

**IN THE HIGH COURT OF TANZANIA**

**AT SONGEA**

**(DC) CRIMINAL APPEAL NO. 13 OF 2022**

*(Originating from Tunduru District Court Criminal Case No. 281/2020)*

**D.P.P ..... APPELLANT**

**VERSUS**

**1. HAJI NYENJE KENYELULE**

**2. RAZACK ALLY JAZZA**

**3. MOHAMED ALLY GAFI @ RAS**

**4. HAMPHREY HALAL KAMBELO**

**.....RESPONDENTS**

**JUDGMENT**

Date of Last order: 21/03/2022

Date of Judgment: 23/03/2022

**BEFORE: S. C. MOSHI, Judge**

The D.P.P was dissatisfied with the trial court's ruling dismissing the charge and acquitting the accused persons under section 225 of the Criminal Procedure Act for want of sufficient evidence, hence; filed a petition of appeal containing one ground as quoted hereunder:

- 1. The Trial Court erred in law dismissing the charge and acquitting the Respondents named above contrary to law.*

***WHEREFORE*** the Appellant prays for the following:

*a) This appeal be allowed entirely.*

*b) The Trial Court's order of dismissing the charge and acquitting the Respondents be quashed and set aside.*

The appeal was disposed of by way of written submissions whereas the Director of Public Prosecution (Appellant) was represented by Ms Generosa Montana, State Attorney and the respondents were represented by Mr. Yusuph Kaukuya, advocate, however the written statement was written by Ms. Neema Nyagawa, advocate.

Among other things, Ms. Generosa Montana submitted in support of the appeal that the respondents in this appeal were the accused persons in Criminal Case No 281 of 2020 which was in the district court of Tunduru before Hon. I.D Chuvaka, RM and they were charged with six (6) counts of Burglary and Armed Robbery. The typed Proceedings of the Trial Court show at Page 28-30 that on 30/03/2021 the matter was adjourned until 21/4/2021, the Public Prosecutor when addressing the Court stated that the matter was scheduled for hearing but he prayed to withdraw the case facing the Accused(s) under **Section 98(a) of the Criminal Procedure Code [CAP 20 R.E2019]**.

After that prayer, the defence Advocate, Mr. Ajetu objected the prayer on the ground that the provision allows for the re – arrest of the accused persons.

She said that, the court, adjourned the matter until 23/4/2021 for Ruling and on that date the court refused the Prosecution's prayer to withdraw Prosecution's case under **section 98(a) of the Criminal Procedure Act (CPA)** and proceeded to dismiss the charge and acquitted the Accused person under **section 225 of the Criminal Procedure Act.**

She argued that, the trial court erred in law in dismissing the charge and acquitting the respondents contrary to the law. She said that, **section 225(5) of the Criminal Procedure Act [CAP 20 R.E 2019]** provides that "Where no certificate is filed under the provisions of subsection (4), the court shall proceed to hear the case or, where the prosecution is unable to proceed with the hearing discharge the accused save that any discharge under this section shall not operate as a bar to a subsequent charge being brought against the accused for the same offence".

She said that, even though the trial magistrate only stated that he acquitted the accused persons under **section 225 of the Criminal Procedure Act [CAP 20 R.E 2019]** without stating the specific

subsection, the only subsection that allow the court to set the accused free is **Section 225(5) of the Criminal Procedure Act** and the said subsection state clearly that the court shall **discharge** the accused and it did not state that the court can **acquit** the accused.

She stated that, provision did not give the trial magistrate power to acquit the accused as he did but he could only discharge the accused person however, contrary to the law the trial magistrate in his Ruling did dismiss the charge and acquit the Accused persons.

She submitted further that, the said provision also clearly state that it does not operate as a bar to a subsequent charge being brought against the accused for the same offence. Hence the prosecution can charge the accused person with the same offences, therefore by acquitting them while the case against, them was not heard on merit to its finality it prevented the prosecution to ever bring the same charge against them again.

She finally contended that, apart from that, on 23/4/2021 when the trial magistrate pronounced his ruling and denied the prosecution to withdraw from prosecution of the accused(s) under **Section 98 (a) of the CPA**, he should have asked first if they had a witness on that date and if they replied that they had none, that's when he could have decided to withdraw

the matter under **Section 225(5) of the Criminal Procedure Act** but the trial magistrate in his ruling proceeded to deny the Prosecution prayer to withdraw from prosecution and without asking them if they want to proceed with the hearing, they had a witness on the material date, however the trial magistrate proceeded to acquit the accused persons contrary to the law.

On the other hand, Ms Neema submitted *inter alia* that, she differs with appellant's proposition. Records in the case file speak for themselves. According to page 7 of the trial Court's Judgment, the trial Magistrate dismissed the charge and acquitted the Respondents on two main grounds, firstly, there were several adjournments over five years by the prosecutor while the Respondents were in remand custody all that time, and secondly, there were complaints by the Respondents through their Advocate of delaying the case and more so the prosecution stated that their evidence was flimsy.

She referred to the case of **D.P.P Vs Martin Nguma and Others**, Criminal Appeal No 48 and 69/76 which was cited in the case of **D.P.P Vs Yahaya Upanga & Another** (1983) TLR 151, where the defunct Court of Appeal of eastern Africa when applying section 201 of the Criminal

Procedure Code, 1969 [now section 255 of the Criminal Procedure act (supra) held that:-

*"The fact that the legislature has empowered the court in terms of section 201 of the C.P.C to grant or refuse an adjournment necessarily implies that a court has power and authority to enforce an order it makes. To hold otherwise would make the power granted to the court meaningless or illusory. A court must within reason have the power to control and regulate its own proceedings in order to prevent itself from being emasculated or rendered impotent. Some of these regulatory powers derive from court's inherent power to control its own proceedings which originate from common law or the very nature of its function not necessarily from statutes; such as the power to punish summarily for contempt. We believe that a court can in such circumstances of emergency clothes as it with inherent power to control its own proceedings, dismiss the charge and discharge the accused despite lack of statutory provisions to that effect. We think that such a discharge and dismissal would be sufficient exercise of the court's inherent power to regulate its own proceedings and that an order of acquittal unless in the most exceptional circumstances is unnecessary and unsuitable for that purpose."*

She expounded her submission, and contended that, while reiterating what was held by the defunct court of appeal of **Eastern Africa in the case of D.P.P Vs. Martin Nguma and Others** (supra), Korosso, J in the case of

**D.P.P Vs. Yahaya Upanga & another** (1983) TLR 151 held that, when the court refuses to adjourn the case after an application for adjournment whether or not the case was ready for hearing on that day on which the refusal is made and if the circumstances of the case are exceptional, the court may invoke its inherent power by dismissing the charge and acquitting the accused.

She lastly prayed the court to dismiss the appeal

The circumstances of this case are peculiar. The respondents were arraigned before Tunduru District court for offences of armed robbery and burglary on 06/10/2020. They all denied the charge which was levelled against them. Thereafter a Preliminary hearing was conducted on 18/01/2021, and the case was set for hearing on 25/01/2021, 08/02/2021 and 15/02/2021 however in all instances the case was adjourned for prosecution's failure to bring witnesses. The first witness testified on 17/02/2021, and the trial was adjourned to 03/03/2021, but on that date the trial could not proceed because the prosecution did not have witnesses. Thereafter, the case was set for mention on 09/03/2021 and hearing on 25/03/2021 as last date of hearing. On 25/03/2021 the case did not proceed with hearing, the prosecution did not state if they had witnesses

on that day, however they prayed to substitute a charge but the prayer to make substitution of the charge was resisted by respondent's advocate, and the court made a ruling on 30/03/2021, it did not grant the prosecution's prayer; again, the case was set for hearing on 21/04/2021.

However, on 21/04/2021 the prosecution was not ready to proceed with the case, instead the public prosecutor prayed to withdraw the case under section 98 (a) of the C.P.A. I quote the prayer here under:

***Public Prosecutor:*** "The matter is for hearing however we pray to withdraw from prosecution of this case under section 98 (a) of the CPA because the evidence against the accused person is flimsy."

The accused's advocate objected to the prayer, hence the court had to make a ruling subject to this appeal.

That was it from the parties

Invariably, it is court's duty to control court's proceeding, see **D.P.P Vs Yahaya Upanga & Another** (Supra).

Considering the proceedings as shown herein above, it is obvious that, the prosecution now appellant was very lax in prosecuting its case, and in all occasions, it was the cause for adjournment in disregard of court orders.



From the beginning of trial, the prosecution had difficulty in procuring and bringing witnesses to court. Even on the date which they prayed to withdraw the case; they did not indicate that they had brought a witness, contrary to what is suggested by Ms. Montana.

Regarding the fact that the court acquitted the respondents under section 225 without specifying the relevant sub section; I agree with Montana that section 225 has several sub sections which prescribe for different scenarios, therefore the court erred in this regard.

The issue now is whether the court erred by refusing prosecution's prayer for withdrawal under section 98 (a) of the Criminal Procedure Act? As indicated above, the court has a duty to control court proceedings and the rules of procedure are supposed to be handmaidens of justice, that is they should be applied to facilitate justice not otherwise. The proceedings glaringly show that, prior to the prayer the court ordered the case to proceed with hearing, the prosecution did not only bring witnesses but it requested withdrawal of the case, which had an effect of rearresting the respondents. It would be a different case if the prosecution had brought witnesses on that particular day, in which case, the court could have ordered the prosecution to proceed with the witnesses who were in court,

and worse still the prosecutor informed the court that they intend to withdraw the case because their case was flimsy. Therefore it is true that, for the prosecutor admitting that their case was weak, then, even if the court was to allow their prayer, there was no likelihood of bringing witnesses in court after the rearrest of the respondent.

That said, in ordinary circumstances I would have revised the order for dismissal and acquittal as it was wrongly made under section 225 of the Criminal Procedure Act. However, I refrain from doing so, in view of the chain of events as narrated herein above which affirmatively indicate that the prosecution were not ready to prosecute the case, the court has a duty to control its proceeding and use its inherent powers for furtherance of justice.

In fine, I dismiss the appeal for the foresaid reasons.

Right of Appeal is Explained.



  
**S. C. MOSHI**

**JUDGE**

**23/03/2022.**