IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL REVISION NO. 1 OF 2010
(Application for revision from RM's Court of Dar es Salaam Region at Kisutu, Criminal Case No. 1831 of 2005)

PAUL PETER MAGASHA ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

Date of submissions: *07/10/2013*
Date of ruling: *17/02/2014*

RULING

F. Twaib, J:

This is an application for revision under section 372 of the Criminal Procedure Act, Cap 20 (R.E. 2002) ("the CPA"). Ultimately, it is the Applicant's prayer for an order of this Curt dismissing the charge against him currently pending at Kisutu RM's Court and acquitting him because "the prosecution side has miserably failed to prosecute the case for no good reason as required by law".

In his affidavit in support of the application, the applicant essentially complains against the decision of the lower Court (Mwaseba, RM) delivered on 21st October 2009 in which the Court dismissed his application for the case against him to be dismissed.'

The Respondent had earlier raised a preliminary objection to the effect that the matter that is the subject of the application is neither appealable nor revisable and thus, the application is incompetent. On 5th August 2013, I dismissed the preliminary objection, but reserved my reasons for so doing to be given in this ruling. The reasons were, essentially, that the application raised matters which, if successful, could result in the trial proceedings being nullified for being so irregular or resulting in a miscarriage of justice, that a higher Court ought to interfere by way of revision. I thus allowed the parties to address me on the merits of the application.

Mr. Magasha, the applicant argued his application on his own, while the respondent was represented by Ms Magoho, learned state Attorney.

Mr. Magasha submitted that the case started as Criminal Case No. 885 of 2001. On 1st June 2005, the case "was dismissed" under section 225 of the CPA and he was discharged. Six months later, the prosecution re-arrested him on a subsequent charge for the same offence. He says that the Republic has since failed to proceed with the prosecution. He submitted that in spite of being given "several last warnings" by the court about the "repeated adjournments", the prosecution "kept on asking for adjournments".

The applicant thus maintains that this amounts to "malicious and frivolous prosecution", amounting to "persecution." He reminded the Court that the law requires that adjournments should not exceed 60 days, unless there is a certificate by the DCI, DPP or State Attorney.

The applicant further contended that even the complainant in the case against him, which is purported to be a pharmaceutical company, is a non-existing entity and thus, the charge against him cannot hold.

Ms Magoho replied by submitting that section 225 (5) of the CPA under which the applicant was discharged in the first case allows the prosecution to bring a fresh charge. The subsection stipulates:

> "(5) Where no certificate is filed under the provisions of subsection (4), the court shall proceed to hear the case or, where the prosecution is unable to proceed with the hearing discharge the accused in the court save that any discharge under this section shall not operate as a bar to a subsequent charge being brought against the accused for the same offence."

It is clear from the above provision that Ms Magoho is right. It was thus proper in law for the prosecution to subsequently bring a charge against the applicant for the same offence.

Before I consider the applicant's second point, I would move to determine his third and last point, where he complains that the complainant company does not legally exist. This point should not detain us. The applicant may well be right. However, this a matter of pure fact, to be determined at the trial through evidence, and not a matter of law. I would thus outrightly reject it.

The applicant's second point demands an examination of the proceedings in the lower Court to determine whether his version of what transpired in Court between the time the new charge was read over to him until he filed the present application is supported by the record. If so, the Court could then consider whether the same amounted to malicious or frivolous prosecution or, as he puts it, persecution.

It is Ms Magoho's contention that the applicants' allegations have no truth. Since the truth would come out clearly from the record of

proceedings in the RM's Court, I will make direct reference to the some salient points therein to determine the issue.

The very first entry in the case was on 23rd December 2005 before Msongo, RM. The charge was read over to the accused, who pleaded not guilty. The facts were read over to the accused. The prosecution then asked for a date of hearing as the investigations were complete. The accused complained that he had been discharged under section 225 and re-arrested.

Hearing was set for 6th February 2006. The prosecution had two witnesses, one Amiri Kimaro and Det. Sgt. Ferdinand. The trial could not proceed on that day because the accused (applicant) informed the Court that he had filed an objection. Hearing of the preliminary objection was set for 8th March 2006. The Court had to hear him on that point. He submitted that the complainant company was non-existent, presumably seeking an order of discharge.

The prosecution asked for time to find out from the Registrar of Companies on the app.licant's allegations before submitting in reply. Hearing was set for 17th May 2006 and adjourned to 23rd June 2006. On both occasions, the Republic was not ready with their reply. On 1st August 2006, they responded. The Court delivered its decision on 12th September 2006, overruling the objection.

On the next date for hearing (20th October 2006), the prosecution did not have a witness and asked for adjournment. There followed several mentions until 11th May 2007 when the prosecution informed the Court that the applicant had asked for a copy of proceedings as he intended to appeal. He however told the Court that he had not yet filed his appeal (presumably against the ruling of 23rd September 2006). The Court ordered that the matter should proceed to hearing on 22nd June 2007.

When that day came, the prosecution had one witness and was ready for hearing. The applicant told the Court that he was not ready, because he had written a letter. The letter turned out to be a purported application for review. The Court had to adjourn the trial to hear the review. There followed several dates for mentions, directions and continuation of hearing of the review and, at one point, the applicant had asked the presiding Magistrate to recuse herself and not hear the application. He wanted another Magistrate to be appointed. The Magistrate (Msongo, RM), obliged and recused herself. Subsequent to that, the other Magistrate (Nkya, RM) refused to sit on review of Msongo RM's decision and returned the file to the PRM In-Charge. The PRM In-charge refused to act on a mere letter.

Then the matter was fixed for hearing before Nkya, RM. After two adjournments where the prosecution had no witnesses, the applicant complained that the matter was taking too long. On 27th May 2009, Nkya, RM withdrew from the case after the accused had written to the Court, once again, and made several allegations against her conduct of the case.

On 18th August 2009, the accused required the court to decide on his application for review. Apparently, the file was returned to Msongo, RM, to determine the review application. In a ruling delivered on 21st October 2009, she dismissed the same. On 13th January 2010, the applicant informed the Court that he had filed an application in this Court and that the calling for record would come soon. That was where the matter ended at the RM's Court.

What comes out quite clearly from the above is that though at some points the prosecution was for one reason or the other not in a position to proceed, there were times, quite significant in my view, when the applicant was the cause. Ever since the matter started, he has been

complaining about one thing or the other, writing letters and filing applications that the Court had to determine, thereby delaying his trial. While the prosecution has to bear part of the blame, it is fair to say, in my respectful view, that the applicant was the main cause of the delay and the rather haphazard manner in which the matter proceeded in the lower Court. I find neither malice nor persecution in the way the Republic or the Court conducted themselves.

In the circumstances, all the three points raised by the applicant in the present application are devoid of merit. I wish also to mention that while the 60-day rule in section 225 of the CPA was enacted to protect the accused from unnecessary delays in criminal proceedings, it was never the Legislature's intention to provide the accused with an excuse for delaying the case and then seeking an order of discharge based on his own wrongdoing.

Hence, the application does not warrant the order of discharge the applicant is seeking. Instead, I find that the Republic is entitled to proceed with the prosecution of the applicant (if they still so desire).

Consequently, the application for revision is dismissed. I order that the file be returned to the RM's Court, Kisutu, which should proceed accordingly. However, given the time the matter has taken so far, I would urge all concerned to handle it with a view to an urgent dispatch thereof.

DATED AT DAR ES SALAAM this 17th day of February 2014.

F. Twaib
JUDGE