

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SONGEA DISTRICT REGISTRY)**

AT SONGEA.

MISC. CRIMINAL APPLICATION NO. 15 OF 2021

(Originating from Criminal Case No. 108 of 2018 of Mbinga District Court)

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

VERSUS

STEPHEN ROJA 1ST RESPONDENT

FRANK PONELA 2ND RESPONDENT

Date of last Hearing: 28/06/2021

Date of Judgment: 30/06/2021

RULING

I. ARUFANI, J

The Director of Public Prosecutions (hereinafter referred as the applicant) filed in this court the application seeking for the following orders:-

- 1) That this honourable court be pleased to call for and examine the records of Criminal Case No. 108 of 2018 before the District of Mbinga (Hon. Mbajo, RM), for the purpose of satisfying itself as to the correctness and legality of the order of acquitting the

respondents (formally the accused persons) under section 226 (1) of the Criminal Procedure Act, [Cap. 20 R.E 2002].

- 2) That this honourable court be pleased to hold that the District Court of Mbinga had no power to acquit the respondents under section 226 (1) of the Criminal Procedure Act, [Cap. 20 R.E 2002] (Now revised Edition 2019).
- 3) That this honourable court be pleased to reverse the order of the District Court of Mbinga of acquitting the respondent under section 226 (1) of the Criminal Procedure Act, [Cap. 20 R.E 2002] and order that the Criminal Case No. 108 of 2018 be restored to the District Court of Mbinga to continue from where it ended.
- 4) Any other order this honourable court may deem fit and just to grant.

The application is made under section 372 and 373 (1) (b) of the Criminal Procedure Act, [Cap. 20 R.E. 2019] (hereinafter referred as the CPA) and is supported by an affidavit sworn by Emmanuel Barigila, State Attorney. The application was heard ex parte after the effort to get the respondents proved futile. When the application came for hearing the

applicant was represented by Ms. Tulibake Juntwa, learned Senior State Attorney.

The learned Senior State Attorney told the court that, the applicant is urging the court to revise the order of the trial court dated 30th January, 2020 which dismissed the charge the respondents were facing and acquitted them under section 226 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002]. She stated that, the trial court dismissed the charge and acquitted the respondents as the prosecution failed to appear before the trial court when the case was coming for hearing.

She argued that, they are challenging the order of acquitting the respondent under section 226 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] as the mentioned provision of the law was amended by section 19 (a) of the Written Laws (Miscellaneous Amendments Act) Act No. 3 of 2011. She submitted the mentioned amendments states that, where a complainant failed to appear before the court, the court is allowed to dismiss the charge and discharge the accused person and not to acquit him as it was done by the trial court.

He submitted further that, the order of acquitting the respondents is illegal as it was made contrary to the above referred law which amended section 226 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002] and allow the courts to dismiss the charge and discharge an accused person where the complainant failed to appear before the court and not to acquit him. She prayed the court to revise the said order of the trial court and set it aside and substituted the same with an order of discharging the respondents to enable the prosecution to recharge the respondents if they will succeed to get them.

Having heard the submission made to the court by the learned Senior State Attorney the court has carefully gone through the proceedings of the trial court in Criminal Case No. 108 of 2018. The court has found the respondents were jointly and together charged with the offence of unlawful transportation of 18.55 kilograms of narcotic drugs commonly known as bhangi contrary to section 11 (1) (d) of the Drug Control and Enforcement Act No. 5 of 2015 as amended by section 3 of the Drug Control and Enforcement (Amendment) Act No.15 of 2017.

The court has also found that, as rightly stated by the learned Senior State Attorney when the case came for hearing on 30th January, 2020 the

prosecution failed to appear before the trial court and the trial court found the prosecution had lost interest with the case and dismissed the charge the respondents were facing under section 226 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] and acquitted them forthwith. It is also the finding of the court that, as rightly argued by the learned Senior State Attorney before the amendments done by Act No. 3 of 2011 to section 226 of the Criminal Procedure Act, [Cap 20 R.E. 2002], the courts were permitted to dismiss the charge where the complainant failed to appear before the court and acquit the accused person.


However, after the amendments done to section 226 (1) of the Criminal Procedure Act, [Cap 20 R.E. 2002] by Act No. 3 of 2011 the word "acquit" which was appearing in the cited section of the law was deleted and substituted thereof by the word "discharge". That means after the said amendment the courts are not allowed to acquit the accused person under the cited provision of the law where the complainant failed to appear before the court. In lieu thereof the court is only enjoined to discharge the accused person.

In the premises the court has found that, as rightly argued by the learned Senior State Attorney the order of acquitting the respondents given

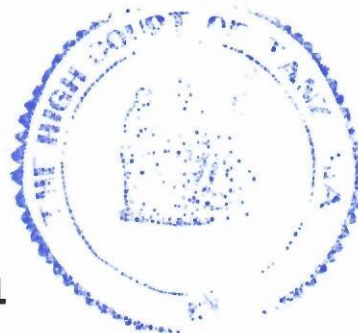
by the trial court on 30th January, 2020 was unlawful as the provision of the law which was allowing the courts to acquit the accused person under section 226 (1) of the CPA was amended in 2011 by Act No. 3 of 2011 and allow the courts only to discharge the accused person.

Consequently, the application of the applicant is granted and the court is exercising the power conferred to it by section 373 (1) (b) of the CPA to set aside the order of the trial court which acquitted the respondents from the offence they were facing. In lieu thereof and as prayed by the learned Senior State Attorney the order of acquitting the respondents given by the trial court in the respondents' case is substituted with the order of discharging them from the offence they were facing. It is so ordered.

Dated at Songea this 30th day of June, 2021


I. ARUFANI
JUDGE

30/06/2021



Court:

Ruling delivered today 30th day of June 2021 in the presence of Ms. Amina Mawoko, State Attorney for the applicant and in the absence of the respondents. Right of appeal to the court of Appeal explained.

I. Arufani
I. ARUFANI

JUDGE

30/06/2021

