IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISCELENEOUS CRIMINAL APPLICATION NO. 57 OF 2020

(Originating from preliminary Inquiry No. 43 of 2014, pending in the Resident Magistrate's Court of Arusha at Arusha)

ABDALLAH ATHUMAN LABIA @ BROTHER M

@USTAADH ABDALAH @ ABDALA MANG'OLA@ ABUU

ATHUMAN @USTAADH MUNNA.....1ST APPLICANT

ALLY HAMISI KADAANYA..... .....2ND APPLICANT

ALLY HAMISI JUMANNE ..... 3RD APPLICANT

RAJAB PIRI HEMED..... 4TH APPLICANT

SHABAN ABDALAH WAWA..... 5TH APPLICANT

YASIN HASHIM SANGA.....6TH APPLICANT

VERSUS

THE RESPUBLIC..... RESPONDENT

RULING

10th Dec. 2021 & 16th March 2022

GWAE, J.

This application has been brought into this Court by six applicants namely; Abdallah Athuman Labia @ Brother M @ Ustaadh Abdalah @

Abdala Mang'ola @ Abuu Athuman @ Ustaadh Munna, Ally Hamisi Kadaanya, Ally Hamisi Jumanne, Rajab Piri Hemed, Shaban Abdalah Wawa and Yasin Hashim Sanga against the respondent, the United Republic. It has been preferred under provisions of section 372 of the Criminal Procedure Act Chapter 20, Revised Edition, 2002 (CPA) and Section 44 (1) (a) of the Magistrates' Courts Act, Chapter 11, Revised Edition, 2002 (MCA).

In the applicants' chamber summons supported by joint affirmed affidavit the application stands on three limbs, to wit;

> (a) That, this court be pleased to call for and examine the record of the proceedings of the Preliminary Inquiry No. 43 of 2014 which is pending in the Resident Magistrates' Court of Arusha at Arusha, for the purpose of satisfying itself as to the correctness, legality, propriety and regularity of the said proceedings
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> (b) that, the court be pleased to nullify the whole proceedings of the Preliminary Inquiry No. 43 of 2014 which is pending in the Resident Magistrates' Court of Arusha at Arusha and set the applicants at liberty and
>
> (c) that this court be pleased to issue any other order(s) as it may deem fit, just and equitable to grant.

However, the brief antecedent of the bone of the applicants' contention goes as follows; all applicants where arrested, charged and finally arraigned before the Resident Magistrate's Court of Arusha at Arusha on various sixteen counts. Among them, one is murder contrary to Section 196 of the Penal Code [Cap. 16 Revised Edition, 2002 (Code)] and the remaining fifteen counts premised on the offence of attempted Murder contrary to section 211 of the said Penal code. Owing to the reason of lack of jurisdiction to try the charged offences but only with conducting Preliminary Inquiry (P.I) the matter in the resident magistrates' court went on various adjournments on the reason of incomplete of investigation. The applicants being vigorously aggrieved by such endless investigation behaviour opted to nothing but filing of the application under scrutiny.

The application was heard and argued orally whereby the 6th Applicant one Yasin Hashim Sanga mounted the dock on behalf of all others after being retained and assumed their confidence as they were unrepresented. The respondent Republic was represented by Ms. Alice Mtenga, Learned State Attorney.

During hearing, the applicants adopted their joint affidavit to form part of their submission. In their submission Mr. Sanga contended that,

the nitty gritty of this application is seated on the complaints that since 2014 to date they have been illegally detained in the prison custody on the ground of investigation incompleteness. He argued that, the investigation must have definite period to be concluded. The assertions by the prosecution that there is no law dictating and or setting specific time for ending investigation is a misconception or fallacy.

The 6th applicant went on submitting further that, the absence of specific law prescribing time for ending investigation requires the investigation to be performed within a reasonable time and therefore be saved by section 62 of the law of interpretation Act, [Cap.1 R.E 2019] which dictates the act to be done conveniently. To him, the period of seven years in custody without trial on the reason of the incomplete investigation, connotes nothing but only inconvenience speed in accordance with section 62 of the Law of limitation Act (supra). To buttress his argument, he cited the case of **TANESCO vs. IPTL & Others** (2000) TLR 324 where the Court among other things ruled that discretional power must be exercised in accordance with common sense and justice. Also, he referred to the case of **John vs. Reginal Police Commander of Bukoba** (1986) TLR 73 where it was held that, for not taking action for about $2^{1/2}$ years was the abuse of discretion. Mr. Sanga

further urged this court to make a reference case of **Republic v. Deeman Crlspin and Others** (1980) TLR 186 where it was held that, the Court have inherent powers to dismiss a charge if the prosecution unreasonably delays investigation or trial. Further to that, for non-bailable offences, accused persons to remain in remand indefinitely is undesirable, the action which courts of law should not condone.

Mr. Sanga bolstered his argument by citing Article 59B (a) (b) and (c) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time. Interpreting such Article, he said, the Director of Public Prosecutions is not above the law and therefore he should be guided by substantive justice.

On the other side, Ms. Alice Mtenga faulted the submission by applicants by arguing that, the applicants are not entitled to file this application under section 372 (2) of the Criminal Procedure Act (supra) on reason that orders given by the Resident Magistrate's Court (the committal) were not final but mere mention fixing dates. Ms. Mtenga went on contending that the nature and circumstance of the case facing applicants do not require harried-up and speedy investigation. She also distinguished the cases cited by Mr. Sanga as not being relevant to the circumstances of this application. Arguing on the cited section 372 (2) of

CPA Ms. Mtenga submitted that. the Court's power under such section is limited.

In his rejoinder to the submission by Ms. Mtenga, the 6th applicant reiterated his submission in chief.

After going through the submissions by both parties, I now turn to the call this court is invited to determine. The very relevant question to be answered by this court is, whether this court it is mandated to exercise revisionary power for the Preliminary Inquiry proceedings pending in the subordinate court.

The power of the court to make revision, in my firm opinion, is not an automatic and or looseness one, it is the mandate which is given within certain restrictions by the law. Therefore, revisional powers are restrictive in nature. Those boundaries as stipulated under provisions of sections 44 (1) of MCA and 273 and 274 of CPA. In essence the court may, suo motto or upon an application by a party, call and inspect any record of any criminal proceedings before any subordinate court in order to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and give any direction it considers fit to make.

As rightly argued by the learned counsel for the Republic, I have examined the record of the Court of Resident Magistrate and observed that nothing like a finding or effectual order that was issued by the subordinate court in the year 2019 to the date of filing of this application on the 7th October 2020 save the orders fixing mention dates for and orders directing the accused persons now applicants to remain in custody (AFRIC). Further to that, several adjournments have been made due to incomplete investigation.

However, the scenario under scrutiny is not novel in our legal circumstances as it once confronted the Court of Appeal of Tanzania in solving such a problem, the Court in the case of **DPP vs. Bookeem Mohamed @ Ally and 7 others,** Criminal Appeal No. 217 of 2019 (Unreported), Court of Appeal of Tanzania sitting at Mwanza, had the following to say;

> "In this matter, the High Court revised a number of cases basically on account that investigations had taken long to be completed and that the respondents had been in incarceration for quite long. The said court went further to make an order and a direction to subordinate courts to either admit the accused persons (respondents) to bail or dismiss the charge and discharge them while committal proceedings were still conducted in the subordinate court. In the first place, the question we ask ourselves is

whether or not the High Court had jurisdiction on the matter which was still under committal proceedings. In the case of **Republic v. Dodoli Kapufi and Another**, Criminal Revision No. 1 and 2 of 2008 (unreported), the Court was confronted with an akin scenario. It discussed among other issues whether or not the High Court in the particular circumstances of bail applications has jurisdiction to grant bail while the accused persons had not yet been committed to it and who were before a subordinate court. After a long discussion the Court stated as follows:

"... it is difficult to appreciate how the High Court in the instant revision could have the power to grant bail to the applicants, pre-committal and in the absence of any committal order under section 246 (1) o f the CPA, which would have submitted them to its jurisdiction. Not only that, save for exhibit to the High Court of an information by the D.P.P. under section 93 (1) of the CPA, section 178 creates a bar against the taking of cognizance by the High Court, of a criminal case, unless the same has been properly investigated by a subordinate court and the accused person has been duly committed to it for trial."

Guided by the above cited authority, it is our view that, if the High Court, in **Dodoli Kapufi's case** (supra) was found to have no powers to grant bail to the applicants on a matter which was still under committal proceedings without prior order which could have vested jurisdiction on it, the matter at hand is even more serious. We say so because, one, there was no illegality, incorrectness or

improprieties which ought **to be corrected in terms of section 372 of the CPA. Neither was there any order, finding or sentence which needed to be corrected in terms** of section 373 (1) (a) of the CPA. Two, there was no committal order by the subordinate court as the matter was still in pre-committal state which the High Court was prohibited even to take cognizance of it. In this regard, we agree with Mr. Ndamugoba that the High Court had no jurisdiction to revise the matter at that stage (emphasis supplied)".

In the light of the above decision of the highest court of the land, I am convinced that this application has prematurely been brought to the court. The court of now lacks the requisite jurisdiction to revise a mere order adjourning case on the ground that, the intended committal proceedings or any other judicial business cannot take off since the investigation is still incomplete. I so hold because the matter is still pending in the subordinate court and no legal order which has been issued capable of justifying this court to exercise its revisionary power as prayed by applicants within the ambit of sections 44 (1) of the MCA (supra) and section 372 of the CPA.

I am nevertheless mindful, that there may be laxity or abuse of discretion on the part of the investigation machinery for its failure to complete investigation within a reasonable time as the matter traces its

filing back to the year 2014, May. I am further of the considered view that, management of cases duly filed in our courts should be in the hands of judges and magistrates dedicating to their judicial functions with good relationship with stakeholders and courts should always control their own proceedings as was rightly emphasized in the Case of **Republic v. Deeman Crlspin and Others** (supra). However, control of proceedings by the courts must be in accordance with the law as the courts are supposed to operate within the dictates of the Constitution and the laws of the Land. Given our current laws, this court does not have any legal justification to direct the investigation machinery to complete its investigation within a certain period.

Currently; neither Provisions of the Penal Code nor of the Criminal Procedures Act or Magistrate Courts' Act (supra) or any other law which set time limit for completeness of investigation of criminal cases. Thus, it sounds ridiculous and absurd for the non-bailable offences such as murder, terrorism, armed robbery, money laundering, treason and so on and so forth since accused persons charged with such offences may be unreasonably detained in custody.

It is therefore my firm view that, in order to circumvent abuse of discretion by investigation machinery, it is necessary if pre-trial rights of

accused persons are observed, it is now hard time for our Parliament to enact provisions of the law setting limit for completeness of investigation and a way forward when the expected investigation is not completed within such statutory period or all offences be bailable as the case in Kenya (See Article 49 (1) (h) of the Kenyan Constitutional, 2010) unless there are exceptional or compelling reasons for denial of bail.

All that said and done, I unhesitatingly find this application to have no merit. I therefore dismiss it. Nevertheless, the prosecution and investigation are urged to ensure that, the investigation is completed within reasonable time in order to avoid unnecessary complaints towards our Government and judiciary merely because of laxity or negligence or both on the part of irresponsible employee (s) so that the applicants may have their rights timely and finally determined.

Order accordingly.

M. R. GWAE
JUDGE
16/03/2022

Court: Right of Appeal fully explained

M. R. GWAE
JUDGE
16/03/2022