

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA SUB-REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO. 69 OF 2023**

*(Originated from Criminal Case No. 119 of 2022 of the District Court of Musoma at Musoma)*

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT**

**VERSUS**

**DAVID S/O SAIRE @ MANOTI ..... 1<sup>ST</sup> RESPONDENT**

**LAMECK S/O ABEL @ LUTAMBI ..... 2<sup>ND</sup> RESPONDENT**

**OLIPA S/O OMARY @ MFUNGO ..... 3<sup>RD</sup> RESPONDENT**

**PASCHAL S/O BURONGO @ MAJURA ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

*21<sup>th</sup> & 22<sup>nd</sup> February, 2024*

**M. L. KOMBA, J.:**

In this appeal, this court is invited to respond on whether non-appearance of prosecution under section 222 of the Criminal Procedure Code, [Cap 20 RE 2022] amount to dismiss of the case and acquittal of the accused persons. Learned counsels who appeared before me for this case had their submission and interpretation on subject matter and I appreciate.

The reason why this court is burdened over the above-mentioned question is that, respondents were arrested and arraigned to District Court of

Musoma on 15/11/2022 to face their charge on leaking examination contrary to section 18 (1) and 24 (1) of National Examination Council of Tanzania Act, Cap 107 RE 2019. It is alleged that the crime was committed between 8-9 September, 2021 at Sokoine Primary School within Musoma District, Mara Region. The matter was fixed for hearing and witnesses were paraded to adduce evidence for prosecution side. At the middle of the hearing, the trial Magistrate was transferred hence the file was re-assigned to another Magistrate, on consensus, parties on 31/03/2023 agreed hearing to proceed where the previous Magistrate ended. As prosecution had no witness on that date, the case was placed on 08/5/2023. On material date (08/5/2023) prosecution had not witness and applied for another date. Upon the prayer, court warned the prosecution and record the last adjournment before placing the case on 10/05/2023.

When the planned hearing date arrived, prosecution failed to enter appearance and the trial Magistrate dismissed the case under section 222 of CPA and acquitted all accused. That was on 10/05/2023.

Mr. Yesse Temba, State Attorney representing Director of Public Prosecution filed this appeal with only one ground that;

*1. The trial Magistrate erred in law and fact for dismissing the case and acquitting the respondents under section 222 of Criminal Procedure Act, [Cap 20 RE 2022].*

When this appeal placed for hearing, appellant was represented by Mr. Yesse Temba, State Attorney who submitted that section 222 of Cap 20 does not allow acquittal, rather discharge. He complained that the action of acquitting accused block the appellant in performing his duty of proving the case against accused persons. He insisted that dismissal is applicable when the matter was heard on merit but that was not in the present appeal. Citing the case of **DPP vs Arbogast Rugaimukamu, TLR 1982** at 139 that the trial court action of acquit accused for non-appearance is frustrating the noble duty of DPP to prove case against the accused. He prayed the appeal to be found with merit as non-appearance cannot remove criminal liability to accused.

Resisting the appeal, respondents hired Mr. Baraka Makowe for the legal service and representation, learned advocate submitted that the right demanded by DPP has obligation. Prosecution has denied their own right to prosecute the case for not parading witnesses and failure to enter

appearance, so to him, the Resident Magistrate's Court was correct to dismiss the case as they were warned prior to dismissal.

It was his further submission that it is true section 222 of Cap 20 is about remedy in incomplete hearing and discharge but complain on miss use of the said discharge that appellant wants to re-arrest which, according to counsel cause endless mitigation and disturbance to other people. He prayed appeal to be dismissed so as it becomes a lesson to appellant to be punctual in prosecution. Mr. Makowe distinguishes the case of **Arbogast** (supra) was decided 40 years ago while nowadays our country has undergone a lot of reforms in the justice delivery system.

During rejoinder, Mr. Temba submitted that the case was dismissed due to non-appearance and not for failure to parade witnesses. However, he prayed this court to note that courts of law in our country is guided by the laws and that if there was non-appearance by prosecution, the court is moved under section 222 to discharge accused persons and not to be termed they won a case by dismissal. Elaborating on what happened on the fateful day, State Attorney submitted that the case was in hearing stage and prosecution started to parade their witnesses but on 08/05/2023 it was the first day the case heard by the trial Magistrate who dismissed it.

He insisted the cited case to be relevant to the case at hand and prayed his appeal to be found with merit.

As narrated, this court is tasked to determine whether non-appearance of prosecution under section 222 of the Criminal Procedure Code, Cap 20 RE 2022 amount to dismissal of the case and acquittal of the accused persons.

For easy of reference, I shall reproduce it hereunder;

*222. Where in any case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complaint, having had notice of the time and place appointed for the hearing of the charge **does not appear, the court shall dismiss the charge and discharge the accused person**, unless for some reason, it shall think it proper to adjourn hearing, of the case until some other date and, pending the adjourned hearing, either admit the accused person to bail or remand him to prison, or take such security for his appearance as the court thinks fit.'*

The section is loud that the remedy is discharge and State Attorney submitted that the trial Magistrate erred by acquitting accused persons instead of discharging them. Mr. Makowe was of the submission that using

word discharge shall cause endless litigation and shall make prosecution to relax on performing their obligation. Our country is a follower of rule of law and as submitted by Mr. Temba that our courts are courts of law, basing on the circumstance of the case during trial, the cited section by the trial Magistrate is about discharging accused and she was supposed to dismiss charge against all accused persons and discharge them. Other complains by the counsel for respondents are worth sharing but has no legal base.

In the case of **Director of Public Prosecutions vs Elia Masaka @ Funyizi & Another (Criminal Appeal No.137 of 2021) [2023] TZCA 17307 (6 June 2023)** the Court of Appeal with approval cited its decision in the case of **Matimo Satimo & Another vs Republic**, Criminal Appeal No. 7 of 2015 (unreported) that:

*"... If the trial magistrate felt that it was improper to adjourn the hearing of that case for whatever reasons, he ought to have dismissed the charge and discharged the accused- See the case of **Republic v. Deeman Chrispin and Others** [1980] T.L.R. 116, a case whose principle was approved by the Court in **Abdallah Kondo's case.**"*

Thus, as it was decided by the CAT, it is settled that, for any reasons, whenever the Magistrate or Judge felt it is improper to adjourn the hearing

of the case before the prosecution closes their case, the only remedy available is to dismiss the charge and discharged the accused person.

Moreso, this court finds it safe to stick on the provision of law as cited by the trial Magistrate and interpret correctly basing on words used by the legislature because it has the duty to so. See **Marwa Mahende vs Republic [1998] T. L.R 249, Adinardi Iddi Salimu and Another vs. The Republic**, 3 Criminal Appeal No. 298 of 2018 (unreported) and **Adelina Koku Anifa and another vs Byarugaba Alex**, Civil Appeal No. 46 of 2019. In the later case Court of Appeal had this to say;

*'...where the lower court may have not observed the demands of any particular provision of law in a case, the court cannot justifiably close its eyes on such glaring illegality because **it has the duty to ensure proper application of the laws by the subordinate courts and or tribunals...**'*


From the analysis above I find the appeal has merit, charge laid against accused persons was supposed to be dismissed and accused be discharged. For that reason, I nullify ruling/order delivered by the trial Magistrate in Criminal Case No. 119 of 2022 and order the matter to proceed from 31/03/2023 before another Magistrate.



It is so ordered.

**Dated** at **MUSOMA** this 22<sup>nd</sup> Day of February, 2024.



  
**M. L. KOMBA**  
**JUDGE**

Right of Appeal explained.

Judgement Delivered today in chamber in the presence of Yesse Temba who representing Director of Prosecution and all respondents were present with their counsel Mr. Baraka Makowe.

  
**M. L. KOMBA**  
**JUDGE**

22<sup>nd</sup> February, 2024