THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL REVISION NO. 02 OF 2023

(Originating from Criminal Case No. 65 of 2023 in the District Court of Kilombero)

THE REPUBLIC..... APPLICANT

VERSUS

JILALA MAYANDA DUTU .....1ST RESPONDENT

MBAGA MNAGANDULA .....2ND RESPONDENT

LUHENDE BIGO ZENGO.....3RD RESPONDENT

RULING

Hearing date on: 24/04/2023

Ruling date on: 02/05/2023

NGWEMBE, J:

The Republic led by Senior State Attorney Neema C. Haule, moved this court by a letter dated 18th April, 2023, inviting this house of justice to exercise its revisional jurisdiction over the order issued by the trial court in respect to Criminal Case No. 65 of 2023, between the parties herein above. The content of the letter was centered on the subsequent order issued by the trial court after the Republic has entered *nolle prosequi* against three accused persons herein appearing as respondents. Such subsequent order after *nolle prosequi* had the effect of returning all herds of cattle to the respective owners. Part of the contents of the letter is quoted herein: -

"Kitu cha kushangaza mahakama ilitoa amri kuwa ng'ombe 152 na ng'ombe 106 waliokamatwa kwa washtakiwa lakini hawakuwahi kupokelewa mahakamani kama vielelezo, wakabidhiwe kwa washtakiwa hao kwa kuwa ni mali zao"

In simple interpretation in a language of this court means, it is surprising, the trial court proceeded to order those herds of cattle that is, 153 and 106 be returned to the respective accused for they are the owners.

Such order aggrieved the applicant herein, hence, moved this court to revise such order as per the dictates of law. Having so received such letter, this court found prudent to invite both parties who were represented by learned counsels, to address the court on that matter. The Republic was represented by learned State Attorney Nestory Mwenda, while the respondents were represented by three advocates namely Hekima Mwasipu, Sikujua Funuki and Mathew Mtemi. However, before recapping their arguments, I find prudent to revisit the law, if at all this court was properly moved.

Rightly, the power of this court over revision of any decision meted by subordinate courts is statutory. Section **372 (1) of Criminal Procedure Act Cap 20 R.E. 2022** (CPA) is quoted herein for purpose of clarity: -

"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed,

and as to the regularity of any proceedings of any subordinate court"

The contents of this section when read together with section 373 of the same Act, leaves no doubt this court may *suo motto* or by being moved in a form of a letter or application or any other form capable of informing this court, may suffice and the court may take an undertaking thereto. Subsection 2 of section 372 of CPA, confer statutory powers to invite both parties in dispute to appear before it and afford them right to be heard before the court's final verdict.

In justifying his application, the learned State Attorney strongly submitted that, the Republic was aggrieved with the subsequent orders of trial court after *nolle prosequi* issued on 17th April, 2023. The subsequent orders after *nolle prosequi* was to the effect of returning all herds of cattle constituting a total of 258 to the alleged owners, while same were not physically tendered in court as part of court's physical exhibits. Secondly, such order was issued while the case was already entered *nolle prosequi* under section 91 (1) of CPA.

Further, argued that, under the cited section, the Republic is at any time allowed to reinstitute in court the same accusations against the same discharged persons.

Argued that once *nolle prosequi* is entered, it means before the court there is no case and the court cannot proceed to issue other orders on a terminated charge. Justified his argument by referring this court to the case of **Emmanuel Saguda Sulukuka & Sahili Wambura Vs. R, Criminal Appeal No. 422 "B" of 2013 at page 9.**

Added that, those herds of cattle are physical exhibits which were yet to be tendered in court, hence the trial court had no mandate to issue any order on exhibit yet to be tendered in court. Justified his argument by referring this court to the case of **Aman S. Shavunza & 3 Others vs. Lamson Sikazwe & 7 Others (Criminal Appeal 156 of 2020) [2021] TZHC 9478.** Insisted that, once *nolle prosequi* is issued by the Republic, it means before the court of law, there is no case capable of being decided by a court of law. Likewise, the trial court issued release of those cows, while before it there was no case.

Moreover, cited the case of **Director of Public Prosecutions vs Mussa Lyamhelo @ Seba Akujiwe & Another (Criminal Appeal 156 of 2015) [2016] TZCA 240**, at pages 12 – 13. Thus, only the prosecution had powers to close prosecution cases. Once the case is ended by *nolle prosequi*, the court has no power to issue subsequent orders. Therefore, the trial court's order to return those herds of cattle to the accused persons was wrong, he concluded.

In turn, the learned advocate Hekima Mwasipu, resisted the application and strongly disputed the arguments advanced by the learned State Attorney. Convincingly cited section 352 (3) of CPA, that the law allows the trial court to order return of the exhibits to the owner upon termination of trial; second the court may order return of intended exhibits to the original owner; and three the trial court likewise may order return of those exhibits mentioned in the proceedings, even if they were not tendered as exhibits.

Rightly, defended the trial court's order to return those herds of cattle to the owners. Proceeded to argue that *nolle prosequi* is part of final

disposal of trial, hence the order issued by the trial court was right. Emphatically, cited the case of **DPP Vs. Kilo kidang'ai & Another [2019] 1tlr 236 [CA]** at page 21. Rested by inviting this court to dismiss the application for lack of merits.

Supporting the arguments of advocate Hekima Mwasipu, the learned advocate Sikujua Funuki insisted that, the section is clear that the word *'admitted'* is not included in the cited section with purpose. So, the trial court was right to issue an order releasing those herds of cattle to the owners.

Advocate Mathew Mtemi insisted that, trial court was right to order as it did base on section 353 (3) of CPA, which is self-explanatory. Cited the case of **National Microfinance Bank vs. Victor Modes Banda, Civil Appeal No. 29 of 2018** (CAT – Tanga).

In rejoinder, the learned State Attorney contradicted the interpretation advanced by the defence counsels on section 353 (3) of CPA. That the section does not cover the situation of this case. That those herds of cattle were not yet tendered in court as physical exhibits, hence the trial court had no mandate and jurisdiction to deal with them. Above all, those cattle were yet to be part of the court's proceedings. Rested by insisting that, once *nolle prosequi* is entered, it means before the court there was nothing to support any subsequent order. Rested by inviting this court to allow the application and quash the trial court's order.

I may begin by admitting that this application has exercised my mind, not because of its complexity but because of its nature and the way section 353 (3) of CPA was drafted. If this section is not properly interpreted, practically may diverge from the known common legal

practice. It is well known that; courts of law are bound to decide on matters that are before them. Anything out of the court room or outside the trial court's table cannot be decided by the court of law. Equally, it is well – known, the court will deal with an exhibit, which is tendered in court and the process of tendering an exhibit, in our jurisdiction, is well developed through countless precedents. Briefly, prior to admitting an exhibit, a witness must first identify it by mentioning its features unique to it as opposed to others of similar nature. If it is herd of cattle, then its features like physical appearance, colour, maturity or calf and alike. Second step is the procedure of tendering it in court. Third, if there is no objection from the opposite party, the court shall pronounce admissibility of that exhibit, with exhibit number. Fourth, if the admitted exhibit is a document, it is mandatory to read its contents loudly in court, but if it is a physical item, then the court shall explain where same should be kept in safe custody. This position was emphasized in the cases of **Robson Mwanjisi & others Vs. R, (2003) T.L.R, 218**. **Paulo Maduka and 3 Others Vs. R, Criminal Appeal, No. 110 of 2007,** where the court held: -

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the court to be seen not to have influenced by the same"*

The persistent question in this application is whether the court has any power to deal with and issue an order in respect of an intended exhibit but same was not tendered and admitted in court? This question will be answered in due course of this ruling.

Equally important is the whole issue of *nolle prosequi* and its effect on the tendered exhibits and those exhibits intended to be tendered in court during trial? Hurriedly, I may answer this issue outright. Section 91 (1) of the Act expressly confer unlimited powers to the Director of Public Prosecutions and any one from his office to terminate any proceedings of criminal nature or criminal case pending before any court of law by *nolle prosequi.* For clarity the section is quoted hereunder: -

> **Section 91 (1)** *"In any criminal case and at any stage thereof before verdict or judgement, as the case may be, the Director of Public Prosecutions may enter a nolle prosequi, either by stating in court or by informing the court concerned in writing on behalf of the Republic that the proceedings shall not continue; and thereupon the accused shall at once be discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged;* ***but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts***"

This section I think is clear like a brightest day light, that the genesis of *nolle prosequi* in our jurisdiction is statutory, unambiguously, the statute vested all powers to enter *nolle prosequi* at any time and at any stage of criminal proceedings under the hands of Director of Public Prosecutions and his officers thereto. Unfortunate may be, the Legislature did not even include the need of the Republic to disclose reasons for so doing. Since the statute read as it is, this court cannot do otherwise than to use and enforce the will of the Legislature reflected to that section.

Dr. Longopa, discussed that section in light of danger of being misused by the DPP in his article titled; the **DPP's Supremacy in Criminal Justice in Tanzania: Analysis of the Exercise of Nolle Prosequi, EALR Vol. 48 No. 2 December 2021, page 11** where he observed: -

> *"The operation of nolle prosequi does not prevent an accused person from being re-arrested and being brought to Court in the future on account of the same offence. This is due to the fact that termination by nolle prosequi does not amount to acquittal but merely discharges the accused person. A person who is discharged under nolle prosequi may be brought to the Court on account of the same facts. Once the charge is re-instituted by the DPP, the case will start afresh as a new case with a different case number. The law allows the DPP to enter nolle prosequi in respect of the same proceeding as many times as he wishes."*

Agreeably, the powers of DPP to enter *nolle prosequi* in any criminal trial at any stage of proceedings prior to the final verdict and as many times as possible is prone to be misused, but that is reserved for another case.

Before going to the bone of this application, let me discuss just briefly on the true meaning of *nolle prosequi*. It is a Latin Maxim bearing the meaning of terminating criminal proceedings. It is a legal notice filed in court by the prosecutor to drop the indictment or the accusations against the accused person. Essentially *nolle prosequi* is a voluntary termination of charge against the accused person.

Blacks Law Dictionary, (8th Edition) defines *nolle prosequi* to mean a judicial determination in favour of an accused and against his

conviction, but it is not an acquittal, nor is it equivalent to a pardon. Usually, acquittal is pronounced as a final verdict of a criminal trial. It can be an acquittal or conviction, but discharge may be made at any time prior to or during trial but before final verdict of a criminal case.

Usually, the DPP or his officer may enter *nolle prosequi* at any time and at any stage of proceedings if in his mind, I presume, has the following reasons: -

i. Failure of a key witness to cooperate during trial;
ii. Re-evaluation of evidence that proves the accused innocence;
iii. New evidence that proves the accused's innocence or brings doubt as to the accused's guilt;
iv. Desire to give the accused a second chance;
v. Negotiated or plea agreement/plea bargaining where the prosecutor dismisses certain charges in exchange for a guilty plea to the remaining charges. (The list is not exhaustive)

The most common reason for dropping charges by way of a disposition of *nolle prosequi* is failure of evidence being available at the time a criminal case is about to go for trial. A missing witness is a common issue that may lead into *nolle prosequi* as an appropriate remedy.

In any event, when a notice of *nolle prosequi* is filed in court or the prosecutor stands up in court and utters *nolle prosequi*, means the legal process over that criminal case ends there. Consequently, the charge against the accused is immediately dropped and the accused is immediately discharged.

Understandably, the accused person who is discharged on *nolle prosequi*, should consider himself as discharged and not acquitted, which means at any time even on the very day and time of being discharged he may be re-arrested and recharged on the same counts he was discharged for. Practically, in case of the High Court, the Committal Proceeding before the subordinate court, which committed him to the High Court for trial, remains intact. This was so decided in the case of **R Vs. Median Boastice Mwale & Others (Criminal Session 77 of 2017) [2018] TZHC 2217,** the Court held: -

> *"I will thus hold as a point of law that once a criminal proceeding is discontinued and the accused discharged by the reason of entry of nolle prosequi by the DPP, the committal order of the subordinate court does not phase out of existence such that if everything remains constant, the prosecution may initiate a new proceeding on the similar facts without commencing a fresh committal proceedings."*

Although *nolle prosequi* and discharge of the accused do not finalise the case, the courts powers to make orders in respect of the exhibit or properties tendered or listed in connection of the proceedings depend on the circumstances of each case. This is born out of the contents of section 353 (3) of CPA which to my understanding is very particular, that any subsequent order is "*subject to such conditions as the court may see fit to impose."* The section did not open doors for subsequent orders after *nolle prosequi* without safety valve. The section is written in a careful manner to give room to the court to issue subsequent orders when circumstances so demand. Thus, concludes the understanding and submission advanced by the learned State Attorney, that once *nolle*

prosequi is entered the court becomes powerless to issue any order therein. I think the Legislature had a purpose to put subject to certain conditions as the court may see fit to impose.

The question still remains whether in the circumstances of the case before the trial court was appropriate to issue such order as it did soon after *nolle prosequi?* This I think is the crux of the whole matter in this application. Maybe it is important to consider the sequence of whole section 353 with a view to grasp a true meaning therein. Section 353 (1) permits sale of properties which were tendered in court, if not claimed by a person within 12 months of final disposal and proceeds be paid to the general revenue of the Republic, under sub section 2, sale may be made before final disposal if the object is subject to speedy and natural decay. Likewise, the proceeds will be paid to the general revenue of the Republic if not claimed within 12 months.

The subsection (3) is drafted in the same logical flow, equitably, the court may order the property be returned to a person entitled to, at any stage before or after disposal of the proceedings. But the return is subject to conditions, which the court should accompany with its order. For clarity the sub-section is quoted hereunder: -

> *"Notwithstanding the provisions of subsection (1), the court may, if it is satisfied that it would be just and equitable so to do, order that anything tendered, or put or intended to be put in evidence in criminal proceedings before it should be returned at any stage of the proceedings or at any time after the final disposal of such proceedings to the person who appears to be*

entitled thereto, ***subject to such conditions as the court may see fit to impose."***

The emphasised phrase put a duty on the court to consider circumstances of the case prior to making any subsequent order after *nolle prosequi*. Those circumstances may include limiting – *movement of property from the jurisdiction of the court or transfer or conversion or dealings with the property and so on.* Taking the provision as a whole, infers the purpose of those conditions are to uphold justice, avoid prejudice and any other conducts that may pre-empt or affect reinstitution of the same charge or an appeal or any further proceedings as parties may so wish.

Similar position is well known and practiced in the Courts of India, whereby magistrates have powers to pass orders as to disposal or delivery of properties seized by police during investigation and brought to court during trial. (See the case of **M.Muniswamy Vs. State of A.P. 1992 (3) ALT 50**. However, magistrate has no jurisdiction under section 457 of Criminal Procedure Act of India to pass an order for custody of property not produced before him in an inquiry or trial. Also see the case of **Voruganti Seshachala Venkateswarlu Vs. Government of A.P. 2003 (2) ALT 444**.

Equally, the same position was held by the Court of Appeal of Tanzania in **Consolidate Criminal Appeal No. 16 'A' of 2016 and 16 of 2017 [2018] TZCA. 321 between Song Lei Vs. R** where briefly, the accused persons' passports and other travelling documents were ordered to be given back to the accused persons and other exhibits were auctioned. Such orders were executed before the appeal could be heard. Thus made the Court of Appeal fail to proceed with hearing as

some exhibits were missing from the record. Among others, the Court of Appeal held: -

> *"We must confess that the order made by the trial court really taxed our minds. They certainly' were made prematurely. The disposal of exhibits was made before the appeal was determined and exhausted. This offended section 353 (1) of the CPA... It need not be overemphasized that once tendered and admitted in evidence exhibits must be in the custody of the trial court. They can only be disposed of in terms of section 353 of the CPA. What happened in the case at hand is, to say the least, strange"*

The question in this application is, if the disposition of exhibits upon conclusion of trial, but before final determination of appeal turned to be strange, what strange would be to order return of properties which were not even tendered in court and made part of the court proceedings?

As discussed above *nolle prosequi* is not the end of accusations against the culprit, in actual sense, the accused may not even dare to lodge a claim for unlawful prosecution (if so wished) based on accusations which were terminated in court by *nolle prosequi.* The reason is simple and straight forward as the section quoted above so provide. That the elements constituting unlawful prosecution denies him to claim any compensation out of dropped charges for *nolle prosequi.*

Logic and common sense, demand that a court of law cannot in any event order return of properties intended as opposed to those actually tendered in court soon after *nolle prosequi.* Always courts must avoid pre-emption of the future proceedings which is purely under the

jurisdiction of the office of Director of Public Prosecution. Any subsequent order after *nolle prosequi* on the exhibits or properties connected to the case and intended to be tendered in court required serious consideration of its consequences, otherwise, may end up pre-empting future prosecution of the same counts of offence.

I may insist that adherence of the letter of the law is of paramount importance not only in disposal of exhibits or exhibits intended to be tendered or in whatever manner but also dealings in all other aspects. The subsequent order made by the trial court is strange. Whatever order of any trial court should be done with observance of the letters of law. The way those cattle were returned to the accused, to say the least, left justice crying. I hope such blatant disregard of the law will not recur for the expense of justice.

While I am approaching to the end of my revision, I have carefully, considered all precedents cited by learned counsels, yet I doubt if they real fit in the situation of this case. The order to return those herds of cattle to the accused, after *nolle prosequi* left the Prosecutor powerless to reinstitute the same criminal charges against the accused persons. This is so because first, those herds of cattle were neither in the custody of the court as physical exhibits nor were they tendered in court as exhibits. Thus, the court issued such subsequent order after *nolle prosequi* on cattle which are not known in law; second the court knew vividly that *nolle prosequi* terminated the charges before the court but same was not a bar to subsequent charges of similar offence; third, the court order was not accompanied with any conditions including a conditions to cause those animals be availed before the prosecution or court when need arise.

For those reasons stated, I am satisfied that this application has merits consequently I proceed to invoke this court's powers under section **372 (1) of CPA** to revise that subsequent order which returned all herds of cattle to the alleged owners immediate after *nolle prosequi* as nullity.

I accordingly order.

Dated at Morogoro in Chambers this 2nd day of May, 2023.

P. J. NGWEMBE

JUDGE

02/05/2023

Court: Judgement delivered at Morogoro in chambers this 2nd day of May, 2023 in the presence of Josbert Kitale and Shaban Kabelwa State Attorneys for the Republic/applicant and Mathew Mtemi, Advocate for the respondents.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

02/05/2023