

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KWARIKO, J.A., LEVIRA, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 137 OF 2021

DIRECTOR OF PUBLIC PROSECUTIONSAPPELLANT

VERSUS

ELIA MASAKA @ FUNYIZI 1ST RESPONDENT

JOBU MATONYA LUCAS 2ND RESPONDENT

**(Appeal from the Ruling of the High Court of Tanzania,
at Dodoma)**

(Mansoor, J.)

dated the 29th day of February, 2021

in

Criminal Sessions Case No. 132 of 2018

.....

JUDGMENT OF THE COURT

3rd May & 6th June, 2023

KWARIKO, J.A.:

Elias Masaka @ Funyizi and Jobu Matonya Lucas, the first and second respondents, respectively, were arraigned before the High Court of Tanzania at Dodoma (the trial court) charged with the offence of murder contrary to sections 196 & 197 of the Penal Code. The particulars of the offence were that; on 30th July, 2017 at Makang'wa Village within the Municipality and Region of Dodoma, the respondents murdered one Julia Tilibu. They denied the charge, hence they were fully tried.

During preliminary hearing, the prosecution intended to call a total of ten witnesses and to tender two exhibits, whereas, the defence side intended to have four witnesses with no exhibits to tender. The trial commenced on 24th February, 2021 where on that day, three prosecution witnesses testified. At the end of their testimony, the prosecution prayed and was granted an adjournment for two hours for the reason that, they were expecting the appearance of their key witness one Eudia Petro who was reported to be on her way to court in the company of a police officer No. F. 1905 Corporal Hamisi. The hearing was adjourned to 16:30 hours of that day. When the court resumed at the scheduled time, the prosecutor successfully prayed for adjournment to the following day as the said police officer had not arrived and he could not be reached.

On 25th February, 2021, two more prosecution witnesses appeared including the said Corporal Hamisi who testified as PW5. At the close of the evidence of the fifth witness, the prosecution prayed for adjournment as they intended to bring their last witness, Eudia Petro. According to the record, this is what happened in court on that day:

"Mr. Sarara- SA: These are the witnesses for today. We were expecting to get Eudla as our last witness but she could not appear. We pray for adjournment.

Mr. Mwashitete: *We do not object.*

Mr. Kidando: *We do not object.*

Court: *there is no justifiable reasons adduced by the prosecution for failure to bring Eudia Petro as their witness today. Therefore, the prayer for adjournment of the prosecution case is hereby rejected.*

Sgd

L. MANSOOR

JUDGE

25/02/2021

Mr. Sarara-SA:

We still insist that we need to produce Eudia, however since adjournment was refused, I leave it to the court to make a decision.

Order: *Since prosecution failed to continue with the prosecution case, the prosecution case is hereby marked closed."*

Following closure of the prosecution case, the trial Judge proceeded to make a ruling that a *prima facie* case was not made out against the respondents to require them to be put on their defence. They were subsequently acquitted of the charge of murder with an order for their release from custody.

The Director of Public Prosecutions, the appellant herein, was aggrieved by the decision of the trial court and has come to this Court on appeal with the following single ground:

"That, the Hon. Judge grossly erred in law when she closed prosecution case."

At the hearing of the appeal, Ms. Bertha Benedictor Kulwa together with Mr. Matibu Salum Matibu, both learned State Attorneys appeared for the appellant, whereas the respondents did not appear although they were duly served through publication in the Habari Leo Newspaper of 12th April, 2023 and personally on 26th April, 2023. However, they were represented by Mr. Leonard Mwanamonga Haule, learned advocate and thus the appeal was fully heard.

In support of the appeal, Mr. Matibu argued that, the appellant was aggrieved by the order of the trial Judge to close the prosecution case since they had more witnesses to call. He contended that, if the trial Judge found that the prosecution had failed to bring more witnesses, she ought to have dismissed the charge and discharged the respondents. The learned counsel fortified his contention with the Court's two unreported decisions in the cases of the **Director of Public Prosecutions v. Joseph s/o Mseti @ Super Dingi & Three Others,**

Criminal Appeal No. 549 of 2019 and **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015.

On the strength of his submission, Mr. Matibu urged us to allow the appeal and remit the case to the trial court before another judge for the trial to proceed from the stage it had reached before the closure of the prosecution case.

On his part, Mr. Haule opposed the appeal. He argued that, the trend exhibited by the prosecution showed that they had no more witnesses to call. That, since they did not give explanation for non-appearance of their witness namely Eudia Petro, the trial Judge found no justification to grant further adjournment. He went on to contend that, in the circumstances of this case, it is the prosecution which impliedly closed its case when it failed to prosecute it.

The learned counsel distinguished the cited cases since in the present case the witness was in the hands of the police but there was no reason given why she did not appear in court to give evidence. Finally, Mr. Haule opposed the prayer by the appellant to remit the case to the trial court to proceed with the hearing for the reason that there is no justification for it. He urged us to leave the matter as it is, and subsequently dismiss the appeal for lack of merit.

In rejoinder, Mr. Matibu submitted that the prosecution did not give reason why Eudia Petro did not appear because they were preparing to procure her attendance in court. He submitted further that, after all, the defence side did not oppose the prayer for adjournment. He argued that, the facts in the cited cases are similar to the case at hand. He wound up his submission by complaining that, the prosecution was denied the right to be heard.

We have considered the sole ground of appeal and the submissions by the learned counsel for the parties. The issue which poses for our determination is whether the trial court was justified to close the prosecution case.

The Criminal Procedure Act [CAP 20 R.E. 2022] (the CPA) governs Criminal trials in the High Court, Courts of Resident Magistrate and the District Court. However, while sections 229 and 292 provides that it is the prosecution that will open the case and lead evidence to support the charge, there is no provision in the CPA which states vividly as to who has the duty to close either the prosecution or defence case.

It is therefore through case law where it has been settled that, it is the prerogative of the prosecution to close its case. In the unreported case of the **Director of Public Prosecutions v. Idd Ramadhani**

Feruzi, Criminal Appeal No. 154 of 2011, the High Court Judge had granted several adjournments in about five months upon request by the prosecution for want of their intended last witness. On being tired of the same request, the trial Judge closed the prosecution case. On appeal, the Court considered this situation and observed as follows:

*"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. Criminal 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 added].*

After that observation, the Court declared that, the trial court had no powers to order for closure of the prosecution case and subsequently it quashed that order and remitted the case to the High Court to proceed with the trial from the stage where it had reached before the said closure of the prosecution case.

Affirming this settled principle in the case of the **Director of Public Prosecutions v. Joseph s/o Mseti @ Super Dingi & Three Others** (supra), the Court stated thus:

"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."

[See also **Abdallah Kondo's** case (supra)].

In the instant case, the adjournments were within a span of two consecutive days which by any standard was a fairly short period of time. It is our considered view that, the trial Judge could have granted time for the prosecution to find out why the said witness did not attend despite being said that she was on the way to attend the court session. Even if the trial court was tired of the unimpressive trend by the prosecution, following the above stated principle, it had no mandate to order for the closure of the prosecution case. That order had effectively prejudiced the prosecution as it was blocked from calling further witnesses to prove their case which amounted to an unfair trial.

Notwithstanding the above settled principle, we are mindful that a court of law is vested with inherent powers to control its proceedings for the timely dispensation of justice. In order to do that, it is supposed to

avoid, among other things, unnecessary adjournments. However, despite those powers, in a case where the court cannot grant any further adjournment, it is not vested with powers to close the case but it can only refuse the adjournment, dismiss the charge and discharge the accused person. When the Court was faced with a similar situation in the case of **Matimo Satimo & Another v. Republic**, Criminal Appeal No. 7 of 2015 (unreported), it observed as follows:

*"... If the trial magistrate felt that 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. Deeman Chrispin and Others** [1980] T.L.R. 116, a case whose principle was approved by the Court in **Abdallah Kondo's case.**"*

Following the above decisions, we are settled in mind that, the order for closure of the prosecution case by the trial Judge was illegal.

We thus allow the appeal and quash and nullify the order of the trial court dated 25th February, 2021 and the subsequent ruling which found that the prosecution evidence had not made out a *prima facie* case against the respondents and acquitted them.

As regards the way forward, we agree with the learned State Attorney's prayer and we proceed to remit the case to the trial court to proceed with the trial from the state it had reached before closure of the prosecution case by the trial Judge.

DATED at DAR ES SALAAM this 1st day of June, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 6th day of June, 2023 in the presence of Mr. Leonard Chalo, learned Senior State Attorney for the Appellant and Mr. Leonard Mwanamonga Haule, learned advocate for the Respondents linked via Video conference from High Court Dodoma, is hereby certified as a true copy of the original.




R. W. Chaungu
DEPUTY REGISTRAR
COURT OF APPEAL