

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**CRIMINAL REVISION NO. 01 OF 2020**

*(Originating from Criminal Case No. 260 of 2017 in the District Court of Shinyanga at Shinyanga).*

**MOHAMED MOHAMED @ PROFESA MUDI.....APPLICANT**

***Versus***

**THE REPUBLIC.....RESPONDENT**

*Date of Last Order: 03/02/2020*

*Date of Ruling: 07/02/2020*

**RULING**

**C. P. MKEHA, J**

On the 11<sup>th</sup> day of November, 2019, Mr. Mohamed s/o Mohamed @ Profesa Mudi wrote to his Lordship Judge- In-Charge, complaining that, his bail, in Criminal Case No.260 of 2017 before the District Court of Shinyanga, had been arbitrarily cancelled. On receipt of the said complaint, his Lordship Judge-In-Charge caused the case file in question to be brought before him. Upon examination of the entire record, an administrative instruction was issued to responsible registry officials that,

revisional proceedings be conducted to legally inquire into the matter. It is against the said background, the present matter found its way into this court's criminal registry.

When the parties were summoned in view of being formally heard over the matter, the applicant/accused was represented by Mr. Augustine Michael learned advocate. On the other hand, Ms. Mbughuni learned Senior State Attorney and Mr. Kigoryo learned State Attorney appeared for the Respondent/Republic.

It was submitted on behalf of the applicant that, the learned Resident Magistrate wrongly cancelled the applicant's bail. According to Mr. Augustine Michael learned advocate, at all times the accused attended court sessions as and when required to do so. The learned advocate went on to submit that, when the applicant fallen ill, his surety attended in court and informed the court reasons for the accused's absence. The learned advocate remained wondering as to what prompted the trial magistrate to cancel the accused's bail.

The learned advocate submitted further that, when the applicant's bail was cancelled, the applicant was in court having voluntarily attended court

session following his recovery. The learned advocate held a view that, had the court considered all what happened to the accused, it would not have reached the decision it ultimately reached at.

As to the aspect of showing cause, the learned advocate for the applicant submitted that, when the accused was given time to show cause, he informed the court that he was sick. While conceding that the accused failed to produce evidence of illness, the learned advocate insisted that, looking at the history of the case, if anything, the accused deserved being warned as he had proved being faithful since his arraignment. Before the learned State Attorneys were invited to submit in reply, the applicant rose to state: **"I was never asked to produce evidence."**

It was the respondent's initial stance through the learned State Attorneys that, the learned trial magistrate was right in cancelling the accused's bail.

Ms. Mbughuni learned Senior State Attorney submitted in reply that, there was no illegality on part of the lower court's order. According to the learned Senior State Attorney, the learned trial Magistrate had indicated how many times the accused failed to enter appearance without notice. The learned Senior State Attorney added that, when the accused was given

time to show cause, he failed to prove his illness. In view of the learned Senior State Attorney, the learned trial Magistrate was justified to cancel the accused's bail.

Mr. Kigoryo learned State Attorney added to what the lead counsel had submitted by telling the court that, the applicant had conceded that he defaulted entering appearance in court without justifiable reasons. The learned State Attorney added that, the learned advocate for the applicant had not cited any impropriety, incorrectness or illegality of the lower court's order, hence, an order for cancellation of bail was justifiable in the circumstances of the present case. The said submission prompted the court to invite the parties to comment on propriety or otherwise of the trial court's record.

Ms. Mbughuni learned Senior State Attorney opted to change her former stance and that of the Respondent in particular. She honestly and fairly submitted that, the trial court's record appeared to be irregular. That, before arrest warrant was enforced, the court extended the accused's bail without cancelling the said warrant first. That, when the accused attended next court session, there was no pending arrest warrant against him. The learned Senior State Attorney added that, the accused voluntarily appeared

in court without being arrested. She further told the court that, neither did the prosecutor address the court in reply to the accused's reasons for absence. She finally concluded that, an order for cancellation of bail was unwarranted. The learned advocate for the applicant had nothing to add.

The circumstances into which the applicant's bail was cancelled by the trial court attracts three important questions:

- (i) Who is duty bound to prove that there are sufficient reasons for cancellation of bail?
- (ii) Whether the accused failed to show cause why his bail ought not to be cancelled.
- (iii) Whether a Judicial Officer can act as a prosecutor in proceedings for cancellation of bail.

In terms of section 150 of the Criminal Procedure Act, the prosecutor has a duty to bring notice to the attention of the court that there are good reasons for cancellation of the accused's bail. The prosecution must establish its case in an application for cancellation of bail by showing on preponderance of probabilities that the accused had attempted or did actually breach his bail conditions. In other words, the prosecution has to

show on balance of probabilities that the accused has breached bail conditions or that there is reasonable apprehension that, if bail is not cancelled he might ultimately jump bail. After the prosecution has discharged its duty, that is when, the court has to invite the accused to show cause why his bail should not be cancelled.

The record of the trial court indicates that, on 28-10-2019 the learned State Attorney addressed the court in the following terms:

**Ms. Mushi, State Attorney: It is for the court to determine the accused's bail.**

The learned State Attorney on duty said nothing more in persuading the court, why was it necessary for the accused's bail to be cancelled. Instead, the trial magistrate went on addressing the accused that, he had failed attending court sessions on 13-08-2019, 21-08-2019, 04-09-2019 and 21-10-2019 without notice. The court remarked that, the accused's attendance was inconsistent as he appeared in court when he felt like doing so. Thereafter, the trial magistrate invited the accused to show cause why his bail ought not to be cancelled.

As rightly submitted by Ms. Mbughuni learned Senior State Attorney, the learned State Attorney who appeared before the trial court was not accorded a chance to address the court in terms of section 150 of the Criminal Procedure Act on reasons for cancellation of the accused person's bail and whether the said reasons still existed in circumstances in which the accused's bail had been extended by the court on 13-08-2019, 04-09-2019 and 30-09-2019. By extending the accused's bail on those days, the court, by necessary implication, rendered its warrant of arrest, issued on 21-08-2019 to be of no effect. It is important to note that, when the accused appeared in court on 28-10-2019, he was not under arrest. He voluntarily appeared in court after his recovery in view of Mr. Augustine Michael, learned advocate for the accused.

It would appear that the trial Magistrate held incorrect view that whenever an accused misses a court session cancellation of bail must follow. Actually, once bail is granted, it should not be cancelled in a mechanical manner without considering whether any supervening circumstances have indeed happened rendering it no longer conducive to allow the accused retain his freedom pending trial. Very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail to be issued.

Interference or an attempt to interfere with due course of administration of justice, evasion or an attempt to evade the due course of justice or abuse of bail conditions are some of the grounds that may attract cancellation of bail. The possibility of the accused's absconding is another reason that may justify cancellation of bail. Ms. Mbughuni learned Senior State Attorney conceded that, when the applicant's bail was cancelled, none of the circumstances existed. It is therefore correct to hold that, an order for cancellation of the accused's bail was unwarranted.

As a matter of fact, the first question would suffice disposing of the matter. However, for the benefit of future practice and final orders to be issued in resolving the controversy, I consider it necessary to respond to the two other questions.

It was the trial Magistrate's view that the accused defaulted entering appearance without notice. The trial Magistrate and the learned State Attorneys condemned the accused for his failure to produce evidence of his illness. However, the record indicates a different story.

The record indicates that on 21-10-2019 the accused's surety appeared in court and notified the court that he was in receipt of an sms from the



accused stating that the latter was sick and that he (the accused) was in Dar es Salaam. Then on 25-10-2019 the accused's surety once again, appeared in court with information that, the accused was on his way to Shinyanga only that, the vehicle he was travelling with got a breakdown. These matters were put on record by the trial magistrate himself. One remains wondering how later on could the same magistrate hold that the accused person's non appearance was without notice.

The record indicates further that, when the accused was invited to show cause he informed the court that his reason for non appearance was illness. When the learned State Attorneys appeared to support the trial magistrate's decision for want of evidence from the accused to prove that he was indeed sick, the accused person rose in court and stated that: **"I was never asked to produce evidence."**

The accused's response, reminded me of what his Lordship Samatta, J, (as then was ) once emphasized to judicial officers when litigants, who appear before them are unrepresented, the said litigants, being persons unfamiliar with all the intricacies of court procedures. His Lordship gave a practice directive that, in such cases, it is not right to hold against such persons

mistakes they might make as the accused's failure to produce documentary evidence to prove his illness. When the applicant appeared before the trial court in view of showing cause, he was unrepresented. The trial Magistrate ought to have asked the accused (a lay person in court procedures) to produce evidence in support of the fact that he was really sick. The accused might have taken a view that, it sufficed merely telling the court that he was sick. **See: KWIGA MASA VS SAMWELI MTUBATWA (1989) TLR 103.** Judicial Officers are reminded to always consider the said practice directive whenever they happen to deal with litigants who are not familiar with court procedures. Instructive words to judicial officers are contained in pages 109 and 110 of the above cited case.

Although in rarest of cases a judicial officer may initiate a motion for cancellation of bail, in most cases, such motions are to be initiated by prosecutors who have a duty to adduce reasons in support of those motions. In the present case, the trial magistrate appears to have somehow assumed the prosecutor's role. Whereas the prosecutor on duty said nothing regarding reasons supporting the motion for cancellation of the accused's bail, it was the Magistrate who is on record to have initiated the said motion thereby inviting the accused to show cause. That should

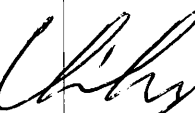
not have been the course. Section 150 of the CPA does not envisage a situation under which a judicial officer can act as a prosecutor. That has never been our practice. A judicial officer should only actively participate in the process to elicit the truth and in permitting circumstances, to protect the weak and the innocent.

For the foregoing reasons and pursuant to section 373(1)(b) of the Criminal Procedure Act, an order cancelling bail is quashed. Since the accused's surety appears to have faithfully performed his duties, the accused's bail is restored on its conditions that existed before the trial Magistrate's order dated the 28<sup>th</sup> October, 2019. Parties are instructed to appear before the trial court as soon as practicable, in any case, not later than the first working day after delivery of this decision for purposes of notifying the accused's surety of this decision. It is so held.

Dated at **SHINYANGA** this **7<sup>th</sup> day of February, 2020.**

  
**C. P. MKEHA**  
**JUDGE**  
**07/02/2020**

**Court:** Ruling is delivered in the presence of the parties.

  
**C. P. MKEHA**  
**JUDGE**  
**07/02/2020**