

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA  
AT MUSOMA**

**CRIMINAL SESSIONS CASE No. 125 OF 2021**

**THE REPUBLIC**

*Versus*

**GAITAN HERMAN @ GAITANI**

**RULING IN TERMS OF SECTION 91(1) & (3) OF THE  
CRIMINAL PROCEDURE ACT [CAP. 20 R.E.2022]**

18.07.2022 & 18.07.2022

Mtulya, J.:

The **Parliament of the United Republic of Tanzania** in its **Fifth Session of Sixth Meeting** held at the Capital City of the Republic in Dodoma on 7<sup>th</sup> day of February this year, deliberated and adopted a proposal on inserting sub section (3) in section 91 of the **Criminal Procedure Act** [Cap. 20 R.E. 2022] (the Act) via section 24 of the **Written Laws (Miscellaneous Amendment) Act**, No. 1 of 2022 (the Amending Act). The cited section 24 of the Amending Act provides that:

*The principal Act is amended in section 91 by adding immediately after sub section (3) the following:*

*(3) where the **accused is discharge under sub section (1)**, he shall not be re-arrested and charged on the **same facts** unless there is sufficient evidence and that the hearing proceedings **shall commence on his first appearance before the court.***

(Emphasis supplied).

This enactment was gazetted a month later, on 8<sup>th</sup> March 2022. Today, 18<sup>th</sup> July 2022, just after a lapse of four (4) months, the enactment was invited in this court to dispute a prayer of *Nolle Prosequi* preferred by the Republic under section 91(1) of the Act by learned State Attorney, Mr. Isihaka Ibrahim, who entered appearance for the Republic. The prayer to register the *Nolle Prosequi* was protested by Mr. Emmanuel Gervas, learned counsel appearing for Mr. Gaitan Herman @ Gaitani (the accused person), who is prosecuted for murder of Gaitan Mwita @ Gibogo (the deceased) that occurred on 17<sup>th</sup> day of April 2020 at Kyankoma Village within Butiama District in Mara Region.

Mr. Gervas issued the protest asking the Republic to give reasons for the prayer of entering *Nolle Prosequi* before this court can grant and mark the case withdrawn in favor of section 91(1) of the Act. According to Mr. Gervas, the new law in section 91 (3) of the Act has put in place conditions limiting the applicability of section 91 (1) of the Act and prohibits the Director of Public Prosecutions (the DPP) to act as he so wish in withdrawing cases and re-arresting accused persons. In his opinion, the Republic must, before withdrawing criminal cases in courts, abide with section 91(3) of the Act in order to avoid re-arresting of accused persons as the Republic so wish.

In bolstering his argument, Mr. Gervas submitted that sub section 3 of section 91 of the Act was inserted in the Act to avoid abuse of powers on part of the DPP in applying section 91 of the Act without reservations and use the section to re-arrest accused persons on the same facts and delay their trials on grounds of investigations of crimes. In his opinion, Mr. Gervas, contended that the practice violates human rights of accused persons as may be discharged and re-arrested more than ten (10) times. Finally, Mr. Gervas prayed this court to balance the rights of accused persons and the duties of the Republic in re-arresting accused persons for interest of justice.

The protest and interpretation of section 91(1) & (3) of the Act by Mr. Gervas was not well received by Mr. Ibrahim. According to Mr. Ibrahim, section 91(1) of the Act was enacted in such a way that it does not require the Republic to register any reasons in its prayers for *Nolle Prosequi* whereas section 91(3) of the Act does not prohibit re-arresting of accused persons when there are sufficient evidence and investigation has been completed. In his opinion, the law in section 91(3) of the Act was enacted by the use of two (2) key words: *unless* and *first appearance*, meaning that the law allows re-arresting of accused persons, provided that there are sufficient evidence and that the accused persons are brought before courts for first appearance as soon as possible for plea

taking or preliminary hearing. In his opinion, Mr. Ibrahim, thinks that the word *court* in section 91(3) of the Act, in murder cases, means the High Court and not subordinate courts, which have no any mandate to hear and determine murder cases.

In persuading this court to decide in favour of the Republic, Mr. Ibrahim requested this court to read the provisions of section 26 of the Amending Act which added section 131A immediately after section 131 of the Act, and specifically section 131A (1) and (4) of the Amending Act which mention serious offences and other considerations in granting application for *Nolle Prosequi*.

In the opinion of Mr. Ibrahim, this court may invite and use the purposive approach in interpreting section 91(3) of the Act by inviting section 24 and 26 of the Amending Act whereas Mr. Gervas thinks that this court may visit and peruse the intention of the Parliament through Hansard Book to see and learn the reasons behind the enactment of section 91(3) of the Act.

I have perused the cited provisions and discussions in our Parliament during the enactment of the cited section 24 and 26 of the Amending Act. It is unfortunate that there are no detailed materials recorded in the Hansard Book on the deliberations conducted of 7<sup>th</sup> February 2022 for this court to draw a conclusion that the intention of the Parliament was to deal with abuse of

powers of the DPP enacted in section 91(1) of the Act. The thinking and feeling may be emanating from our society and legal community in this State. However, in absence of detailed materials on the dispute, this court cannot not gamble on the intention of the Parliament. It is unlucky that the cited enactments in section 24 and 26 of the Amending Act is very new in our jurisdiction with four (4) months loiter and have not received any interpretation of this court or the Court of Appeal to put in place a standard practice.

It is also unfortunate that the law is silent on when exactly to challenge the applicability of section 91 (3) of the Act. Some of the pertinent questions may be: is it invited at this stage of withdrawal of the charge against accused persons? Is it invited during re-arresting of the accused persons? Or is it during the committal proceedings or plea taking and preliminary hearing stage? Or else, which procedure to be followed in challenging the prayer on the application of section 91(1) of the Act by inviting section 91(3) of the Act? and finally whether the challenge is registered in main case or separate application?

I think, in my considered opinion, there is a bunch of unanswered questions in the new insertion of the law in section 91 (3) of the Act that need to be resolved and settled. In the present case, the prayer is on withdraw of the case under section 91(1) of the Act, which has no any enactment pressing reasons on part of

the DPP. In any case, this court has no materials on record to decide on speculations of re-arresting of the accused person to decide on the present matter. I think, Mr. Gervas may wait for the appropriate moment to register his complaints and protests, and invite the new enactment of section 91 (3) of the Act. I am aware that it is difficult at same point to balance the rights of accused persons versus that of the Republic, but this court decides matters brought before it with relevant materials to enable it to have a fair conclusion between the parties.

Having said so, I grant the prayer of the Republic registered by Mr. Ibrahim under section 91(1) of the Act and hereby discharge the accused person, Mr. Gaitan Herman @ Gaitani under the provision of section 91(1) of the Act. However, before I wrap up the proceedings in this case, I must take this opportunity to update the Republic on the enactment of the provision in section 91(3) of the Act, in case they decide to re-arrest the accused person, Mr. Gaitan Herman @ Gaitani.

Ordered accordingly.




F. H. Mtulya

**Judge**

18.07.2022

This Ruling was delivered in open court in the presence of the accused person, Mr. Gaitan Herman @ Gaitani and his learned counsel Mr. Emmanuel Gervas and in the presence of the learned State Attorney, Mr. Isihaka Ibrahim for the Republic.



F. H. Mtulya

**Judge**

18.07.2022