IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO 32 OF 2014

(Revision from the Ruling and orders of the Resident Magistrate's Court of Dar es Salaam at Kisutu Hon Kisoka RM dated 12th March, 2014 in the Preliminary Inquiry No 7 of 2013)

1. RAZA HUSSIN RADHA
2. GOODLUCK SILVESTER MBAGA
3. WILBROAD WILBARD MUGYABUSO
4. IBRAHIM MOHAMED @ KISOKI
5. CHARLES SALU OGARE **..... APPLICANT**
6. ZONAZEA ANANGE OUSHOUDADA
7. MICHAEL LOTH HEMA
8. ALBERT JONAS MUNUO
9. JOSEPH FRANK RINGO
10.MOHAMED SWABURI ABDULKARIM

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

Date of Last Order: *27/06/2014*
Dare of Ruling: *22/08/2014*

RULING

Bongole,J

This ruling is in respect of Preliminary Objection raised by the respondent (The DPP) on points of law to the effect that:-

1. The application is bad in law for contravening Section 372(2) of the Criminal Procedure Act [Cap. 20 R.E 2002] as amended by Act No 25 of 2002.
2. The High Court Lacks Jurisdiction to deal with this application at this stage as it is premature.
3. The application is incompetent for being supported by an incurably defective affidavit.
4. The court has not properly moved.

The respondent therefore pray for the dismissal of the application.

The application upon which the objection is grounded is made under section 392A(1)(2), section 161, section 150,section 129,section 132,section 135(a)(iii)(f); section 148(3), section 372, section 373 and S.376 of Criminal Procedure Act Cap.20 [R.E. 2002]

The applicants pray to be heard on an application for Revision for the following orders:-

1. That this honourable court be pleased to call for and examine and revise the proceedings and orders of the Resident Magistrate Court Kisutu, Dar es Salaam made on 12th March, 2014 for purposes of satisfying itself as to the correctness, legality or propriety of the said proceedings and orders.
2. That the Honourable Court be pleased to consider and revise the charges filed by the Respondent, and accepted by the court contrary to the law.

3. That this honourable court be pleased to revise the orders made by the Resident Magistrate court accepting new aggravated charges without the respondent in forming the court of the circumstances giving rise to the new charge or giving the accused (applicants) opportunity to be heard according to the law.
4. That this honourable court be pleased to revise the order made by the resident magistrates court cancelling accused bail without a fair hearing.
5. That this honourable court be pleased to strike out the illegally substituted charge of murder in lieu of manslaughter and grant the accused persons bail in the circumstances of the case.

Before this court, the applicants have the legal services of the following legal ferms:-

Ms Tanzania Law Chambers, Crest Attorneys, ADCA veritas Law Group, Delight Attorneys, M & A Attorneys and AKSA Attorneys.

The Respondent is represented by Mr. Kongola learned Principal Attorney, Mr. Peter Njike Senior State Attorney and Mr. Joseph Mango Senior State Attorney.

By the permission of this court the learned State Attorneys and counsels filed written submissions in disposing the Preliminary Objection.

Before dwelling on the arguments raised n the submissions I find it significant though in brief to dictate the facts that led to this application. The facts are that. The Applicants were initially charged with

manslaughter contrary to S.195 of the Penal Code before the Kisutu Resident Magistrate court and were all granted bail. Then after sometimes, the charge was substituted to a charge of murder contrary to section 196 of the Penal Code. The RM's court cancelled bail to the applicant under S.148(5) of the Criminal Procedure Act and the applicants were remanded in prison.

Subsequent to the orders of concelation of bail and remanding the applicants in prison, the applicants preferred this application armed with the prayers as enumerated above. The application is now confronted with legal points of objections as pointed above supported with the filed submissions.

Having traversed through the submissions I find it proper to start with the second ground of objection i.e the High court lacks jurisdiction to deal with this application at this stage as it is premature.

Arguing the second point, they submitted that the case at the Resident Magistrate court of Dar es Salaam at Kisutu is still at an inquiry stage so as a matter of practice and law, this court is not aware of the existence of this case until a formal charge has been filed by the Director of Public Prosecution or that other public officer has filed information as per Section 245(6) of the Criminal Procedure Act, Cap. 20 (R.E 2002].

That the High Court can not amend or substitute the charge or make such orders because that is in the domain of the respondents due to the fact that they are in a better position to know their case. They went on arguing that according to section 245(1), (2) and (3) of the Criminal

Procedure Act, Cap. 20 [R.E 2002] the subordinate court is only a committal court as the magistrate is supposed to only read over and explain to the accused persons the charges set out in the charge sheet in respect of which it is proposed to prosecute the accused but the accused persons shall not be required to plead or make any reply to the charge as provided for under section 245(2) of the Criminal Procedure Act Cap. 20 [R.E 20.2002]. Further that according to the circumstances of this case, it is premature for this court to entertain this application as it lacks jurisdiction to determine the legality of the charge of murder against the applicants due to the facts that the applicants are not yet committed by the committal or subordinate court and also the information is not yet to be filled to this court so as to commit the applicants and forward the case to the high court for trial.

The applicants Advocates, vehemently objected the above arguments. They argued that this court has jurisdiction to entertain the application. That as the application is preferred under among other provisions section 161 of the Criminal Procedure Act which is clear that appeal or revision can be sought to the Court of Appeal on orders relating to section 148 to 160 of the CPA.

That the application before this court revolves around the provisions of section 148 of the CPA. Further that the provisions of S.372(1) of the CPA empowers this court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, or order recorded or passed, and as to the regularity of any proceedings of any

subordinate court. That there is nothing in the two provisions which requires such power to be exercised after the subordinate court has finalized committal proceedings.

Further more they argued that indeed the High Court has no powers to amend or substitute a charge. However, they said the court can reject or struck out a charge if it is defective and also revise the order or proceedings which are irregular and improper.

They challenged the respondents argument that the murder charge which as are filed in the Kisutu Resident Magistrate Court against the Applicants are treated as a holding charges pending the completion of Investigation which as at now are still in progress". They said if this is the position then it is dangerously conspicuous that the powers of the Director of Public Prosecution are being abused.

That as the record shows, the applicants were charged under S.245 and bail was granted to them. That on the day of substitution of the charge, no reasons were given and also the cancellation of bail was done without a fair hearing, moreover the provisions of section 245(4) of the CPA were not followed in that the cancellation of bail was done before information was filed. That if the applicants were on bail for almost one year, that was a sufficient to be a holding charge. That there was no need to change the charge while the Investigation were incomplete.

They submitted therefore that the action of the Respondents had no any other intention apart from chenging the charge so that the applicants bail can be cancelled and remain in custody.

They referred to the case of the **Director of Public Prosecution Vs Mehboob Alber Haji and another Criminal Appeal No 28 of 1992** (unreported) where the CAT had this to say *"We are suppressed because we did not think anyone in our country could be vested with such absolute and total powers. It would be terrible to think that any individual or group of individual could be empowered by law to act even mala fides"*

They also referred to the case of **Ephata Lema Vs The Republic Criminal Appeal No 2 of 1990** (unreported) where the CAT stated:

"As has been repeatedly pointed out, the overall control of Criminal proceedings in the country are vested in him. But we cannot bring ourselves to accept the suggestion that the courts should not interfere with his exercise of those powers even where he has outrageously abused them"

They therefore submitted that this court has jurisdiction to hear the application which challenges the powers of the DPP and the propriety of the order by the subordinate court.

Let my sincere thanks and gratitude beyond measure go to the learned State Attorneys and counsels for their industrious arguments they have so far advanced.

At the outset, I must point out that the provisions of the law under which the application is preferred vests the power to this court to intervene the decisions, orders and proceedings of the subordinate courts at any stage so far as the need arises to do so. Before me, the applicants want

this court to look at the proceedings and orders of the subordinate court in Criminal Case P.I No 7 of 2013.

In the said Preliminary Inquary, no dispute that the Applicants were charged of Manslaughter c/s 195 of the Penal Code. The applicants who were out on bail mate a subordinate court's order of cancellation of bail and were as per the law remanded in custody.

Being mindful of the provisions of S.372(1) of the Criminal Procedure Act this court has jurisdiction. The section goes:-

S.372(1) *"The High Court may call for and examine the record any Criminal Proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court"*

The gist of this provision is for this court to satisfy itself as to whether there is any Procedural Irregularity or not in the Criminal Case P.I No 7/2013 of Kisutu Magistrate Court.

The arguments as to whether information has been filled and as to whether the provisions of S.245 (i)(2)(3 and (6) of the Criminal Procedure Act are yet to be complied and that the application pre-mature are the arguments to be looked at during hearing of the application and not at this stage.

A fact that the Manslaughter case in P.I No. 7/2013 was substituted to murder case c/s 196 of the Penal Code, this Act in precise terms meant

that the Manslaughter case is no longer in existence that is, it was finalized.

Wherefore, been mindful of the effect of the substitution of the charge sheet the provisions of S.372(2) can not be used to impede the present application.

That been said, the 1st preliminary point of objection is axed into pieces. I am forced so to write because, expressly, the order of the subordinate court/committal court goes:- I quote in extenso:-

"The matter now is murder. I hereby cancel bail to the accused persons as per S.148(5) of CPA. That the accused person to be remanded as per law stated"

The words "The matter now is murder" conotes that the manslaughter charge no longer exists. That means it was finalized. It is on this bases I join hands with the applicants Advocates arguments that the provisions of Section 372(2) would not apply under the circumstance. I will as I hereby do overrule the 1st preliminary point raised.

With regard to the third preliminary objection that this application is incompetent on reasons that the affidavit supporting the application is incurably defective. It was the State Attorneys arguments that paragraphs 14,15 and 16 of the joint affidavit of the applicants contains nothing but legal arguments which offends principles governing Affidavit Equally that paragraph 16 of the joint affidavit and Para 17 of the 10th Applicant's Affidavit contains prayers which offends the principles governing

affidavities. They invited this court to adopt the position as it was in the case of **UGANDA VS COMMISSIONER OF PRISONS, EX-PARTE MATOVU (1966)** E.A 314. Where it was held *"..... as a general rule of practice and procedures an affidavit for we in our court being a substitute for oral evidence, should only contains statement of facts and the circumstances to which the witness deposed either of his own knowledge or such affidavit should not contain extraneous matter by way of objection or prayer or legal argument or conclusion."*

In the same vain, they cited the case of **SIMPLIUS FELIX KIJUU ISSAKA VS. THE NATIONAL BANK OF COMMERCE LTD, CIVIL APPLICATION NO 24 OF 2003** (unreported) where it was held:-

"..... a defective affidavit in support of a notice of motion renders the application incompetent. It leaves the application without legs to stand."

Responding to that the learned Advocate for applicants stated that the respondents have failed to show in their submissions how the said paragraphs have overred legal arguments. That paragraph 14 speaks for itself as it explains the resolve of the counsel for the applicants to file the revision on what was observed in court in failure of the court to render justice. That paragraph 15 speaks of the finding of fact by the said deponent on the defect of a charge which is not object of the revision application and paragraph 16 is based on the belief which the deponents are holding. That the said paragraphs complained off are inconformity with the law Governing affidavits. They invited this court to stand by the decision in the case of **Samwel Kimaro Vs. Hidaya Didas Civil**

Application No 20 of 2012 (unreported) where Msofe J.A quoted with approval the decision in the case of **University of Dar es Salaam Vs Mwenge Gas and Luboil and Phantom Morden Transport (1985) Ltd Vs. D.T Dobie (Tanzania) Ltd Civil Reference No 15 of 2001 and 3 of 2005** respectively where it were held that:-

University case *"The court has the discretion to allow a deponent of an affidavit lacking verification clause to amend the affidavit....."* and Phantom case *"where defects in an affidavit are inconsequential, those defective paragraph can be expunged or overlooked, leaving the substantive parts of it intact so that the court can proceed to act on it"*

I have had time to traverse through the impugned paragraphs and I could not see legal arguments as complained off. It is in paragraph 17 of the 10th Applicants affidavit which contains prayers. Having observed so and confronted with such evil paragraph in that particular affidavit, the relief available is that of striking it off or expunge it from the affidavit leaving the other paragraphs to support the chamber summons. I stand by the decision of Phantom's case (supra)

The thirty preliminary objection is therefore sustained to that extent.

With regard to the fourth preliminary objection which is to the effect that the court has not been properly moved; It has been argued that S.372 of the CPA was amended on the 14th day of December, 2002 by Act No 25 of 2002 which created subsections in section 372.

That the enabling laws in the chamber summons is vital as the court should be moved to act on by citing the relevant provisions of the law granting the court authority to entertain the matter or grant the order or relief being sought in the application. That by citing section 372 without citing sub-section creates confusions before the court as section 372(1) of the CPA provides for power of the High Court to call for records while section 372(2) of the CPA provides for the limitation of subsection (1) regarding to the revision. That the position of the law is that non citation or wrong citation of provision of the law renders the whole application totally incompetent as per **Marwa Maseka Vs The Republic, Criminal Application No 1 of 2005 (CAT)**(unreported)

The position of the law with regard to non citation and wrong citation of the law has so for changed. It was religiously celebrated in the case of **Dodsal Hydvocabons and power (Tanzania) PVT and others Vs Hasmukh Bhangwaji Masrani Commercial case No 42 of 2011** where quoted with approval recent Court of Appeal decisions on the issue of wrong and non citation namely:-

Nicholus Hamis & 1013 others Vs. Tanzania Shoes Co. Ltd & 2 others Civil application No 54 of 2009 (CA) unreported); Farid Ahmed Vs. Scania (T) Ltd (CA) unreported and **Samson Ngwalida Vs. TRA, Civil Application No 86 of 2008 (CA)** unreported.

His Lordship had this to say:-

"It has been observed by the Court of Appeal that failure to cite the correct enabling provisions of the law are not always fatal and the court

can disregard that omission for the purpose of dispensation of substantial justice without being tied up too much with undue technicalities. Therefore the current acceptable position of the law both in by the Court of Appeal and this court (HC) is that the omission to cite a proper or correct provision of the law in chamber summons is not necessarily fatal to the application so long as there is a law that grants the court such powers without occasioning failure of justice to the other party"

As correctly pointed by the learned counsels for the applicants which I subscribe that non citation of Sub – Section (1) of section 372 has not occasioned failure of justice to the respondent.

In the upshot, it is my considered view that the preliminary objections raised and the arguments in support thereto though not lacking in attractiveness are without merit.

The same are overruled as I hereby do.

S.B. Bongole

JUDGE

22/08/2014

Mr. Mzava: My lord, we pray to make written submissions in this matter.

Mr. Njike: We need at least 2 weeks.

Court: The application be disposed by way of written submissions.

S.B. Bongole

JUDGE

22/08/2014

Order:

1. Submission by Applicants be filed on 27/07/2014
2. Submission by Respondents 10/09/2014
3. Rejoinder if any by 15/09/2014
4. Mention for necessary orders on 17/09/2014

S.B. Bongole

JUDGE

22/08/2014