

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB-REGISTRY
AT MOROGORO**

CRIMINAL REVISION NO. 35 OF 2023

*(Originating from Criminal Case No. 151 of 2022: Morogoro District Court at Morogoro,
dated 14th September 2023)*

ERICK ISACK MUSHI..... APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

14/02/2024 & 29/02/2024

KINYAKA, J.:

In Criminal Case No. 151 of 2022, the applicant was charged before the District Court of Morogoro of an offence of stealing by agent. The District Court heard both parties. After the parties filed their respective final submissions, the trial court scheduled the matter for judgement on 14/09/2023. On 14/09/2023 when the matter was called on for judgement, the Respondent presented to court a written notice of *nolle prosequi*. The applicant strongly resisted the *nolle prosequi* and urged the trial court not to accept the same. In compliance with the *nolle prosequi*, the trial court was constrained from pronouncing its judgment and it thereafter discharged the applicant. Immediately after the discharge of the applicant, the respondent



arrested the applicant on charges of stealing by servant and preferred Criminal Case No. 137 of 2023.

Aggrieved by the respondent's actions and the trial court's discharge based on the Respondent's *nolle prosequi*, the applicant preferred the present revision under section 372(1) and (2) of the Criminal Procedure Code, Cap. 20 R.E. 2022 (hereinafter, the "CPA") for the court:

- (i) to call and examine the records in Criminal Case No. 151 of 2022 for the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and orders;
- (ii) to enter a finding that the procedure adopted by the respondent in entering a *nolle prosequi* was illegal and/or irregular;
- (iii) to order that the judgement that was scheduled to be delivered by Hon. E. Ushacky SRM in Criminal Case No. 151 of 2022 which was irregularly pre-empted by the *nolle prosequi* be delivered as scheduled; and
- (iv) to make any appropriate order as may think fit for the interest of justice.



The affidavit of the applicant in support of the application discloses that prior to Criminal Case No. 151 of 2022, the respondent charged the applicant for stealing by servant in Criminal Case No. 300 of 2019; stealing by servant and money laundering in Economic Case No. 18 of 2020; stealing by servant and money laundering in Economic Case No. 67 of 2020; and stealing by agent in Criminal Case No. 71 of 2021.

On 04/12/2023, the respondent lodged his counter affidavit opposing the revision. In addition to the counter affidavit, he raised preliminary objection on a point of law that the application is unmaintainable for being premature before the Honourable Court and ought to be dismissed.

In the course of the their submission, I asked parties to address the court, whether the order withdrawing the charges upon the Respondent's entering *nolle prosequi*, had the effect of finally determining the criminal charges against the Applicant in Criminal Case No. 151 of 2022.

On the date of hearing of the preliminary objection, the applicant was represented by Mr. Ignas Punge, learned advocate, and the respondent enjoyed the services of Mr. Shabani Kabelwa, learned State Attorney.



Mr. Kabelwa took the flow by submitting that section 372(2) of the CPA bars revision from the order of the subordinate court which do not have the effect of finally determining a criminal charge. He argued that the present revision emanated from the order of the trial court discharging the Applicant under section 91(1) of the CPA, upon entry of the *nolle prosequi* by the respondent. He contended that section 91(1) of the CPA require the court to discharge the accused person upon the Respondent's entry of *nolle prosequi*. He contended further that the said section is clear that when *nolle prosequi* is entered and the accused person is discharged, the same does not bar the prosecution to prosecute the accused on account of same facts. He argued that it is clear from section 91(1) of the CPA that the charge against the accused has not been finally determined as he can still be charged based on the same facts in a court of competent jurisdiction.

Mr. Kabelwa proceeded that when the accused is discharged under section 91 of CPA, he is not qualified to invoke section 137 of the CPA which gives right to an accused person to plea *autrefois acquittal* or *autrefois conviction*. He argued that a criminal case is finally concluded under section 230 of the CPA on a no case to answer; and under section 235 of the CPA where the court convicts or acquits the accused persons or discharge him under section

38 of the Penal Code. He added that the only scenario that can conclude a criminal charge is only when the right of any of the parties is concluded. He argued that in the present application, the rights of the parties have not been determined upon the discharge of applicant. He prayed for the court to sustain the preliminary objection and dismiss the applicant's application.

In resisting the preliminary objection, Mr. Ignas Punge, learned advocate for the applicant submitted that the case subject of the present complaint, emanate from the proceedings and order of the trial court of discharging the applicant upon the entering of *nolle prosequi* by the respondent. According to Mr. Punge, the action determined the matter to its finality because Criminal Case No. 151 of 2022 came to an end on 14/09/2023. He argued that there was no any case pending before the trial court after the applicant was discharged. He added that the subsequent charge has no relation to Criminal Case No. 151 of 2022. He viewed the prosecution's mandate to enter *nolle prosequi* and recharge the applicant on same facts on the ground that rights of the parties were not determined, of no basis. He insisted that the criminal charge was determined to its finality in the circumstance of the case before the trial court, as both parties had finalized their respective testimonies and filed final submissions.

Mr. Punge submitted that it is a narrow interpretation of the phrase 'determination of a criminal charge' for the respondent to state only two circumstances under sections 230 and 235 of the CPA that finalizes a criminal case. He argued that even a discharge of the accused person is a determination of a criminal charge. He added that there are guiding principles on how *nolle* is required to be entered which include the need to do justice, the need to prevent abuse of the legal process, for the public interest, and the control of criminal proceedings as provided for under section 8 of the National Prosecution Services Act, Cap. 430, which were not complied by the prosecution. He argued that there is no way to challenge the actions of the respondents other than by way of revision. He concluded that the application is not premature and prayed for the preliminary objection to be overruled.

Mr. Kabelwa rejoined by submitting that section 91(1) of the CPA clearly provides how, and when *nolle prosequi* can be entered. He contended that the said provision does not require the respondent to give reasons for entering *nolle prosequi*, though section 8 of National Prosecution Service Act provides for matters to consider when the decision to enter *nolle prosequi* is made. He added that the discharge in section 91(1) of the CPA does not bar

subsequent charges against the accused person which means that the discharge does not finally conclude a criminal charge. He reiterated his prayer for dismissal of the respondent's preliminary objection.

In determining the preliminary objection on prematurity of the present application, I am enjoined to determine whether the proceedings and resultant decision or order of the trial court dated 14/09/2023 finally determined the criminal charge against the applicant.

As hinted earlier on, and as deduced from paragraphs 4, 5 and 6 of the affidavit of the applicant, the trial court's proceedings and order discharging the applicant attached as EIM-1, was as a result of the respondent's notice to discontinue with criminal proceedings against the applicant in compliance with section 91(1) of the CPA. The provision entitles the respondent to discontinue criminal proceedings at any time before verdict or judgment. Upon entering of the *nolle prosequi*, the trial court complied with the dictates of section 91(1) and ordered the discharge of the accused person at once. It was on basis of such an order of the trial court that the present application for revision was lodged before this Court.



My entry point in determining the raised point of preliminary objection is section 372(1) of the CPA that empowers the High Court to call for and examine record of any criminal proceedings of subordinate courts as part of its supervisory powers. However, it is on basis of subsection (2) of section 372 of the CPA that the respondent's preliminary objection is predicated. Section 372(2) of the CPA bars application for revision to the High Court in respect of any preliminary or interlocutory decision or order of a subordinate court, unless such decision or order has the effect of finally determining a criminal charge. Section 372(1) and (2) of the CPA provide:

"372(1) The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.

(2) Notwithstanding the provisions of subsection (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of a



subordinate court unless such decision or order has the effect of finally determining the criminal charge."

At the onset, it is my position that the order discharging an accused person on the respondent entering *nolle prosequi* is not a preliminary or an interlocutory order. This is based on my position that once the accused person is discharged upon *nolle prosequi*, the criminal proceedings discontinue and nothing remains before the trial court in respect of the criminal charge, the subject of which the *nolle prosequi* was entered.

It is my considered position that a discharge upon *nolle prosequi* does not finally determine the criminal charge for which it is entered. I derive my position from section 91(1) of the CPA that a discharge upon *nolle prosequi* does not bar any subsequent proceedings against the accused person on account of the same facts. It means that for as long as the respondent is entitled by the law to initiate subsequent proceedings against the accused person based on same facts, the suit cannot be held to be finally determined. It is common knowledge that once criminal proceedings are finally determined in respect of an offence, the respondent cannot prefer a charge based on same facts constituting the determined criminal charges. This principle has been enunciated in a number of decisions, one of them being

the decision in the case of **The Director of Public Prosecution v. Faridi Hadi Ahmed and 36 others, Criminal Appeal No 205 of 2021** (unreported), where the Court of Appeal took the position that:

*".....it is our view that an order or decision is final only when it finally disposes of the rights of the parties. **That means that the same order or decision must be such that it could not bring back the matter to the same court.**"* [Emphasis Added]

In the matter at hand, despite the fact that there remained no proceedings when *nolle prosequi* was entered, and the accused was discharged as argued by Mr. Punge, the fact that the discharge does not finally determine a criminal charge against the accused person, the same limit the applicant from preferring an application for revision under section 372(2) of the CPA.

Based on my above observations, I do not agree with the learned counsel for the applicant that the discharge determined the matter to its finality because Criminal Case No. 151 of 2022 came to an end on 14/09/2023 when the case was called on for judgement and parties had filed their respective final submission. Although the respondent's subsequent charge against the applicant in Criminal Case No. 137 of 2023 is stealing by servant and not the

withdrawn charge of stealing by agent in Criminal Case No. 151 of 2022, the subsequent prosecution is based on same facts. Again, the withdrawal of criminal charges does not bar the prosecution to prosecute the accused person on same criminal charges to which the *nolle prosequi* was entered.

I am of the position that a discharge of the accused person upon *nolle prosequi* does not finally conclude criminal charges against the accused person in respect of the charge the subject of *nolle prosequi*. It is for that reason, the applicant may be recharged on account of same facts.

I agree with Mr. Shabani Kabelwa, learned State Attorney that criminal proceedings conclude when a criminal case is finally determined. The instances of conclusion of criminal proceedings include, where the court pronounce a ruling on a no case to answer under section 230 of the CPA; under section 235 of the CPA where the court convicts or acquits the accused person; or when the accused person is discharged under section 38 of the Penal Code, Cap. 16 R.E. 2022.

It follows that in order to prefer revision, the applicant ought to have satisfied himself that the decision or order of the trial court to discharge him upon the respondent's notice to discontinue the criminal proceedings, had an




effect of finally determining criminal charge for which the applicant was charged.

It is from the above observations that I sustain the preliminary objection that the present application for revision is premature. Guided by the decision of in the case of **Mustapha Songambele v. Republic, Criminal Application No. 3 of 2016 [2019] TZCA 101 (3 May 2019)**, where the Court of Appeal struck out the application for review filed before the Court prematurely, I accordingly strike out the application.

It is so ordered.

DATED at **MOROGORO** this 29th day of February 2024.


H. A. KINYAKA
JUDGE
29/02/2024

