IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM MAIN REGISTRY

(CORAM: A.K. MUJULIZI, J., S.B. BONGOLE, J. and E.M. FELESHI, J.)

MISCELLANEOUS CIVIL APPLICATION NO. 21 OF 2013

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA [CAP. 2 R.E., 2002]

AND

IN THE MATTER OF A PETITION TO ENFORCE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, [CAP. 3 R.E., 2002]

AND

IN THE MATTER OF A PETITION TO CHALLENGE AS UNCONSTITUTIONAL SECTIONS 244 AND 245(1), (2) & (3) OF THE CRIMINAL PROCEDURE ACT, [CAP. 20 R.E., 2002]

BETWEEN

ZEPHRINE GALEBA ..... PETITIONER

AND

HON. THE ATTORNEY GENERAL ..... RESPONDENT

JUDGMENT

FELESHI, J.:

The Petitioner seeks this Court to declare that, sections 244 and 245(1),(2) & (3) of the Criminal Procedure Act, [Cap.20, R.E.2002] ("the CPA") regarding Committal Proceedings in the subordinate Courts for matters triable in the High Court are unconstitutional for contravening

Article 13(6)(a) of the Constitution of Tanzania, [Cap. 2 R.E.2002] ("the Constitution"). The article requires that, whenever rights and duties of any person are being determined by the Court or any other agency, such person should be afforded a fair opportunity to be heard including right of appeal against the decision of such organ.

The hearing of the Petition was conducted by written submissions. The Petitioner engaged the services of James Jesse, learned advocate from the University of Dar es Salaam whereas the respondent, Attorney General, was represented by Ms Sarakikya, learned Principal State Attorney. We wish to express our gratitude to counsel for their well argued submissions which were useful in our deliberations and finally determining the matter before us.

In his written submission, the petitioner's advocate submitted that: offences triable by the High Court as prescribed by the CPA, the Penal Code and other penal statutes are in the first place instituted in the subordinate Courts by way of Committal Proceedings. In essence, the said Courts lack Jurisdiction to try such offences. Mr. Jesse argues that, Committal Proceedings before subordinate Courts in matters triable by the High Court deny an accused timely access to Court/Justice hearing or trial. To him, this is a strap up of justice especially in a just, democratic and prosperous society based on the rule of law that respects and promotes Human Rights.

Besides, he argued that, from such state of affairs by way of a remedy, it is imperative for such provisions to be removed by amendment

within a certain period of time to be specified by this Court. He further argues that, sections 244 and 245(1), (2) & (3) of the CPA do not conform with article 13(6)(a) of the Constitution, which emphatically advocates for equality before the law by intrinsically reciprocating implication of appropriate procedures which take into account fairness and right of appeal among other remedies.

Further, that, it will thus be unconstitutional for the law to subject a suspect of criminal offences such as homicide, treason or drug trafficking to mention but a few, to Committal Proceedings before a Court of law which does not have jurisdiction to try the offences. This he argued, has been the cause of delay for pending matters in Courts with endless adjournments.

Besides, Mr. Jesse urges Tanzania to actively undertake her international obligations to which it is committed by acceding and ratifying, to domesticate the same so as to fit her local circumstances. The relevant instruments for the purposes of this petition include the International Covenant on Civil and Political Rights of 1966 especially under articles 9(2)-(4), 14, 15, 18, 26 and 27. In the said instrument, article 9(2) – (4) of the Covenant provides that:-

> "(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a Judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the Judgment.

> (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before the Court, in order that that Court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

Besides, Mr. Jesse argued, from the Tanzania experience and nature of Committal Proceedings, even if a person charged with capital offences admits to have committed the charged offence, yet, he stands to stand the queue instead of being arraigned before the Court with competent jurisdiction to try the offence, that is, the High Court.

In the alternative to matters tried only before the High Court, he therefore strenuously argued that, the purpose of Committal Proceedings should extend mandate to Magistrates to weigh out whether there is any evidence that a reasonable jury can proceed to convict, otherwise, such Magistrates should be vested with power to dismiss the charges although this should not amount to an acquittal. The prosecution, upon gathering further evidence, may arraign such person in Court for it to abrogate the presumption of innocence in criminal matters as held in R vs. Oakes [1986] 1 S.C.R. 103.

In his opinion, Magistrates in Committal Proceedings should be relieved of the passive role they currently have in such proceedings and extend to them an active role to make Committal Proceedings more meaningful. Moreover, he urged, failure to observe article 13(6)(a) of the Constitution also violates article 13(6)(b) of the Constitution which prohibits the acts of treating an accused as a convict until the contrary is otherwise proved.

Besides, he stressed: in essence, the sections under scrutiny as provided for under the CPA suppress the right to be heard which is both an established trite principle of natural justice and a Constitutional right.

Reference was made to Dishon John Mtaita vs. Director of Public Prosecutions, Criminal Appeal No. 132 of 2004 (Arusha Registry) (Unreported) and Selcom Gaming Limited vs. Gaming Management (T) Limited and Gaming Board of Tanzania [2005] T.L.R 116 to that effect.

Further reference was made to Central Asbestos Co. Ltd. vs. Dodd [1972] 2 All E.R 1153 where the Court held that:-

> " ..... Delays will make it more difficult for the legal procedure themselves to vouch safe a just conclusion. Evidence might have disappeared and recollection becomes increasingly unreliable. Speedy rough justice, will therefore, generally be better justice than justice worn smooth and fragile with the passage of years".

It was Mr. Jesse's additional prayer that, this Court should be guided by the Bangalore Principles on Domestic Application of the International Human Rights Norms which stand as a guide to Judges when adjudicating on cases concerning Human Rights cases in the interest of justice.

In summing up his submission, Mr. Jesses added that, Committal Proceedings have been abolished in some jurisdictions such as in the United Kingdom, Australia and Tasmania thus urging this Court to take inspiration from those common law jurisdictions and declare the procedure of Committal Proceedings in Tanzania to be inappropriate for being unconstitutional.

In reply, Ms Sarakikya learned Principal State Attorney, submitted that, access to justice includes according one reasonable time to investigate, prepare and present her case as was held in Juma and Others vs. Attorney General [2003] 2 E.A.L.R 461. She argued that, Committal Proceedings intend to accord the prosecution with opportunity to properly gather the requisite pieces of evidence and by no means can that be construed to amount to unfair hearing on the part of the accused.

M/S Sarakikya added that, article 13(6)(a) of the Constitution is inapplicable considering some other laws in terms of article 30(2)(b) of the Constitution which makes it clear that the provisions regarding basic rights are subject to other existing laws, as was held in Mbushuu @ Dominic Mnyaroge and another vs. the Republic [1995] T.L.R 97.

She added that, Committal Proceedings are not arbitrary as propagated by the petitioner's counsel but rather, the purpose is to safeguard criminal justice. Besides, the learned Principal State Attorney argued: Committal Proceedings were introduced to expedite trials. Magistrates have mandate to hold Committal Proceedings per section 243(1) of the CPA. Arguably, Ms Sarakikya postulates that, absence of opportunity to plead to the charge/information by the accused before the subordinate Court does not at any rate prejudice the accused whatsoever.

She further added that, section 245(3) of the Criminal Procedure Act (supra) should be broadly construed to the effect that, by not requiring the accused to plead in the subordinate Court, the charges are still under consideration and cannot be said at that stage to prejudice the accused.

Rather, she argued, Committal Proceedings stand to favour the accused and not otherwise as argued by the petitioner's counsel.

Besides, section 245(5) of the Criminal Procedure Act (supra) categorically requires the Director for Public Prosecutions to assess whether there is sufficient evidence worth a meaningful prosecution in law for the prosecutor to take prosecution initiatives. To the contrary, in absence of sufficient evidence, then, the charge is withdrawn in terms of section 91(1) of the CPA that is, by entering a nolle prosequi, which is in the accused's interest.

Ms Sarakikya added that, section 135 of the CPA is designated to stand just as a mode in which offences are to be charged in a form of information. A careful reading of section 135 reveals that, the charge is to contain such detailed information which could not have been mentioned in the holding charge. Thus, it is only upon further investigation that further specific details can be obtained.

Thus, M/S Sarakikya was of the view that, to have made the accused plead or speak or defend himself immediately upon being taken to the subordinate Court would in effect be discriminatory against him and contrary to the right to a fair hearing as the accused would not be in receipt of the totality of the evidence against him.

She cited The Republic vs. Asafu Tumwine, Criminal Revision No. 1/2006 (unreported) (Mwanza Registry) where the Court of Appeal of Tanzania observed the following regarding proper conduct of Committal Proceedings and the requirement of an Order of Committal:-

> " ..... That since the District Court of Karagwe never made an order committing the accused Asafu Tumwine for trial before the High Court, the entire proceedings and orders in the High Court in Criminal Sessions Case No. 40 of 2002 before Mlay, J of 30.9.2002 were a nullity. The same are hereby quashed and set aside. The District Court of Karagwe, which has all along retained jurisdiction over P.I case no 37 of 1999 is hereby directed to hold, as expeditiously as possible, a fresh Preliminary inquiry and commit the accused Asafu Tumwine for trial before the High Court in accordance with the law."

Regarding delays, M/S Sarakikya argued that, even in the event investigations are unreasonably delayed during Committal Proceedings and absent indications for the accused being committed to the High Court for trial within the foreseeable future, there is an available remedy where the accused is at liberty to seek redress by filing an application for leave to apply for an order of harbeas corpus in terms of section 390 of the CPA.

She added that, expediting disposal of cases depends in composite on a number of factors in the investigation process such as, the availability of witnesses, human and financial resources, cooperation of the accused and competency of both Magistrates and Prosecutors to mention but a few. Thus, the causes for delays in access to justice cannot be solely pegged on the prosecution side, rather, they are contributed to also by the accused and other stakeholders at different stages of the process.

The learned Principal State Attorney further contended that, the erstwhile reforms in the office of the Director of Public Prosecutions, which include employment of University graduates in the investigation and prosecution departments, would finally find solution to delays occasioned by the prosecution including Committal Proceedings. She added, meanwhile, delays in committing accused persons for trial in the High

Court, after either completion of evidence gathering, or upon significant admission of accused to the framed charges, can be dealt with administratively as pointed out by the Court of Appeal of Tanzania in Attorney General vs. W. K. Butambala [1993] T.L.R. 46 that:-

> " ..... We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really momentous occasions. Things which can easily be taken up by administration initiatives are best pursued in that manner .....".

Citation was also made to Rev. Mtikila vs. Attorney General [1995] T.L.R 31 where the High Court of Tanzania held that:

> "Where a provision is reasonable and valid the mere possibility of its being abused in actual operation will not make it invalid. ..... The provisions [of the Newspapers Act 1976] complained of however, are administrative and implementation and their constitutionality can only be challenged if they were not within the power of the Legislature to enact them."

Besides, the Principal State Attorney argued, on the same footing, the Petitioner also ought to have invoked the available administrative remedies available to find his matter (if any) heard without preferring institution of a Constitutional case. Reference was made to Elizabeth Stephen and another vs. Attorney General [2006] T.L.R 404 where the Court held:-

> "It appears to us that whereas under section 4, an aggrieved person may take two avenues for redress, this is qualified under section 8(2) of the BRDEA. If the Court is satisfied that other avenues for redress are or have been available those avenues had better be exhausted first before one comes to Court. We are satisfied that this is good for two main reasons. First, to preserve the sacrosanct nature of the Constitution and to bring to Court only matters of great importance and leave the rest to be dealt with by other authorities."

Besides stressing the need to maintain Committal Proceedings within our Jurisdiction, Ms Sarakikya argued that, there are few High Court registries in the country whereas abolishing Committal Proceedings will be injurious to both the general public and accused persons in particular in the dispensation of Criminal Justice.

In composite, Ms Sarakikya urged this Court to adopt the position arrived at by the High Court in Jackson ole Nemeteni @ ole Saibul @ Mdosi @ Mjomba Mjomba & 19 Others, Miscellaneous Criminal Application No. 117 of 2004 (Unreported) (Dar es Salaam Registry)where the Court underscored that:-

> "We think the problems under section 225 of the Act are compounded not by the law itself but its application. Our criminal justice system is still growing. We have not reached a level where all investigations are carried out before arrest. Our criminal detection mechanisms are not yet advanced. Our manpower is not yet seasoned and in many cases, our people do not have permanent addresses or reliable physical addresses. With globalization, crime is becoming more sophisticated and criminals more mobile. Cross border criminal activities are on the increase. The aggregate period for offences under the first schedule of the Act, which is provided for investigation is a total of 24 months. If this period is closely monitored by the magistracy it will fall within the parameters of "kutochelewesha haki bila sababu yoyote ya kimsingi" (not to delay justice without justifiable reason)" as provided in Article 107A (2) (b)".

In rejoinder, the petitioner's counsel reiterated that, the redress sought in this Court is for: one, cease to institute Committal Proceedings in the subordinate Courts for matters triable in the High Court; two, viability of the curtailed right of the accused to enter plea in the subordinate Courts during Committal Proceedings; and three, denial of the right of the accused to state anything on the charge until he is subsequently arraigned

before the High Court for trial. Mr. Jesse learned counsel thus argued that, the whole process before the subordinate Courts (which lack jurisdiction to try the cases) should be discouraged and hence be carried out only by Courts with competent Jurisdiction to try such matters, that is, the High Court.

We propose to begin with a summary of the historical backdrop of the impugned position. In the first place, the list of offences subject to Committal Proceedings are listed in the schedule to the Criminal Procedure Act (supra) specifically under sections 164 and 165 -5th column of Part A of the 1st schedule. Committal Proceedings in Tanzania can be traced back to sections 205 to 223 of the Criminal Procedure Ordinance, No. 12 of 1930.

This procedure remained intact despite several amendments made through Act No. 8 of 1932, Act No. 11 of 1936, Act No. 15 of 1937, Act No. 23 of 1939, Act No. 17 of 1940, Act No. 16 of 1941 and Act No. 5 of 1945. In that era, Committal Proceedings were that, at the commencement of inquiry, the Magistrate read over and explained to the accused the charge against him but the accused was not allowed to plead.

Thereafter, the Court recorded the Statements of the witnesses made on oath and the accused was given opportunity to pose some questions to each witness. If the Court found that the examination of the prosecution witnesses established sufficient evidence for the purposes of committing the accused for trial, then, the Magistrate framed the charge and called the accused and his witnesses, if any, to give evidence and address in defence.

After closure of the case on both sides, the Magistrate considered the evidence in whole and if he was of the view that the prosecution evidence was insufficient to put the accused to trial, then, the accused was discharged from the charge. On the other hand, if the Magistrate found that there was sufficient evidence, he committed him for trial in the High Court.

Thereafter, the Attorney General after receiving a copy of inquiry record could direct for further investigation and additional witnesses and once satisfied, the Attorney General drew and filed the relevant Information. The subordinate Court could also grant bail for bailable offences. Here, all the intended evidence and witnesses were fully disclosed under the doctrine of “full disclosure” in Criminal Cases.

The former Criminal Procedure Ordinance No. 12 of 1930 and its subsequent amendments was repealed and replaced by the Criminal Procedure Code, Cap. 20 which came into force on 28/09/1945 and for the first time the Office of the Public Prosecutions was established as a controller of criminal prosecutions instead of the Office of the Attorney General per se. The new Criminal Procedure Code (supra) did not save the powers hitherto vested in the Magistrate in the subordinate Court. That is the position to date, which is now impugned by this Petition.

Even after the repeal of the Criminal Procedure Code in 1945 and enactment of the new Criminal Procedure Act, 1985 whose main object, as indicated in its long title was to provide for the procedure to be followed in the investigation of crimes and the conduct of criminal trials and for other

related purposes, the same more or less maintained the former position (1945).

Comparatively, the traditional Committal Proceedings procedure was similarly applicable in Kenya and Uganda. Under the Kenya and Uganda Criminal Procedure Codes, the Committal Proceedings shared all fundamental features to those which existed in Tanganyika before 28/09/1945. Formerly, the Courts had powers to discharge the accused in case there was insufficient evidence and could commit him for trial or admit him on bail or remand him to prison for safe custody and have information filed.

The experience as gathered from New South Wales, Victoria and the Australian Capital Territory, is to the effect that where a person is charged with an indictable offence, it is generally necessary for a Magistrate to conduct a Preliminary Hearing to ascertain whether or not there is a prima facie case so as to justify committing the accused for trial to the District Court or to the Supreme Court. The charge is read to the accused but no plea is taken.

It is at this point that the dispositions of witnesses are then recorded in the presence of the accused. The disposition is read either to or by the witness and is signed by him and by the Magistrate, except where the Magistrate directs otherwise. At this juncture, counsel are obliged to examine every recording apparatus or other authorized means as well as examining every avenue of defence open to the accused and for this purpose, to cross examine exhaustively the witness for the prosecution.

Upon conclusion of the hearing the Magistrate may either discharge the accused or commit him for trial.

The position in England and Wales, is slightly different. Committal Proceedings are to the extent that, an accused, with consent, may be committed for trial on the basis of written statements, without consideration of the evidence by the Magistrate.

The main issue for our determination is whether Committal Proceedings in subordinate Courts in matters triable in the High Court are inconsistent with the provisions of the Constitution – that is, whether as contended by the Petitioner the Proceedings amount to denial of the right to be heard.

Notably, as submitted by Mr. Jesse, in some jurisdictions such as the United Kingdom, Australia and Tasmania, Committal Proceedings have since been abolished. However, with respect, that fact alone, in the absence of a clear comparative analysis as to why they were abandoned cannot help in our case. Each jurisdiction would have its own peculiar circumstances.

In the reception clause under the Judicature and Application of Laws Act, [CAP. 358 R.E, 2002], reception of the Common Law and Doctrines of Equity, Statutes of General Application of England applicable before the 22nd of July, 1920 which is deemed to be the Reception date for English Law in Tanzania, it is clearly stated that applicability of the foreign laws in Tanzania under section 2(3) of the Judicature and Application of Laws Act (supra) is subject to suitability and conformity with the local circumstances.

We are in agreement, as submitted to us that delayed justice is denied justice. However, equally, hurried justice is true buried justice. In our view therefore, in analyzing the legal arguments made before us, we will attempt to strike a balance between the two poles.

From the general perspective, as correctly submitted by the petitioner's counsel, Committal Proceeding or Preliminary Hearing in some countries is regarded to be a crucial stage in the dispensation of Criminal Justice.

For instance, the essence of conducting Committal Proceedings was expressed in Barton vs. Republic [1980] 147 CLR 77 that:-

> "It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair. ..... To deny an accused the benefit of committal proceedings is to deprive him of a valuable protection uniformly available to other accused persons which is of great advantage to him, whether in terminating the proceedings before trial or at the trial".

The purpose of Committal Proceedings was also stressed by Mr. Justice J.A. Lee of New South Wales Supreme Court in his paper titled 'In Defence of the Committal for Trial' presented at the 2nd International Law Conference in June, 1988. In his paper he identified two main functions of Committal Proceedings: first, to ensure that the accused is not put on trial unless there is either a probability of conviction, that is, existence of a "prima facie case"; and second, to appraise and ensure that the accused is fully informed and detailed of the case that has been brought against him.

The learned Justice argued further that:-

> "It is not an argument for abolition of the committal that only a small percentage of those charged are discharged at committal, for the very requirement that a case must be made out at the committal is itself, and has been, a significant factor inhibiting baseless committals. ..... The Committal ensures that a person is not put on trial unless it has been shown publicly that there is a prima facie case against him. (I use the phrase 'prima facie case' in a general sense to express whatever is the requirement of the relevant State Justices Act. ..... The curb which the committal offers to the enthusiastic prosecutor is plain for all to see. Equally plain to see is the advantage to the public interest of only bringing to trial matters which can pass that test". [Emphasis supplied]

Justice Lee added that:-

> " ..... Speaking of myself, I cannot feel other than that the preliminary investigation provided by committal is a protection to an accused against wrongful prosecution of the same order as is the requirement at the trial that the charge against him be proved beyond reasonable doubt. Putting altogether to one side, the advantages which the accused himself may gain from the committal for use by him in the subsequent trial, there remain the fundamental feature that the committal ensures that a person is not put on trial unless it has been shown publicly that there is a prima facie case against him. .....". [Emphasis supplied].

With respect, we share the same view that, sufficiently, Committal Proceedings in capital offences serve a meaningful purpose in the dispensation of criminal justice, from the role they play to both the accused on one part, and the complainant and the Republic (the general public) on the other. However, we are also mindful of the fact that at times well intended procedures, may, in the hands of inept and even negligent handlers be amenable to abuse in practice.

The question to be answered is whether the constitutionality of an otherwise good law should be impugned on the basis that in practice it is

prone to abuse? The respondent propose a negative answer to the question – let each case be dealt with on its own peculiar circumstances. The test therefore should be objective. Besides, there are other remedies available.

For instance, Ms Sarakikya has argued that, in the event investigations are unreasonably delayed during Committal Proceedings and it becomes evident that the accused cannot be committed to the High Court for trial within reasonable time, then, the available remedy is to file an application for leave to apply for an order of harbeas corpus in terms of section 390 of the CPA. However, with due respect, we do not believe that the given analogy is correct.

The reason is not hard to grasp. Considerably, the remedy of harbeas corpus is available when one is missing and his where abouts are unknown. This is different from delays in Committal Proceedings where the accused is known to have been remanded in prison or otherwise bound by conditions prescribed by the Court under section 248 of the CPA which provides:

> "248 (1) If for any reasonable cause, to be recorded in the proceedings, the court considers it necessary or advisable to adjourn the proceedings it may, from time to time by warrant, remand the accused for a reasonable time, not exceeding fifteen days at any one time, to a prison or any other place of security.
>
> (2) Where the remand is for not more than three days, the court may, by word of mouth, order the officer or person in whose custody the accused person is, or any other fit officer or person, to continue to keep the accused in his custody and to bring him up at the time appointed for the commencement or continuance of the inquiry.

> (3) During a remand, a court may at any time order the accused to be brought up before it.
>
> (4) Subject to the provisions of section 148 the court may admit an accused on remand to bail."

Thus, harbeas corpus is not a remedy for delay in Committal Proceedings. We believe the remedies are inbuilt in the above cited provisions which by necessary implication would allow an aggrieved party to seek remedy in the High Court in case where a motion to get any of the reliefs prescribed there-under is denied by the subordinate Court handling the Committal Proceedings.

We wish to stress that, the need to have meaningful Committal Proceedings is reasonably clear from the spirit embraced in our laws. Though the accused might have committed the charged offence, yet, the accused is presumed innocent until he is found guilty. This presumption in law is provided for under article 13(6) (b) of the Constitution. Thus, it is for that reason the accused should not unreasonably be held for unreasonable long periods without being committed to the trial Court.

We however hasten to observe albeit briefly that, the nature of Committal Proceedings conducted in other jurisdictions, that is, Australia, United Kingdom and Tasmania are a bit different from the proceedings in Tanzania. In the former, the Magistrate in the Committal Proceedings plays an active role including ruling out that the prosecution have made up a prima facie case for trial by the High Court.

To the contrary, Committal Proceedings in Tanzania vest no mandate in the Magistrate to form opinion such that there is a possibility of

conviction to justify committing the accused to the High Court for trial. In other words, the role of Magistrates in our Committal Proceedings in Tanzania seems to be passive. We are challenged to inquire as to why? Were there other good reasons for so doing?

Is the role of Magistrate in Committal Proceedings just to adjourn such matters as required by law, to enable the prosecution to continue with gathering of evidence and ultimately assess whether a case has been established for a trial before the High Court? Thus, is it the prosecution side (not the Court) which as such, gathers and assesses whether there has been established a case worth for trial by the High Court?

As much as we can associate ourselves to the axiom that investigation of case in real sense comes to an end at the conclusion of criminal trial and its judgment, [so as to entitle the accused to a right to plead "autrefois convict and autrefois acquit" under section 137 of the CPA], yet, we are clear in our minds that section 245(4),(5) (6) and (7) warrants the Director of Public Prosecutions to present a well investigated criminal case file capable of allowing him and the Committing Magistrate, where an information is filed, to conduct committal proceedings and have the accused to be committed for trial by the High Court under section 246(1) of the CPA. While that seems to be the position, we find evidence to the contrary in the same Act. Section 178 of CPA provides that:-

> "..... no criminal case shall be brought under cognizance of the High Court unless it has been previously investigated by a subordinate Court and the accused person has been committed to trial before the High Court".

The words “cognizance” and “investigate” are not defined in the CPA. The words are defined in the Oxford Learner’s Dictionary to mean:

> “Cognizance – to take cognizance of something (law) to understand or consider something; to take notice of something”.

‘‘Investigate” is defined among others to mean [Intransitive, transitive] to carefully examine the facts of a situation, an event, a crime, etc. to find out the truth about it or how it happened. It also means [Transitive, Intransitive] to find out information and facts about a subject or problem by study of research.

In our considered view, the use of the words in section 178 of the CPA was not merely perfunctory, but meant to retain the functionality of the Committal Proceedings. The weight attached to Committal Proceedings, is what made the Court of Appeal in Republic vs. Asafu Tumwine (supra) to nullify, quash and set aside entire High Court Proceedings in Criminal Sessions Case No. 40 of 2002 and direct the District Court of Karagwe, which had all along retained jurisdiction over P.I case no 37 of 1999 to hold, as expeditiously as possible, a fresh Preliminary inquiry and commit the accused Asafu Tumwine for trial before the High Court.

With that in mind, we believe it is important to have a clear understanding of the scheme put in place by sections 244 and 245 read together with section 178 of the CPA.

The provisions of the CPA referred to above provide in-extenso:

> “245. (4) After a person is committed to remand prison or on bail by a subordinate court or <u>after the investigations have been completed</u> but before the suspect is arrested, <u>the police officer, or other public officer</u>

in charge of the relevant criminal investigations under this Act, shall forthwith cause the statements in quintuplicate of persons intended to be called as witnesses at the trial to be properly typed out, conveniently compiled and sent, along with the police case file, to the Director of Public Prosecutions or any other public officer designated by him in that behalf.

(5) If the Director of Public Prosecutions or that other public officer, after studying the police case file and the statements of the intended witnesses, is of the view that the evidence available is insufficient to warrant the institution of a prosecution, or it is otherwise inadvisable to prosecute, he shall, where the accused has already been charged, immediately enter a nolle prosequi unless he has reason to believe that further investigations can change the position, in which case he shall cause further investigations to be carried out.

(6) If the Director of Public Prosecutions or that other public officer, after studying the police case file and the statements of the intended witnesses, decides that the evidence available, or the case as such, warrants putting the suspect on trial, he shall draw up or cause to be drawn up an information in accordance with law and, when signed by him, submit it together with three copies of each of the statements of witnesses sent to him under subsection (4), including any document containing the substance of the evidence of any witness who has not made a written statement.

(7) After an information is filed in the High Court, the Registrar shall cause a copy of it to be delivered to the district court where the accused was first presented or within the local limits of which the accused resides.

246. (1) Upon receipt of the copy of the information and the notice, the subordinate court shall summon the accused person from remand prison or, if not yet arrested, order his arrest and appearance before it and deliver to him or to his counsel a copy of the information and notice of trial delivered to it under subsection (7) of section 245 and commit him for trial by the court; and the committal order shall be sufficient authority for the person in charge of the remand prison concerned to remove the accused person from prison on the specified date and to facilitate his appearance before the court."

In view of the foregoing, whereas it is clear that the Director of Public Prosecutions can receive the investigation case file and file information against the accused who is yet to be arraigned before the

Committing Court, in which case no one would complain for having his/her rights been violated, it is well clear to us also that, under those provisions the Director of Public Prosecutions and the Court, for that case, can keep adjourning the case involving the accused who is in custody pending the completion of investigation as per section 245(5) or pending completion of Committal Proceeding and arraignment to the High Court as per sections 245(6) and 246(1) of the CPA.

In that regard, unlike the situation addressed by section 225(4) and (5) of the CPA where the Court is guided by the sixty (60) days rule and can still readmit the once dismissed charge against the accused on the same offence, there is no equivalent avenue available for the Court when dealing with delayed committal proceedings and Plea taking proceedings. This, in our unfeigned opinion, dents the mandate of the Judiciary, which under Article 107A (1) of the Constitution, is the authority with final decision in the dispensation of justice in the United Republic of Tanzania.

Section 225 of the CPA, as aforesaid, provides for the "sixty days rule" which require the prosecution to finalize the investigation process and exceptionally further accord the Regional Crimes Officer, State Attorney and Director of Public Prosecutions to file a Certificates for extension of time to continue with investigations save for fraud if at all investigations are incomplete within the prescribed time limit.

If at all filing of Certificate for extension of time also covers minor offences, obviously, one would expect to find proportional mechanism prescribed set out when capital offences such as homicide, treason,

terrorism and drug trafficking are in question. We hasten to argue that, such regulatory mechanisms would ultimately safeguard the interests of the accused, who is a weaker party, the victim of crime and the public as well, as the exclusive mandate of the Court to regulate and control judicial proceedings when dispensing justice according to the law cannot be compromised.

The weaknesses obtaining in the dispensation of criminal justice, as of now, may be attributed to the overlapping mandates the criminal justice institutions are exercising against the doctrine of separation of powers where the three organs of the State, that is, the Executive, Parliament and the Judiciary operate independently though through checks and balances.

Under this doctrine whereas the Director of Public Prosecution in the National Prosecutions Service who falls under the Executive has quasi-judicial exclusive mandate to discharge the prosecutorial decisions and coordinate the investigation duties conducted by the investigative organs under Articles 59B(2) - (4) of the Constitution and sections 4, 8, 9, 10, 16 and 17 of the National Prosecutions Service Act, Cap.430 respectively, the Judiciary has on the other hand an exclusive mandate over other law actors under the Constitution and written laws like the CPA, the Civil Procedure Code, Cap.33 R.E.2002, the Magistrate Court Act, Cap.11 R.E.2002 and the Evidence Act, Cap.6 R.E.2002 to mention but a few, to regulate and control all judicial proceedings before it.

It is imperative therefore that, once a case is instituted in Court, the Court must control it for the interest of both parties. Observance to this

doctrine would, in our humble opinion, naturally not allow the Court to serve as a forum perpetuating further investigations without reasonable cause. We however understand that the checks and balance alluded to above are what our country and other countries in the region aspire to realize.

Article 23 of the Constitution of the Republic of Uganda, 1995 has a provision on the protection of personal liberty illustrating the above discussion. Article 23(6) reads:

> "23(6) where a person is arrested in respect of a criminal offence—
>
> (a) the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;
>
> (b) in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days;
>
> (c) in the case of an offence triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.

From the above analysis, the immediate question is whether time stands to be shortened if Committal Proceedings are made in the High Court which is the very Court vested with jurisdiction to try the matter.

Besides, one may ask why other matters which do not proceed for hearing while waiting for completion of pleadings should not as well be filed in the subordinate Courts and be transferred to the High Court only when pleadings are ready if true that that aims at time management of the High Court.

In answering the above questions, we wish to make a comparison to civil matters. In civil matters, the Civil Procedure Code (supra) does not have 'mention' rather has 'hearing' dates. In other words, from the nature of conduct of Civil Cases, on the face of it, pleadings are set to proceed with hearing and for that matter, are likely to be completed within the scheduled limit of time without injury to the rights of parties to law suits.

Under such circumstances, the logical interpretation is that, once a Civil Case is filed, it is also set to proceed with hearing once pleadings are complete and after disposal of preliminaries.

We feel thus indebted to note that, the Judiciary in Tanzania is shaped by law to ensure that civil disputes instituted before Courts of law are heard with immediate effect to save time, human and material resources of both the Court, litigants and the general public. That also marks the gist for the amendments effected in the Civil Procedure Code in the 4th quarter of the 20th Century by introduction of speed tracks through G.N. No. 422/1994 in addition to non-trial suit disposal mechanisms available under Orders VII Rule 11, VIII Rule 14(1) & (2) (a), IX Rules 2,3 & 8, XII Rule 4, XIV Rule 4, XVII Rule 4 and XXIII Rule 3 of the Civil Procedure Code (supra).

Consequent to the above amendments for instance, pleadings are set to be completed within 28 days after the filing of the Plaint that is, 21 days for filing a Written Statement of Defence and 7 days (though not mandatory) for filing a reply after filing of the Written Statement of Defence. Thus, introduction of speed tracks vide G.N. No. 422 of 1994

enables hearing of the scheduled civil cases to be disposed within the range of time prescribed by Order VIIIA Rule 3 (3)(a)-(d) of the Civil Procedure Code (supra).

Profoundly, this is because, even the standard of proof required in civil matters save for election petitions is only on the balance of probabilities, unlike the standard in criminal cases and election petitions which is on the scale of beyond reasonable doubt thus entailing a preliminary inquiry prescribed by section 178 of the CPA intended to meet the required standards of proof. The section provide in part:

> ".....no criminal case shall be brought under cognizance of the High Court unless it has been previously investigated by a subordinate court and the accused person has been committed for trial before the High Court."

That being the case, there is no gainsaying that the process in Criminal Justice is a bit different from that in Civil Justice to an extent of rendering Committal Proceedings irrelevant.

However, we subscribe to the spirit propagated in our local laws to have criminal matters determined within the shortest time possible as observed by this Court in Bizabigomba s/o Tiyeri vs. The Republic, Criminal Appeal No. 47 of 2006 (Unreported) (Tabora Registry) where the Court applauded the introduction of accelerated trial and disposal (Preliminary Hearing) of cases item under Part VI of the CPA in 1992 and the subsequent extension of its scope through Written Laws (Miscellaneous Amendments) Act No. 3 of 2010. This Court observed that that was another progressive initiative taken to promote and protect the accused's right to a fair trial in our country, saying:

> "The provision in a way regulates sections 229 and 283 of the CPA and provides wide latitude to accused persons to, first, understand the nature of criminal accusations mounted against them by the prosecution; second, make plea; third, sort out the factual matters that are not in dispute, and finally, make a memorandum of the matters agreed.
>
> To a large extent, Sub-section (4) of section 192 of the Act, when equitably applied, provides a legal force to agreed matters, in same way as the Settlement Order drawn under Order VIIIC of the Civil Procedure Code, Cap.33, Revised Edition, 2002 for court annexed mediation, provides....."

To this end, whereas we do not find it hard to cherish the measures taken to accelerate the disposal of both criminal and civil cases by our courts, we equally wish to observe here that our decision in Jackson Ole Nemeteni @ Ole Saibul @ Mdosi @ Mjomba Mjomba & 19 Others (supra) did not associate itself with the exclusion of court's control over pending Committal Proceedings cases in Subordinate Courts. It rather construed section 225 of the CPA and boldly underscored the need for magistracy control in shortening the time spent in investigation. It held:

> "The aggregate period for offences under the first schedule of the Act, which is provided for investigation is a total of 24 months. If this period is closely monitored by the magistracy it will fall within the parameters of "kutochelewesha haki bila sababu yoyote ya kimsingi" (not to delay justice without justifiable reason)" as provided in Article 107A (2) (b)".

And what we gather from measures taken above is that, when the legislature introduced the accelerated trial and disposal (Preliminary Hearing) of cases item in criminal cases in 1992 and revisited it in 2010 with the Minister Gazetting the Accelerated Trials and Disposal of Cases Rules in G.N. No. 192 of 1988 no attention was paid at all on the need to accelerate committal proceedings in the Subordinate Courts.

We further note that all what is needed now is to embrace an objective administration of our criminal justice in our society as, though true that whenever rights of suspects are at stake criminal suspects should not be treated as guilty until so proved as correctly submitted by the petitioner's counsel, yet, consideration of the complainants' rights should not be suppressed because criminal justice is a two way traffic.

Perhaps as we move on, it is important to reproduce the provisions of law the Petitioner's Counsel dwelt on in arguing that Committal Proceedings amount to denial of the right to be heard. Section 244 of the Criminal Procedure Act (supra) regarding committal proceedings reads:-

> "Whenever any charge has been brought against any person of an offence not triable by a subordinate court or as to which the court is advised by the Director of Public Prosecutions in writing or otherwise that it is not suitable to be disposed of upon summary trial, committal proceedings shall be held according to the provisions hereinafter contained by a subordinate court of competent jurisdiction".

Section 245(1), (2) & (3) of the Criminal Procedure Act (supra) provides the following on the arraignment procedure:-

> "(1) After a person is arrested or upon the completion of investigations and the arrest of any person in respect of the commission of an offence triable by the High Court, the person arrested shall be brought within the period prescribed under section 32 of this Act before a subordinate court of competent jurisdiction within whose local limits the arrest was made, together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act.
>
> (2) Whenever a person is brought before a subordinate court pursuant to subsection (1), the magistrate concerned shall read over and explain to the accused person the charge or charges set out in the charge sheet in respect of which it is proposed to prosecute the accused but the accused person shall not be required to plead or make any reply to the charge.

(3) After having read and explained to the accused the charge or charges the magistrate shall address him in the following words or words to the like effect:

> "This is not your trial. If it is so decided, you will be tried later in the High Court, and the evidence against you will then be adduced. You will then be able to make your defence and call witnesses on your behalf"".

Thus, from all the above analysis, whilst much alive to the fact that any comparison between the two or more systems should be sparingly taken with great care, we are of the considered view that, even though the Director of Public Prosecutions has mandate to enter nolle prosequi in case he finds a case lacking cogent evidence to earn a conviction, yet, it is high time for subordinate Courts to be extended with Jurisdiction to assess the evidence on record for committal cases filed there in terms of section 245(1) of the CPA at any appropriate stage as may be crafted in the applicable law with a view to ruling out whether the accused has a prima facie case to warrant his plea and trial by the High Court, as envisaged by section 178 of the CPA.

Where the Prosecution is not satisfied with the ruling of the committing Court particularly on a no case to answer, the law should be instructive that accused be further remanded in custody and the record be forwarded to the High Court for review. Otherwise the law be crafted also to allow: one, the accused to exercise their right to indicate plea of their choice to committing courts since the right to plead is fundamental in as far as prerequisites of fair trial are concerned.

For those willing to plead guilty say to manslaughter, they should be given opportunity to do so when the charge is read over and explained to

them under section 245(3) of the CPA, to allow the court to further order the prosecution to prepare the facts and order the accused and the record to be immediately transferred to the High Court for affirming the plea and sentencing; two, by consent of the accused, the accused upon putting appearance as per section 246(1) of the CPA and upon receipt of copy of the Information sent in terms of section 245(7) of the CPA be ordered to appear before the High Court for plea taking and Preliminary Hearing under section 192 of the CPA; and three, in the alternative, in case of delayed information and witnesses dispositions for the Subordinate Court to rule out on whether there is a prima facie case or not or otherwise to record the accused's consent to be produced before the High Court for plea taking and Preliminary Hearing as proposed above, the Committing Court then be empowered to grant bail to the accused if no information will have been drawn against him at the expiration of one year.

Having considered all the above in unison, we are of the considered opinion: one, that the Attorney General can only make better provisions in sections 245(3) and 246 of the CPA that will ensure the fundamental rights of the accused, victim of crime and the mandate by the court to regulate, control and dispense justice according to the law; and two, that the procedure be set out to vest such powers at least to Senior and Principal Resident Magistrates who, being seasoned Magistrates with good experience to meaningfully deal with the committal cases.

The foregoing discussion has thus sufficiently established that Committal Proceedings in capital offences serve a meaningful purpose in the dispensation of criminal justice from the role they play to both parties

and that, the constitutionality of an otherwise good law should be given an objective test since the need to have meaningful Committal Proceedings is reasonably clear from the spirit embraced in our laws where a right to deal with the accused person does not take away his right to be presumed innocent until he is found guilty.

At this juncture, we are clear in our minds that the issue we posed earlier as to whether Committal Proceedings in subordinate Courts in matters triable in the High Court are inconsistent with the provisions of the Constitution is answered in the negative since, as aforesaid, the proceedings conducted under sections 244 and 245(1), (2) & (3) of the Criminal Procedure Act (supra) in the subordinate Courts are not intended to amount to denial of the right to be heard as per article 13(6)(a) of the Constitution.

However, we hold that, as the urge to embrace an objective administration of criminal justice in our society is inevitable, as pointed out earlier, it is high time that subordinate Courts had been extended with Jurisdiction to assess the evidence on record for committal cases filed there in terms of section 245(1) of the CPA, at appropriate stages within the spectrum we have endeavoured to indicate above. The Honourable Attorney General should initiate the requisite amendments in the CPA to ensure that the functionality of section 178 of the CPA is not rendered obsolete, instead, it becomes more sensible and meaningful in improving the administration of Criminal Justice in our country.

Considering the nature and circumstances of the remedy sought, we make no order as to costs.

It is so ordered.

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A.K. MUJULIZI
JUDGE
2/6/2016

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S.B. BONGOLE
JUDGE
2/6/2016

……
E.M. FELESHI
JUDGE
2/6/2016

Judgment delivered this 2nd day of June, 2016 in presence of …….. and in presence of ……..

……
A.K. MUJULIZI
JUDGE

……

S.B. BONGOLE
JUDGE

……
E.M. FELESHI
JUDGE