedings to this Court for revision in accordance to the law. And, in addition to the irregularities pointed out by his learned friend, Mr. Kayaga, also pointed out that the committal proceedings leading to Criminal Sessions No. 3 of 2016, were conducted in the very case file where the previous committal proceeding had been done, of which, the committing magistrate

was *functus officio*. He thus reiterated the prayers presented by his learned friend, with nothing more.

In the light of what has been submitted by the counsel from either side above, the germane issue for determination is whether the application for revision before us is tenable. The basis of this issue is founded on the previous experience by the Court, whereby it has sometimes been the trend of the High Court to casually refer matters which are not fit for revision to this Court, under the cover of seeking guidance or direction on the way forward. Among such instances, was the case of **Sharrif Abdallah Salim and Another Vs Mahsen Abdallah Salim**, Civil Revision No. 11 of 2016 (unreported), where upon being faced with a snag that his learned brother might have handled a land issue which he lacked jurisdiction, the Judge referred the matter to this Court for direction and guidance thus: -

*“The Deputy Registrar to prepare the court record to be placed before the Court of Appeal for direction and guidance”*

This Court, displeased with such trend of operation, seized the chance to discourage it with the following words: ;

*"With due respect, we expect the High Court to work out challenging issues on their own. It is not appropriate for the High Court to expect the Court of Appeal to be an extension of research facility at its disposal. It is axiomatic to say that when hearing and determining matters before them judges must look up all statutes and regulations that apply to matters before them."*

See also: **Maulid Juma Vs Ismail Mrindoko**, Civil Appeal No. 198 of 2016 and **the Republic Vs Rashid Salim Mohamed @ Rashid Ramadhan Mohamed**, Criminal Revision No. 1 of 2017 (both unreported), just to mention but a few.

To answer the issue which we posed above in respect of the application under scrutiny, we propose to start by considering first, the circumstances which encountered the previous Judge in Criminal Sessions Case No. 71 of 2015. It is reflected on pages 45 and 46 of the record of appeal, that the information contained in the committal proceedings, was at variance with the information which was contained in the information/charge regarding the murder case against the respondent; which was filed in the High Court by the Director of Public Prosecutions

(DPP). While the DPP indicated in the information that the prosecution would call six witnesses during trial, in the committal proceedings, there were listed eleven witnesses. Furthermore, while the DPP indicated in the information that three exhibits would be tendered, in the committal proceedings there were nil exhibits. Under such situation, we are convinced to sail in the same boat with the learned counsel that the previous Judge, was correct in holding that the committal proceedings before him were improper.

Having correctly held that the committal proceedings in the case which he had started to hear were defective, the subsequent task which lay to the previous Judge, was as to what was to be the way forward. Mr. Mwakalinga, argued that the previous Judge had to stop there and forward the proceedings to the Court of Appeal for direction. We agree with him that under the circumstances, there was no way in which the previous Judge, could have amended his own proceedings. As to the way forward, two options were open to him. One, he could have advised the State Attorney to seek the intervention of this Court by lodging an application for revision, in terms of section 4 (2) of **the AJA**. In the alternative, in line with what was held in **the Republic Vs Nelson Mbalanji and Three Others**, Criminal Revision No. 4 of 2015 (unreported), he could have referred the

case to the Court of Appeal, to exercise its revisional powers. The act by the previous Judge to close the proceedings which were before him, was legally not sound.

In the same vein, we agree with the learned State Attorney, that the direction by the previous Judge, for the conduct of fresh committal proceedings, was legally improper. It was faulty in twofold. In the first place, it was improper to order for fresh committal proceedings, while the previous committal proceedings were still subsisting. And, secondly, it was also legally not sound to order so, because the proceedings in the High Court, in respect of the previous committal proceedings, still subsisted.

As regards to the circumstances pertaining to the proceedings in Criminal Sessions Case No. 3 of 2016, it is our view that the same were a nullity for the reason that they emanated from committal proceedings which were improper as discussed above. That being the case, the latter Judge was correct in hesitating to entertain them. Like his learned brother in the previous case, there were two options on the way forward. In opting to forward the record to this Court to exercise its revisional powers, he was correct in line with the holding in **the Republic Vs Nelson Mbalanji and**

**three Others** (supra) and **the Republic Vs Asafu Tumwine**, Criminal Revision No. 1 of 2006 (unreported).

On account of what we have highlighted above, we are satisfied that the illegality and the resulting impropriety of the two cases in Criminal Sessions No. 71 of 2015 and No. 3 of 2016, inevitably calls for the intervention of this Court by way of revision under section 4(3) of **the AJA**. This leads us to answer the issue which we posed at the beginning in the affirmative, that Criminal Revision No. 2 of 2018 is tenable before the Court.

Having held so above, we now invoke the revisional powers bestowed on us by the provisions of section 4 (3) of **the AJA**, by quashing both proceedings in Criminal Sessions Case No. 71 of 2015 and No.3 of 2016 and set aside the orders which were issued by the previous Judge. In lieu thereof, we direct that fresh committal proceedings in respect of murder case No. 2 of 2014 which was instituted in the District court of Urambo, be expeditiously conducted in strict compliance with the provisions of sections 245, 246 and 247 of **the CPA**, and commit the respondent for trial before the High Court of Tanzania at Tabora according to the law.

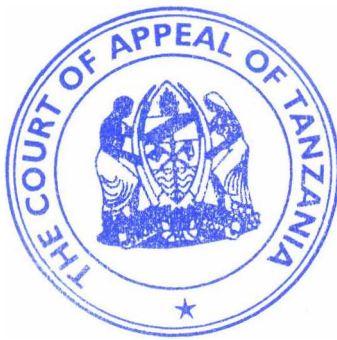
Before we conclude, we would wish to say a word on the whole process leading to the situation under which the respondent has been put in the instant case. It is apparent that the irregularities which were occasioned resulting to prolonged trial, have so far seriously affected the rights of the respondent. The State Attorney tried to shift the blames to the committal court, that it was the one which did not act in accordance to the stipulation under the law. While to some extent we subscribe to such averment, nevertheless, the prosecution on its part, cannot avoid to bear part of the blames. It is common knowledge that they were the ones who lodged the information in the High Court. Thereafter, they participated in the committal proceedings at the committal court.

The foregoing apart, they participated during the plea taking and preliminary hearing, while they were already in possession of the committal proceedings for a reasonable time. Were they to be cautious and serious with their work, undoubtedly, they would have discovered the anomaly quite long and done the needful. We urge each party in the administration of criminal justice, to be serious with the obligations which they are expected by the public, to perform in accordance to law.

That said, we reiterate the order which we gave above, and further order that the process in conducting committal proceedings to the respondent and the trial of his case, be expedited because his case has unnecessarily remained pending in court for quite a long time.

Order accordingly.

**DATED** at **TABORA** this 23<sup>rd</sup> day of November, 2020.




S. S. MWANGESI  
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

The Ruling delivered this 23<sup>rd</sup> day of November, 2020 in the presence of Mr. Tito Ambangile Mwakalinga, learned State Attorney for the Applicant/Republic and Mr. Kamaliza Kayaga, learned counsel for the respondents is hereby certified as a true copy of the original.

  
D.R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**