

IN THE HIGH COURT OF TANZANIA
AT DODOMA

DC CRIMINAL APPEAL NO. 1 OF 2010
(ORIGINAL CRIMINAL CASE NO. 1 OF 2007 OF
MANYONI DISTRICT COURT AT MANYONI)

DIRECTOR OF PUBLIC
PROSECUTIONS (D.P.P.) APPELLANT

Versus

1. ABDALLAH A. MSONGELA 2. GEOFREY DAVID MKUMBO 3. JULIUS MAGAFU 4. JOYCE MSUKUMA 5. JANE ELETUS SENGA	}	... RESPONDENTS
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31/05/2010 & 09/07/2010

R U L I N G

HON. MADAM, SHANGALI, J.

In the original case No. 1 of 2007 the respondent, namely **ABDALLAH ATHUMANI MSONGELA, GEOFREY DAVID MKUMBO, JULIUS MAGAFU, JOYCE MSUKUMA AND JANE ELETUS SENGA** were jointly and together charged before Manyoni District Court with thirteen counts of Conspiracy to Commit an Offence, Use of Documents Containing Erroneous material particulars intended to mislead principal and

Occasioning Loss to a Specified Authority, all under the Penal Code, Cap. 16 R.E. 2002.

In the cause of proceedings of the trial on 23.09.2009, Mr. Swai, prosecuting Attorney from the Prevention and Combating of Corruption Bureau (PCCB) on behalf of the Director of Public Prosecutions (DPP) moved the trial court suo motto and requested the trial Resident Magistrate to disqualify himself from conducting the case on several allegations of biasness and impropriety. On 13/10/2009 the trial Resident Magistrate, Mr. N.A. Baro delivered his ruling on the request and variantly refused the request on the ground that there was no justifiable reason for his disqualification. He ordered the hearing of the case to proceed before him.

Dissatisfied with that decision, the DPP opted to appeal to this court aiming to impugn the stand of the trial Resident Magistrate, hence this Criminal Appeal No. 1 of 2010.

Before the hearing of this Criminal Appeal Mr. Tundu Lissu, learned Advocate for the respondents raised a preliminary objection based on three major grounds.

On the first ground, Mr. Tundu Lissu submitted that the appeal is incompetent in law because it is in contravention of the mandatory provision of section 43 (2) of the Magistrate Court Act, Cap.11, R.E. 2002. He argued that the ruling or

decision appealed against is an interlocutory decision which has not had effect of finally determining the criminal charges against the respondents. In elaboration, Mr. Tundu Lissu stated that the appellant is appealing against the decision of the trial Resident Magistrate dated 13/10/2009 in which the later refused to disqualify himself from the conduct of the case. He further submitted that the appellant was also uncomfortable with the decisions dated 20/03/2009 and 10/06/2009 in which the trial Resident Magistrate refused to admit some prosecution documents. He further stated that the appellant was also infuriated by the decision dated 12/06/2009 in which the trial Resident Magistrate ordered some witnesses to appear before the trial court having been mentioned adversely in the proceedings.

Mr. Tundu Lissu argued that all the above mentioned decisions never finalized or determined the case finally and conclusively. They are interlocutory orders in terms of the law and therefore not appellable, he contended. He referred the court to the case of **UNIVERSITY OF DAR ES SALAAM VS SILVESTYER CYPRIAN AND 210 OTHERS (1998) TLR 175.**

The second ground of preliminary objection is that the appeal is incompetent in law in that it is frivolous, vexatious and/or an abuse of the process of the court because the appellant was informed by the court that such interlocutory

decisions or orders are not appellable. Mr. Tundu Lissu submitted that there was a time when the appellant complained to the Judge-in-Charge on the same matter and requested for the revision but the Hon Judge-In-Charge in her letter dated 4/08/2009 written to the Principal State Attorney-In-Charge advised them to proceed with the case because their complaint was based on interlocutory orders which are not appellable.

On the third ground of preliminary objection, Mr. Tundu Lissu submitted that the appeal is incompetent in law in that it is frivolous, vexatious and/or an abuse of the process of the court because the appellant caused the trial District Magistrate of Manyoni to disqualify himself from the case due to unsubstantiated complaints of bias and lack of confidence from the appellant. He contended that having managed to force the District Magistrate In-Charge of Manyoni to abdicate his responsibility to try and determine the case, the appellant was repeating again to force the trial Resident Magistrate to disqualify himself. He contended that the conducts of the appellant amount to abuse of court process and vexatious against the respondents.

Ms. Shio learned State Attorney who appeared for the appellant conceded that section 43 (2) of the Magistrate Court Act prohibit appeals from interlocutory orders arising from

preliminary matters. She submitted that it is the duty of this court to consider the effects of a refusal by the trial Resident Magistrate to disqualify himself where there are clear reasons for him to do so. She contended that the whole trend of the prosecution case has been frustrated by the trial Resident magistrate who appeared to be absolutely bias. Ms. Shio argued that their appeal is neither frivolous, vexatious nor amount to abuse of court process because they have sound and viable reasons supported by the facts.

Regarding to the letter from the Hon. Judge-In-Charge, she submitted that the advice was administrative and not a bar from filing the appeal.

Let me start with the first ground of the preliminary objection which is the most crucial. What is the position of the law regarding to the appeals against interlocutory decisions and whether the order of trial Resident Magistrate dated 13/10/2009 is the interlocutory decision.

Section 43 (2) of the Magistrate's Court Act, 1984 as amended by Written Laws (Miscellaneous Amendments) Act No. 25 of 2002 provide;

"Subject to the provisions of subsection (3) no appeal or application for revision shall lie against or be made in respect of

any preliminary or interlocutory decision or order of the district court or a Court of Resident magistrate unless such decision or order has the effect of finally determining the criminal charge or the suit."

That is the position of the law and in deed, it is exactly the centre of Mr. Tundu Lissu's arguments that the law forbids appeals on preliminary or interlocutory orders which had no effect of finally determining the criminal charge conclusively. From her submission, Ms. Shio learned State Attorney had no quarrel with that position of the law. So do I.

On the second limb of the question, Mr. Tundu Lissu strongly argued that the order of the District Court appealed against falls under the ambit of section 43 (2) and therefore not appellable. In the case of **UNIVERSITY OF DAR ES SALAAM** (Supra) the Court of Appeal held that;

"Interlocutory proceedings are proceedings that do not decide the right of parties but seek to keep things in status quo pending determination of those rights, or enable the court to give directions as to how the cause is to be conducted or what is to be done in

the progress of the cause so as to enable the court ultimately to decide on the rights of the parties."

I entirely agree with Mr. Tundu Lissu that the order of the trial Resident magistrate dated 13/10/2009 is an interlocutory order which does not finally determine the pending case. The argument of Ms. Shio calling for this court to consider the effects of a refusal by the trial Resident Magistrate to disqualify himself where there are clear reasons sound attractive. To beef up her worriers let me, reproduce what Lord Denning, MR said in **Metropolitan Properties Co. (7GL) Ltd vs. R. Lennen (1969) 1. UB 577**; He said,

"The law on judicial bias is quite clear and it is this, bias or likelihood of bias on the part of a magistrate, in particular proceedings, disqualifies him from sitting in such proceedings and if he does sit, his decision will be quashed - - -."

The position of the law is clear that the prohibition on appeal against interlocutory order is absolute. However, that prohibition does not mean the appellant's doors to pursue his rights is completely shut, for he has a chance to appeal after

the trial and when the whole case has been determined if he feels aggrieved. At that stage one of his grounds of appeal could be the issue of bias and impropriety on the part of the trial Resident magistrate. The provisions of section 43 and 44 of the Magistrate Court's Act, 1984 as amended by Act No. 25 of 2002 is clear and precise. See also the case of **ALOIS KULA & ANOTHER VS. R. Criminal Appeal No. 121 of 1991** (unreported).

In the case of **SEIF SHARIF HAMAD VS. SMZ (1992) TLR**, The Court of Appeal was faced with almost similar situation. In that case after the conduct of a preliminary hearing the appellant was committed to the High Court for trial. The case was assigned to a Regional Magistrate with extended jurisdiction to hear and determine the case. Before hearing commenced the appellant raised a point of jurisdiction of the trial court. The trial Regional Magistrate ruled that he had jurisdiction to try the case. The appellant filed an appeal with the Court of Appeal challenging the ruling that the Regional Magistrate with extended jurisdiction was legally competent to conduct the trial.

However, before the Court of Appeal could entertain the appeal it considered whether it had jurisdiction to hear the appeal in view of section 6 of the Appellate Jurisdiction Act, 1979 and also whether the appellant was competent to lodge

the appeal. The court of appeal found that the ruling by the Regional magistrate was a specie of interlocutory order which did not decide the cause/case finally and conclusively and therefore, following their decision in **ALOIS KULA (SURPA)** the Court of Appeal had no jurisdiction to hear an appeal against it under the Appellate Jurisdiction Act, 1979.

The Court of Appeal went further and held that;

"Our appellate jurisdiction derives from the Appellate jurisdiction Act, 1979. Section 6 deals with Criminal Appeals like this one. Section 6(2) expressly permits only the DPP to appeal against any order of the High Court or subordinate Court in the exercise of extended jurisdiction."

Likewise, our appellate jurisdiction derives from the Magistrate Court Act, 1984 as shown above. It is unfortunate to the appellant that in the Magistrate Court, Act, 1984 there is no similar provision expressly empowering or permitting the DPP to appeal against any order of the District Court or Resident Magistrate Court at any stage like section 6 (2) of the Appellate Jurisdiction Act, 1979.

This ground of preliminary objection is enough to dispose off this matter but let me say few words on second and third grounds together. The two grounds are based on matters which are said to portray an abuse of court process. It should be remembered that the term abuse of the process of the court is a term of great significance. It connotes that the process of the court must be carried out properly, honestly, and in good faith; and it means that the court will not allow its noble functions as a court of law to be misused, **but will, in a proper case prevent its machinery from being used as a means of vexation or oppression in the process of litigations.**

With much respect to Mr. Tundu Lissu, learned advocate for the respondents, I have seen nothing of that sort in this case. In the foremost, the alleged letter from the court was normal administrative correspondence and was in regard to the order dated 20/03/2009 and not the one on appeal. Secondly, the main case and its subsequent applications and appeal are all based on contentious legal issues in need of judicial decisions. Moreover, to conclude at this early stage that the steps taken by the appellant to challenge the interlocutory orders are frivolous, vexations amounting to abuse of the Court process would indicate that the complaints are worthless. It is not the duty of this court at this stage to

determine on the merits of appellants complaints against the interlocutory orders. That mandate is reserved on appeal after the final determination of the case. It is sufficient at this stage to remind the appellant that in law, interlocutory orders are not appellable during the pendance of the trial.

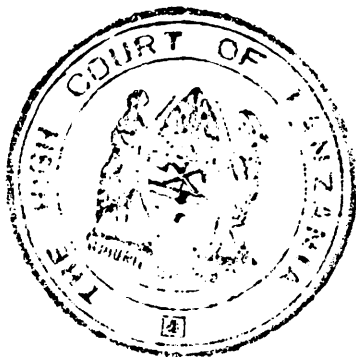
In conclusion, the first and main ground of the preliminary objection is meritorious. The appellant has no right of appeal against interlocutory order. The appeal is incompetent and premature. It is hereby dismissed.


M.S. SHANGALI

JUDGE

09/07/2010

Ruling delivered todote 9th July, 2010 in the presence of Ms. Mdulugu, learned State Attorney representing the appellant and the respondents present in person.




M.S. SHANGALI

JUDGE

09/07/2010