IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

RM. CRIMINAL APPEAL NO. 81 OF 2020

(C/O Economic Crimes Case No. 37 of 2019 of Resident Magistrate Court of Katavi)
(F U. Shayo, RM)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT
VERSUS
HILALI S/O HAMSINI @ MILINDI ..... RESPONDENT

13/01 & 08/02/2022

JUDGMENT

Nkwabi, J.:

Hurt by the order dismissing and acquitting the respondent in criminal case No. 37 of 2019 made by the trial court, the appellant lodged this appeal to this court. Based on the ground that the learned trial Magistrate erred in law and in fact by dismissing the case and acquitting the respondent before the appellant's case being closed, the appellant prayed the appeal be allowed, the order be quashed and this court orders that the case be retried before another magistrate with competent jurisdiction.

The respondent was charged with unlawful possession of Government trophies (eight pieces of elephant tusks having the value of T.shs

69,630,000/=) contrary to section 86(1) and (2) (c)(iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59(a) and (b) of the Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2016 read together with paragraph 14 of the First schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control, Act [CAP. 200 R.E. 2002 as amended by section 16(a) and 13(b) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The appellant had paraded five witnesses in court. On 31st August, 2020 the prosecution represented by one Malifimbo, learned State Attorney, told the court as they had no witness, they would have had the case adjourned to another date for hearing. The trial magistrate then made the following order:

> *Order: (1) Prosecution failed to proceed with the Hg of this matter as the result caused unnecessary inconveniences to the accused person who is in custody. It is the case of its own kind which prosecution seen as if they are not interested with it, in this circumstance the court has to invoke its inherent power to make sure that all parties are fairly treated in court, as it was observed in the case of DPP vs Yahaya Upanga and Others 1983 TLR 151 where Koroso J, (as he then was) had this to say*

"If the court refuses to adjourn the case after an application for adjournment whether or not the case was ready for hearing on the day in which the refusal is made and if the circumstance of the case are exceptional the court may invoke its inherent power by dismissing the charge and acquitting the accused person forthwith.

It is so ordered

Sgd: F. U. Shayo
RM
31/8/2020

What transpired in the trial court is that, the case was filed on 06/12/2019. The preliminary hearing was conducted on 06/04/2020. Four months later the case was dismissed and the respondent was acquitted. Prior to the dismissal of the case on 20/04/2020 and 04/05/2020 the appellant had no witnesses in attendance. On 07/05/2020 the appellant had four witnesses in attendance but the prosecuting attorney was reported sick hence the matter was adjourned to 19/05/2020 where hearing took off with four witnesses in attendance.

On 01/06/2020 no witnesses attended including on 15/06/2020, 29/06/2020 no witness attended as well as 06/07/2020 the prosecution claimed that their witness was on official leave hence trial has to wait for his return to work. On 20/07/2020 no witness attended, until 03/08/2020 when one witness attended and gave evidence. Then an adjournment was requested and given to 17/08/2020 where no witness attended as well as 31/08/2020 when the trial magistrate dismissed the charge and acquitted the respondent.

It should be noted here on a number of occasions, the counsel for the respondent pleaded with the appellant to close his case if they had no more witnesses to appear. Yet within a span of four months, the appellant had no witness in seven adjournments.

The hearing of this appeal was carried out by way of oral submissions. The appellant was represented by Ms. Flavia Shio, learned State Attorney. The respondent appeared in person, unrepresented.

Submitting in chief, Ms. Shio argued for the appellant that they filed the appeal challenging the decision made by Resident Magistrate in the Resident

Magistrate's Court of Katavi dated 31/08/2020 when the respondent was acquitted in a case which the appellant had yet to close its case.

The case was fixed for hearing in the Resident Magistrate's Court on 31/08/2020. On that date the appellant failed to produce a witness and prayed for adjournment. The Resident Magistrate Katavi acquitted the respondent applying **DPP V. Yahaya Upanga & Others [1983] TLR 151,** Ms. Shio explained.

Ms. Shio further maintained that they went through the case cited and they found that the trial magistrate misdirected himself as that case directs that he ought to consider Section 225(5) of the Criminal Procedure Act Cap. 20 RE: 2019 which provides that the court may dismiss the charge and discharge the accused. She therefore concluded that the appellant was not given the option to charge the respondent as per the section.

Backing her argument, she cited **DPP V. Leonard Rugemereza & 7 Others Criminal Appeal No.188/1980** (Unreported), Mr. Justice Chua, J. discussed the inherent powers of the court citing **DPP V. Martin Ngumaj & Others Criminal Appeal No. 48 of 1976:**

"The remedy however, is not acquitting the accused persons....."

She then implored this court decides for the case to proceed from where it ended before another magistrate.

She added that five witnesses were heard. The matter started to be adjourned when the magistrate had gone to leave, but when he came, he merely dismissed the case without giving them time to bring our last witness. So, on their side, they do not see any exceptional circumstances which warranted the trial magistrate to come to the conclusion he came to. She rested her submission.

Respondent resisted the appeal for reasons that the trial magistrate accorded him justice and he was not biased. The case was a fabricated one and the evidence was weak to prove the case, he remarked. He further argued that the elephant tusks claimed to have been found at his home, he was not the one who showed the prosecution. The witnesses who inspected his premises did not find anything and no independent witness was called. It was also during the night. He then prayed this court to dismiss the appeal as it is meritless.

In rejoinder, Ms. Shio, learned State Attorney, reiterated her suggestion that the trial magistrate did not do them justice as per her submission as she had already indicated in her submission in chief.

She observed that they just argue the case and tender the evidence they do not jail any accused. As to the search, that is a matter of evidence that is why they pray for an order that the case proceeds with trial from where it ended. She finally reiterated her prayer.

I have searchingly considered the vying submissions. It is, however, mundane law that each case must be decided in accordance with its circumstances. It is also typical law that a court of law has inherent powers to control its proceedings **Abdallah Kondo v Republic, Criminal Appeal No. 322 of 2015** CAT (unreported):

> *We, in this regard, find inclined to agree, re-affirm and adopt the principle laid down by the late Hon. Mzavas, J (as he then was) in* ***R. V. Deemay Chrispin and others,*** *[1980] TLR 116. In that case the accused persons were charged on 2nd January, 1973 and there were numerous adjournments on ground that investigations were*

incomplete and missing police case file. On 30/03/1979 the subordinate court dismissed the charge and discharged the accused. When the matter went up to the High Court on revision it was held:

1. *A court was to have, within reason, the power to control or regulate its own proceedings in order to prevent itself from being emasculated or rendered impotent.*
2. *If a court refuses an adjournment and the prosecution is unable to proceed, a court does not have to rescind its order. It is clothed with inherent power and so, in such cases of emergency, it can dismiss the charge and discharge the accused. But except in the most exceptional circumstances, an order of acquittal is unnecessary and unsuitable for that purpose."*

Having indicated the principles governing closure of prosecution case and the courses the trial Court can take out of the jam, ...

Further, it is mundane to state that courts look for trends of a party or parties to come to a certain conclusion as it was stressed in the case of **Bernard Beatus Pamela v. Tanzania Breweries Ltd Civil Case No. 305 of 1990** (HC) Dar es Salaam Registry (Unreported):

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"Court may consider trend of a party to reach at a certain decision against a party at faulty. Whether to believe the claim or denial or not."

Now, is the trend of the appellant in the proceedings in the trial court warrant his lamentation in this appeal? It is obvious that on several (7) occasions the appellant approached the court in the proceedings and invocated the trial court for adjournment for they had not managed to bring a witness. It is also clear in the court record that the counsel for the respondent would lament that if the prosecution were not having witness(es) they ought to close their case. In the circumstances the trial court was entitled in rejecting the prayer for adjournment therefore dismissing the charge was an order that necessarily had to follow, that order was issued by the trial court. The question that remains for this court to determine is whether it was proper for the court to acquit the respondent in the circumstances?

Even though the trial magistrate was of the view that *the circumstance of the case was exceptional* he however did not explain why he was of the view. The feeling that the prosecution was not interested in prosecuting the case without explaining and making the same known to the parties and maybe to an appellate court like this, was not sufficient. On my part, I do not see any most exceptional circumstances in this case to warrant acquittal of the

respondent. Therefore, I am of the firm view that it was wrongful for the trial court to have ordered acquittal of the respondent in the circumstances.

Consequently, I partly allow the appeal as it has merits to that extent. The order for acquittal is therefore quashed. In substitution, the respondent ought to have been discharged and it is so ordered. If the appellant wishes to re-arrest the respondent and charge the respondent with the same offence, that option would be open to the appellant.

It is so ordered.

DATED at **SUMBAWANGA** this 8th day of February 2022.

J. F. Nkwabi

Judge