IN THE HIGH COURT OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MISC CRIMINAL APPLICATION NO. 84 OF 2020

(Arising from Criminal Case No. 672 of 1999 in the District Court of Mwanza at Mwanza)

BETWEEN

1. SHUKURAN MASEGENYA MANGO
2. THOBIAS MANG'ARA MANGO ..... **APPLICANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

16/12/2020 & 21/12/2020

RULING

MASAJU, J

The Applicants, Shukran Masegenya Mango and Thobias Mang'ara Mango, the 1st and 2nd Applicants respectively, jointly and together were charged with and convicted of Armed Robbery contrary to sections 285 and 286 of the Penal Code, [Cap 16] in the District Court of Mwanza at Mwanza (Criminal Case No. 672 of 1999). The Applicants were sentenced to serve thirty (30) years imprisonment on the 7th day of May, 2004. When sentencing the Applicants, the trial Court stated thus;

"Since the offence of armed robbery is under the Minimum sentence Act I therefore sentence the first and second accuseds to 30 years imprisonment. It is so decided."

The Applicants unsuccessfully appealed against both conviction and sentence to the Court at **Mwanza Registry (Criminal Appeal No. 291 of 2004). The Court (Masanche, J)** when dismissing their Appeal in its entirety on the 31st day of October, 2005 stated thus:

"Each of the appellant was sentenced to 30 years imprisonment. That was lawful sentence"

The Applicants then unsuccessfully appealed to the Court of Appeal of the United Republic of Tanzania, Mwanza Registry (Criminal Appeal No. 27 of 2006). In her judgment, delivered on the 12th day of May, 2010, the Court of Appeal of the United Republic stated thus;

"The Appellants to serve the prison terms as imposed by the trial Court."

The Applicants were not satisfied with the said judgment of the Court of Appeal of the United Republic of Tanzania. They filed therein Criminal Application No. 8 of 2010 for review of the said Judgment. The said Application was dismissed by the Court of Appeal of the United Republic on the 18th day of February, 2013 for want of merits. The said Court when dismissing the Application stated thus;

"In conclusion, we are of the settled mind that the applicants herein have not shown, in our view, any ground that raises the need for review of our earlier judgment in Criminal Appeal No. 27 of 2006 delivered at Mwanza on the 12th day of May, 2010. Accordingly this Application fails and it is dismissed."

The Applicants then filed Application No. 005/2015 before the African Court on Human and Peoples Rights alleging that their human rights have been violated by the United Republic of Tanzania, thus;

"i Articles 1, 2, 3, 5, 6, 7 and 10 of the Universal Declaration of Human Rights.

ii. Articles 3, 7, 7 (2), 19 and 28 of the Charter.

iii. Articles 107A (2) (e) and 107B, 12 (1) and (2); 13 (1), (3) (4) and (b) (c); 26 (1) and (2); 29 (1), (2) and (5); 30 (1), (30 and (5) of the Constitution of the United Republic of Tanzania,

iv. Article 6 of the European convention on Human Rights

v. Article 8 of the American convention on Human Rights; and

vi. Section 285 and 286 of the Penal Code of the United Republic of Tanzania regarding their illegal sentencing to thirty years' imprisonment"

The African Court on Human and Peoples' Right decided on the merits of the Application in her judgment dated the 11th May, 2018 thus;

"v. Finds that the Applicants have not established the alleged violation of Articles 2, 3, 5, 19 and 28 of the Charter and Articles 1, 2, 5, and 7 of the Universal Declaration of human Rights.

vi. Finds that the Respondent has not violated Article 7 of the Charter as regards, the Applicants' Identification; the changing of the Magistrate hearing the case, the alleged failure by the national Courts to apply the required standard of proof; the alleged lack of consideration of the second Applicant's submissions by the trial Court and the allegation that the judgments against the Applicants were defective and erroneous; consequently finds that the prayer that the Respondent state has violated Articles 8 and 10 of the Universal Declaration of Human Rights has become moot;

Vii. Finds that the incompatibility of section 142 of the Evidence Act with the international standards on the right to fair trial has not been established;

viii. Finds that the allegations relating to the dismissal of the Applicants' Application for review and rejection of their Constitutional Petition have not been established;

ix. Finds that the Respondent State has violated Article 7 (1) (c) of the Charter as regards, the failure to provide the Applicants with copies of some witness statements and the delay in providing them some witness statements; consequently finds that Respondent State has violated Article 1 of the charter"

On remedies to the parties, the African Court on Human and peoples' rights decided thus,

"x. Does not grant the Applicants' prayer for the Court to directly order their release from prison, without prejudice to the Respondent State applying such measure *proprio motu;* and."

It is against this background that the Applicants have filed in the Court the Chamber Summons Application made under section 2 (1) (2) (3) of the Judicature and Application of Laws Act, [Cap 358] and sections 390 (1) (a) (b), and 391 of the Criminal Procedure Act, [Cap 20] and Rules 2 and 12 of the Criminal Procedure (Habeas corpus) Rules, 1936 for Habeas Corpus *"that this honorable Court may be pleased to:*

I. Issue a writ of habeas corpus ordering for the Applicants confined in Respondents custody to be brought in Court and dealt with according to law

II. Issue directions as deems fit and Equitable to grant by this Court upon occasional sequence stated violation and or deprival of Applicants liberty by Respondent.

III. And any other orders/Reliefs/and remedy(ies) as this honorable Court seems justifiable to consider and grant in the circumstances of the application"

The Chamber Summons Application is supported by the Affidavit jointly sworn by the Applicants themselves. The said Affidavit gives the background and the reasons for the Application accordingly.

The Respondent Republic contests the Application and there is a Counter Affidavit sworn by Ms. Catherine Gwaltu, the learned Senior State Attorney, to that effect along with the Notice of Preliminary Objection on Points of law thus;

"1. That, the Court is Fanctus Officio

2. That, the Application is untenable, frivolous and vexatious"

The said preliminary points of law were heard before the Court on the 26th day of November, 2020. In the presence of the learned Senior State Attorney, Ms. Catherine Gwaltu, for the Respondent Republic and Mr. Shukran Masegenya Mango, the 1st Applicant who had informed the Court that the 2nd Applicant was a prisoner in Uyui Central prison, Tabora and that the said Applicant has consented that the Application be heard in his absence for their Application was just one and the same.

The Respondent Republic submitted on the 1st Preliminary point of law that since the Applicants have already been duly, heard and decided according to law by the trial Court, the Court of Appeal of the United Republic of Tanzania and the African Court on human and Peoples' Rights in which Applicants' conviction and sentence by the trial Court were upheld by the Court and the Court of Appeal of the United Republic of Tanzania,

and the Applicants' Application for Review and Application before the African Court for Human and Peoples' Rights respectively dismissed by the Court of Appeal of the United Republic of Tanzania and the African Court on Human and Peoples' Rights, the Applicants then have been duly dealt with according to law by the said Courts accordingly. There is no need for *habeas corpus* in terms of section 390 (1) (a) (b) of the Criminal Procedure Act, [Cap 20]. That, this Court which heard ad decided (HC) Criminal Appeal No. 201 of 2004 Mwanza Registry) was *functus officio.* That, since the Applicants' conviction and sentence which has been duly considered and dealt with by the trial Court, High Court of the United Republic of Tanzania (the Court), Court of Appeal of the United Republic of Tanzania and the African Court of Human Peoples' Rights, according to law, the instant Application for *habeas corpus* was untenable, frivolous and vexatious. The Respondent Republic further argued that the Applicants have not been illegally detained. They are serving a legally imposed sentence by the trial Court, which sentence has never been vacated by any Court of law. The Respondent Republic prayed the Court, to dismiss the Application for want of merit.

The Applicants on their part contested the preliminary points of law by submitting that their Application was legally before the Court pursuant to the enabling provisions cited in the chamber summons because they are being illegally held, for the sentence of 30 years imprisonment expired on the 2nd day of July, 2019 this is because they were convicted and sentenced to serve 30 years imprisonment on the 7th day of May, 2004

when they had already been in prison remand for six (6) years since the 3rd day of July, 1999, for in serving their sentence the period already spent in remand should be inclusive pursuant to section 172 (2) (c) of the Criminal Procedure Act, [Cap 20]. That, their remaining in prison custody was therefore illegal and contrary to section 327 of the Criminal Procedure Act, [Cap 20]. That, their Application was therefore tenable before the Court bearing in mind that they were no longer challenging their conviction and sentence but the execution of the sentence thereof. That, the Court was therefore not *functus officio.* That, the wording in their prison committal warrant should be widely interpreted so as to include relevant laws thereof. That is why as prisoners they benefitted from one third remission of the sentence under section 49 (1) of the prison Act, [Cap] though the same was not stated in the judgment and prison Commitment Warrant. That, section 53 (2) of the Inter pretention of laws Act, [Cap 1] calls for enforceability of section 172 (2) (c) of the Criminal Procedure Act, [Cap 20] accordingly. The Applicants also argued that they were being discriminated contrary to Article 13 (4) (5) of the constitution of the United Republic of Tanzania. The Applicants at last argued that the Court is seized with the jurisdiction pursuant to **Northern Tanzania Farmers Cooperative Society Ltd. V. Shellukindo [1978] TLR 36** as they prayed the Court to dismiss the preliminary points of law accordingly.

The Respondent Republic, in rejoinder, maintained her submissions in chief and added that the Applicants' arguments in respect of sentence ought to have been heard and considered by the Court and the Court of

Appeal of the United Republic of Tanzania where the Applicants had unsuccessfully appealed against both the conviction and sentence. That, such argument at this stage were after thoughts. That section 172 (2) (c) of the Criminal Procedure Act, [Cap 20] applies to confirmation of sentences imposed by the Magistrate Courts by the Court and not otherwise. That, the discount, if any, of the period spent by the prisoner in remand should be so stated in the sentence itself. The Respondent Republic rested her case by once more praying the Court to dismiss the Application for want of merit. That is all by the parties hereof.

The Court is of the considered position that the Applicants have already been dealt with according to law from when they were tried, convicted of the offence and sentenced by the trial Court. Their Appeals to the Court and the Court of Appeal of the United Republic of Tanzania against both the conviction and sentence were unsuccessful. Again, the Applicants' Application for Review before the Court of Appeal of the United Republic of Tanzania was unsuccessful as well. So was their Application for enforcement of human rights in the African Court of Human and Peoples' Rights. That being the case, the Applicants at this stage cannot invoke section 390 (1) (a) (b) of the Criminal Procedure Act, [Cap 20] for consideration by the Court otherwise. That is to say, the Application fails the test for *habeas Corpus* in terms of section 390 (1) (a) (b) of the Criminal Procedure Act, [Cap 20].

Secondly, this Court (Masanche, J) in (HC) Criminal Appeal No. 201 of 2004 Mwanza Registry did substantially adjudicate on the Applicants' Appeal to the Court against the conviction and sentence and upheld the conviction and sentence thereof. The Court is therefore *functus officio.*

Thirdly, section 172 (2) (c) applies in sentencing the offender. Yet such discount of the period spent by the offender in remand must be so categorically stated in the sentence. In the instant matter, the trial Court when setting the Applicants to the minimum sentence of 30 years imprisonment did not take into account the period spent by the Applicants in remand. The said sentence was upheld by both the Court and the Court of Appeal of the United Republic in the unsuccessful appeals lodged by the Applicants therein. Indeed, the Court of Appeal of the United Republic, whose decisions binds this Court stated categorically that *"the Appellants to serve the prison terms as imposed by the trial Court."* There is therefore no legal room for this Court to invoke section 172 (2) (c) of the Criminal Procedure Act, [Cap 20] on the Applicants' sentence execution at this stage.

Fourthly, for that matter the interpretation of Applicants' sentence as stated in their Commitment warrant to prison pursuant to section 327 of the Criminal Procedure Act, [Cap 20] to include the dictates of section 172 (2) (c) of the Criminal Procedure Act, [Cap 20] would be legally uncalled for. Whereas the Prisons Service can apply section 49 (1) of the Prisons Act, [Cap] for automatic one third remission of the inmates sentences save for those serving life sentence, yet the said Prisons Service cannot

invoke section 172 (2) (c) of the Criminal Procedure Act, [Cap 20] because, the Prisons Service is not a Court (sentencing authority). Sentencing is exclusive mandate of the Courts pursuant to section 327 of the Criminal Procedure Act, [Cap 20]. In such circumstances the Prisons Service must supervise the execution of the sentence stated in the Commitment warrant accordingly as per section 327 of the Criminal Procedure Act, [Cap 20] which reads thus;

"327 A warrant under the hand of the Judge or Magistrate by whom any person is to be sentenced to imprisonment ordering that the sentence shall be carried out in any prison within Tanzania Mainland, shall be issued by the sentencing judge or Magistrates and shall be full authority to the officer in charge of such prison and to all other persons for carrying into effect the sentence described in such warrant, not being a sentence of death, and every sentence shall be deemed to commence from, and to, include the whole of the date on which it was pronounced, except where otherwise provided in this Act or in the Penal Code"

So, section 327 of the Criminal Procedure Act, [Cap 20] relied upon by the Applicants, is against their own arguments.

The Applicants' argument that they are being discriminated contrary to Articles 13 (4) (5) of the Constitution of the United Republic of Tanzania was desperately raised by the layman Applicants in this Application.

That said, the Application is untenable, the Court being *functus officio* and being bound by the decisions made by Court of Appeal of the United Republic of Tanzania. The preliminary points of law are hereby sustained accordingly. The Application is dismissed.

GEORGE M. MASAJU

JUDGE

21/12/2020