IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 217 OF 2019

D.P.P .....APPELLANT

VERSUS

1. **BOOKEEM MOHAMED @ ALLY**
2. **ALLY KHAMIS HOSSEIN @ GULABAA**
3. **MOHAMED HASSAN @ TINDE**
4. **MUSSA JOSEPH @ YALED**
5. **MOHAMED IBRAHIM @ HASSAN ADAM**
6. **SALIM CLEOPHACE RWABUYAGALA**
7. **RAJABU JUMA MZEE**
8. **OMARY ABDALLAH @ KISANDU**

.....RESPONDENTS

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Rumanyika, J.)

dated the 13th day of August, 2019

in

Criminal Revisions No. 10, 11,12,13,14,15,16,17 & 18 of 2019

JUDGMENT OF THE COURT

20th April, & 7th May, 2021

MKUYE, J.A.:

The respondents, Bookem Mohamed @ Ally, Khamis Hossein @ Gulabaa, Mohamed Hassan @ Tinde, Mussa Joseph @ Yaled, Mohamed Ibrahim @ Hassan Adam, Salim Cleophase Rwabuyagala, Rajabu Juma Mzee and Omary Abdallah @ Kisandu (hereinafter to be referred to as the respondents) were arraigned before the Resident Magistrate's Court

of Mwanza at Mwanza on two counts. In the 1st count all the respondents were charged with conspiracy to commit an offence contrary to section 24 (2) and 27 (c) of the Prevention of Terrorism Act, No. 21 of 2002 (the Prevention of Terrorism Act); and in the 2nd count, the first respondent alone was charged with the offence of arranging a meeting in support of terrorist group contrary to section 26 (1) (c) of the Prevention of Terrorism Act.

In the 1st count, it was alleged that all the respondents on diverse dates between 1st September, 2013 and 24th October, 2015 at Mabatini Posta "B" area within Nyamagana District in the City and the Region of Mwanza and at various other places within the United Republic of Tanzania, did conspire with other people not before the Court to commit offences under the Prevention of Terrorism Act, No. 21 of 2002 to wit; to carry out attacks against police stations along with other security installations within the United Republic of Tanzania.

In the 2nd count, involving the 1st respondent alone, it was alleged that Bookem Mohamed @ Ally on diverse dates between 1st September, 2013 and 24th October, 2015 at Alafa Mosque located at Mabatini Posta "B" area within Nyamagana District in the City and Region of Mwanza

and various other places within the United Republic of Tanzania, knowingly arranged for sermon meeting to be addressed by Ibrahim Logo and Abuu Ismail who belong to Al-Shabaab Islamiya, a terrorist group.

As the charge involved offences under the prerogative of the High Court, it was on 16th December, 2015, filed at the Resident Magistrate's Court for purpose of conducting committal proceedings, thus, it was registered as Preliminary Inquiry No. 185 of 2015. The committal proceedings commenced on 17th December, 2015, whereupon the charge was read over and explained to the respondents but were not required to enter any plea. Since then up to 22nd June 2019 the matter had been mentioned and adjourned several times for the reason that the investigation was incomplete.

On the basis of this state of affairs, on 24th June 2019 the Hon. Judge-in-charge of the High Court at Mwanza opened, *suo motu*, revision proceedings and consolidated Criminal Revision Cases Nos. 10,11,12,13,14,15,16,17 and 18 of 2019 as they contained offences of the same nature.

On 2nd August, 2019 the Consolidated Criminal Revision cases were heard by the High Court whereby the Director of Public Prosecutions (DPP) (the appellant herein) was represented by Mr. Castuce Ndamugoba, learned Senior State Attorney assisted by Ms. Mwamini Fyeregete and Ms. Lilian Meli, learned Senior State Attorney and learned State Attorney respectively. On the other hand, the respondents were represented by Messrs Constantine Mutalemwa, Heri and F. Mtewele, learned advocates.

Upon hearing both parties, the learned trial Judge composed a ruling and, in the end, he ordered and directed the committal courts to either admit the respondents (accused persons) to bail or dismiss the charge and discharge them within a period of one year with effect from 15th August, 2019, the date of the ruling.

It is noteworthy that the said ruling was issued while the committal proceedings were still going on. For ease of reference, we take the liberty to reproduce the portion of the trial judge's order as hereunder: -

> *"...In the meantime, with the persuasive Kenyan case of* ***Republic v. Robert Zippor Nzilu,*** *Criminal Case No. 14 of 2018 (unreported) with*

lapse of the first two years of the 1st arraignment of the accused, and if need be on application and grant of extension of time not beyond six months, it shall be lawful for the committal court to admit the accused on bail or dismiss the charge and discharge the accused, (See the principle in the case of ***Deeman Crlspin*** *(Supra) as it was approved and adopted by the Court of Appeal of Tanzania in the case of* ***Abdallah Kondo v. R.*** *Criminal Appeal No. 322 of 2015 (unreported). Whichever was the prosecution's option number one. A grace period of one year is, with effect from this 13th August, 2019. The committal courts are so directed and ordered".*

Aggrieved by the decision of the High Court, the appellant has filed an appeal to this Court fronting a memorandum of appeal consisting of two grounds as follows: -

1. *That, the trial judge erred in law and fact to revise this matter in which he had no jurisdiction.*
2. *That, the trial judge erred in law and fact to direct and order the committal courts with lapse of two years of the 1st arraignment of the accused persons, to admit the accused persons charged with unbailable offences to bail or*

dismiss the charge the order which is not within the ambit of the law.

When the appeal was called on for hearing, the appellant was represented by Mr. Castuce Clemence Ndamugoba learned Senior State Attorney assisted by Ms. Mwamini Yoram Fyetegere, learned Senior State Attorney. On their side, all respondents appeared in person and were unrepresented.

When given the floor to expound on the grounds of appeal, Mr. Ndamugoba argued that the High Court Judge did not have jurisdiction to revise the matter as sections 372 and 373 (1) of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA) did not allow him to do so. In elaboration, he contended that in terms of section 372 of the CPA, the powers of revision are limited to illegality, incorrectness and improprieties of the lower court's proceedings, particularly in relation to the sentence, finding or order of the subordinate court. However, he said, according to the High Court's order, the reason for revision was that the respective cases had been long overdue in the subordinate court due to endless investigations and orders of adjournments and that the respondents had been in custody for a long time. He submitted further that the issue that investigations were taking long was not under

the prerogative of the High Court. He referred us to the case of **Damiano Qadwe v. Republic**, Criminal Appeal No. 317 of 2016 (unreported), where this Court underscored the criteria for the High Court to conduct revision under sections 372 and 373 of the CPA. In any case, he stressed that even if the High Court felt imperative to revise anything it had to be under sections 366, 368 and 369 of the CPA or rather it should have powers under those provisions of the law.

Mr. Ndamugoba went a further milestone and argued that in granting any order, the court has a duty to ensure that it is done in accordance with the law. To support his argument, he referred us to the case of **Attorney General v. Dickson Paulo Sanga,** Civil Appeal No. 175 of 2020 (unreported) pg 48 where the Court emphasized that although the judiciary is the only organ of the State with final authority in the administration of justice, the courts have to operate within the confines of the Constitution and in accordance with the law of the land. It was, therefore, his firm view that even if there had been any shortcomings, the High Court had no jurisdiction to do so and urged the Court to find this ground meritorious.

As regards the 2nd ground of appeal on the High Court's order and direction to the subordinate courts limiting the investigations on unbailable offences in two years period and allowing the subordinate courts to grant bail or dismiss the charges, Mr. Ndamugoba reacted that the subordinate courts, have no such jurisdiction on the account that the offences involved were unbailable in terms of section 148 (5) (a) of the CPA. He pointed out that under sections 245 and 248 of the CPA, the subordinate courts with regard to unbailable offences, are mere committal courts and when the investigation is completed, they commit the accused to the High Court which is vested with powers of discharging them.

Otherwise, failure to complete investigations which was the reason for the revision is not a problem of the subordinate court concerned and, in any case, revision could not be used to compel the executive to complete investigations within the time frame prescribed in the order. He argued that, even if the investigation of the cases had taken long, each case has to be taken in accordance with its own circumstances. For those reasons, Mr. Ndamugoba prayed to the Court to allow the appeal.

In reply, all the respondents being laypersons with limited knowledge on legal issues left the matter in the hands of the court to determine having regard to the fact that they have stayed long in custody. The 5th respondent also urged the Court to consider the arguments raised by Mr. Mutalemwa before the High Court in which he argued that the High Court had powers to supervise on regularity in the subordinate courts under section 372 of the CPA. In essence, all the respondents urged the Court not to fault the High Court decision.

Mr. Ndamugoba, given the response of the respondents, had nothing in rejoinder.

Having summarized the whole matter together with submissions from either side, we think, we are now in a position to deliberate on it.

As regards the complaint that the High Court judge lacked jurisdiction to revise the matter, our stating point will be to examine sections 372 and 373 (1) of the CPA which empower the High Court to revise criminal proceedings in the subordinate courts.

Section 372 of the CPA provide as follows: -

> *"The High Court may call for and examine the record of* ***any criminal proceedings*** *before*

> ***any subordinate court*** *for the purpose of satisfying itself as to the* ***correctness, legality or propriety of any finding, sentence or order recorded or passed****, and as to the regularity of any proceedings of any subordinate court".* [Emphases added].

This position of the law was reiterated in the case of **Damiano Quadwe** (supra) which was rightly cited by the learned Senior State Attorney. Also, section 373 (1) (a) of the CPA vests the High Court with revisional powers over criminal proceedings in the subordinate courts, particularly, in accordance with the provisions of sections 366, 368 and 369 of CPA. Under those provisions of the law, the High Court is empowered to alter sentences including enhancing them; suspending the sentences and grating of bail to a prisoner pending the hearing of his appeal; and taking of additional evidence if it is necessary to do so.

On looking at the powers vested in the High Court under those provisions of the law, it seems to us that there must be a finding, order or sentence passed by the subordinate court for the High Court to revise.

In this matter, the High Court revised a number of cases basically on account that investigations had taken long to be completed and that the respondents had been incarceration for quite long. The said court went further to make an order and a direction to subordinate courts to either admit the accused persons (respondents) to bail or dismiss the charge and discharge them while committal proceedings were still conducted in the subordinate court.

In the first place, the question we ask ourselves is whether or not the High Court had jurisdiction on the matter which was still under committal proceedings.

In the case of **Republic v. Dodoli Kapufi and Another,** Criminal Revision No. 1 and 2 of 2008 (unreported), the Court was confronted with an akin scenario. It discussed among other issues whether or not the High Court in the particular circumstances of bail applications has jurisdiction to grant bail while the accused persons had not yet been committed to it and who were before a subordinate court. After a long discussion the Court stated as follows:

> *"... it is difficult to appreciate how the High Court in the instant revision could have the power to*

grant bail to the applicants, pre – committal and in the absence of any committal order under section 246 (1) of the CPA, which would have submitted them to its jurisdiction. Not only that, save for exhibit to the High Court of an information by the D.P.P. under section 93 (1) of the CPA, section 178 creates a bar against the taking of cognizance by the High Court, of a criminal case, unless the same has been properly investigated by a subordinate court and the accused person has been duly committed to it for trial."

Guided by the above cited authority, it is our view that, if the High Court, in **Dodoli Kapufi's case** (supra) was found to have no powers to grant bail to the applicants on a matter which was still under committal proceedings without prior order which could have vested jurisdiction on it, the matter at hand is even more serious. We say so because, **one,** there was no illegality, incorrectness or improprieties which ought to be corrected in terms of section 372 of the CPA. Neither was there any order, finding or sentence which needed to be corrected in terms of section 373 (1) (a) of the CPA. [See also **Domiano Qadwe's** case (supra)]. **Two,** there was no committal order by the

subordinate court as the matter was still in pre-committal state which the High Court was prohibited even to take cognizance of it.

In this regard, we agree with Mr. Ndamugoba that the High Court had no jurisdiction to revise the matter at that stage. Hence, the 1st ground of appeal is allowed.

We now turn to consider the 2nd ground of appeal relating to the order and direction to the committal court to admit on bail the accused charged with unbailable offence after the lapse of two years after their 1st arraignment or to dismiss the charge and discharge the accused. In the first place, in tackling this ground, we think, we need to first refresh ourselves on the nature of the offences the respondents were facing.

As alluded to earlier on, the respondents were charged with offences under the Prevention of Terrorism Act. By their nature, such offences are triable by the High Court and as such have to undergo committal process in subordinate courts before being committed to the High Court after the completion of investigation. During the committal proceedings the law is quite settled that such committal courts have power to grant bail on matters which appear to be bailable for which bail

is not expressly barred by law. This stance was taken in **Dodoli Kapufis'** case (supra) where the Court stated as follows:

> *"It would appear to us that on a true and contextual reading of sections 148 (1) and 148 (5) (a) of the CPA, which are principal provisions governing bail, subordinate courts are empowered to admit accused persons before them to bail for all bailable offences including those triable by the High Court, save those specifically enumerated under section 148 (5) (a) thereof, for which no bail is grantable by any court."*

Having stated clearly the position of the law, we ask ourselves whether the offence the respondents were facing were bailable to enable subordinate courts to admit them to bail as ordered and directed by the High Court. As it was intimated earlier on, all the respondents in the first count were charged with an offence of conspiracy to commit an offence contrary to sections 24 (2) and 27 (c) of the Prevention of Terrorism Act. In the 2nd count, the 1st respondent alone was charged with arranging a meeting in support of terrorist group contrary to section 26 (1) (c) of the same Act. According to section 148 (5) (a) (iv) of the CPA which provides for unbailable offences, the offences under

the Prevention of Terrorism Act are among unbailable offences. We have already said that committal courts have power to grant bail on matters which appear to be bailable for which bail is not expressly barred by law incidentally even those triable by the High Court. The offences to which the respondents were charged are not among them. We therefore, agree with the learned Senior State Attorney that the offences which the respondents stood charged with, being offences under the Prevention of Terrorism Act, are unbailable and that the subordinate courts are not seized with the jurisdiction to grant bail.

On the same ground, the other complaint is that the High Court also ordered the subordinate courts to dismiss the charge after expiration of two years after the accused's 1st arraignment and discharge them. In making such an order the High Court relied on the case of **Abdallah Kondo v. Republic,** Criminal Appeal No. 322 of 2015 (unreported). In the said case, the issue of what could be done in a situation where there are prolonged adjournments resulting from the prosecution was discussed by the Court. In the end, it was resolved that the subordinate court was at liberty to dismiss the charge.

However, we think, the case of **Abdallah Kondo** (supra) is distinguishable to the case at hand for two reasons; **one,** the offence in that case was unnatural offence for which a subordinate court had jurisdiction to try. In the instant matter the offences are under the Prevention of Terrorism Act which the subordinate court has no jurisdiction to try. **Two,** unnatural offence is a bailable offence unlike the offences under the Prevention of Terrorism Act which are unbailable in terms of section 148 (5) (a) (iv) of the CPA. In this regard, the subordinate courts, whether acting as a committal court or not, have no power to dismiss the charge and discharge the accused persons as was directed by the High Court.

We are alive, as was stated by Mr. Ndamugoba that there may be laxity on the part of the investigation for failure to complete investigations within a reasonable time, but, we think, still the court has to operate within the dictates of the Constitution and the laws of the Land. See **Dickson Paulo Sanga's case** (supra). And, in any case, this could not be used as a forum to compel the executive to complete investigations. In the circumstances, we find this ground merited and allow it as well, and vacate the order of the High Court dated 13th August, 2019.

In view of the above discussion, we vacate the order and direction of the High Court dated 13thAugust, 2019. We find this appeal meritorious and allow it.

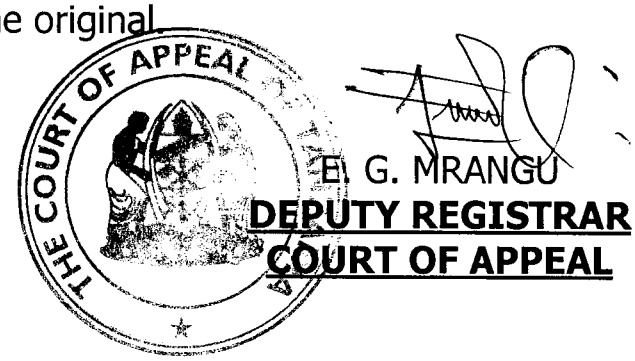
DATED at **MWANZA** this 7th day of May, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 7th day of May, 2021 in the presence Ms. Lilian Meli, the learned State Attorney for the appellant and in the presence of 1st to 7th respondents who appeared in person and in the absence 8th respondent who is reported sick, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL