

**IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA**

CRIMINAL JURISDICITON

CRIMINAL SESSIONS CASE NO. 51 OF 2012

**THE REPUBLIC
VERSUS
VALERY NZYUNGU**

21st June & 5th August, 2013

RULING

MWAMBEGELE, J.:

This case was fixed for preliminary hearing in the High Court Sessions at Sumbawanga which commenced on 27.05.2013 and ended on 21.06.2013. On perusal of this case, I realised that no committal proceedings were conducted. The reason why committal proceedings were not conducted are obvious on record: the accused person Valery Nzyungu is reportedly dead.

The case file landed into this court administratively. It was forwarded to this court vide a letter of the Court of the Resident Magistrate of Rukwa bearing Ref. No. RM/SU/A. 57/VOL II/40 dated 17.05.2013 addressed to the District Registrar, High Court of Tanzania, Sumbawanga Zone. The

letter states that the file is being forwarded to the office of the District Registrar on the ground that the Registrar did inform the subordinate court that the accused is no more. Let the letter speak for itself:

"...

RM/SU/A.67/VOL.II/40.

17th May 2013.

DISTRICT REGISTRAR,
HIGH COURT OF TANZANIA,
SUMBAWANGA ZONE,
P.O. BOX 771,
SUMBAWANGA.

RE: PI NO.27/2011,
DISTRICT COURT OF SUMBAWANGA
REPUBLIC VRS VALERY S/O NZYUNGU
FAILURE TO CONDUCT COMMITAL
PROCEEDINGS

Reference is made to the above captioned matter.

Your honour we have failed to conduct the committal proceedings of the above mentioned

Preliminary Inquiry having received the information from your office, due to the fact that the accused person have (sic) passed away.

For the reasons which I have assigned above, I forward the above mentioned file for your necessary action.

Sgd

**RESIDENT MAGISTRATE INCHARGE
RUKWA REGION"**

Admittedly, the accused person has not been appearing in court for committal proceedings and the Public Prosecutor has been telling the court that the accused is no more but has all along not been able to produce a death certificate to verify his death. The last time the accused person appeared in court was on 23.10.2012. On 20.11.2012 when the case was called on for committal proceedings the accused was absent and the Public Prosecutor for and on behalf of the Republic told the court that the accused had passed away some two weeks back but had no death certificate to the effect. He prayed for adjournment. The matter kept on being adjourned for the same reasons and the accused has never entered any appearance ever since until the forwarding of the file to this court on the reasons advanced hereinabove.

When this matter came up before me on 14.06.2013 during which it was fixed for Preliminary Hearing, I asked the two learned Counsel for the Republic and Defence if the case was properly before me. I gave them time to prepare and address me on the issue. By consent, the case was fixed for that purpose on 20.06.2013 but for some reason the same was rescheduled to 21.06.2013. The learned brothers addressed me on the issue as scheduled. They both feel the case was improperly before me because no committal proceedings have been conducted.

I have painstakingly gone through the provisions of the Criminal Procedure Act, Cap. 20 (RE 2002). I am of the considered view that the matter is incompetently before me. I shall demonstrate. The starting point is section 178 of the CPA. This section provides:

“The High Court may inquire into and try any offence subject to its jurisdiction in any place where it has power to hold sittings; and except as provided under s. 93, **no criminal case shall be brought under cognizance of the High Court unless it has been previously investigated by a subordinate court and the accused person has been committed for trial before the High Court**” (emphasis mine).

My reading of the foregoing provision has it that the same underlines that a case will be properly before the High Court if the same **"has been previously investigated by a subordinate court and the accused person has been committed for trial before the High Court"**. In the present case there was no accused person to be committed to this court. What then would, in the circumstance, be a proper course to take? The rest of this ruling is attempting to answer this pertinent question.

It is common knowledge that once an accused dies, proceedings against him abate. The relevant provisions to this effect are sections 224A and 284A of the CPA in respect of abatement of proceedings in the subordinate Court and High court respectively. Section 224A appears in Part VII of the CPA which deals with and is titled "Procedure in Trials before Subordinate Courts". The provision reads:

"Every trial under this Part shall abate on the death of the accused person".

And section 284A appears in Part VIII of the Criminal Procedure Act, Cap 20 which deals with and is titled "Procedure in Trials before the High Court". It reads:

“Every trial before the High Court shall abate on the death of the accused person”.

Indeed, after reading between the lines the above provisions, I have found myself caught up in a predicament hence my hesitance to issue the abatement order. This is not only because the death certificate of the deceased Valery Nzyungu has not been availed to court on which the court can peg its abatement order, but more importantly, the case is not properly before me in that it has not been forwarded to this court as per prescriptions of the CPA and therefore not a trial before the High Court within the meaning of Section 284A quoted above. In the premises, I think, it would be inappropriate to invoke the provisions of section 284A of the Criminal Procedure Act, Cap 20.

Admittedly, these two provisions are relatively new in our midst. They were entrenched in the CPA by the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2002 – Act No. 9 of 2002. Why were they entrenched?

In answering this question, I took the trouble to read the Hansard in a bid to understanding what was at the back of the legislators’ minds in enacting these provisions. The Attorney General, when presenting the relevant Bill on 20.04.2002, had this to say in respect of these two provisions:

"Mheshimiwa Spika, Sheria ya mwenendo wa Mashtaka ya Jinai imetoa utaratibu wa ukomo wa rufaa zilizo katika Mahakama Kuu endapo mkata rufaa binafsi au wajibu rufaa binafsi atakuwa amefariki au wamefariki.

Mheshimiwa Spika, **Sheria haikuweka utaratibu wa aina hiyo iwapo mshtakiwa katika kesi iliyofunguliwa katika Mahakama ya Wilaya, Mahakama ya Hakimu Mkazi au Mahakama Kuu atakuwa amefariki dunia.** Hata hivyo, Mahakama zimekuwa zikitumia uzoefu uliopo Katika kesi za rufaa na hivyo kutoa amri kwamba kesi hizo zinafikia ukomo pale ambapo mhusika amefariki dunia.

Kwa mantiki hiyo inapendekezwa kuongezwa vifungu vipya vya 224 (a) [sic] na 284 (a) [sic] ili kuweka utaratibu kuhusu kesi ambazo washtakiwa wamefariki kufikia ukomo kupitia mapendezo haya tunasema endapo atafariki basi mashtaka dhidi yake yatakuwa yamefikia ukomo". [Emphasis mine].

I have quoted *in extenso* what was said in Parliament by the Attorney General in order to underpin why the two provisions were enacted. It is therefore obvious that the two provisions were enacted because there was a *lacuna* in the law. While there was a provision which made appeals to abate in cases of death of the accused, there was no such provision to cater for circumstances other than appeals.

However, the wording of the two provisions does not seem to have sufficiently addressed the problem the legislators intended to. The word "trial" used in these provisions is narrower in interpretation than the word "proceedings" or "criminal proceedings". It appears, there is still room for improvement of the wording of these provisions. The word "trial" appearing in the two provisions could be improved by replacing it with "proceedings" or "criminal proceedings". Alternatively, the word trial may be defined to include any criminal proceeding. This course would preempt any argument from prospective doubting Thomases to the effect that a case under committal proceedings does not fall within the meaning of a trial as envisaged by the provisions of section 224A of the CPA. The situation is exacerbated by the fact that the two provisions have been put under the Parts which deal with and are titled "Procedure in Trials before Subordinate Courts" and "Procedure in Trials before the High Court".

As the law stands now, it appears, after the amendments which was intended, as the Attorney General said in Parliament on 20.04.2002

(supra), to cater for abatement of proceedings in situations other than appeals, has only solved the problem in respect of trials. Some other situations have, it appears, been left out. Improving the wording of the provisions as suggested in the foregoing paragraph would, in my considered view, solve the problem and put in place what the Parliament intended to.

Reverting to the subject under discussion, a somewhat identical situation appeared in ***Asafu Tumwine Vs R***, Criminal Revision No. 1 of 2006 (unreported). In that case, the High Court conducted Preliminary Hearing under Section 192 of the CPA without a subordinate court committing the accused for trial in the High Court as mandated by section 246 (1) of the Criminal Procedure Act. The Court of Appeal held the entire proceedings and orders in the High Court to be a nullity for want of committal proceedings. The Court of Appeal held:

“Since the District Court ... never made any order committing the accused Asafu Tumwine for trial before the High Court, the entire proceedings and orders in the High Court in Criminal Sessions Case No. 40 of 2002 ... were a nullity. The same are hereby quashed and set aside.”

In the instant case there is no accused person. For reasons already shown above no committal proceedings have been conducted.

The Court of the Resident Magistrate of Rukwa at Sumbawanga, in my considered view, is still clothed with jurisdiction over P.I. case No. 21 of 2011. Inasmuch as no committal proceedings have been conducted, this court is not clothed with jurisdiction to entertain the same. The Court of the Resident Magistrate of Rukwa, it appears, was still bearing with the prosecution to produce the relevant death certificate so as, I think, to make necessary orders in accordance with the law. If it were not for the seemingly interference from the office of the District Registrar, the file, it seems, would not have been before me today.

From what was held in the *Asafu Tumwine* case (supra) it appears a subordinate court still retains jurisdiction of a PI case until when committal proceedings are conducted. This can be inferred from the following paragraph:

“The District Court of Karagwe, **which has all along retained jurisdiction over P.I. case No. 37** of 1999 is hereby directed to hold, as expeditiously as possible, a fresh preliminary inquiry and commit the accused Asafu Tumwine for trial before the High Court in accordance with the law” (emphasis supplied).

The above discussion can be summarised as follows: in a case which is triable by the High court, there must be an order to commit the accused person to the High Court for trial so that the High Court can be clothed with jurisdiction to entertain and determine the matter. During the period, a subordinate court is seized with the conduct of committal proceedings, it still retains jurisdiction of a PI case until when committal proceedings are conducted. During this period the subordinate court has jurisdiction to, *inter alia*, grant bail to the accused person to those offences which are bailable [see ***Rebuplic Vs Dodoli Kapufi and Patson Tusalile***, Criminal Revision No. 1 of 2008 CF No. 2 of 2008 (Mbeya unreported)] and order abatement of committal proceedings in case the accused dies. The High court is not clothed with jurisdiction to entertain and determine such a case unless there is such order committing the accused person to it. The procedure of forwarding by an administrative letter a case which was under committal proceedings in the subordinate court for hearing by the High Court is strange and unknown to the law. An administrative letter by a subordinate court is not a substitute of a committal order by the same court. The proper procedure and which subordinate courts must abide with to the letter is as provided for by the provisions of section 246 (1) of the Criminal Procedure Act.

Having said what I have endeavoured to hereinabove, I find myself not clothed with requisite jurisdiction to entertain and determine this matter.

In the premises, I order that the relevant file be remitted to the Court of the Resident Magistrate of Rukwa – the committing court - which is hereby directed to, after being satisfied that the accused person is indeed no more, make necessary orders according to law. It is so ordered.

DATED at SUMBAWANGA this 5st day of August, 2013.

J. C. M. MWAMBEGELE
JUDGE