IN THE HIGH COURT OF TANZANIA

AT DAR ESSALAAM

MISCELLANEOUS CRIMINAL APPLICATION NO. 14 OF 2013

(Originating from Criminal Case 37/2013 & 6/2013) of Kisutu RMS Court)

1. WILFRED LWAKATARE
2. LUDOVICK RWEZAHURA JOSEPH .....} .....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

L.K.N. KADURI, J.

In this application six grounds have been raised for the following orders, namely:-

1. That the Honourable court may be pleased to call for and examine the record of the Criminal proceedings in Kisutu Resident Magistrates Court (P1) Criminal Case No. 37 of 2013 between the parties which was terminated consequent to the Nolle Proseque entered by the Director of Criminal Prosecutions on 20th March, 2013 and recorded by the Kisutu Court on the same dated; (sic) and the record of the Criminal Proceedings in the same

Court in (PI) Criminal Case No. 6 of 2013 instituted by the Respondent immediately thereafter and now pending before a different Resident Magistrate in order for the Honourable court to satisfy itself as to the correctness legality and for propriety thereof;

2. That the Honourable court may be pleased to revise and/or quash the Nolle Proseque and the order terminating the proceedings in (PI) Criminal Case No. 37 of 2013 referred to in paragraph 1 above;
3. That the Honourable court may be pleased to order that the ruling that had been scheduled to be delivered by Hon. Mchauru PRM in (PI) Criminal case No. 37 of 2013 which was irregularly pre-empted by the Nolle Proseque afore-mentioned be delivered as scheduled;
4. That the Honourable court may be pleased to revise and/or quash the proceedings in (PI) Criminal case no. 6 of 2013 that were instituted pursuant to the Nolle Proseque afore-mentioned and the proceedings in (PI) Criminal case no. 37 of 2013 be reinstated and continued as scheduled;
5. That the Honorable court may be pleased to enter a finding that the procedure adopted by the Respondent in entering a Nolle Proseque when ruling was pending in (PI) Criminal case no. 37/2013 was illegal and/or irregular and amounted to an abuse of the judicial process, an abuse of the prosecutional power and a derogation of the independence of the judiciary;
6. That the Honourable court may be pleased to grant any other orders and /or reliefs that it may deem fair, just and proper;

This application is supported by the affidavit of Peter Kibatala the learned counsel for the Applicant and was argued by himself, Mr. Tundu Lissu and Mr. Marando. The Respondent was represented by Mr. Rweyongeza PSA, Mr. Lukosi PSA and Mr. Maugo SSA, all from the Directorate of Public Prosecutions.

The facts giving rise to this application going by the sworn affidavit by the applicants and the counter affidavit of the Respondent, can be summarized as follows:-

WILFRED MUGANYIZI LWAKATARE and JOSEPH RWEZAHURA LUDOVICK were charged in the Resident Magistrate's Court of Dar es Salaam Region at Kisutu in Preliminary Inquiry (PI) no 37 of 2013 on 18th March, 2013.

In the first count, they were charged with CONSPIRANCY TO COMMIT AN OFFENCE, contrary to Section 384 of the Penal Code [Cap 16 RE 2002].

It was alleged in the particulars of the offence that on or about the 28th day of December, 2012 at King'ong'o Kimara Stop over, within the District and Municipality of Kinondoni in Dar es Salaam Region, jointly and together did conspire to commit an offence, namely MALICIOUSLY ADMINISTERING POISON WITH INTENT TO HARM against one DENNIS MSACKY contrary to Section 222 of the Penal Code [Cap 16 RE 2002].

In the second count they were charged with CONSPIRACY TO COMMIT AN OFFENCE, contrary to section 24 (2) of the Prevention of Terrorism Act, No. 21 of 2002.

The allegation in the particulars of offence being that on or about the 28th day of December, 2012 at King'ong'o Kimara stop over, within the District and Municipality of Kinondoni in Dar e salaam Region they jointly and together did conspire to commit an offence, namely KIDNAPPING OF ONE DENIS MSACKY contrary to Section 4 (2) (III) of the Prevention of Terrorism Act, No. 21 of 2002.

In the third count they faced a charge of COMMISSION OF OFFENCE OF TERRORIST MEETING, contrary to Section 5 (a) of the Prevention of Terrorism Act, No. 21 of 2002 this time around they are alleged to have arranged and participated in a meeting knowing that the said meeting was concerned with an act of terrorism, namely KIDNAPPING OF ONE DENIS MSACKY. This offence is under section 4 (2) (c) (III) of the Prevention Terrorism Act, No. 21 of 2002.

The first accused alone who is the applicant namely WILFRED MUGANYIZI LWAKATARE, is charged in the fourth and last count with PROMOTION OF OFFENCES contrary to section 12 (a) of the Prevention of Terrorism Act, No 21 of 2002. The particulars alleged that at the same time and place, he being the owner of a house knowingly permitted a meeting between him and LUDOVICK REZAURA JOSEPH to be held in the said house for purposes of promoting a terrorist act to wit KIDNAPPING.

The charge was duly consented to by the Director of Public Prosecutions. When this matter came before Hon. Mchauru PRM, the charge was read over to the accused persons and they were asked to plead thereto.

Both accused pleaded not guilty to all the counts

The counts preferred under the Prevention of Terrorism Act, are triable by the High Court. The counsel for the applicants in these revisional proceedings made submissions on bail, on the validity of the charges and on the propriety of the applicants being invited to plead to the said charges which are by law triable by the High Court.

The Respondent challenged the applicant's submissions, rejoinders were made and the matter was set for ruling on 20th March, 2003. As the applicant's affidavit further discloses, on 20th March, 2013 the respondent entered a Nolle Proseque u/s

91 (1) of the Criminal Procedure Act, [Cap 70 RE 2002]. The same was duly recorded by the court, consequent upon which the applicants were set at liberty. However, immediately upon their release, the applicant was rearrested and charged afresh on the same very charges as those in respect of which the Nolle Proseque had been entered.

The learned counsel, Mr. Kibatala has submitted that the interpretation or reasonable conclusion is that the Nolle Proseque was entered to defeat justice and that it was purely an abuse of court process taking into consideration that the Nolle Proseque was entered after the legal arguments and the charges were reintroduced barely two hours later, while there were no changes of circumstances to warrant such an act.

The court was invited to draw similarity of the present situation with what transpired in Criminal Appeal No. 98/1992 DPP V MEHBOOB AKBER HAJI in which the Court of Appeal held that the cause of action taken by the DPP cannot have another interpretation except to defeat the ends of justice. The court then went further and dismissed the new case preferred after the first one was terminated by Nolle Proseque and ordered that the first case proceed to finality.

On the basis of the above decision the learned counsel prayed that the court hold that the act of the DPP is against the legal basis the DPP has to take in exercising his power. That the proceedings were improper and aimed at pre-empting the ruling in PI no. 37 of 2013.

The learned advocate Mr. Tundu Lissu in supporting the arguments advanced by his colleague, Mr. Kibatala, pointed further the guiding principles when the DPP wishes to exercise his powers of entering Nolle Proseque in the Constitution as well as section 8 of the National Prosecution Service Act, Cap 430.

It is stipulated in Section 8 of the National Prosecution Service Act, No. 22 of 2008 that:-

> *5.8 In the exercise of powers and performance of his functions the Director shall observe the following principle;*
>
> *a. The need to do justice.*
> *b. The need to prevent abuse of legal process and.*
> *c. The public interest*

Article 59 B (4) of the constitution Mr. Lissu pointed out reproduces in essence Section 8 of Cap 430 above.

It was his opinion that the use of Nolle Proseque in the circumstances of this case was to pre empty a ruling on a matter argued by both parties as it does not advance interests of justice, or prevent abuse of process and it is not in the public interest.

The aim according to him was to punish the applicant because the charges preferred are not bailable. Mr. Lissu argued further that as was in the Mehboob's case (supra) The aim of the Nolle Proseque was forum shopping because the first case was before Hon. Mchauru PRM who was to deliver a ruling however the case was withdrawn, the applicant rearrested and another case was preferred before another magistrate.

Mr. Rweyongeza PSA conceded that the powers of the DPP were as defined in the Constitution and the NPSA but argued that in the instant case they were exercised in the interest of justice. In his submission in support of the counter affidavit PI No. 37/2013 was filed in wrong register of the subordinate court cases.

It had to be withdrawn so as to be filed in the right PI register in which it was recorded as PI No. 6/2013.

The second error according to him was made also by the court when it called upon the applicants to enter a plea while the court had no jurisdiction to hear the matter. In order to ensure justice, the case had to be withdrawn and be refilled in the right register. Mr. Rweyongeza submitted that u/s 91 (1) CPA the DPP can enter Nolle Proseque at any time before verdict or judgment, since the case was before an incompetent court the pending ruling could have been of no consequence.

The law provides that it is the High Court that shall have jurisdiction to try offences under the Prevention of Terrorism Act, No. 21 of 2002 (see Section 34 (1) of Act No. 21 of 2002).

The charges preferred against the applicant include offence based on prevention of terrorism in the 2nd, 3rd and 4th counts. It is only the first count that is based on the Penal Code [Cap 16 RE 2002].

It is obviously therefore correct to hold that what was termed as PI No. 37 of 2013 (R V Wilfred Muganyizi Lwakatare and Joseph Rwegahura Ludovick) was wrongly registered on cases triable by the subordinate court since that court had no jurisdiction to entertain the same except for conducting committal proceedings only. In the exercise of revision powers what is looked at is what was before the subordinate court and how it was handled. This is in line with the observation made by Ramadhani JA as he then was, in Civil Application No. 42 of 1999 between Shahida Abdul Hassanal Kassam and Mahedi Mohamed Gulamali Kanji, unreported.

The Court of Appeal considered the powers of the High Court in revision and had the occasion to interpret the provision of section 44 (1) (a) of the Magistrate Courts Act, which provides:-

> *44(1) In addition to any powers in that behalf conferred upon the High Court, the High Court:-*
>
> *(a) Shall exercise general powers of supervision over all District Courts and court of resident magistrate and may, at any time, call for and, inspect or direct the inspection of the records of such court and give such directions as it considers may be necessary in the interest if justice and all such courts shall comply with such direction without undue delay.*

See also Luanda JA in Director of Public Prosecutions (Applicant) versus Elizabeth Michael Kimemeta @ Lulu (respondent) Criminal Application No. 6 of 2012.

The court went on to observe that the above section was interpreted in John Mgaya & 4 other V. Edmund Mjengwa and 6 others Criminal Appeal No. 8 (A) of 1997 (CA) in which the court stated:-

> *"From our reading and understanding of this section, it seems to us plainly, clear that in addition to its other*

powers the High Court is empowered to supervise district and resident magistrate courts. Furthermore, it is also crystal clear from this section that in inspecting the records the High Court is empowered to give directions to the courts of district and resident magistrates courts which directions these courts are obliged to comply with. In our new what is envisaged under this provision is direction of the nature of guidance from the High court to subordinate courts...."

The court held also that to "supervise" is to watch or otherwise keep a check, whereas "to revise" is to re-examine in order to correct or improve.

With the above guidance of the Court of Appeal in mind, I wish to address what transpired in court so as to re-examine the same with a view to correct or improve if necessary to do so.

The proceedings in PI No. 37 of 2013 were registered in the register for cases triable by the subordinate court. The applicant was asked to enter a plea after charges were read over and explained to the applicant and his co-accused. The applicants counsel then made oral submissions for bail, on the validity of the terrorism charges in view of the information contained on the particulars of the offences, thereof, and on the propriety of the accused being asked to enter a plea in a court which had no jurisdiction to record the plea. Rebuttal submissions were made by the Republic. The presiding Principal Resident Magistrate set the 20th

March, 2013 as the date on which he would deliver his ruling in all points raised. The Director of Public Prosecution entered a Nolle Proseque and the applicant was discharged. However, soon thereafter he was re arrested and charged with the very same offences for which the Nolle Proseque had been entered, this time before a different magistrate. The case was registered as PI No. 6 of 2013.

In EPHATA LEMA V R, CRIMINAL APPEAL NO 2 OF 1990 the Court of Appeal pointed out that:-

> *If a prima facie ground is established for the proposition that the DPP is in the course of misusing his powers, the court should be justified to revise and decide on the validity for his exercise of the powers.*

The court went on to observe that:-

> *The burden to impugn the DPP's exercise of these powers should not be a light one to discharge"*

It is necessary therefore from what we gather from the authorities that in order to impugn the exercise of the DPP's powers there should be prima facie ground established for the proposition that he was in the cause of misusing his power, that by tangible evidence the DPP's Nolle Proseque was designed to pervert the cause of justice or that he was actually forum shopping to get a magistrate who would comply with his wishes thereby pre empting the pending ruling.

On the other hand it is not abuse of powers of entry of Nolle Proseque if there is good reason pertaining to the sound administration of justice.

We have to bear in mind that as the Court of Appeal held in MEHBOOBS CASE THE DDP's powers are limited to public interest. Interest of justice and prevention of abuse of the legal process.

But the court of Appeal further observed that, "the presumption is that public officers do as the law and their duties require them" unless a prima facie ground is established to the contrary.

In a book titled ESSENTIALS OF CRIMINAL PROCEDURE IN KENYA by PATRICK KIAGE Published by Law Africa at p 64, the author, cites the decision in Atielo V R [2004] 2 KLR 333 where the court took the view that:-

> *"In declaring whether the exercise of the powers of the entry of a Nolle Proseque by the Attorney General was capricious, offensive and an abuse of the process of court, it was only the circumstances surrounding the entirely of a Nolle Proseque that would be taken into account in order to guide the court to either grant or refuse such declaration."*

I subscribe to the view above that it is the circumstances that count. I wish also to echo and join hands with what the author observes at p 52 that:-

> *"The decision to prosecute or to discontinue a prosecution is the most important decision that a prosecutor makes in the criminal justice process indeed prosecutions that are not well founded in law or fact or which do not serve the public interest, may unfairly expose citizens to the anxiety, expense and embarrassment of a trial while the failure to effectively*

prosecute guilty parties can directly impact public safety. Wrong decisions tend to undermine the confidence of the community in the criminal system"

The author draws our attention to the fact that "in his proper sphere, the Director of Public Prosecution is expected to act fairly conscientiously and with due regard to principle as opposed to arbitrarily, oppressively or contrary to public policy.

The issue before me is whether in the circumstances surrounding the entry of the Nolle Proseque in PI No. 37 of 2013 and the subsequent charges on the same facts in PI No 6 of 2013 a prima facie ground based on tangible evidence has been established for the proposition that the DPP acted in abuse of his powers to warrant the court to revise and decide on the validity for his exercise of the powers.

The reasons given by the DPP as opposed to the circumstances in Mehboob's case is that after realizing that the case had been filed in the wrong register he decided to remedy this situation by withdrawing it so as to re file it in the right register. We do not know what the ruling on the points raised would have been so we cannot say the exercise was aimed at pre empting the ruling or that the re filing of the case based on the same facts was aimed at forum shopping in order to get a magistrate who would comply with the DPP's wishes as this would amount to mere speculation. What is required is tangible evidence that in the said exercise the DPP was in the cause of abusing the exercise of his powers.

In the circumstances, I find that the DPP had good reasons pertaining to the sound administration of justice when he terminated the proceedings that were filed in the wrong register in order for the same to be filed in the right register.

However matters do not end here. There has been raised the issue of the propriety of the charges. Mr. Rweyongeza learned Principle State Attorney brushed the point aside submitting that the charges were subject to amendment at any time as they were only holding charges.

In my view, for a charge to be admitted it has to show in the particulars all the ingredients of the offence charged. Section 132 of the Criminal Procedure Act, Cap 20 RE 2002] provides:-

> *132"Every charge or information shall contain, and shall be sufficient if it contains a statement of all specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".*

A charge that can set in motion the machinery of justice has to contain reasonable information as to the nature of the offence charged.

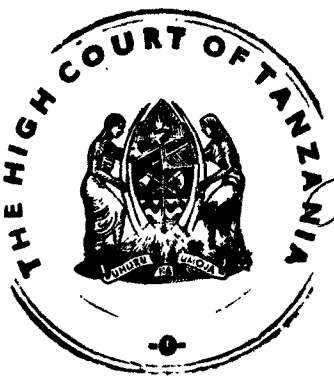
As earlier stated, on the charge against the applicant and his co-accused both in PI No. 37 2013 and PI No. 6 of 2013 the 2nd, 3rd and 4th counts are based on the Prevention of Terrorism Act. These are conspiracy to kidnap Denis Msacky, Commission of Terrorist meeting and promoting a terrorist act of kidnapping the said Denis Msacky respectively. It is from the offence of promotion of offences of terrorist meeting from which the others two offence revolves.

Section 26 (2) of the prevention of terrorism Act defines "meeting "as hereunder:-

"26 (2) *in this section "meeting" means a meeting of three or more persons, whether or not the public are admitted".*

I agree with the learned counsel for the applicant, Mr. Tundu Lissu that, there is a patent error on the face of the records because the alleged meeting was between the applicant and his co accused only. This cannot form a terrorist meeting. If no terrorist meeting was held the interpretation is that there could have been no conspiracy to commit terrorism that could be charged. In order for the offences charged to be distinguishable from the Penal Code offences, sufficient information to link the act with terrorist purpose should feature in the charge. There should be information behind the terrorist kidnapping of Dennis Msacky. This does not show clearly in the statement or particulars of the offence sufficiently to give reasonable information as to the nature of the offence under the Prevention of Terrorism Act visa vis similar offences under the penal Code.

I therefore strike out counts No. 2, No. 3, and No. 4 from the charge and leave the DPP with an option to pursue the remaining count in the appropriate court with competent jurisdiction. It is so ordered.



L.K.N. Kaduri

JUDGE

3/5/2013

Date: 08/05/2013

Coram: Hon. Kaduri, J.

For the Applicants:

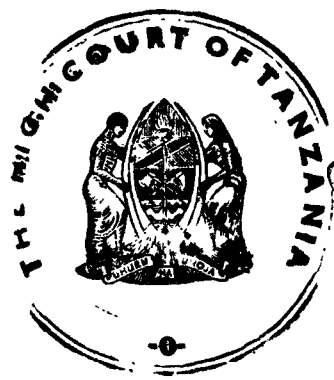
1st Mr. Kibatala holding brief

2nd for Mabere Marando, Tundu Lissu Prof. Abdallah Safari & Nyaronyo Kicheere

For the Respondent: Mr. Lukosi

Cc: Lukindo

Ruling delivered in this 8th May 2013 in the presence of Mr. Kibatala for the applicants holding brief also for Mr. Mabere Marando, Tundu Lissu, Prof. Safari and Nyaronyo Kicheere and Mr. Lukosi PSA for the Respondent.



L.K.N. Kaduri

JUDGE

08/05/2013