IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 111 OF 2022

(Appeal from the decision in Economic Case No. 28 of 2022 of the Resident Magistrates' Court of Dar es Salaam at Kisutu (Ngimilanga, SRM) dated 17th of June, 2022.)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

JITESH JAYANTILAL LADWA ..... 1ST RESPONDENT

ELLY CHIRONGO MUSYANGI ..... 2ND RESPONDENT

JUDGMENT

25th July, & 11th August, 2022

ISMAIL, J.

Jitesh Jayantilal Ladwa and Elly Chirongo Musyangi were jointly charged with multiple counts of economic crime offences. Out of 24 counts, Mr. Elly Chirongo Musyangi was involved in the first count of conspiracy to commit an offence. On arraignment in the Resident Magistrates' Court of Dar es Salaam, Mr. Jeremiah Mtobesya, learned counsel who represented the respondents, raised a preliminary objection, contending that the court was not vested with jurisdiction to deal with the matter. The basis for learned counsel's objection is that, following the amendment of the law, through Act

No. 3 of 2016, all economic offences are triable in the High Court of Tanzania, Economic Crimes Division, and that the role of the subordinate courts is in terms of section 243 of the Criminal Procedure Act, Cap. 20. This entails, Mr. Mtobesya argued, conducting of the committal proceedings in terms of section 4 of Cap. 20, which has since been amended by Act No. 1 of 2022. The respondents argued that in view of the said amendment and, cognizant of the existence of civil proceedings vide Commercial Case No. 2 of 2020, the criminal proceedings were of a civil nature and that their invocation ought to have awaited conclusion of the civil proceedings.

The learned magistrate, before whom the matter was placed, found sense in the respondents' contention. She held that the continued pursuit of the criminal proceedings, in the pendency of the civil suit, was to subject the 1st respondent to two different punishments over the same allegations. This, she concluded, was contrary to the principle of double jeopardy. Consequently, the court dismissed the charge sheet and set the 1st respondent free.

The Director of Public Prosecutions, the appellant, is profoundly bemused by the decision of the court. He has chosen to prefer an appeal against the whole of the said decision and three grounds of appeal have been raised. These are: ***One***, that the court erred in law by entertaining the

preliminary objection and dismiss the charge sheet against the respondents in respect of an Economic Case without having jurisdiction; ***two***, that the court erred in law in holding that the offences of forgery which are purely criminal offences are remediable in civil forum/court; and ***three***, that the court erred in law by dismissing the charge sheet on the ground that 1st accused is subjected to two different punishments from two different courts, against the principle of double jeopardy.

Hearing of the appeal pitted Ms. Hellen Rwijage, Senior State Attorney, Messrs Nassor Katuga and Timotheo Mmari, learned Senior State Attorney and State Attorney, respectively, for the appellant; against Messrs Jeremiah Mtobesya and John Chuma, learned counsel, for the respondent.

The first bullet was fired by Mr. Mmari, who informed the Court that they were going to argue the grounds of appeal in a combined fashion. He argued that the Kisutu court did not have the power not only to dismiss charges but also to deliberate on the arguments made by the parties as it was not a trial court. Mr. Mmari argued that the court was simply a committal court that did not have any powers to determine anything in the matter.

Learned attorney argued that jurisdiction of the court to determine the matter is conferred upon by law and that it must be expressly given. He contended that such jurisdiction cannot be implied or assumed. Mr. Mmari

submitted that the respondent was charged with economic charges which are triable in the Economic Crimes Division of the Court. He added that the case must be committed to the Court under section 30 of the Economic and Organized Crime Control Act, Cap. 200 R.E. 2019, read together with regulation 8 of the Anti-Money Laundering Regulations, 2012 as amended by Anti-Money Laundering (Amendment) Regulations, 2019; and section 246 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019 (CPA).

Mr. Mmari further argued that section 29 (2) and (3) of Cap. 200, which is similar to section 245 of the CPA, spells out clearly that at the stage of Preliminary Inquiry the court's duty is to read and explain the charge to the accused person. This would include, in terms of rule 8, reading the substance containing evidence of the witnesses. He contended that this is the only role played by the committal court. While maintaining that the court overstepped its mandate by dismissing the charge, learned counsel urged the Court to be inspired by the decisions of the Court and the Court of Appeal of Tanzania in ***Mathias Frank Radetaki v. The Director of Public Prosecutions***, HC-Econ. Application No. 1 of 2022; and ***Republic v. Farid Hadi Ahmed***, CAT-Criminal Appeal No. 59 of 2015 (unreported).

Weighing in for the appellant was Ms. Rwijage, who argued that her submission is predicated on section 4 of the CPA (as amended), and that the

catch word is "nature". She submitted that even if the court was vested with powers to determine the matter, it still had the duty of ascertaining if the charges are of civil nature and not that there are other civil cases involving the same parties. Learned counsel argued that the attached copy of the proceedings in Commercial Case No. 2 of 2020 has paragraph 4 but the same does not carry any allegations of forgery or money laundering. She took the view that it was not proper to rule that what was in Commercial Case No. 2 of 2020 is what is in the pending criminal proceedings. Ms. Rwijage was adamant that that the Commercial Division of the Court would not determine criminality that the respondent is accused of.

Ms. Rwijage further contended that the expectation was that civil issues from which the criminal proceedings arose would be pointed out. She contended that the court ought to have realized that the allegation that bred the instant appeal did not have a commercial cause in the Commercial Division of the Court, insisting that the interpretation of section 4 (as amended) was flawed. She concluded that there was nothing on which to base the contention that there would be a double punishment. Ms. Rwijage's final rallying call was for the Court to allow the appeal and let the committing court proceed with its committal function.

Mr. Mtobesya's submission was equally ferocious. He began by submitting that section 28 of Cap. 200 allows the application of the provisions of the CPA, and that, conventionally, the CPA is used in carrying out committal proceedings. This, he said, comes from section 178 of the CPA. Mr. Mtobesya submitted that the role of a subordinate court, under section 4 of the CPA, entails taking some action in the proceedings, and that such powers go further to allow subordinate courts to conduct committal proceedings. Learned counsel took the view that, section 4 requires that, prior to anything else, the court must look into the matter and, if the matter is civil in nature, then the provisions of the CPA should not be invoked.

In answering the question of the time at which the provisions of the CPA are invoked, the learned advocate took the view that invocation begins when investigation into allegations commences. He argued that the prosecution carries the duty of ensuring that civil remedies are exhausted before going to the criminal limb of the process. If that is not done, he argued, the court must take steps. Such steps, Mr. Mtobesya contended, would include terminating proceedings, granting bail and imposing such other conditions. He insisted that a committal court is not a mere clerical office that is without powers to act. Learned counsel argued that committal is a function under the law, and that review of the propriety of the charge is

also within the powers of the court. He took the view that waiting until committal is done would render section 4 meaningless.

On whether the proceedings were of a "civil nature", the view taken by respondent's counsel is that the issue here is not one of similarity, adding that it is enough if it is shown that there is are civil elements in the case. Mr. Mtobesya argued that the magistrate was satisfied that the matter was of a civil nature, and that such conclusion was reached after a thorough analysis as gathered from page 6 of the ruling. He maintained that section 4 (3), as amended, is clear and unambiguous, urging the Court to give it a plain meaning, as was held in the case of ***The Director of Public Prosecutions v. Julieth Simon Peleka***, CAT-Criminal Appeal No. 94 of 2019 (unreported). Mr. Mtobesya was insistent that dismissal of the charge was a consequential order after ruling on the impropriety. He urged the Court to find that the trial court was correct when it dismissed the charge.

Regarding the decisions cited by the appellant's counsel, the view held by Mr. Mtobesya is that both are distinguishable as none of them spoke of the powers of a committing court under section 4 (3) of the CPA.

Submitting in rejoinder, Ms. Rwijage reiterated what the appellant's attorneys submitted in chief. She submitted that jurisdiction is a creature of the statute and that this is the essence of the instant appeal. She submitted

that section 245 (3) of the CPA is about committal proceedings and that the court was invited to sit as a committal court whose powers are limited to what it can do. She argued that committal powers are exercisable only where the law allows e.g. granting of bail where the same is available. This means, she submitted, jurisdiction of a committal court is limited and never absolute.

Ms. Rwijage took the view that the prosecution played its role when it drew the conclusion that this was a criminal matter, hence its decision to charge the respondents. Anything else would be dealt with during trial.

Regarding the similarity, she argued that the contention was on the nature of the charges and that section 4 (3) talks about nature and not elements.

On the relevancy of the ***Julieth Peleka's case***, the argument is that the same is irrelevant as the issue in the instant case is the applicability of section 4 (3) by a committal court. In the learned attorney's view, the court did not have powers to dismiss the case. At the very best, the court should have stayed the proceedings. She added that the ***Mathias's case*** is relevant on the issue of jurisdiction.

Form the parties' splendid submissions, the crucial issue to be resolved in this case is narrowed down to the question of jurisdiction. It is as to

whether, the Kisutu court, sitting as a committing court, was vested with jurisdiction to hear and determine the objection raised by the respondents.

The trite position with respect to jurisdiction in this country is firmly settled. It is to the effect that courts must understand the scope of their powers their powers and that discharge of their judicial functions must be within the confines of such powers. Ascertainment of the court's powers must be done before commencement of the proceedings over which they preside. Proceeding with a matter in the obliviousness of whether the court has powers is laden with profound risks. This was accentuated in the famous case of ***Fanuel Mantiri Ng'unda v. Herman M. Ng'unda***, Civil Appeal No. 8 of 1995 (unreported), in which the following guidance was laid out:

> *"The jurisdiction of any court is basic, it goes to the very root of the authority of the Court to adjudicate upon cases of different nature … the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial.* ***It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case.****"* [Emphasis supplied]

The clear message distilled from the foregoing excerpt is that powers to handle proceedings by courts must be real, apparent and not assumed or

conferred on the parties' consensual basis. It must be a creation of a statute that establishes the judicial organ or body or those that creates rights or offences. This position was underscored by the Court, in ***Shyam Thanki and Others v. New Palace Hotel*** [1972] HCD No. 97, this Court warned against possible 'conspiracy' by the parties to consent to give jurisdiction to a body that has none. It was held:

> *"All the courts in Tanzania are created by statutes and their jurisdiction is purely statutory. It is an elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess."*

In the instant case, the discussion on the court's jurisdiction arises because of the decision of the court to accede to the respondent's prayer to have the charges against the respondents discontinued or dismissed. This will come out clearly in a moment.

It is worthy of a note, that the recently promulgated Written Laws (Miscellaneous Amendments) Act No.1 of 2022 amended, *inter alia*, the CPA, came up with a number of amendments to the provisions of the CPA. One of the provisions affected by the amendment is section 4 which was amended by the section 23 of the Amendment Act, to introduce subsection 3, immediately after subsection 2. It is this provision which was applied to a

good effect by the respondents to secure their reprieve. The new provision stipulates as follows:

> *"Not withstanding subsection (2), where a matter is of a civil, administration or criminal nature, as the case may be exhaustion of the remedies in civil or administrative domains shall be mandatory prior to the invocation of the criminal process in accordance with this Act."*

As both counsel alluded to, this provision is intended to avoid the concurrent or parallel pursuit of remedies. This new dispensation is intended to let the remedies in the previously instituted matter come to a conclusion before a consideration is made to resort to another remedy.

While this objective has drawn no qualms amongst the counsel, it is its applicability or the stage at which the court may intervene that has drawn a sharp divergence of opinion. The view held by counsel for the appellant is that only a trial court enjoys that mandate, not a committing court whose powers are restricted. In their view, the committing court, in this case, the Kisutu case, is not vested with jurisdiction that stretches to the point of touching on the propriety or not of the proceeding whose trial is being awaited. The view taken by the respondent is that the course taken by the court is unblemished, and that this is what constitutes part of the courts mandate when it presides over committal proceedings.

As I move to the heart of the parties' rival contentions, two key aspects need be put in serious consideration. They emanate from the substance of section 4 (3) those are: the meaning of **"a civil nature"** and **"invocation"** of the criminal process.

With respect to the latter, the question to be posed would be, when is the process said to have been invoked? Black's Law Dictionary, 8th edn., defines invocations as:

> *"The act of calling upon for authority or justification; or the act of enforcing or using a legal right."*

The use of this word in the quoted provision means and conveys a condition that exercise of the appellants' legal right or authority to commence criminal proceedings, against any suspect, must ensure that all other remedies are exhausted prior to such commencement. In our case, invocation of the criminal process began with investigation of the alleged wrongdoing, followed by arrest of the respondents, and their subsequent or eventual arraignment in court. The argument by the respondents is that commencement of such proceedings should have ensured that the civil proceedings, if any, are brought to a conclusive determination. In my considered view, this is a plausible argument that reflects the position of the law, as it currently obtains.

But as I join hands with learned counsel for the respondent on the interpretation of the law and invocation of the criminal process, two issues surface. One, whether the proceedings commenced through the invocation of the criminal process were civil in nature; and two, whether the court had powers to entertain the discussion on the propriety of the charges, alleged to have a criminal nature in them.

I will focus my attention to the second question, and on this, I subscribe to the contention by the appellant. I take the view that, it is not enough to demonstrate that there are pending proceedings of civil nature pending in one of the courts, even if doing so amounted to or was akin to demonstration that there is a claim of civil nature. It is equally necessary to demonstrate that the court in which such criminal case lies was, at the time of so doing, clothed with powers to pronounce itself on the matter. In our case, discussion of the propriety or otherwise of the invoked criminal process fell on a wrong floor. This is primarily because the court's limited power to handle the matter was too insignificant to give it an authority to determine the competence or otherwise of the proceedings in respect of which the court is only to coordinate the completeness of per-trial issues. Clearly, issues of concerns by the parties, but touching on the competence or validity of the course of action taken by the prosecution, are matters which would never

be in the remit of the court that sits as a committal forum. This is the essence of what was spelt out by my brother, Luvanda, J., at page 6 of the ***Mathias Frank Radetaki v. Republic*** (supra), in which he held:

> *"Indeed issues of regularity herein if any, are pegged to the validity of a charge (alleged holding charge), defectiveness of a charge sheet leveled to the applicant to the subordinate court."*

The foregoing holding beds well, or are in conformity with the provisions of section 245 (3) of the CPA the substance of which stipulates as hereunder:

> *"After having read and explained to the accused the charge or charges the magistrate shall address him in the following words or words to the like effect"*
>
> > *"This is not your trial. If it is so decided, you will be tried later in the High Court, and the evidence against you will then be adduced. You will then be able to make your evidence and call witnesses on your behalf."*

The import of the cited provision is amplified by the wording of section 245 (1) of the CPA, which stipulates as follows:

> *"After a person is arrested or upon the completion of investigations and the arrest of any person in respect of the commission of an offence triable by the High Court, the*

person arrested shall be brought within the period prescribed under section 32 of this Act before a subordinate court of competent jurisdiction within whose local limits the arrest was made, ***together with the charge upon which it is proposed to prosecute him, for him to be dealt with according to law, subject to this Act****."* [Emphasis supplied]

The highlighted portion of the quoted provision brings a sensible impression that what is instituted in court in the cases triable by the High Court is not even a charge whose competence would be impeached at this stage of the criminal process. It is just a proposal of what is intended to prosecute the accused. Actual charges which require conformity with the law would come by way of information, as and when it is established that all actions which are the prelude to the preference or commencement of the trial have been fulfilled. It is why the accused is not required to pleade to the proposed charges.

The cumulative message extracted from the quoted excerpts, read together with the fabulous reasoning in the ***Farid Hadi Ahmed case*** (supra) is that matters relating to propriety of the charges are matters of substance that are a subject for another stage of the proceedings. That being the case, I am not persuaded by Mr. Mtobesya's contention that review of

the propriety of the charges is also part of the committal proceedings, and that the same are matters falling within the jurisdiction of the committing court.

I am in agreement with the counsel for the appellant that the absolute powers of what the committal court can do were, in the proceedings that bred the instant appeal, stretched overboard, and that such excess cannot go untamed.

Consequently, on the point of jurisdiction alone, I find merit in the appeal and I allow it. I quash the proceedings from which the impugned ruling arose, and set aside the said ruling.

Order accordingly.

DATED at **DAR ES SALAAM** this 11th day of August, 2022.

M.K. ISMAIL

JUDGE

11.08.2022