

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR-ES-SALAAM DISTRICT REGISTRY)**

**AT DAR-ES-SALAAM**

**MISCELLANEOUS CRIMINAL CAUSE NO. 5 OF 2023**

**LUQUMAN NYAMBO MALOTO ..... APPLICANT**

**VERSUS**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 1<sup>st</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>nd</sup> RESPONDENT**

**RULING**

Date: 22/02 & 22/03/2023

**NKWABI, J.:**

Under the provisions of section 2(1) of the Judicature and Application of Laws Act, R.E. 2019 and section 392A (2) of the Criminal Procedure Act, Cap. 20 R.E. 2019 and any other enabling provision of the law, the applicant brings this application. It is supported by affidavits, duly sworn by Luquman Nyambo Maloto, the applicant, Zitto Zuberi Ruyagwa Kabwe and Mdude Mpaluka Nyagali. The applicant is praying for the following orders:

1. That this honourable Court be pleased to declare that all issues pertaining to killings, disappearances and torture of individuals in the United Republic of Tanzania every person including the applicant herein has a locus to protect the interests of the victims in this Court.

2. That, this honourable Court be pleased to declare that the 1<sup>st</sup> respondent has failed to competently or willfully investigate the disappearances, killings and torture of Azori Gwanda, Ben Saanane, Simon Kanguye, Daniel John, Tundu Lissu, Mdude Mpaluka Nyagali alias Mdude, Leopord Lwajabe, Akwilina Akwilini, Ibrahim Mshana alias Roma Mkatoliki and Alan Kiluvya.
3. That, this honourable Court be pleased to declare that the 1<sup>st</sup> Respondent was the full in-charge of the life of Azori Gwanda, Ben Saanane, Simon Kanguye, Daniel John, Tundu Lissu, Mdude Mpaluka Nyagali alias Mdude, Leopord Lwajabe, Akwilina Akwilini, Ibrahim Mshana alias Roma Mkatoliki and Alan Kiluvya as his duties are to protect the lives of all citizens of the United Republic of Tanzania.
4. That, this honourable Court be pleased to draw adverse inference against the 1<sup>st</sup> respondent due the prolonged and failure to give reports to the public and families of the victims about the disappearances, killings and torture of Azori Gwanda, Ben Saanane, Simon Kanguye, Daniel John, Tundu Lissu, Mdude Mpaluka Nyagali alias Mdude, Leopord Lwajabe, Akwilina Akwilini, Ibrahim Mshana alias Roma Mkatoliki and Alan Kiluvya.

5. That, this honourable Court be pleased to declare that the prolonged investigation of the disappearances, killings and torture of Azori Gwanda, Ben Saanane, Simon Kanguye, Daniel John, Tundu Lissu, Mdude Mpaluka Nyagali alias Mdude, Leopord Lwajabe, Akwilina Akwilini, Ibrahim Mshana alias Roma Mkatoliki and Alan Kiluvya are not governed by rule of reason.
6. That, this honourable Court be pleased to order the 1<sup>st</sup> respondent to submit to this Court full and well detailed reports regarding the disappearances, killings and torture of Azori Gwanda, Ben Saanane, Simon Kanguye, Daniel John, Tundu Lissu, Mdude Mpaluka Nyagali alias Mdude, Leopord Lwajabe, Akwilina Akwilini, Ibrahim Mshana alias Roma Mkatoliki and Alan Kiluvya and that report to be tabled to this honourable Court for scrutiny.
7. Any other order(s) this honourable Court may deem fit to grant.

The miscellaneous criminal cause was greeted with a preliminary objection having six points of objection. They are as follows:

1. That the honourable Court has no jurisdiction to entertain this application.

2. That the application is incompetent for being supported by incurably defective affidavits.
3. That the application is untenable in law for want of proper party.
4. That the application is bad in law for misjoinder of a party.
5. That the application is untenable for want of locus standi.
6. That the application is incompetent and bad in law as the prayers sought are untenable in law.

The preliminary objection was disposed of by way of oral submissions. Mr. Mutalemwa Kishenyi, and Heziron Mwasimba both learned Senior State Attorneys, appeared for the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent was absent. The applicant was represented by Mr. Hekima Mwasipu, learned advocate.

On the 1<sup>st</sup> point of preliminary objection, it was the contention of Mr. Mutalemwa that since the alleged (omissions) incidences were alleged to have occurred in different parts of the country such as Mbeya, Kigoma, Rufiji, Dar-es-Salaam, Dodoma and others, the High Court Dar-es-Salaam zone cannot hear the matters which arose in a geographical jurisdiction outside Dar-es-Salaam zone. He referred to **Dr. F. Lwanyantika Masha v AG**. Civil Case No. 136 of 2001, HC (unreported) the decision of Manento, J.K. as he

then was. That submission was in respect of the 1<sup>st</sup> part of the objection based on jurisdiction.

On the second part to the objection that this Court lacks jurisdiction, Mr. Mutalemwa was of the view that all the cited provisions of the law do not give mandate to the Court to give the reliefs sought by the applicant. He pointed out that section 392A of the Criminal Procedure Act cannot avail reliefs which are declaratory in nature such as the 1<sup>st</sup> respondent failed to perform his duties. There are procedures for compelling the 1<sup>st</sup> respondent to act.

He explained that the Constitution of the United Republic of Tanzania provides for procedures to bring a legal action particularly Article 26(2) and the applicant ought to have called into play the provisions of section 4 of the Basic Rights Enforcement of Duties Act. He insisted that this Court has no jurisdiction.

Mr. Mwasipu was not persuaded that this Court has no jurisdiction to entertain the application under Article 108 (2) of the Constitution (supra). In respect of the registry, Mr. Mwasipu argued that since this is not a civil suit

rather it is a criminal application, every registry of the High Court has jurisdiction, he opined.

He further contended that they cited section 2(1) of the Judicature and Application of Laws Act and added, section 392A of the Criminal Procedure Act talks on how the application could be brought. It does not provide for jurisdiction of the Court. He was further of the view that section 392A supplements section 2(1) of the Judicature and Application of Laws Act. He also submitted that Article 30(3) of the Constitution (supra) empowers the applicant to bring this application. He was of the view that the allegations of torture and disappearance can be determined by the High Court. He insisted they have followed a proper procedure to get redress in Court and this Court has jurisdiction to entertain the matter.

Pressing on the argument that this Court has no jurisdiction to entertain the matter, Mr. Mutalemwa submitted that Article 107 of the Constitution gives powers to the Judiciary, which is a final authority. He was quick to add that there are procedures, the applicant cannot hide himself under Article 107 of the Constitution. He questioned if this is criminal prosecution for what

offence and under which provisions of the law. He pointed out, crimes are committed against an individual and not the state.

It was also pointed out that even if this were a criminal case, there are geographical boundaries (where the offence is committed). A court also seats in its registry. A murder offence committed in Mwanza cannot be charged in Musoma registry.

Mr. Mutalemwa went on explaining his position that an individual cannot sue the DCI or the DPP criminally as they have done whereas he questioned, in this application, which kind of punishment will be imposed and under which law? It was added that section 392A of the CPA and section 2(1) of the JALA operate in accordance with the constitution. He further stated that Articles 26 and 30 of the Constitution provide how to seek redress against the Government. He said, that is why there are specific laws to deal or bring applications of this nature.

Mr. Mwasimba added that the applicant ought to have brought prerogative writs. He prayed the preliminary objection be sustained and the application be dismissed.

I have considered this preliminary objection on the point of objection that this Court has no jurisdiction to entertain the matter and I accept the view of the learned Senior State Attorneys that this Court (High Court District Registry of Dar-es-Salaam) has no jurisdiction to entertain the matter. In submissions, the 2<sup>nd</sup> respondent suggests that by the nature of the reliefs sought, the applicant ought to have instituted a matter by way of a prerogative writ to compel the 1<sup>st</sup> respondent to do what the applicant thinks the 1<sup>st</sup> respondent has omitted to do. I agree, else there would be no need of establishing an avenue for any aggrieved person to seek prerogative writs.

By bringing this application of this nature to this Court, the applicant wants to sideline the provisions of the Constitution (supra) and the provisions of section 4 of the Basic Rights Enforcement of Duties Act. The applicant too wants to disguise the true nature of the reliefs and wants to make them appear as normal prayers in a normal criminal application while as correctly submitted by the learned Senior State Attorney for the 2<sup>nd</sup> respondent, they are not. That is, with profound respect, unacceptable and cannot be entertained by this Court.



For instance, one of the reliefs sought is to order the 1<sup>st</sup> respondent to submit to this Court full and well detailed reports regarding the allegations of disappearances, killings and tortures. The order ought to be sought by way of prerogative writ. Thus, with profound respect, I rejected the insinuations by Mr. Mwasipu that this Court (High Court Dar-es-Salaam District Registry) they have followed a proper procedure to get redress in Court and this Court has jurisdiction to entertain the matter. He insisted they have followed a proper procedure to get redress in Court and this Court has jurisdiction to entertain the matter. My view, I hope, is supported by the provisions of Article 108 (1) of the Constitution (supra) which provides:

*"There shall be a High Court of the United Republic (to be referred to in short as "the High Court") the jurisdiction of which shall be as specified in this Constitution or any other law."*

Moreover, section 5 of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E. 2019 emphasizes that an application should be filed in the appropriate registry of the High Court.

Since this Court has no jurisdiction to entertain the matter, I do not see the need to consider and determine the rest of the points of the preliminary objection. Thus, it is my view that even the rest of the reliefs prayed can be entertained in such proceedings in the appropriate Court. Consequently, the miscellaneous criminal cause is ruled to be incompetent and is struck out. The preliminary objection is sustained. It is so ordered.

**DATED** at **DAR-ES-SALAAM** this 22<sup>nd</sup> day of March, 2023.



  
J. F. NKWABI

**JUDGE**