

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

**MISC CRIMINAL APPLICATION NO 32& 43 OF 2014**

(Revision from the Ruling and Orders of the Resident Magistrate's Court of Dar es Salaam at Kisutu (Hon. Kisoka RM) dated 12<sup>th</sup> March 2014 in PI No 7/2013)

1. RAZA HUSSEIN LADHA
2. GOODLUCK SILVESTER MBAGA
3. WILBROAD WILBROAD MUCYABUSO
4. IBRAHIM MOHAMED KISOKI
5. CHARLES SALU ORAGE
6. ZONAZEA ONANGE OUSHUDADA
7. MICHAEL LOTH HEMA
8. ALBERT JOHAN MNUO
9. JOSEPH FRANK RINGO
10. MOHAMED SWABURI ABDALARIM.

**APPLICANTS**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

Date of last Order 17/9/2014

Date of Ruling - 10/10/2014

**RULING**

**BONGOLE, J.**

Two applications have been preferred before this Court i.e. Misc. Crim. Application No 32 of 2014 and Misc Crim. Application No 43 of 2014. They were consolidated as they

arise from the same impugned ruling and orders of the RM's Court of Dar es Salaam at Kisutu in P.I. No 07/2013. This ruling is in respect of the two applications.

The applications are made under Section 392A (i)(2) Section 161, Section 150, Section 129, Section 132, Section 135(a)(iii)(f), Section 148(3), Section 372, Section 373, and Section 376 of the Criminal Procedure Act (Cap 20 R.E 2002).

The applicants namely Raza Hussein Ladha; Goodluck Silvester Mbanga; Wilbroad Wilbard Mugyabuso; Ibrahim Mohamed @Kikoki; Charles Salu Ogare; Zonazoea Anange Oushoudada; Michael Loth Lema; Albert Jonas Mnuo; Joseph Frank Ringo and Mohamed Swabiri Abdulkarim hereinafter referred to as 1<sup>st</sup> to 10<sup>th</sup> applicants respectively are praying for revision for the following orders:

1. That this Honorable Court be pleased to call for and examine and revise the proceedings and orders of the Resident Magistrate's Court, Kisutu, Dar es Salaam made on 12<sup>th</sup> March 2014 for purposes of satisfying itself as to

the correctness, legality or propriety of the said proceedings and orders.

2. That the Honorable Court be pleased to consider and revise the charges filed by the Respondent, and accepted by the Court, contrary to the laws.

3. That this Honorable Court be pleased to revise the orders made by the Resident Magistrate's Court accepting new aggravated charges without the Respondent informing 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 Magistrate 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 person bail in the circumstances of the case.

Application No. 32 of 2014 is supported by the joint affidavits of WINFRED MATHIAS MNZAVA, OTHIAMBO KOBAS, ADRONICUS BYAMUNGU, RICHARD W. MMBANDO, RACHEL JOSHUA and REGINALD BERNARD, the dully instructed learned counsels for the 1<sup>st</sup> to 9<sup>th</sup> Applicants AND, application No. 43 of 2014 is supported by the affidavit of EDWARD NELSON MWAKINGWE learned advocate for the 10<sup>th</sup> applicant.

The Respondent was represented by Mr. B. Kongola Principal State Attorney, Mr. Peter Njike Senior State Attorney and Mr. Joseph Maugo Senior State Attorney all from the Director of Public Prosecutions.

The facts giving rise to this application going by the sworn affidavits by the Applicants' advocates and the counter affidavit of the Respondent may be summarized as follows:

That the Applicants were charged with manslaughter in the Resident Magistrate Court of Dar es salaam at Kisutu in

April 2013 and granted bail by the court then. Twenty four counts were leveled against the applicants.

On the 12<sup>th</sup> March, 2014 which was a mention date, the Prosecutor requested the court to be allowed to substitute the charge by adding another accused person and also prayed to substitute the charge. The Court allowed the addition of accused No. 12 and allowed the substitution of the charge of manslaughter to a new charge of murder.

The RM's Court allowed the new charge to be read to the accused persons, (Applicants) without explanation who were not asked to plead. Twenty nine count of murder were leveled against the applicants. The prosecution prayed for another mention date as investigations was incomplete. The court made two orders namely, that the matter was now murder and that accused bail was cancelled hence the accused (Applicants) were remanded in custody as per the law(s.148(5)of the Criminal Procedure Act Cap 20 R.E 2002).

That the Court failed to require the Prosecution to explain the circumstances giving rise to aggravate the charge of manslaughter to murder and further to give accused persons a hearing before accepting the new charge of murder.

That the Counsels for the applicants believe that where rules of law are not followed and the accused/applicants were not given an opportunity to be heard on aggravated charges, the defective charge cannot stand in law amounting to gross irregularity occasioning injustice warranting revision by the High Court despite the preliminary inquiry being continuing in the Resident Magistrate Court of Dar es Salaam without being finally determined.

By the permission of the court, parties filed written submissions in disposing the applications.

For the applicants, it is submitted that, the applicants (accused) were charged with Manslaughter in early April 2013 at Kisutu Resident Magistrate Court, under

Preliminary Inquiry No 7 of 2013, following the collapse of a building under construction along Indra Gandhi Street within Ilala District of Dar es Salaam.

That the applicants were granted bail under Manslaughter charges on 16<sup>th</sup> April 2013. After about a year of a said peaceful and eventful bail period they said, on 12<sup>th</sup> March, 2014 at the instance of the Respondent, the charge of Manslaughter was impliedly withdrawn and substituted with a charge of Murder c/s 196 of the Penal Code. That the substituted charge of murder was applied for by the Respondent under section 234(1) of the Criminal Procedure Act 1985 without advancing any reasons and the applicants bail was cancelled and the applicants were ordered to be remanded in custody.

That the proceedings and orders of the RM's Court Kisutu made on 12<sup>th</sup> March 2014 were illegal as they were contrary to the procedures laid down in law under section 150 and section 98 of the Criminal Procedure Act 1985. Thus they argued that the proceedings were in law a nullity.

They submitted that five errors were made by the RM's Court namely:

- (a) The RMs Court at Kisutu made serious errors of law in presuming the withdrawal of the charges of manslaughter under wrong section of the law (s.234)(1) and without any reasons from the Respondent.
- (b) The RM's Court erred in accepting and concurring to the new aggravated charges of murder without requiring the Respondent to state or inform the Court of the circumstances giving rise to the new charge of murder, contrary to S. 150 of the CPA.
- (c) Failure of the Court to grant the Accused/Applicants opportunity to be heard on the charges according to the law AND unlawfully cancelling Applicants' bail without a fair hearing C/S 150 of the CPA.
- (d) Accepting defective charge of murder unknown to the law and lacking necessary particulars, to the prejudice of the Applicants, C/S 132 and 135 of the CPA and S. 196 of the Penal Code.



- (e) Failing to prevent the Respondent from abuse of the legal process as per the law C/S 8(b) of the National Prosecutions Services Act, 2008 and Section 90(4) of the Criminal Procedure Act, 1985.

They said, in examining the proceedings of the RM's Court on 12<sup>th</sup> March 2014 the following observation is seen that:-

- The Prosecutor applied to substitute the charge of manslaughter by adding another accused person (Gabriel Kaziyashule Fuime)
- The Prosecutor prayed to substitute the Manslaughter charge sheet under Section 234(1) of the CPA.
- The Prosecutor did not present a new charge of manslaughter containing the name of the new accused person
- The Prosecutor concluded by saying "That is all."
- The Prosecutor did not apply to withdraw the charges of manslaughter
- The Prosecutor did not give any reasons for the presumed withdrawal
- The Court did not grant leave to withdraw the charge of manslaughter

- The Court was just passive and presumptuous.
- The Prosecutor again applied to substitute the charge.  
But which one the old manslaughter charge with 11 accused persons or the new one with 12 accused persons charged with manslaughter?
- The Court granted leave to substitute the charge (whichever) without leave to withdraw the manslaughter charge.
- The new charge was read over to the accused persons.
- It is now MURDER
- Accused persons were not given any opportunity to say anything to the new charge of Murder as per the law (s. 150 of the CPA)
- The Prosecutor pray for another mention date as the matter is routine for the umpteenth time
- The Court cancelled the bail of the accused persons under Section 148(5) of the Criminal Procedure Act, 1985.
- The Court ordered the accused persons to be remanded in custody as per the law.

They therefore asked, was the law complied with, was justice done to the accused persons (Applicants)? It was their arguments that the law was ignored and the Applicants were unjustly treated to their prejudice, and remanded in custody.

They further submitted that S. 234(1) of the Criminal Procedure Act, 1985 does not apply to Preliminary Inquiries but applies only to TRIALS. That the Applicants were not on trial they said and so they emphasized that the Prosecutor used a wrong section of the law for reasons best known to themselves. That in the case of **R versus Athuman Rajabu and Others** (1989) TLR 44 at p. 46 it was held by Kazimoto J. that:-

Section 234(1) of the CPA only empowers the Court to amend the charge where on the face of it , it appears to be defective either in substance or form but does not empower the Court to order that a person be included in a charge sheet.

They cited the case of **R versus Suleiman Saleh Ally** (1985) TLR 96 at page 100 where it was held that:-

*“Any Public Prosecutor wishing to withdraw charges must give reasons for his intention to do so, and must seek consent of the Court and the Court must record those reasons to accord or to withhold consent.”*

*“The practice of Public Prosecutors withdrawing charges without assigning reasons and the Court according consent as a mere formality, is improper and should cease.”*

They therefore argued that the RM’s Court at Kisumu erred in law by “suo moto” presumably granting withdrawal of the charges of manslaughter, which were never applied for by the Prosecutor let alone stating reasons for the withdrawal of the charges and also using wrong section of the law for withdrawing a manslaughter charges. This makes the withdrawal of the charge under a wrong section of the law a nullity. That legally and in law, the charges of manslaughter still subsists in Kisumu P.I. 07/2013 as it was not legally withdrawn.

That legally there are two subsisting and concurrent charges of manslaughter and murder in the Court file, in P.I No. 07/2013.

Responding to the above arguments, the Respondent submitted that the provisions of Section 234(1) as cited above were the proper provisions for making the substitutions to the charges in form and in substance. That they understand it to mean adding an accused person and/or changing the nature of the charge as it was done by the Respondents in this particular case. That they are not aware nor do they know of any other provision that caters for making such amendments or changes to the charges in our laws. They therefore argued that the legal provision under which substitution was made was proper and that the procedure adopted by the Respondent in effecting the same was proper and in conformity with the laid down procedure.

I found it pertinent to reproduce the provision referred to i.e. S 234(1) of the CPA. It provides:

“S. 234(1) Where at any stage of a trial, it appears to the Court that the charge is defective, either in substance or in form, the Court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the Court thinks necessary to meet the circumstances of the case unless, having regard to the merit of the case, the required amendments made under the provisions of this subsection shall be made upon such terms as to the Court shall seem just.”

At the outset, I must state that the cited provision is applicable in trials and not at a stage of Preliminary Inquiry. The provision is clear and free from any ambiguity of interpretation. The oral application before the Committal Court under section 234(1) was wrong as the Prosecutor /Respondent could have used the relevant laws which empowers him to make substitution i.e. Section 91 and 150 of the Criminal Procedure Act, Cap 20 R.E. 2002 and Section 90 (4) (2) and 16(1) of the National Prosecutions Services Act No. 27 of 2008.

Having found that the substitution was applied for under wrong provision of the law, it renders the said oral application incompetent hence illegal and with no legal effects. It goes therefore that whatever followed thereafter in the committal proceedings was null and void. In other words, the proceedings was vitiated by virtue of the oral incompetent application. The oral application which was incompetent ought to have been struck out by the Committal Court. As the Committal Court did not do so, I now correct that error in that proceedings by strike out the prayer of substitution of the charge sheet made by the Respondent under S. 234(1) of the CPA.

As it was demonstrated in the proceedings, the Respondent had applied for substitution of the charge to add the 12<sup>th</sup> accused person in the manslaughter charges. There was no any Court order indicating that the application was granted or not. Further the record does not show if the manslaughter charge that was substituted was read over and explained to the 12<sup>th</sup> accused person as per what the law requires.

The subsequent charge of murder which was read over and explained to the accused persons was done so before notifying neither the Court nor the accused persons/Applicants.

As the charge was an amendment that had an automatic effect to the Applicants bail, the Applicants had a right to be informed and be heard before cancellation of bail. This was a peremptory requirement as enshrined under Section 150 of the CPA. The circumstances giving rise of new charge of murder ought to have been stated by the Prosecutor and recorded by the Court; the accused ought to have been given a chance of being heard on the new charge. Further the new substituted/amended charge of murder ought to have disclosed ingredients of the offence that is to say "the ACTUS REUS" and "MENS REA". It is well known by all lawyers that Actus reus of murder is an "unlawful killing" and its respective mens rea is the "malice aforethought." As the Applicants Counsels argued that the Applicants were charged of a Manslaughter charge at RM's Court Kisutu in P.I. No 07/2013 following the collapse of



the building under construction along Indira Gandhi Street within Ilala District of Dar es Salaam the facts were not opposed by the Respondent. It follows therefore that each accused/Applicants particular ought to have been indicated in the charge sheet and the unlawful act or omission he did in causing the death to those 27 people alleged in the charge sheet. In here the essential elements of the murder charge were not disclosed. It was emphasized in the case of **Mussa Mwakunda versus R** (1996) TLR 387 that:

“An accused person must know the nature of the case facing him and this can be achieved if the charge discloses the essential elements of the offence charged.”

Equally so in the case of **Oswald Abubakari Mangula Versus R** (2000) TLR 271, the CAT held that

- i) It is a salutary rule that no charge should be put to an accused person before the Magistrate is satisfied, inter alia, that it discloses an offence known in law. It is

intolerable that a person should be subjected to the rigorous of trial based on a charge which in law is no charge”

- ii) Since the charge sheet disclosed no offence known in law the learned Judge of the High Court should have declared the proceedings a nullity.
- iii) The proceedings in the District Court were a nullity.

In the case **Henry Kilewo & Others vs R**, Tabora Misc Criminal Application No. 53 of 2012 Hon Lukelelwa, J cites a Circular by the Director of Public Prosecutor (DPP) No. 1 of 2009 issued on 8/7/2009 under S. 8(1) of the National Prosecutions Services Act and directed to Public Prosecutors of the NPS which states:

“Ensure that all charges that are filed before subordinate court explicitly state all the ingredients of the respective offences for the charge that have been preferred. In addition to charges filed a separate detailed profile of particulars of the

accused persons should be attached and filed together with the charge sheet.”

The new Murder charge that is on record in the impugned proceedings of the RM's Court is not in conformity with neither the Court of Appeal decisions cited nor the DPP's circular cited. Being found so therefore, the proceedings of P.I. No. 07/2013 were a nullity. A contention in the Respondent's submission that the charge contains all the necessary ingredients to enable the applicants to understand the nature of the charges facing them and to enable them to prepare their defence is in my respectful view a naked lie.

There have been strong and serious complaints leveled by the Applicants' Counsels in their submission in chief which were not responded by the Respondent in their submission. These are in particular in errors of the RM's Court alleged at paragraph (e) cited earlier.

They submitted that the Court accepted the substitution of charges, under section 234(1) of the CPA which only

applies to trials and not to Preliminary Inquiries. That the court was passive and accepted the substitution. That the DPP was not ignorant of the law that he practices but it was deliberately done in bad faith. To that end they submit, it was convenient to avoid the use of S. 150 of the CPA which required the Prosecutor stating to the Court the change of circumstances justifying cancellation of the bail. That this was not an isolated incident by the DPP. That a combination of the actions of the DPP on 12/3/2014 in P.I. No. 07/2013 points towards deliberate bad faith and breach of human rights to the prejudice of the accused applicants. That the Court did nothing to prevent abuse of the legal process. That the drawing of a defective murder charge was also a deliberate bad faith aimed at charging accused applicants with an unbailable offences to facilitate the control of and expedition of criminal justice of which the court failed to observe the law and accommodated this mischief of bad faith and abuse of the legal process.

That the deliberate use of a wrong section of the law by experienced Principal and Senior State Attorneys in a criminal matter is sufficient to prove that a court process

has been used for ulterior purpose, hence the abuse of the process of law and process of court.

I fully subscribe to the Counsels observations and arguments in this respect. I am persuaded with the decision of the House of Lords in England in **R versus Crown Courts at Leeds Exparte Wardle** [2001] 2 All E.R. 1, where at para 155 Lord Scott of Foscote had this to say:

“The concept of abuse of process is no different in criminal cases. It involves the use of court process for a purpose other than that for which the purpose in question was intended. It is in that sense that one may speak of some procedural step being taken for an improper purpose and therefore, constituting an abuse of process. The procedural step will often be accompanied by bad faith or dishonesty in that a legitimate purpose, not being the true purpose, may be put forward as the true purpose. But bad faith or dishonesty are not essential. What is essential is that a court process has been used for ulterior purpose.”

In the application at hand, the ulterior purpose is manifested from the non rebuttable facts that the applicants were charged as a result of the collapse of building under construction which caused the death of 27 victims. A subtle question will be where is the malice aforethought of the Applicants so as to constitute a Murder case. As the Respondent (DPP) had preferred manslaughter charges against the Applicants that was the correct step and action done. But upon examining the records in the proceedings from the beginning, it appears that the Respondent did not wish/like to see the Applicants out on bail. It is manifested so from the very beginning of the proceedings. The Respondent did object grant of bail to the Applicants/ accused persons on the ground that the Committal court had no jurisdiction to entertain an application for bail on a matter triable by the High Court. The Committal Court overruled that the objection basing on the decision of **Republic versus Dodoli Kapufi and Paston Tusalila**, Criminal Revision No. 1 of 2008, CAT (Unreported). Bail was granted to applicants. The Respondent was aggrieved where he issued a Notice of

Appeal to the High Court dated 30<sup>th</sup> April 2013. The Respondent did not proceed with the Appeal instead, he applied after a year for substitution of the charges and preferred/substituted before the court a defective murder charges where the applicants bail was cancelled and they were remanded in custody. Now should a court worth of the name interprets the Respondent's acts to be within the ambits of section 8 of the National Prosecutions Services Act No 27 of 2008 and s. 90(4) of the Criminal Procedure Act, Cap 20 R.E. 2002?

Under the NPS Act the Respondent is directed as hereunder:

“S.8 In the exercise of the powers and performance of his functions, the Director shall observe the following principles:

- (a) The need to do justice;
- (b) The need to prevent abuse of legal process; and
- (c) The public interest.”

In ensuring that the Applicants bail is cancelled by substituting a defective murder charge on the part of the

Respondent, was it for justice or for prevention of abuse of legal process or for public interests?

I am forced to say in broad terms that it was for some ulterior purpose and it amounted to malicious abuse of the legal process in an abominable manner just as it was in the case of the **DPP Versus Mehboob Akberhaj**, Criminal Appeal No. 98/1992 CAT (Unreported).

In the present application, the Respondent avoided to withdraw the charge sheet as he did in **Mehboob Akberhaj's** case (supra) but he used modern technique or rather digital I may call in making substitution but with the same malafides purpose. This kind of behaviour should cease.

I am of mindful of the wide powers of the DPP but if he do not exercise such powers for public interest, for preserving justice and for preventing abuse of legal process may unfairly expose citizens to anxiety, expenses and embarrassment of trials; while the failure to effectively prosecute guilty parties can directly impact public safety. I



should refresh the Respondent that wrong decisions tend to undermine the confidence of the community in the criminal justice system.

That being said and done, I find the application meritorious. Consequently,

- (a) I declare the proceedings and orders of the RM's Court at Kisutu in P.I. No. 07 of 2013 dated 12<sup>th</sup> March 2014 null and void in law and with no effect. The proceedings is therefore quashed and the orders made are hereby set aside.
- (b) The Applicants/Accused should revert to the original position prior to the proceedings of 12<sup>th</sup> March 2014 where they were charged with manslaughter with bail on the same terms and conditions.
- (c) The charges of manslaughter are hereby restored and the Applicants/ accused bail is hereby extended as from the pronouncement of this Order.

In terms of S. 376 and 148 (3) of the CPA, this Order/decision shall be certified by this Court to the Kisutu RM's Court upon promptly typing of the same.

The Applicants to appear before the RM's Court on a date that has been fixed for mention.

Ordered accordingly

S. BONGOLE

JUDGE

10/10/2014

**10/10/2014**

Coram Bongole, J

For the 1<sup>st</sup> Applicant;

Mr. Henry Masaba

For the 2<sup>nd</sup> Applicant:

Mr. Mwambando

For the 3<sup>rd</sup> Applicant:

Mr. Masaba/Byaungo

For the 4<sup>th</sup> Applicant:

Mr. Masaba/Mr. Kobasi

For the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> Applicants: Mr.Masaba/Mr.Mzava.

For the 8<sup>th</sup>, 9<sup>th</sup> Applicants:

Mr.Masaba/Mr. Makanja

For the 10<sup>th</sup> Applicant:

Mr.Masaba/ Mr. Mwakinge

For the Respondent:

Mr Joseph Maugo SSA

CC: Eveline

**Mr. Maugo:**

My Lord the application comes for ruling and we are ready to receive.

**Court**

Ruling delivered

S. BONGOLE

**JUDGE**

**10/10/2014**

Right of appeal explained

S. BONGOLE

**JUDGE**

**10/10/2014**