

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO 27 OF 2014

1. ALL OTHUMANI RASHID 2. SHABANI BAKARI WAZIRI 3. FARAJI ALI RAMADHANI 4. MUSA DAUDI MTWEVE	} APPLICANTS
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VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last order: 17/09/2014
Date of Ruling: 7/11/2014

Bongole,J

In the Resident Magistrate Court of Dar es Salaam at Kisutu in P.I No 18 of 2013, the applicants namely Ally s/o Othmani Rashid, Shabani s/o Bakari Waziri, Faraji s/o Ali Ramadhani and Musa s/o Daudi Mtwewe herein after referred to as the first, 2nd, 3rd and 4th applicant respectively were charged of two counts.

The first count was tailored for the 1st applicant. The statement of the offence was RECRUITMENT OF PERSONS TO BE MEMBERS OF TERRORIST GROUP C/S 21 (a) of the Prevention of Terrorism Act, No 21 of 2002.

It was alleged that the 1st application on diverse dates between 1st January, 2012 and 16th September, 2013, at Masjid Noor Tegeta Kibaoni within the District and Municipality of Kinondoni in Dar es Salaam Region, in the United Republic of Tanzania, Republic of Kenya and the Republic of Somalia knowingly did recruit SHABAN S/O BAKARI WAZIRI, FARAJI S/O ALLY RAMADHANI and MUSA S/O DAUDI MTWEVE to be members of AL-SHAABAB.

The second count was for all the Applicants. The Statement of the offence was"- PROFESSING TO BE MEMBER OF TERRORIST GROUP c/s 25(1)(b) of the Prevention of Terrorism Act No 21 of 2002.

The particulars of the offence were that all the applicants on diverse dates between 1st January, 2012 and 31st October, 2013 at various places within Kinondoni district in Dar es Salaam Region in the United Republic of Tanzania, Republic of Kenya and Republic of Somalia did profess to be members of AL-SHABAB that is a terrorist group.

The P.I was assigned to HON MCHAURU SRM where upon the charge was read over and explained to the applicants who were not asked to plead as the matter was triable by the High Court. The applicants were accordingly incarcerated in remand prison awaiting completion of prosecution Investigation and trial. It is the law i.e. The Criminal Procedure Act Cap. 20 R.E 2002 S.148(5) that the offences under the Terrorist Act are non bailable offences.

Championed by Mr Mohamed Tibanyendera learned Advocate from Star chambers Advocate, the applicants have preferred the present

application challenging the legality and propriety of particularly, the charge sheet and the proceedings before the SRM at KIisutu

The application is made under Section 165(1) and 372 of the Criminal Procedure Act Cap. 20 R.E 2002, and any other enabling provisions of the law.

The applicants pray before this court for orders as follows:-

1. That this Honourable court be pleased to call upon, the Records of the RM's Court of Dar es Salaam at Kisutu in P.I No 18 of 2013 currently pending before Hon Mchauru, SRM and revise the proceedings.
2. That the Honourable court be pleased to order that the charges against the 1st, 2nd, 3rd and 4th Applicants currently pending in the RM's Court of Dar es Salaam, at Kisutu in P.I No 18 of 2013 before Hon Mchauru SRM be dismissed.
3. That the Honourable Court be pleased to order that the direct that the 1st 2nd, 3rd and 4th applicants be released from remand prison where they are currently withheld.
4. Costs for this application.
5. Any other relief this court may deem appropriate, just and equitable to grant.

The application is supported by an affidavit deposed on by Mr. Tibanyendera learned counsel. Among others, Mr Tibanyendera deposed that the applicants are Tanzania Nationals, residents of Dar es Salaam and

committed Muslim believers. That some times in the year 2013, the 2nd 3rd and 4th applicants decided to travel to Sudan, a country situated in Northern Africa with a view to acquire religious Education as per Islamic preach that Muslims should seek and obtain education from every source regardless of the distance or mileage to be spent before acquisition of the education so desired. That on their route to Sudan, the 2nd 3rd and 4th applicants were arrested in the republic of Somalia where they were seriously assaulted/tortured before returned to Tanzania where P.I No 18/2013 was preferred against all the applicants.

Further that the charge against the applicants has been pending in the court for a period of more than sixty days required by the law and there is no certificate duly filed by the RCO or the DPP whatsoever. That the applicants have never been recruited by any person to join a terrorism group anywhere in the world nor has the 1st applicant has been a member of any terrorism group within or outside the United Republic of Tanzania.

Further more that the respondent has been delaying the proceedings in P.I No 18 of 2013 before the RM's Court of Dar es Salaam at Kisutu alleging that the Investigations are incomplete against the applicants in order to keep the applicants withheld in remand prisons without any legal justification.

That the applicants stand to suffer irreparable loss by continued remand in Segerea Prison or in any other prison of the respondent without any justifiable cause if the application is not granted.

That the ground of their revision is based on the charge sheet in P.O No 18/2013 where the 1st Applicant is charged in person for recruitment of

persons to be members of Terrorist group c/s 21A of the Prevention of Terrorism Act of 2002. That in the particulars of the offence, the charge sheet speaks that in divers dates between the 1st January, 2012 and 16th September, 2013 at Masjid Tegeta Kibaoni Dar es Salaam Region in the United Republic of Tanzania, Republic of Kenya and the Republic of Somalia knowing did recruit Shaban Bakari, Faraji s/o Ramadhani and Musa s/o Daud Mtweve to be members of Alshabab.

That they pray the revision of 1st count and the charge against the 1st Applicant be dismissed because the particulars of the offence never mention the said Alshabab to be a Terrorist group. Further that the charge itself is defective as the Masjid Nur Tegeta Kibaoni is the place these people were recruited in Kenya and Somalia. Generally he said, it is not easy for a person be seated at Tegeta Kibaoni in Kinondoni in Dar es Salaam at the same time recruits people to join Alshabab in Kenya and Somalia. He added that the charge sheet never discloses the relationship between himself and the said Alshabab group. That it never state if the 1st Applicant is a member, leader or the owner of the Alshabab group so as he may recruit other people to join the Alshabab.

That the word Alshabab is capable of been having interpreted to have different meanings not only necessarily terrorism.

That one meaning from the Arab Dictionary Alshabab means a "YOUTH" "CLUB" it's a football club in Ira1, Kuwait, Oman, Saudi Arabia and Libya. It means also a Militant group in Somalia with the aim of Overthrowing the leadership in somalia of which all its activities are carried in Somalia and not in Tanzania.

Further more that by virtue of Act No 21/2002 which is the prevention of Terrorism Act, it gives powers to the Government to make Regulations and rules under S.6, 12 and 48 of the Act. By virtue of the Enacted Regulation known as Prevention of Terrorism Regulation of 2012 GN NO 283 Published on 31st august 2012 provides as to what should be known as Terrorist group and in particular Regulation 28 says Alshabab Alsaimiya (b) Alkaida.

He submits therefore that taking into account different meanings of Alshabab, the 1st count is with no merit because the 1st Applicant is not a member of Alshabab Alsaimiya by virtue of Tanzania law. He said, the charge is defective and he pray the same to be dismissed.

With regard to the 2nd count he submitted that the four applicants are charged of professing to be members of terrorist group c/s 25(1)(b) of the Prevention of Terrorism Act No 21/2012. That the particulars are that all the applicants on divers dates between January 1st 2012 and 31st October, 2013 at various places within Kinondoni District in Dar es Salaam Region in the URT; Republic of Kenya and Republic of Somalia did profess to be members of Alshabab which is a Terrorist group.

That this count deserves a dismissal order because by virtue of Our Law Alshabab is not a Terrorist group in Tanzania as the only Terrorist group in Tanzania are Alshabab Alsaimiya and Alkaida and not any other group of sect called Alshabab. He finally submits that it is not an offence to be a member of Alshabab except Alshabab Alsaimiya.

The Respondent filed a Counter Affidavit deposed on by Mr Peter Njike Senior State Attorney in the Attorney General's chambers. Among others

he concedes to the facts that the applicants are charged in Kisumu RM's Court having been arrested in Somalia i.e the 2nd, 3rd and 4th Applicants.

That there is no time limitation in Investigating the offences the applicants are charged with and finally that the Investigation of this case is not yet complete.

Further, Mr. Kongola Principal State Attorney made oral submission in opposing the application. He argued that the reliefs sought in this application are not backed by any provision of the law. That the charge sheet in P.I No 18/2013 contains two counts which were read over and explained to the Applicants before Mchauru SRM. That if the charge had defects, it was then Mchauru SRM to reject it as per S.129 of CPA Cap. 20 R.E 2002. That it is not this court to reject it but the RM's Court. Further that if the RM's Court could deduce any defect from the charge sheet, it could not dismiss it as prayed in the c/summons but the only remedy was to apply S.234(1) of the CPA which could have directed the prosecution to amend the charge sheet and not to dismiss it. That at this stage, the High court has nothing to entertain . In support of his argument he cited the case of R. Vs Asafu Tumwine Cr. Rev.No 1 of 2006 CAT at Mwanza (Unreported)

On the meaning of Al-shabab, he said the meaning given by Mr Tibanyendera is a political wing and whatever that he said requires proof. That the applicants are charged on Terrorism Act Cap. 21 and even the statement of the offence it is quoted Cap. 21 R.E 2002 being the main Act. Further that during trial it shall be known the Alshabab they are talking about is a club, young man or a terrorism group.

Having received arguments from both sides I wish to extend my sincere gratitude for the superb and convincing arguments they advanced. Their arguments have assisted me in narrowing down the decision in this Revision.

I have had a chance of reading the charge sheet in between the lines. The Applicants are charged under Terrorism Act Cap. 21 R.E 2002. So whatever meaning and any reference to the charge sheet must and has to be limited to Terrorism Act cap. 21 R.E 2002. It goes therefore that the word ALSHABAB that appears in the charge sheet must have the meaning described under the Terrorism Act Cap. 21 R.E 2002 of which under S. 6, 12 and 48 the Minister has been empowered to make Regulations. By virtue of GN No 283/2012 which was made in line with the requirements of Cap. 21; under regulation 28 the list of suspected International terrorists, terrorist groups and prescribed organizations prescribed in the 1st schedule to the Regulations to be suspected Terrorist groups

- (a) AL-SHAABAB AL-ISLAMIYA
- (b) AL-QAEDA (See part 1 of the schedule)

For all purpose and intent, when one refers to Alshabab by virtue of Cap. 21 R.E 2002, he/she refers to the Alshaabab Al-Islamiya. Admittedly the charge sheet is written AL-SHAABAB insteady of Al-Shaabab Al-Islamiya. To my understanding and Interpretation, this was an error on description rather than one on substance. It can not therefore vitiate the charge to be defective as argued by Mr Tibanyendera. On the face of it, I find the charge to be within the ambits of the law i.e S.132 of the CPA. It provides:-

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

There is no doubt that the accused are aware and they understand the nature of the offence they stand charged because a Terrorist group under Cap. 21 known as Al-shaabab is the one referred under regulation 28 of GN No 283/2012.

Having found that the charge sheet contains the necessary particulars save for the error noted, I find the details that Mr. Tibanyendera pointed out in his submission as are missing to be pre-mature at a stage of P.I as such details are to be disclosed in the committal proceedings and during trial as evidence to proof the charge. Further more, on my careful perusal of the P.O 18/2013 of the RM's Court file, I find no any irregular or illegal order made that would warrant this court to make a revision order as prayed in this application.

I have had also a chance of traversing the case cited of R **Vs. Asafu Tumwine (Cr.Rev. No. 1/2006 (supra))**. The case insisted on how committal proceedings should be conducted and what should a committal court do so as the High Court may assume jurisdiction to proceed with trial. The dicta in this case does not oust powers of this court conferred under S.372(1) of the Criminal Procedure Act Cap. 20 R.E 2002 to revise any order or proceedings of the subordinate court if it is satisfied that such order or proceedings are illegal or Irregular.

That been said and done, I find the applicants' application unmeritorious and I accordingly dismiss it.

S.B. Bongole

JUDGE

7/11/2014

7/11/2014

Coram: Bongole,J

For the 1st Applicant

For the 2nd Applicant

For the 3rd Applicant

For the 4th Applicant

Mr. Aron Lesindous

For the Respondent: Mr. P. Njike S.S.A

Mr. Barasa S.A

c.c. Evalina

Mr. Njiku: My lord, the matter come for ruing and we are ready to receive it.

Court: Ruling delivered.

S.B. Bongole

JUDGE

7/11/2014