

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 549 OF 2019

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

**1. JOSEPH s/o MSETI @ SUPER DINGI
2. RAPHAEL s/o ANGAYO
3. JOHN s/o MICHAEL @ MACHO
4. OMARY s/o JUMA @ SUMBWI @ TALL** }**RESPONDENTS**

(Appeal from the Ruling and Order of the High Court of Tanzania at Mwanza)

(Mgeyekwa, J.)

**dated the 19th day of September, 2019
in
Criminal Sessions Case No. 162 of 2016**

JUDGMENT OF THE COURT

16th & 18th December, 2020

KEREFU, J.A.:

The respondents herein stand charged jointly with the offence of murder contrary to sections 196 and 197 of the Penal Code, [Cap. 16 R.E 2019] before the High Court of Tanzania at Mwanza (Mgeyekwa, J.) in Criminal Sessions Case No. 162 of 2016.

It was alleged that, on 18th April, 2014 at about 01:00 hours at Rwegasore Street within Nyamagana District in Mwanza Region, the respondents murdered one Ryoba s/o Mwita Kigocha.

Following those allegations, the respondents were arrested and arraigned in court to answer their charge. However, the respondents pleaded not guilty to the charge. Hence the trial commenced.

During the preliminary hearing which was conducted on 5th March, 2018, the prosecution side, among other things, indicated that it will summon twenty four (24) witnesses together with six (6) exhibits including both, documentary and physical evidence. On the other side, the respondents indicated that they will rely on their own evidence and will not call any witness. They also indicated that they will produce four (4) documentary exhibits (PF3).

The prosecution side opened its case by parading their witnesses. On Wednesday, 17th September, 2019 when the trial was still in progress and after the prosecution's eighth witness one Pastoru Maboto (PW8) has testified, Ms. Mwamini Fyeregete, learned State Attorney who represented the appellant sought leave, which was granted, to submit a notice to call

additional witness and the learned trial Judge ordered that the prosecution case will be closed on Thursday, 19th September, 2019. On that date, when the said notice was submitted, it was objected to by the learned counsel for the respondents on account that it was submitted contrary to the provisions of section 289 (2) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (the CPA) for failure to indicate physical address of the said witness and that, his statement was neither availed to the respondents during the preliminary hearing nor were the respondents given reasonable notice to that effect.

The learned trial Judge upheld the objection and disregarded the said notice. As such, Ms. Fyeregete, prayed for an adjournment of hearing of the case to allow the prosecution side to summon the remaining witnesses to testify before the court. Both prayers were again objected to by the learned counsel for the respondents who argued that the prosecution had adjourned the hearing of the case several times and that on 17th September, 2019 the court issued an order for the last adjournment.

In her ruling, the subject matter of this appeal, the learned trial Judge upheld the objection raised by the learned counsel for the

respondents and declined to grant the prosecution's prayer by stating that on 17th September, 2019 when the court issued an order for the last adjournment the prosecution side did not object. On that account the learned trial Judge found it prudent to close the prosecution case and ordered that a ruling on whether or not the respondents had a case to answer would be delivered on 20th September, 2019.

Aggrieved, the appellant has lodged this appeal with one ground that:-

"The learned trial Judge erred in law to close the prosecution case while it is not the duty of the court to close the prosecution case."

At the hearing of the appeal, the appellant was represented by Mr. Hemedi Halidi Halfani, learned Senior State Attorney, whereas the respondents enjoyed the services of Mr. Constantine Mutalemwa, learned counsel. It is noteworthy that no written submissions were filed by the parties and they thus addressed the Court under Rule 106 (10) (b) of the Tanzania Court of Appeal Rules, 2009 as amended.

Submitting in support of the ground of appeal, Mr. Halfani faulted the procedure adopted by the learned trial Judge of closing the prosecution case. He argued that such an act was contrary to the provisions of section 293 of the CPA. To amplify on his argument, he referred us to pages 161 to 167 of the record of appeal and argued that, on 5th March, 2018, during the preliminary hearing the prosecution side, among other things, indicated that it would summon twenty four (24) witnesses and on 19th September, 2019 after only eight witnesses had testified and the prosecution prayed for an adjournment to summon the remaining witnesses, the trial Judge un-procedurally closed the prosecution case and issued an order for delivery of a ruling on the no case to answer.

It was his further argument that the order given by the learned trial Judge prejudiced the appellant as she was denied the right of calling the remaining witnesses to prove the case. He argued further that such an order has vitiated the entire trial and had portrayed that the trial Judge was not impartial. Based on his submission, Mr. Halfani urged us to nullify the entire proceedings of the trial court, quash the order made thereto and order for a retrial before another Judge.

Upon being probed by the Court on whether the issue of impartiality of the learned trial Judge was part of the ground of appeal, Mr. Halfani, though conceded that the said issue was not raised as a ground of appeal, he insisted that the act of closing the prosecution's case un-procedurally depicted an element of not being impartial.

In response, Mr. Mutalemwa, at the outset declared his stance of supporting the appeal and he associated himself with the submission made by Mr. Halfani. Relying on the decision in the case of **Frank s/o Mgala and 2 Others v. Republic**, Criminal Appeal No. 364 of 2015 (unreported), Mr. Mutalemwa added that, after the alleged several adjournments of the prosecution's case, the proper course which was supposed to be taken by the trial Judge, was to exercise the court's inherent powers to dismiss the charge and discharge the respondents.

However, and upon further reflection on the way forward proposed by his learned colleague, Mr. Mutalemwa, urged the Court to only quash the impugned order of the court and remit the matter to the trial court for continuation of the trial, before a different Judge.

On our part, having examined the record of appeal and considered the submissions made by the learned counsel for the parties, we agree with them that it was improper for the learned trial Judge to close the prosecution's case but we do not agree with Mr. Halfani that such an irregularity affected the entire proceedings. We shall give our reasons.

It is on record and as submitted by Mr. Halfani that, on 5th March, 2018, during the preliminary hearing the prosecution side, among other things, indicated that it will summon twenty four (24) witnesses to prove the case against the respondents. On 19th September, 2019 after the prosecution's eighth witness had testified and the learned trial Judge had already issued an ultimatum on 17th September 2019 that no further adjournment would be entertained and allowed, the prosecution side prayed for an adjournment to summon the remaining witnesses. The said prayer was objected to by the learned counsel for the respondents who argued that the prosecution had caused adjournment of the hearing of the case on several times and that an order for the last adjournment had already been issued. The learned trial Judge upheld the objection raised by the learned counsel for the respondents and outright closed the

prosecution case while scheduling a ruling on a no case to answer on 20th September, 2019. Specifically, in her ruling found at pages 166 – 167 of the record of appeal, the learned trial Judge stated that:-

"...This court has adjourned the hearing several times for failure of the prosecution side to summon and call witnesses to testify before this court. The hearing of this case started on 09/09/2019 and as per criminal session schedule, hearing was set for 4 days but to date 19/09/2019 this court is still proceeding with hearing of the same case. Three times the hearing was adjourned and on 17/09/2019 this court issued a last adjournment the prosecution side was aware and they did not object, but as a result they are still adjourning the hearing without considering the time used by the court and the other side (defence side). This court is responsible to handle the court proceedings for that reason, I think it is prudent to close the prosecution case/hearing.

This court orders that:-

- 1. On 20/09/2019 the court will deliver a ruling on whether there is a case to answer and proceed with the defence case; and*
- 2. Hearing on 20/09/2019."*

From the wording of the above ruling and order, it is thus apparent that the learned trial Judge after having adjourned the hearing of the case several times upon prayers by the prosecution side, and for purposes of controlling the court proceedings, she finally decided to close the prosecution case. The crucial issue is whether the trial Judge was justified to do so.

It is trite position that, a trial court does not have a right to close the prosecution's case. There are numerous authorities to this effect and one of them has been cited to us by Mr. Mutalemwa in his submission. We will however wish to add few more others, such as **Director of Public Prosecutions (DPP) v. Iddi Ramadhani Feruzi**, Criminal Appeal No. 154 of 2011, **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015, **Matimo Sagila and another v. Republic**, Criminal Appeal No. 07 of 2015, **Frenk Benson Msongole v. Republic**, Criminal Appeal No. 72 'A' of 2016 and **Emmanuel Idd Faraja v. Republic**, Criminal Appeal No. 563 of 2016 (all unreported).

Specifically, in **DPP v. Iddi Ramadhani Feruzi** (supra) the Court considered a similar situation, where after several adjournments of about

five months at the instance of the prosecution on allegation that their last witness could not be found, the High Court Judge went ahead and closed the prosecution case. By then, five witnesses had already testified. Dissatisfied with that order, the **DPP** appealed to this Court and the Court held that:-

*"It is settled that the prosecution has control over all aspects of criminal prosecutions and proceedings (Public Prosecutor v. Suleiman and Another [1986] SC, LRC. Crim. 320 followed). **It is not therefore either the court or the defence to determine when the prosecution should close its case, or in respect of the court to make an order for such closure.**" [Emphasis supplied].*

The Court then proceeded to declare that the trial Judge had no powers to order for the closure of the prosecution case. And after quashing and setting aside the impugned order the matter was remitted to the High Court for it to proceed with the hearing from the stage it had reached before the purported closure of the prosecution case.

The rationale of the above position was succinctly expressed in **Abdallah Kondo** (supra) where the Court emphasized that:-

"Indeed, the order to close the prosecution case by court affects greatly the prosecution for it blocks the prosecution from calling witnesses to prove their case."

Similarly, in the case at hand, and as submitted by the learned counsel for the parties, the closure of the prosecution case by the learned trial Judge was improper and it had affected the interests of the prosecution side who had about sixteen (16) remaining witnesses to be summoned to testify before the court to establish its case.

Admittedly, the court is vested with the power of controlling its proceedings and therefore is, in appropriate situations enjoined to avoid unnecessary adjournments. However, in doing so, the move is not to close a party's case but to refuse adjournment, dismiss the charge and discharge the accused person. This principle was echoed by the Court in **Matimo Sagila & Another** (supra) in the following words:-

*"...If the trial Magistrate felt it was improper to adjourn the hearing of that case for whatever reasons, he ought to have dismissed the charge and discharged the accused – see the case of **Republic v. Deemay Chrispin and Others** [1980] T.L.R. 116, a case whose principle was approved by the Court in **Abdallah Kondo's case**."*

Having found that the closure of the prosecution case by the trial court was prejudicial to the prosecution side, we hasten to remark that the impugned order was erroneous. For this reason, we hereby allow the appeal and quash the order of the trial court issued on 19th September, 2019 in respect of the closure of the prosecution's case.

On the way forward, we are mindful of the fact that, in his oral submission, Mr. Halfani, while based on his argument that the act of the learned trial Judge to un-procedurally close the prosecution case depicted element of the learned trial Judge not being impartial, he pressed for an order for a retrial before another Judge. With due respect, we are unable to agree with Mr. Halfani on this point, because the issue on the impartiality or otherwise of the trial Judge was not a ground of appeal. We find that the case of **Frank s/o Mgala** (supra) relied upon by Mr. Mutalemwa on this aspect, distinguishable from the facts of this appeal. In that case, the Court, among other things, considered several irregularities found in the trial court's proceedings, including the plea of the accused persons, which is not the case herein. It is therefore, our considered view that, since the rest of the proceedings were not complained of by the

appellant in this appeal, the impugned order of the trial court only affected the prosecution's rights to call its remaining witnesses.

In view of the aforesaid, we remit the case file to the High Court and order that the trial be continued against the respondents from the stage at which the prosecution case was erroneously closed by the trial court.

DATED at Mwanza this 18th day of December, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 16th day of December 2020, in the Presence Mr. Hemedi Halidi Halfani, learned Senior State Attorney for the Appellant/Republic and Present Mr. Constantine Mutalemwa, learned Counsel for the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "G. H. Herbert", written over a faint circular stamp.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL