IN THE HIGH COURT OF THE UNIED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 151 OF 2021

SAED AHMED KUBENEA .....APPELLANT

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATION .....1ST RESPONDENT

DIRECTOR PUBLIC PROSECUTION.....2nd RESPONDENT

PAUL CHRISTIAN MAKONDA.....3RD RESPONDENT

JUDGMENT APPEAL

S. M. MAGHIMBI, J:

On the night of 17th March 2017 around 10.40 pm when the scene of *SHILAWADU* program was being broadcasted, the 3rd respondent (during his tenure as the Regional Commissioner for Dar es salaam Region) is alleged to have trespassed into Clouds Media Studio Building that house Clouds Television and Radio Stations. Apparently, the appellant herein alleges to have been concerned with the 3rd respondent's acts done, terming the acts as criminal, tortuous and violent having culminated into public outcry in social media including but not limited to WhatsApp, Instragram, Twitter, Jamii Forums and Facebook. Following what he termed as inaction from the first and the second respondents; the appellant herein instituted private prosecution against the respondent at Kinondoni Resident Magistrate Court.

The application; registered as Criminal Application No. 01/2020; was lodged under the provisions of Section 99(1)&(3); 128(2) a d 392A(1)&(2) of the Criminal Procedure Act, Cap 20 R.E 2019 ("the CPA") . When filing their counter affidavit in opposing the application on the 2nd day of March, 2022, the 1st and 2nd respondents raised preliminary objections on point of law that:

1. That the Resident Magistrate's Court has no jurisdiction to entertain the application for the offences enlisted therein were economic offences.
2. The application is frivolous and vexatious as it is made and backed up with an incurably defective charge sheet
3. The application is frivolous and vexatious for citing provisions of law which were not in use as of 17th March, 2017
4. The frivolous and vexatious application is incompetent for basing on hearsay information
5. The applicant has no locus standi.

In his ruling dated 09th day of June, 2022 the Hon. Principal Magistrate sustained the first point of objection and dismissed the application for want of jurisdiction. Aggrieved by the said dismissal, the appellant has lodged this appeal on the following grounds:

1. That, the Resident Magistrate erred in law and fact in dismissing the application for leave of private prosecution for wants of jurisdiction.
2. That, the Resident Magistrate erred in law and fact in deliberation of the charge sheet of the application while it is not the legal requirement at the stage of the leave for private prosecution.
3. That, the Resident Magistrate erred in law and facts in holding that the charge sheet annexed in the application for leave of private prosecution since they need consent of 2nd Respondent.
4. That, the Resident Magistrate erred in law and fact in holding that the charge sheet annexed in the application for leave of private prosecution since they need consent of the 1st Respondent.

At the hearing of this appeal, the Appellant enjoyed the service of Mr. Hekima Mwasipu, learned advocate, while the first and second Respondents were represented by Mr. Hezron Mwasimba, learned State Attorney. On his part, the 3rd Respondent was represented by Mr. Goodluck Reginald learned advocate. The appeal was disposed by way of written submissions.

While making his submission to support the appeal, Mr. Mwasipu consolidated all the grounds of appeal and came up with the ground summarizing the issues to whether the RMS court had jurisdiction in terms of both the type of offence that is intended to be charged and the want of

consent of the 2nd respondent in relation to the type of offence. His consolidated ground was that the Resident Magistrate erred in law and fact in dismissing the application for leave for want of jurisdiction on the pretext that the 1st offences is the one triable by the High Court and the 2nd offence needs consent of the 2nd Respondent. His initial argument was that the holding of the trial Magistrate is a misconception of law.

He then submitted that section 99(1) and 128(2) of the CPA are to the effect that a person who want to privately prosecute the offender need to seek leave to the Magistrate and not High Court. He then argued that the language of the statute is very clear with no any ambiguity, contrary to the ruling of the Magistrate that the appellant need to seek leave to the High Court. That there is no any provision in the CPA which requires that leave for private prosecution be sought to the judge of the High Court. He supported his submissions citing the case of **Edmund Mjengwa and Six others Vs John Mgaya and Four others TLR (2004) 201** where the Court held that:

> *"Up on reading of section 99 (1) of Criminal Procedure Act of 1985, there is no requirement of the formal charge or complaint in order the*

magistrate of grant leave for Private Prosecution."

He then argued that the act of the trial Magistrate to dismiss the application because the charge contained offences which are not triable by RMs Court was not the correct position of the law. That the Hon Magistrate was supposed to look at the affidavit averments on whether they disclose any offences and if there was probable and reasonable cause. He went on submitting that after leave being granted is when now the private Prosecutor is ordered to being the charge and all power vested on the 2nd Respondent transfers automatically to the private prosecutor. That the only power that the 2nd Respondent has is to take and discontinue the case at any stage but after the appellant having been granted leave.

Mr. Mwasipu submitted further that at the stage of leave, what the Court is supposed to do is to scrutinize the applicant's affidavit and not the charge sheet, since the charge sheet was not read to the 3rd Respondent and he did not plead thereto. He argued that it could not possible to challenge the charge sheet at this stage hence the issue of jurisdiction in terms of offence in charge sheet was raised prematurely leading to the appellant being denied his right of access to justice.

Referring the court back most celebrated case of private Prosecution in Tanzania, the cited case of **Edmund Mjengwa** (supra), Mr. Mwasipu submitted that charge sheet is not legal requirement or the pretext requirement of granting leave for private prosecution in Tanzania. He emphasized that the averments in the affidavit are what should be looked upon whether there is prima facie case, reasonable and probable cause and where the affidavits disclose elements of offences. That upon being satisfied on this, the next step for the court is to grant leave and hence the appellant be allowed to table charge sheet. He concluded by a prayer for the appeal to be allowed and the decision of the Resident Magistrate Court be quashed.

In reply, Mr. Mwasimba submitted that the trial Magistrate was correct to dismiss the application because all offences therein where of economic nature not triable by Courts Subordinate to the High Court without consent from the Director of Public Prosecution as provided under Sections 3, and 12 of the Economic and Organized Crime Control Act, Cap 200 R.E. 2019 (" The EOCCA"). To support his submissions, he cited the case of; **Mauld Ismail Ndonde Vs Republic (Criminal Appeal 319 of 2019) [2021] TZCA 538 (29 September 2021).** He went on submitting that the Hon. Magistrate was of the correct view that offences under Section 96(1) & (2) of the Penal Code, Cap. 16 R.E. 2019 ("Penal Code") and that of interfering

communications under Section 123 of the Electronic and Postal Communications Act, No. 3 of 2010 (EPOCA) are economic offences under paragraph 37 and 38 of the 1st scheduled to the EOCCA.

Mr. Mwasimba then argued that jurisdiction is a creature of statute and the two offences through which the Appellant sought to prosecute privately can be triable by the subordinate court upon the issuance of the certificate of DPP to confer jurisdiction to try them. That the jurisdiction to try the offence is on the High Court. To fortify his submissions, he cited the case of; **Rombo Green View Investment Ltd Vs Card Asp Tanzania, H. C. Land Division Case No. 268 of 2008**(unreported)

He submitted that, Section 99(1) of CPA provide that any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the President in this behalf shall be entitled to conduct the prosecution without such permission. He argued that since the Appellant sought to prosecute the 3rd Respondent on offences whose jurisdiction was vested to the High Court, the RMs Court was in no position to grant leave to the Appellant.

Having gone through the rival submission of the parties, the issue before me is whether a court can grant leave for private prosecution over

offences which it does not have jurisdiction to try. It is trite law that jurisdiction, including jurisdiction to grant leave, is a creature of a statute. The jurisdiction to grant leave under scrutiny is pursuant to Section 99(1) of CPA which is clear that:

> *"99.-(1) Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the President in this behalf shall be entitled to conduct the prosecution without such permission."*

Undisputedly, a magistrate has powers to permit a person other than the public prosecutor to conduct prosecution. In this case, the appellant seeks to convince the court that the magistrate in the Criminal Application erred by refusing to grant such permission to the appellant. The question which the magistrate asked himself is whether he will have jurisdiction to grant permission for private prosecution for offences that he did not have jurisdiction to try. This was undisputed by the appellant, however, Mr. Mwasipu argued that what the Court is supposed to do at the stage of leave was not look at the charge sheet but the applicant's affidavit, since the charge sheet was not read to the 3rd Respondent and he did not plead thereto. He argued that it could not possible to challenge the charge sheet

at this stage hence the issue of jurisdiction in terms of offence in charge sheet was raised prematurely leading to the appellant being denied his right of access to justice.

With respect, I don't agree with Mr. Mwasipu's argument. Leave is only granted when the court that an application is tabled has jurisdiction to entertain the same. The jurisdiction is derived by looking at the documents tabled before it including the ruling or judgment sought to be challenged (in case of application for leave to appeal). In this case, the court has to look at the charge which the intended accused is sought to be charged of, before proceeding to grant the leave sought. Jurisdiction has to be looked from the context of the offences that the intended charge is to cover.

In the case at hand, the offences that the appellant intended to charge the 3rd respondent with were offences triable by the High Court and not the court which heard and determined the application. The provisions of Section 91(1) are to the extent of those offences that the magistrate is inquiring into or trying. The catching words are that for a magistrate to grant the permission, the magistrate must have jurisdiction to inquire or try the case. This is an implication that the permission can only be granted to those offences or matters where the magistrate has jurisdiction. Therefore the argument that the permission can be granted without looking at the charge

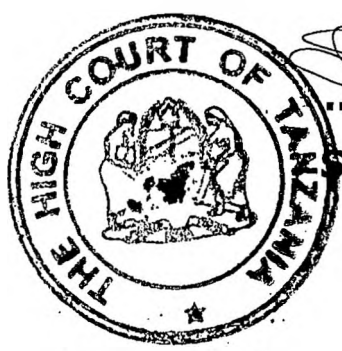
sheet is off context because the power to grant permission ends where the jurisdiction of the magistrate to try or inquire on a case ends.

As for the cited case **of Edmund Mjengwa**, it is distinguishable in our case because in that case, the basis of refusal was on the fact that the formal charge sheet was not attached. In this case, the appellants were seeking leave to initiate private prosecution and the reasoning of the Magistrate, was that he could not grant leave because the offences intended to be charged are offences triable by the High Court. In my view, the important question is whether the Resident Magistrate could grant permission for private prosecution and thereafter the offence be tried by the High Court. The answer is definitely no, Jurisdiction is a creature of the statute and normally, leave is granted by a court that has jurisdiction to entertain that which leave is sought for. Examples include where the party intends to appeal to the High Court from a decision of RM's court and is late, leave to extend time is sought in the High Court. The same case is an application for leave to file prerogative orders where the same is filed in the same court that has jurisdiction to entertain the matter or in application for leave to file representative suit, this is lodged in the same court that the suit is intended to be filed.

Therefore, unless the statute expressly provides otherwise, like in cases of leave to appeal to the Court of Appeal as provided under Section 5 of the Appellate Jurisdiction Act, a court cannot grant leave to initiate proceedings of a matter which it has no jurisdiction to try or inquire on. That being the case, the learned magistrate did not error in holding that he had no jurisdiction to entertain the matter.

Consequently, on the above reasoning, this appeal lacks merits and it is hereby dismissed

Dated at Dar es salaam this 25th day of May, 2023



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S.M.MAGHIMBI

JUDGE.