IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MAIN REGISTRY)

AT DAR ES SALAAM

(CORAM: MGETTA, MASOUD, AND KAKOLAKI, JJJ.)

MISCELLANEOUS CIVIL CAUSE NO. 20 OF 2021

ODERO CHARLES ODERO..... PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1st RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

JUDGMENT

28/07/2022 & 19/12/2022

Masoud, J.

The petitioner complains about the practice of the first respondent of instituting charges against accused persons before completion of investigations and/or while criminal investigations are ongoing. He alleges that when the investigation is still ongoing and incomplete, it is not possible to determine criminality of the person accused who is presumed innocent unless it is otherwise proved.

It is his view which is the basis of his complaint that, the practice is violative of the cardinal principles enshrined under Articles 9 and 59B (4) of the Constitution. The cardinal principles stipulated under Article 59B (4) of the Constitution requires the first respondent to have regard to the need to dispense justice, prevention of misuse of procedures for dispensing justice, and public interest.

He was further of a belief that such practice, resulted into numerous adjournments which prolong the litigation, appear to drain judicial resources; tends to make citizens lose confidence with the judiciary; affects the judiciary mandate and commitment to ensure timely justice; and render the criminal justice system ineffective, unpredictable and uncertain.

In fortification of his contention, the petitioner made reference to a number of filed cases allegedly filed without completion of investigation, including the cases of **Republic vs Eric Kabendera**, Economic Crime Case No. 75 of 2019, **Republic vs Farid Hadi Ahmed and Others**, Preliminary Inquiry No. 29 of 2014 and **Republic versus Tito and Another**, Economic Crime Case No. 137 of 2019, all instituted in the Resident Magistrates Court of Dar es Salaam at Kisutu, which according to

him were adjourned for more than 20 times to allow room for completion of investigation.

We were then told in the instant petition that, the first respondent had in addition instituted other cases before completion of investigation, which cases were likewise being adjourned to pave way for completion of the investigation. It was in connection averred that the correct number of such cases at the time of instituting the instant petition was estimated at 500 cases. According to the petitioner, the implication of such cases was to force the under capacity prison to maintain a huge number of remanded inmates, while the judiciary is faced with backlog of pending cases.

In his pleading, the petitioner also sought support of his averments from statements allegedly made by national leaders and members of parliament complaining about the practice and its consequences among others. In this respect, reliance was made on speeches by the former President of the United Republic of Tanzania (Late Dr John Pombe Magufuli), and the current President of the United Republic of Tanzania, Her Excellence Dr. Samia Suluhu Hassan, and His Lordship the Chief Justice of Tanzania, Prof Ibrahim Juma. In reinforcing his pleading, the petitioner relied on the case of Consolidated Misc. Criminal Revision No.

1,2,3,4,5,6,7,8,9,10&11 of 2017, High Court, Tabora, in which the court complained about the practice. The facts of the case and the reasoning of the court were however not detailed by the petitioner.

In their joint reply to the petition, the respondent opposed the complaints by petitioner. They contended that while an accused person is indeed arrested and charged before completion of investigation in compliance with the law, he would be entitled to bail pending investigation and trial. The exception is, it was averred, where an accused is charged with any of non-bailable offences, which offences are justifiable on the basis of their seriousness, safety and prevailing socio-economic situations, in which case bail is not open to an accused person.

In relation to the comments made by the alleged national leaders amongst others, it was contended in reply that the comments were reflective of the need of investigation organs to speed up investigation with a view of attaining timely hearing of pending criminal cases. In relation to the consolidated case of this Court relied on by the petitioner, it was contended that the same was overruled by the Court of Appeal hence not relevant anymore.

As regard to Article 59B of the Constitution, we were told that it stipulates guiding principles which the first respondent has to observe when exercising his powers. However, it was contended by the respondents that arresting and charging before completion of investigation are carried out in accordance with the law, and they are not violative of the Constitution as alleged. There are no sufficient grounds shown justifying interrogating the exercise of the powers vested in the DPP's office. It was added that, the petition is hinged on hearsay, speculation and ignorance of the law harboured by the petitioner.

While the petitioner was represented by Mr. John Seka, learned counsel, who also filed written submission on behalf of the petitioner, the respondents were represented by Mr. Stanley Kalokola, learned State Attorney, who likewise prepared and filed written submission in reply for the respondents. The said rival submissions, which informed this judgment, are on the record. We will as such need not reproduce them in their entirety as we intend to consider them in the course of our deliberations and determinations.

From the petition and reply to the petition as well as is from the rival submissions, the issue which arises and which this court endeavored to

answer is whether the alleged practice of instituting criminal cases against accused persons before completion of criminal investigations is violative of the provisions of Articles 9 and 59B of the Constitution. As it will become clear shortly, the other issue is whether the petitioner led evidence to substantiate the allegations that the practice is in violation of the invoked provisions of the Constitution.

We appreciate that there were matters that are not in dispute at all, and which are herein below worthwhile mentioning. We mention them as we are mindful of the issues that we are to resolve.

First, it was not in dispute that the first respondent files criminal cases in court before completion of the investigation, which is admittedly preceded by arresting and charging of an accused person.

Second, it was uncontroverted fact that Article 9 of the Constitution mandatorily obliges the first respondent to take cognizance of, observe and apply in his day to day execution of his responsibilities the fundamental principles, namely, respecting and enforcing the laws of the land; upholding and enforcing the laws of the land; preserving and upholding human dignity in accordance with the spirit of the Universal Declaration of

Human Rights; accord equal opportunities to all citizens, men and women alike without regard to their colour, tribe, religion or station in life, and; eradicating all forms of injustice, intimidation, discrimination, corruption, and oppression or favouratism.

Third, both parties are in agreement that Article 59B (2) and (3) of the Constitution confers to the first respondent powers to supervise his subordinates, to institute, prosecute and supervise all criminal prosecutions in the country. It is in similar vein that the cases mentioned by the petitioner were not disputed only to the extent of their institution and prosecution.

Fourth, the principles to be observed by the first respondent pursuant to Article 59B (4) of the Constitution were essentially not disputed. In this respect, we think that whether or not such principles are "cardinal" as averred by the petitioner or "guiding" as averred in reply by the respondents is trivial and insignificant. Indeed, such principles, requires the first respondent while exercising his powers, to have regard to, firstly, the need to dispensing justice; secondly, prevention of misuse of procedures for dispensing justice; and thirdly public interest.

We are, on the other hand, appreciative of the matters on the record that are in dispute, and which are critical to the determination of this petition. We say so as we are mindful of the need of evidence from the petitioner to establish the allegations on the disputed matters. In a nutshell, those matters are as follow:

First, it is disputed that there is a practice of the first respondent of instituting criminal prosecution in courts based on incomplete investigations, ongoing and inconclusive criminal investigation contrary to the requirements of Articles 9 and 59B (4) of the Constitution, and against binding and non-binding international treaties and conventions to which Tanzania is a party. It is worthwhile to mention that such international instruments were not disclosed in the petition.

Second, it is also disputed that institution of criminal cases in courts based on incomplete investigations and ongoing criminal investigations is violative of Articles 9 and 59B (4) of the Constitution. It is likewise disputed in this respect that the referred cases, namely, **Republic vs Eric Kabendera** (supra), **Republic vs Farid Hadi Ahmed and Others** (supra), and **Republic versus Tito and Another** (supra), were instituted

and being prosecuted in a manner that is violative of the invoked provision of the Constitution.

In relation to such cases, and the practice of the first respondent, it is the respondents' standpoint that the arresting and charging of a person accused of committing an offence before completion of the investigation is usually done in accordance with the law and the Constitution. Regard was accordingly had to the safety of the public, the nature and seriousness of the offence committed, Government policy on having zero tolerance on certain offences such as possession of drugs, money laundering, murder which trigger strict treatment and the right to bail which is generally available to an accused person.

If we go by the rival written submissions on the record which we have closely considered, it is disputed whether or not there is evidence sufficiently establishing the allegations which are disputed by the respondents, and which form the basis of the instant petition. This dispute is critical to the determination of this petition.

The rival submissions referred us to a wealth of authorities on principles applicable to constitutional cases. One of the principles restated

in the said authorities is on the burden of proof which is the most relevant to the circumstances of the instant petition. The principle vests the burden to the petitioner which, according to the case of **Rev. Christopher Mtikila vs Attorney General** [1995] TLR 31, should not be taken lightly, and again, according to that case, should be beyond reasonable doubt. We take the latter as insisting that the standard is, in the cases of this nature, higher than that of ordinary civil cases given the seriousness of allegations of breach of the Constitution which should not be taken lightly. See also **Attorney General vs W.K. Butambala** [1993] TLR 46.

We also understand that by virtue of **Attorney General vs Dickson Paulo Sanga**, Civil Appeal No. 175 of 2020, which relied on **Julius Ishengoma Francis Ndyanabo vs Attorney General** [2004] TLR 14, the petitioner had a duty to establish a prima facie case, which upon being so established, the duty to prove otherwise where the respondents rely on exclusion or limitation clause, shifts to the respondents who must justify the restriction.

We are aware that the allegations characterizing the petition are those which could not, in terms of the burden of proof, be discharged with by mere arguments showing violation as was in **Legal and Human Right**

Centre and Two others vs Attorney General [2006] TLR 240, but by evidence as was very well reasoned and stated in **Rev. Christopher Mtikila** (supra). In that case, this Court held and we hereby quote thus:

> *A situation could certainly arise where the cause of action would depend upon actual exercise of power. Such a situation is exemplified in this petition where the constitutionality of the appointment of Zanzibaris to non-union positions on the Mainland is questioned. In that context, it is the appointment themselves that constitute the cause of action, but that has to do with the validity of the action rather than the law.*

The above principle was also restated in the case of **Attorney General and others v Bob Chacha Wangwe**, Civil Appeal No. 138 of 2019. In applying the principle, the Court of Appeal was in that case of the holding that the argument by the respondent that, because the District Executive Directors are appointed by the President, they cannot abide by the Constitutional requirement of being impartial, was a mere speculative and based on apprehension.

Accordingly, it is the alleged practice of the first respondent itself which constitutes the cause of action, and which has to do with the constitutional validity of the first respondent's action in relation to actual

exercise of his powers. As such, the actual exercise of power of the first respondent culminating in such practice must be established and shown by evidence that it violates the invoked provision of the Constitution.

We think, for the stated reasons, the above principle applies in this petition as petitioner's key allegations are to the effect that, the practice of the first respondent violates the invoked provision of the Constitution. And that, the cases relied upon in the pleading, and those which were referred to without being mentioned in which the petitioner is not a party, signify such practice to the extent that they were instituted and prosecuted before completion of the criminal investigations.

We must point out that the petition was brought under Article 108 of the Constitution, and was not supported by an affidavit which would have constituted material evidence supporting and verifying the allegations therein. The subsequent prayer by the petitioner for leave to file an additional affidavit was not granted as there was in the first place no affidavit which accompanied the petition justifying granting of the leave to file the additional affidavit.

As there were no petitioner's witnesses called to testify in support of the petition, we find also that there was no oral evidence on the record to substantiate the allegation as per the petition. We so find because given the nature of the averments and the allegations, we do not think that the arguments in the written submissions in chief by the petitioner's counsel would save to substantiate the allegations.

We so find because it is settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. See, **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Versus Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 41.

The invoked provision of Article 59B (4) of the Constitution reads and we hereby quote thus:

> ***59B.**-(1) There shall be a Director of Public Prosecutions who shall be appointed by the President from amongst persons with qualifications specified in subarticle (2) of Article 59 and has continuously held those qualifications for a period of not less than ten years.*
> *(2) The Director of Public Prosecutions shall have powers to institute, prosecute and supervise all criminal prosecutions in the country.*
> *(3) The powers of the Director of Public Prosecutions under subarticle*

(2), may be exercised by him in person or on his directions, by officers under him, or any other officers who discharge these duties under his instructions.
(4) In exercising his powers, the Director of Public Prosecutions shall be free, shall not be interfered with by any person or with any authority and shall have regard to the following -
(a) the need to dispensing justice;
(b) prevention of misuse of procedures for dispensing justice;
(c) public interest.
(5) The Director of Public Prosecutions shall exercise his powers as may be prescribed by any law enacted or to be enacted by the Parliament.

We do not read the requirement of completing investigation prior to institution of criminal cases in the above quoted provision of the Constitution. Thus, since it is alleged that the practice by the first respondent of instituting cases prior to completion of the investigation is violative of the Constitution, the evidence should have been led proving the existence of such practice, and that it is indeed violative of Article 59B (4) of the Constitution or article 9 of the Constitution.

Such evidence was, as already indicated, neither led by affidavital evidence nor by the petitioner himself nor by any individual who was a party to any of the referred cases. The statements by national leaders which were not essentially disputed could not in any case substantiate the

allegations of violation of the invoked provision of the Constitution however elaborate they were.

It would appear that at some point the petitioner realized the difficult he was facing in proving his case to the required standard. We say so because he sought, through his learned counsel, leave of this court to file additional evidence, which was however inapplicable as alluded to herein above since the petitioner was in the first place not accompanied by any affidavit verifying the pleaded facts. In that respect, it is not surprising to learn that the leave was not granted.

We are inclined to think that what was open to the petitioner in the circumstances was for him to procure witnesses who could have testified in support of the petitioner. The failure to procure such witnesses leads us to irresistible conclusion that he has failed to justify his allegations.

The petitioner herein sought for so many reliefs based on the allegations which he was to establish as shown herein above. The said reliefs were in the nature of declaration and orders. For ease of reference, we reproduce them as thus:

> ***FOREGOING FACTS*** *your humble petitioner prays before this Honourable Court for judgment and decree as follows:*

1. DECLARATION *that, on a proper, correct and harmonious construction of Article 59B(2) of the Constitution of the United Republic of Tanzania, the practice by the First Respondent to institute criminal prosecutions based on incomplete; ongoing and inconclusive criminal investigations is an abuse of the discretion conferred to the First Respondent.*

2. DECLARATION *that, on a proper, correct and harmonious construction of Articles 59B(2) and 59B(4a) of the Constitution of the United Republic of Tanzania, the practice by the by the First Respondent to institute criminal prosecutions based on incomplete and ongoing criminal investigations in not in consonance with the need to dispense justice.*

3. DECLARATION *that, on a proper, correct and harmonious construction of Articles 59B(2) and 59B(4b) of the Constitution of the United Republic of Tanzania, the practice by the First Respondent to institute criminal prosecutions based on incomplete and ongoing criminal investigations is a misuse of procedures for dispensing justice,*

4. DECLARATION *that, on a proper, correct and harmonious construction of Articles 59B(2) and 598(4e) of the Constitution of the United Republic of Tanzania, the practice by the by the First Respondent to institute criminal prosecutions based on incomplete and ongoing criminal investigations is not a correct exercise of power in the public interest*

5. DECLARATION *that, on a proper, correct and harmonious construction of Articles 59B(2) and 59B(4c) of the Constitution of the United Republic of Tanzania, the practice by the First Respondent to institute criminal prosecutions based on incomplete, ongoing and inconclusive criminal investigations does not serve the public interest.*

6. DECLARATION *that the practice by the by the First Respondent to institute criminal prosecutions based on incomplete, ongoing and inconclusive criminal*

investigations contravene the provisions of Article 9 of the Constitution.

7. DECLARATION *that the practice by the by the First Respondent to institute criminal prosecutions based on incomplete, ongoing and inconclusive criminal investigations is against the principles of Rule of Law and those of Good Governance.*

8. DECLARATION *that the practice by the First Respondent to institute criminal prosecutions based on incomplete, ongoing and inconclusive criminal investigations is unconstitutional.*

9. DECLARATION *that the practice by the First Respondent to institute criminal prosecutions based on incomplete, ongoing and inconclusive criminal investigations is against binding and non-binding international treaties and conventions to which Tanzania is a party and or signatory.*

10. ORDERS:-

a) *That the First Respondent is directed to exercise his constitutional discretion by instituting criminal prosecutions only if criminal investigation into the alleged offenses is certified to be completed.*

b) *That the First Respondent and the Second Respondents should within 2 months of this decision should prepare a code of conduct for prosecutors as guidance for future exercise of the First Respondent's Constitutional Discretion.*

c) *The Second Respondent should prepare an advisory note to the Chief Justice within 30 days of this decision proposing steps to be taken by the Judiciary of Tanzania to limit the First Respondent's practice of instituting of criminal cases in the courts until when there is evidential proof that criminal investigations into the alleged offences have been completed.*

d) *The First Respondent should in the next 30 days following this judgment, withdraw with leave to refile all ongoing cases whose investigations are incomplete and remit the case files to the investigation authorities prior to*

reinstituting them in court.

e) *The Second Respondent should prepare an advisory note to the Chief Justice within 30 days of this decision, advising the Chief Justice to cause and summon all cases whose investigation is incomplete and decide the fate of the said cases in accordance with prevailing procedural laws and tradition of the court.*

f) *The First and Second Respondent in close cooperation with the Registrar of the High Court should in the next 6 months prepare a joint progress report of implementation of this court's order and table the said report before the Minister responsible for justice in hard and soft copies.*

g) *The Second Respondent is directed to publish the report submitted to the Minister responsible for Justice in its website as well as well availing soft copy of the report to the Petitioner, to the President of the Tanganyika Law Society, the Chairperson of the Commission for Human Rights and Good Governance and to the Chief Secretary.*

h) *That non-compliance with the orders of this court with regard to the report shall entitle the Petitioner to invoke this court judicial review Powers to compel its production and or its wide circulation.*

We asked ourselves whether the reliefs sought by the petitioner could in the circumstances, and in view of our findings be granted. We were in the end satisfied that none of the reliefs sought by him could be granted. We so hold as there was no evidence adduced establishing the allegations to justify the reliefs sought, other than arguments of the learned counsel for the petitioner. Indeed, the said arguments, as we have already demonstrated herein above, cannot substitute evidence as it was

rightly stated in **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd** (supra).

In view of the foregoing, we were settled that even if we were to take judicial notice of the alleged practice, as a matter of expediency as submitted by the petitioner's counsel, there was still no established evidence exhibiting that the said practice was indeed violative of the invoked provisions of the Constitution as alleged by the petitioner. With that note, the case of **Onkar Nath and Others vs The Delhi Administration** 1977 SCR [2] 991 relied on by the petitioner's counsel, and which relates to taking judicial notice as a matter of expediency would not help the petitioner's case either.

We say so as we are mindful of the constitutional nature of the matter before us, the seriousness of the allegation of the breach of the Constitution by the first respondent, and the burden of proof which the petitioner had to discharge. With these findings, we need not indulge on the other aspects raised by the petition and dealt with in the rival submissions.

In the event and for the reasons herein above stated, we find no merit in the petition before us. We accordingly proceed to dismiss it without orders as to costs because the petition was conducted as a public interest litigation.

We order accordingly.

DATED and DELIVERED at Dar es Salaam this 19th day of December 2022.

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J. S. MGETTA
JUDGE

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B.S. MASOUD
JUDGE

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E.E. KAKOLAKI
JUDGE