

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL REVISION NO. 06 OF 2022
(Originating from the Resident Magistrates Court of Songwe,
Criminal Case No. 51 of 2021)

THE REPUBLIC.....APPLICANT

VERSUS

TITO STEVEN MBWILO.....RESPONDENT

R U L I N G

Dated: 5th & 6th December, 2022

KARAYEMAHA, J

This is a ruling is with regard to application for criminal revision preferred by the applicant seeking for the community service order passed by the Resident Magistrate for Songwe at Vwawa (trial Court) to be set aside.

Initially, the respondent was arraigned in the trial Court facing two charges of as follows; 1st, Malicious damage to property contrary to section 326(1) and 2nd, disobedience of lawful order contrary to section 124 both of the Penal Code (Cap. 16 R.E. 2019). Having been found guilty and convicted the respondent was omnibusly sentenced to a two (2) years term of imprisonment.

The present application stems from the certification by the officer in charge of prison made to Court that the respondent was eligible for release on community service after serving almost one (1) month and ten days (10) of his sentence, a portion of his remaining sentence in terms of section 52 (1) and (2) of the Prison Act [Cap 58 R.E 2002].

On receipt of the officer in charge of Prison's report, the trial Court ordered the Probation Officer to conduct an inquiry with a view of ascertaining whether or not the proposed prisoner had qualifications. The order was made in terms of section 4 of the Community Service Act, No. 6 of 2002 (henceforth the CSA). The inquiry report informed the trial Court that the prisoner had qualifications in terms of section 3 (10) of the CSA and Rule 18 (2) (a) (b) (c) (d) (e) (g) (h) (j) (k) (m) (n) of the Community Service Regulations, 2004 G.N. No. 36 of 2004 (henceforth the CSR)

Acting on the officer in charge of Prison's recommendation and the inquiry report by the Probation officer, the trial Court issued a community service order on 17th July, 2022. With this order, the respondent was ordered to serve the remaining period of his sentence cleaning the compound of the Resident Magistrates Court of Songwe.

This order aggrieved the applicant Republic who complained through a letter dated 24th November, 2022 to Judge In charge High

Court of Tanzania – Mbeya Zone. The gist of its complaint is that the republic was not involved in the process which resulted into the decision of community service order. Also, it was contended that the victim, TRA, was not involved in the process. It was, therefore, argued that the decision that the respondent should serve the remaining portion of sentence on community service was prejudicial to justice.

When the matter was called on for hearing before me on 5th December, 2022, Ms. Prosista Paul and Joseph Mwakasege, learned State Attorneys, appeared for the Republic, the respondent fended for himself and Mr. Francis Citojo, Probation Officer, appeared.

Ms. Prosista's submission was by and large a repetition of the complaint embedded in the letter. The respondent agreed that he was not called in court for hearing before the community service order was passed. He also submitted that he had no information if the applicant was summoned. He, however, prayed for the trial court's order to remain intact. On his part, Mr. Citojo submitted that the probation office complied with all procedures of inquiring into the fitness and acceptance of the community on the respondent's presence in the same as per law. He, also contended that the respondent accepted the proposal of serving the community in lieu of the period remaining of his custodial sentence. Mr. Citojo argued that the Republic was not

involved in the process because there was no order of varying the sentence. According to him what was being done was to change the mode of serving the meted sentence. The probation officer argued further that the law neither makes it a requirement for the Republic to be involved in the process nor does it make mandatory for the prisoner, Republic or Probation officer to be present in court when the community service order is being passed.

Of substance in the rejoinder, Ms. Prosista insisted that they were to be involved in the process in whatever case and the inquiry report was to be submitted to TRA, who was the victim in terms of section 3 (4) of the CSA and should have been interviewed.

I have heard parties' contending arguments and read the record. In a nutshell parties, unanimously agree that having been sentenced to serve 2 years imprisonment, the respondent was eligible for community service order. Undeniably, this is the import of section 3 (1)(a) of the CSA which provides that:

"3- (1) where any person is convicted of an offence punishable by:-

(a) Imprisonment for a term not exceeding three years, with or without the option of fine;

... the Court may, subject to this Act, make a community service order requiring the offender to perform community service."

Having this provision at the back of their minds, parties had no qualms on the respondent to perform community service for the remaining period of his custodial sentence, which in simple calculations, is almost 1 year and 8 months.

Thus, parties are parting ways on whether the applicant and the victim were to be involved in the process of inquiry and eventually be notified of the order. In a bid to answer this issue, I shall be guided by section 3 (4), (6) and (9) of the CSA and Rule 18 (1) (a) (b) and (c) of the CSR.

I have read subsection (4) and I am inclined to agree with Ms. Prosista. This subsection provides as follows:

*(4) Where a court determines that a community service order should be made, it may, before making the order, **direct a community service officer to conduct an inquiry into the circumstances of the case and of the offender** and report the findings to the court.*

As rightly submitted by Ms. Prosista's, the law requires the community service officer to mainly conduct an inquiry in the

circumstances of the case and of the offender and report the findings to the Court. That is the toner and import of the bolded expression of the above quoted subsection. In inquiring into the circumstances of the case, in my considered view, the community service officer was to interview, **firstly**, the police officer to get the cruel on how the offence was committed since they were the ones who conducted investigation hence are well versed with the information. **Secondly**, to interview the Republic, of course, the office of the National Prosecutions Service (NPS) who prosecuted the case after reading all the statements pertaining to this case and preparing the witnesses. **Thirdly**, the victim whose property was damaged. This one would have explained what transpired and the conduct of the prisoner before and after the incident. And I believe this would help in forming an opinion. **Fourthly**, the prisoner himself and **lastly**, the community surrounding the offender, as he did. Sidelining the important stakeholders in his inquiry, the community service officer contravened the law. Likewise, the court went wrong in acting on the inquiry report which was legally incomplete.

I have closely examined the record and discovered that no proceedings were opened conducted with regard to committing the respondent to perform community service. The respondent categorically

submitted that he was not called to appear in Court. It is the requirement of the law that the trial court should conduct the proceedings through which the offender would be made available in court before making an order. This mandatory requirement is embodied in subsection (6) of section 3 of the CSA which bars the court to make an order unless the offender is present and the court is satisfied, **firstly**, that the offender consented to the order being made, **secondly**, that adequate arrangements existed for the execution of the order, **thirdly**, that after considering the report made under subsection (4) and, where necessary, after hearing the community service officer that the offender is a suitable person to perform community service under the order. For easy of reference subsection (6) is left to speak:

(6) A court shall not make an order under this section in respect of an offender unless the offender is present and the court is satisfied—

*(a) that the **offender consents to the order being made;***

(b) that adequate arrangements exist for the execution of the order; and

*(c) after considering the report made under subsection (4) and, where necessary, **after hearing the community***

***service officer**, that the offender is a suitable person to perform community service under the order.*

In the light of the bolded expressions, there is no way the court could get consent of the offender and hear from the community service officer without opening and conducting proceedings. A good practice would, in my view, require the Republic to be present in court and hear all that would be said by the offender and the community service officer for purpose of record, follow up and/or air up objections if need arose. In view thereof, it was wrong for the trial court to opt a silence path in issuing a community service order.

Another task that was to be performed by the Court under the law was, before making an order to explain to the offender, **firstly**, the purpose and effect of the order and in particular, his obligation, **secondly**, the consequences for failure to comply with the order and **thirdly**, the powers of the court to review the order on application either by the offender or of a community service officer. This also would require the Republic to be summoned and be present in Court for the interest of justice. For easy of reference, I find it apposite to reproduce the provisions of subsection (9) of section 3 of the CSA;

"(9) Before making an order under this section, the court sentencing an offender shall explain to the offender in a language that he understands–

(a) the purpose and effect of the order and in particular, his obligations under section 4;

(b) the consequences specified in section 5 for failure to comply with the order or with any of the requirements of that section; and

(c) the powers of the court under section 6 to review the order on application either by the offender or of a community service officer."

The directions under subsection (9) would be complied with if the trial Court opened proceedings with regard to the application and summon all parties. It is reckoned from the record that before the community service order was passed, the respondent was not educated on the consequences of sinning against the above subsection. The trial court is, therefore, faulted for not complying with the mandatory legal requirements.

On this position, I am further strengthened by rule 18 (1) (a) (b) and (c) of the CSR which clearly provides for the Magistrates obligations. The rule provides that:

"18 -(1) The obligation of the Magistrate shall include the following:

(a) To hear the offender before making a community service order;

(b) To hear the community service officer on the pre-sentencing report;

(c) To explain to the offender before making the order his obligations under a community service."

I wish to underscore, gleaned from the gist of the above rule, that these obligations cannot be performed silently. There must be a record intimating that the respondent was summoned along with the community service officer and the Republic. The record must indicate that the respondent was well educated of his obligations and what would be the consequences in case of noncompliance and must be revealed that the Republic had a chance to hear the report and comment that what was stated by the interviewed officer is part of the inquiry report.

Flowing from the above discussion, it is categorical that the clear provisions of the law were not complied with by the trial court. On the way forward, I invoke the revision powers under section 373 of the Criminal Procedure Act, [Cap 20 R.E. 2022] to revise the order given by

the trial court. Consequently, the community service order passed by the trial Court is hereby nullified and orders thereto are set aside. It is further directed that the community service officer should conduct an inquiry complying with the provisions of subsection (4) of section 3 of the CSA and the trial Court should comply with the provisions of subsection (6) and (9) of section 3 of the CSA. The Republic should be involved in the whole process in accordance with the law.



It is so ordered.

DATED at MBEYA this 6th day of December, 2022

A handwritten signature in black ink, appearing to read "J. M. Karayemaha".

J. M. Karayemaha
JUDGE