IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

CRIMINAL REVISION APPLICATION NO. 1 OF 2021

(Originating from the Resident Magistrates' Court of Arusha, Criminal Case No. 237 of 2018)

SABATHY MAKUMBATI ..... APPLICANT

Versus

REPUBLIC ..... RESPONDENT

Ruling

14th February & 25th April, 2022

Masara, J.

This Application was preferred under the provisions of Section 372 of the Criminal Procedure Act, Cap. 20 [R.E 2019], (hereinafter referred to as the 'CPA'), whereby **Mr Sabathy Makumbati** ("the Applicant") moved the Court to call and inspect the records in respect of Criminal Case No. 237 of 2018 currently pending before the Resident Magistrates' Court of Arusha ("the trial court"), so as to examine the legality, correctness and propriety of the same. The Application is supported by an affidavit deponed by Mr Edmund R. Ngemela, the Applicant's advocate. The Respondent contested the Application in a counter affidavit deponed by Ms Tusaje Samwel, learned State Attorney.

Brief facts of the case leading to this Application are as follows: At the trial court, the Applicant initially stood charged of the offence of

Presumption of Fraud, contrary to sections 332B(1) & (3) and 35 of the Penal Code, Cap. 16 [R.E 2002] ("Cap. 16"). On 03/08/2018, the charge was read over to the Applicant who pleaded not guilty. The case proceeded for hearing whereby two witnesses for the Respondent (Ahmed Saleh (PW1) and Winfrida Fute (PW2)) testified. The case was set for further hearing on 16/12/2020. On that date, the State Attorney in conduct of the case prayed to substitute the charge against the Applicant. The prayer was granted by the trial court and the charge was substituted. The charge was changed to the offence of **Kite Flying,** contrary to section 332B(1) & (3) and 35 of the Penal Code, Cap. 16 [R.E 2019. The substituted charge was read to the Applicant who, in turn, pleaded not guilty to the charge. On the same date, the third witness for the Prosecution, Salehe Salum Salehe (PW3) testified. After PW3's testimony was recorded, the Prosecution prayed to close its case.

Mr. Ngemela, advocate for the Applicant (the accused thereat), prayed that PW1 and PW2, who had testified earlier, be recalled for cross examination on the new offence. The prayer was objected by the State Attorney. In the trial court's ruling, the trial magistrate made a finding that substitution of the charge did not introduce any change in substance of the charge. She added that particulars of the offence remained the

same and that the substituted offence was predicated under the same provision of the law. That, therefore it was the wording of the charge that changed. She declined the prayer made by the Applicant's advocate and ordered hearing to proceed. The Applicant was aggrieved by that order. It is against that order that the Applicant has preferred this Application for revision.

At the hearing of the application, the Applicant was represented by Mr Edmund Ngemela, learned advocate, while the Respondent was represented by Ms Tusaje Samwel, learned State Attorney. It was unanimously resolved that hearing of the application be through written submissions. The counsel for the parties were also ordered to address the Court whether the matter can be revised at this stage.

Submitting in support of the application, Mr Ngemela stated that according to section 372 of the CPA, this Court has a discretion to revise the order of this nature. He contended that in line with the above provision of the law, the High Court has mandate to call and examine records of criminal proceedings of any subordinate court for the purpose of satisfying itself as to the correctness of any order passed by such subordinate court. According to Mr Ngemela, this is a fit case in which this Court can invoke

its revisional powers. His reliance is premised under paragraphs 2 to 8 of the supporting affidavit.

Mr Ngemela strenuously submitted that since the Respondent substituted the charge, and since the Applicant prayed that PW1 and PW2 be recalled so that the Applicant could exercise his right to cross examine them, denial of that right by the trial magistrate infringed the provisions of section 234(2) of the CPA. He added that the provision reserves the right to the accused person to request for recalling of witnesses, who earlier testified, for cross examination. He admitted that section 43(2) of the Magistrate Courts Act, Cap. 11 [R.E 2019] prohibits revision against orders which do not finally determine the matter, however he was quick to submit that the provision does not bar the Court from exercising its supervisory powers over subordinate courts.

Contesting the application, Ms Tusaje submitted that the impugned decision of the trial court is an interlocutory one, which cannot be revised. She made reference to section 372(2) of the CPA, which prohibits appeals or application for revision against interlocutory orders or decisions made by subordinate courts. The learned State Attorney pointed out that the order sought to be revised by the Applicant has no effect of finally

determining the criminal charge. Ms Tusaje also faulted the Applicant's advocate's failure to annex both the old and substituted charges in the affidavit in support of the application. She further contended that the Applicant in his submissions has not shown how the former offence and the substituted offences differ, thus making it difficult for one to ascertain whether it was crucial to recall the two witnesses. Ms Tusaje further faulted the advocate for the Applicant for citing section 43(2) of the MCA, which is inapplicable in the circumstances of this case, contending that section 372(2) of the CPA is the applicable provision. Further, she fortified that the Applicant did not show any injustice or prejudice to be suffered, and why he could not await full determination of the case on merits. She implored the Court to dismiss the application as it is preferred against an interlocutory order contrary to the dictates of the law.

I have dispassionately considered the affidavits of the parties as well as their competing submissions. The main issue calling for Court's determination is whether the current Application is competent before this Court.

Before delving into determination of the above issue, I am in full agreement with the learned State Attorney that this Application was

preferred under a wrong provision of the law. Whereas Mr Ngemera premised the Application under Section 31(1) of the Magistrates Courts Act, Cap. 11, the correct provision for this Application is Section 372 of the CPA. That notwithstanding, I deem it appropriate to deal with the same on merits. I will commence by making a précis regarding the interpretation of section 372 of the CPA. As already stated above and confirmed by both counsel, section 372(1) of the CPA is the overriding provision governing revisions from subordinate courts to this Court. It mandates the High Court to call for and examine the record of any criminal proceedings before any subordinate court with a view of satisfying itself as to the correctness, legality and or propriety of any finding, sentence or order of any proceedings of a subordinate court. The provision provides:

> *"372. - (1) The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court."*

In the case of **Consolidated Holding Corporation vs Sackson Andrew Luhanjo and 2 Others, Criminal Appeal No. 126 of 2010 (unreported)**, the Court of Appeal had the following to say on section 372(1) of the CPA:

> *"In our considered view, the interpretation of Section 372 poses no difficulty. The section is very clear. In our reading of the section, we do*

not get the impression that the legislature intended to exclude third parties. On the contrary, it is evident thereat that the High Court may call for and examine the record of any criminal proceedings for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, ... or order ...passed... For our purposes, the catchword in the section is ***"any".....***" (Emphasis added)

I agree with Mr. Ngemela that the discretion can be exercised in any criminal proceeding pending before a subordinate court. It can also be exercised after the matter has already been determined by a subordinate Court. This can be done at any stage of the proceeding either *suo moto* or upon application by a party to the proceedings or any other third party to the case. That general rule, however, has inherent limitations. Ordinarily, a party applying for revision has to satisfy the Court that the impugned interlocutory decision or order has the effect of determining the case or is so grave that leaving it to stand will be against due process and justice. I do not agree with him that such discretion is exclusive to any order or Subsection 2 of section 372 of the CPA poses that limitation. It provides:

(2) Notwithstanding the provisions of subsection (1), ***no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of a subordinate court unless such decision or order has the effect of finally determining the criminal charge.***" (Emphasis added)

Thus, where the order or decision subject of revision is preliminary or interlocutory which does not finally determine the criminal charge, the

High Court will ordinarily shun from entertaining the Application. Whether this Application fulfils the conditions set out in Section 372 is what I now turn to.

The question is whether the order by the trial magistrate in Criminal Case No. 237 of 2018 refusing to recall PW1 and PW2 for cross examination is a preliminary or interlocutory order. What amounts to interlocutory order has been expounded in extenso by the Court of Appeal in a number of decisions, including the decision in **Vodacom Tanzania Public Limited Company vs Planetel Communications Limited, Civil Appeal No. 43 of 2018 (unreported)**. In that case, the Court adopted the test of an English case in **Bozson vs Artincham Urban District Council (1903) 1KB 547** wherein Lord Alverston stated as follows:

> *"It seems to me that the real test for determining this question ought to be this:* ***Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as final order; but if it does not, it is then, in my opinion, an interlocutory order."*** (Emphasis added)

In the same case the Court of Appeal also made reference to its previous decision in the case of **Chama Cha Walimu Tanzania vs The Attorney General, Civil Application No.151 of 2008 (unreported),** where it held:

*"We have dispassionately read the ruling of the Labour Court and the order extracted therefrom in the light of the order sought in the chamber summons. We are of the firm view that the order was not interlocutory. It had the effect of conclusively determining the application. The respondent was unreservedly granted what he was seeking in the chamber summons, as the applicant and its members were unequivocally restrained from "calling for and /or participating in the planned strike". **There was no other issue remaining to be determined by the Labour Court. Both in form and substance the issued injunction order carries the hallmarks of finality, as it was not granted pending any further action being taken in those proceedings...** The applicant therefore had an automatic right of appeal to this Court under section 57 of the Labour Institutions Act..."""*

The same principle was reiterated in the subsequent case of **Jitesh Jayatilal Ladwa and Another vs Dhirajlal Walji Ladwa & 2 Others, Civil Application for Revision No. 154 of 2020 (unreported).**

From the above authorities, for an order to have the effect of finally determining the rights of the parties, there has to be no other pending issues or action in court in respect of the said proceedings. The test is: does the judgment or order, as made, finally dispose of the rights of the parties? Unfortunately, all the authorities referred to above relate to matters of a civil nature. If we were to apply the said tests in the application at hand, it is crystal clear that the order subject of this revision was not a final order. Notably, after refusal by the trial magistrate to recall PW1 and PW2, Criminal Case No. 237 of 2018 was still in progress. The

Court went ahead to decide that the Applicant had a case to answer in terms of section 231 of the CPA. He was called on to enter his defence whereby the case was fixed for defence hearing on 19/01/2021. The above suffices to conclude that the rights of the parties in Criminal Case No. 237 of 2018 were not determined to finality. There remained issues since the Applicant's fate in that case was yet to be determined.

Having resolved that the order subject of revision was in all fours interlocutory, I would ordinarily, in accordance with section 372(2) of the CPA, resist from exercising revisionary powers of this Court. I have strenuously considered the effect of such a decision and I feel obligated to deal with the matter in a manner that will ensure that justice is done to both parties.

I have taken cognizance of the fact that the charge was substituted after PW1 and PW2 had testified. On the same date, 16/12/2020, PW3 testified. Whether the Applicant had an opportunity to internalise the essence of the substituted charge or not is a question that this Court cannot with certainty answer. Nevertheless, it is on record that after the testimony of PW3, the Prosecution prayed to close their case, whereby the counsel for the Applicant prayed that PW1 and PW2 be recalled for cross examination

on the substituted offence. Substitution of the charge made changes to the offence the Applicant stood charged. Prior to the substitution, the Applicant was facing a charge of **Presumption of Fraud**, contrary to section 332B(1) and (3) and 35 of Cap. 16. This charge was changed to that of **Kite Flying**, contrary to section 332B(1) & (3) and 35 of Cap. 16. Although the Sections of the charge remained the same, the nomenclature changed.

It is obvious that Mr Ngemela relied on section 234(2) of the CPA to request that PW1 and PW2 ought to have been recalled so that the Applicant could exercise his right to cross examine them on the substituted charge, notwithstanding the fact that the substitution made changes in form or substance of the charge. On her part, Ms Tusaje submitted that the Applicant's counsel did not show how the offences of Presumption of Fraud and Kite Flying differ, insisting that it was in the domain of the trial court to determine. This position is abhorrent. It is for the Prosecution to prove that the substituted charge did not make any substantial alteration to the original charge. Why was the charge altered in the first place? This question was not addressed at all during trial and in the written submissions made by the Respondent.

I have taken note of section 234(2) of the CPA. It calls upon the trial court to recall witnesses who had testified upon application by the accused person, regardless of the impact on the change on the charge. I would hasten to add that the provision does not harbour any exception. Once the chargesheet is amended after witnesses have testified, the Court has to recall witnesses who testified before the amendment, unless the Accused waives that right. Section 234, which is excusive on substitution or alteration of a charge, provides:

> *"234.-(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.*
> *(2) Subject to subsection (1), where a charge is altered under that subsection-*
> *(a) the court shall thereupon call upon the accused person to plead to the altered charge;*
> ***(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination****; and*
> *(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice."* (Emphasis added)

Ordinarily, it was incumbent upon the trial magistrate to afford the Applicant the right to recall PW1 and PW2 and have them cross examined. Her refusal to grant such right was against the dictates of the law. The reason for denying the Applicant the right to recall the aforesaid witnesses as stated by the trial magistrate was that only the wording of the charge changed. Obviously, any alteration of a charge entails a change in the wording. I believe her reasoning resonated on the fact that the Section of the law contravened by the Applicant remained the same. That, to me, cannot be a ground to deny the Applicant the right to recall a witness for cross examination. She manifestly erred as her reasoning is not backed by the law regulating criminal proceedings and the due process tenets. The Court of Appeal has consistently held that after amending a charge, witnesses who had already testified must be recalled for cross examination. In this respect, I have in mind the decision in the case of **Ezekiel Hotay vs Republic, Criminal Appeal No. 300 of 2016 (unreported)**, where it was held:

> *"According to the preceding cited provision,* ***it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant case, having substituted the charge the five prosecution witnesses who had already testified ought to have been re-called for purposes of being cross-examined. This was not done. In failure to do so, rendered the evidence led by the five prosecution witnesses to have no evidential value.*** *"*(Emphasis added)

I entirely agree with the advocate for the Applicant that failure to afford the Applicant the right to have PW1 and PW2 recalled for cross examination prejudiced the Applicant. It was a clear deviation from the mandatory requirements of the law. If this was an appeal, I would be compelled to expunge the evidence of PW1 and PW2. That would leave only the evidence of PW3 on record. Will such evidence sustain the ruling of a case to answer against the Applicant? Well, this is not the opportune time to render such opinion.

Although the word used in Section 234(2)(b) and (c) is "may", courts have interpreted the same to be non-discretional. In **Ezekiel Hotay vs R** (supra), the Court of Appeal had this to say:

> *"Given the shortcomings in the procedure, which with respect the High Court failed to detect, we are not inclined to vouch that the appellant's conviction was safe. We therefore exercise our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Cap 141, R.E 2002 and revise and quash the lower courts' proceedings and judgment and set aside the sentence."* (Emphasis added)

Further, in **Godfrey Ambrose Ngowi vs R, Criminal Appeal No. 420 of 2016, CAT (Unreported)**, the Court of Appeal confronted with the same issue had this to say:

> *"It was argued by the appellant that, after the charge had been substituted which was after six witnesses had already testified, the provisions of section 234 of the CPA, were not complied with. Indeed, that is the position of law. And the rationale was stated in*

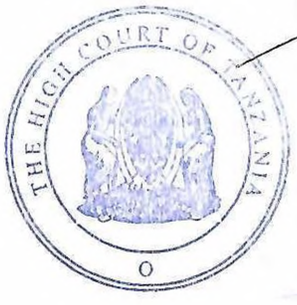
the case of ***Ramadhan Abdallah vs Republic*** *[2002] TLR 45, where the Court stated that:*

> *".. we wish to state that the rationale for section 234 is easy to discern. A new charge sheet is introduced after some witnesses have already testified. The new offence charged may consist new ingredients and or may attract different consequences."*

The above holding was followed in the case of ***Nyiga Kinyalu Vs Republic,*** *Criminal appeal No. 64 of 2012 (unreported). The fact that in the instant appeal the provision of section 234 was flouted as conceded by Mr. Mwinuka,* ***there was no way in which the proceeding against the appellant could stand.***" (Emphasis added.

Based on the decisions of the Court of Appeal cited above, which decisions are binding to this Court, the fact that the trial Court flouted the requirements of Section 234 of the CPA is fatal to fair hearing. It would be a traverse for this Court not to intervene given the impact that the trial court's decision will entail after the conclusion of the case. I do think this is a fit case where the Court, in exercise of its powers under the provisions of Section 372(1) of the CPA, should intervene to avert the adverse consequences to either of the parties in the case in question. Where it is apparent on the face of the record that the decision of the trial court made in the course of the proceedings is ipso facto illegal and that such decision if left to stand will at the end of the trial vitiate the proceedings before such court, this Court, in exercise of its revisionary power has power to intervene in order to rectify the illegality in question.

For the above reasons, I find merits in the application before me. It is accordingly allowed. The order of the trial magistrate rejecting to recall PW1 and PW2 for cross examination is hereby quashed and set aside. It is hereby ordered that the file be remitted back to the trial court for a fresh trial on the substituted charge before a different magistrate.



Y. B. Masara

JUDGE

25th April, 2022