

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

CRIMINAL REVISION NO. 3686 OF 2024

(Originating from Criminal Case No. 30 of 2022 at the Resident Magistrate's Court of
Morogoro at Morogoro, dated 12th December 2023)

REPUBLIC APPLICANT

VERSUS

HARRY AMLIKE MWAMBENE 1ST RESPONDENT
ZUHURA OMARY MZEE 2ND RESPONDENT

RULING

29/02/2024 & 14/03/2024

KINYAKA, J.:

The revision is a result of the Court's exercise of supervisory powers upon receipt of a complaint lodged by the applicant on 13/12/2023. Having received a complaint letter from the applicant, the Court summoned the parties to appear on 29/02/2024 in order to address the Court. On 29/02/2024, the Respondents appeared in person while the applicant was represented by Mr. Shabani Kabelwa, learned State Attorney. Having understood the context of the revision, the Respondents informed the court that they will proceed with hearing of the revision without legal representation.



Addressing the Court in support of the revision, Mr. Kabelwa submitted that the applicant's complaint was against the discharge of the accused persons, the respondents herein, made by the Resident Magistrate's Court of Morogoro at Morogoro, resulting from an order of dismissal of Economic Case No. 30 of 2022 dated 12/12/2023. He contended that the proceedings of the trial court reveal that on 12/12/2023, when the matter was called for hearing of the prosecution case, the State Attorney appearing for the Republic informed the trial court that he had three witnesses and was ready to proceed. He stated that it was the Counsel for the 1st respondent who was not ready to proceed based on the 1st accused's sickness and hospitalization. Mr. Kabelwa submitted that the trial magistrate committed irregularity by dismissing the criminal charges for want of prosecution and discharge the accused persons under section 225(5) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (hereinafter, the CPA). He argued that as it was the defence Counsel who was not ready for hearing due to sickness and hospitalization of his client, the 1st accused, the trial court ought to have adjourned hearing of the case instead of dismissing the suit for want of prosecution and discharging the respondents.



Mr. Kabelwa added that the dismissal order and discharge of the respondents prevented the applicant from re-arresting or re-charging the respondents, except where he had obtained an order setting aside the dismissal order. He relied on the decision of the Court of Appeal in the case of **Twaha Hussein v. R, Criminal Appeal No. 415 of 2017** on page 10, where it was held that the dismissal order, though does not acquit the appellant, has the effect of dismissing the charge.

Mr. Kabelwa argued that both section 225(5) of the CPA and the case of **Abdallah Kondo** (supra) were inapplicable in the circumstance of the case before the trial court. He contended that dismissal under section 225(5) of the CPA is appropriately invoked when the prosecution is unable to proceed with hearing of the case on the date of hearing. He prayed for the Court to revise the proceedings in Criminal Case No. 30 of 2022, and order the trial court to hear the criminal case at the stage it reached. In the alternative, Mr. Kabelwa prayed for an order to reverse the dismissal order dated 12/12/2023.

Opposing the revision, the 1st respondent submitted that the decision of the trial court was correct as the applicant was not serious in prosecuting the case before the trial court. He contended that Criminal Case No. 30 of 2023

was the second case after the applicant had entered *nolle prosequi* in the previous Criminal Case No. 72 of 2019. He stated that the trial magistrate on various occasions demanded and insisted the prosecution to present their witnesses but they did not, despite his notification to court that he was sick and expected to undergo operation on 10/12/2023. He argued that due to the prosecution's continuing neglect to prosecute the case, it was possible that the prosecution did not present witnesses on 10/12/2023, but stated so upon his absence. He added that the prosecution despised all trial magistrates who heard their criminal cases including the magistrate who made the impugned order. He prayed for the Court to find the order of the trial court proper and valid.

The 2nd respondent equally opposed the revision. She submitted that the trial magistrate was correct to hold as he did as the prosecution was ordered several times to present their witnesses but they did not. She stated to have been staying in court for long hours waiting for the prosecution witnesses. She argued that the prosecution were not sure of their witnesses and did not present their witnesses which made the trial magistrate to such dismiss the case and discharge them. She prayed for the court to investigate the



proceedings of the trial court where it will find that the prosecution had no intention to prosecute the criminal charges against them.

In rejoinder, Mr. Kabelwa opposed the 1st respondent's contention that he informed the court of his intended operation. If that was the case, Mr. Kabelwa argued, his advocate would not have informed the court that his condition worsened leading to his hospitalization. He contended that if the 1st accused informed the court that he will undergo operation on 10/12/2023, the case would not have been scheduled for hearing on 12/12/2023. He reiterated his submissions and prayers made in his submissions in chief.

I have inquisitively read the hand written proceedings of the trial court, and considered the submission of both parties. The sole question for determination before me is whether this application is meritorious. To begin with, I have opted to firstly establish whether the respondents' contention that it was the prosecution who defaulted to present its witnesses on the dates of hearing is substantiated.

The record reveal that the prosecution failed to proceed with hearing of the prosecution case on 02/08/2023, upon failure by the prosecution to present witnesses on the first date of hearing; on 08/09/2023 upon emergency of



the prosecution witness; and on 21/11/2023 upon the prosecution's assumption that the 1st accused (the 1st respondent herein) was still sick.

On the other hand, the prosecution case could not proceed at the instance of the respondents (the accused persons before the trial court) on 21/08/2023 on the absence of the defence counsel; on 23/10/2023, 30/10/2023, 08/11/2023, 17/11/2023 and 12/12/2023 on the absence of 1st respondent due to sickness.

From the record, it is clear that the prosecution case was adjourned often at the instance of the respondents. It means that the arguments by the respondents that it is the prosecution who delayed the proceedings culminating to the dismissal order on 12/12/2023, is not supported by the record of the trial court.

Turning to the applicant's complaint against the dismissal order and discharge of the respondents under section 225(5) of the CPA, I find it prudent to reproduce section 225(5) of the CPA. The section stipulates;

"Where no certificate is filed under the provisions of subsection (4), the court shall proceed to hear the case or, where the prosecution is unable to proceed with the hearing discharge the accused person in the court, save that any discharge under this



section shall not operate as a bar to a subsequent charge being brought against the accused for the same offence."

What I have gathered from the above provision is that, the court is empowered to discharge the accused person upon the prosecution's inability to proceed with the case. In the instant matter, the record of the trial court reveal that the trial court dismissed the case on 12/12/2023, when the prosecution was ready to proceed with hearing and presented three witnesses. It was the 1st respondent who was absent due to sickness. In those circumstances, the prosecution had not defaulted to appear, to present or expressed inability to proceed with hearing that would warrant the trial court to dismiss the criminal charges for want of prosecution as it was in the case of **Zephania Sindiyo Mollel and Another v. Republic (Criminal Revision 4 of 2021**, HCT at Arusha [unreported] where this court dismissed an application for revision preferred by the Republic and sustained the order of dismissal of the prosecution's case that was made by the trial court for the prosecution's failure to bring their witnesses on the date of hearing. In the matter at hand, it was the 1st respondent who failed to appear and made it impossible for the prosecution and the court to proceed with hearing.

I therefore agree with Mr. Kabelwa that the case of **Abdallah Kondo** (supra), was wrongly applied by the trial court to dismiss the criminal charges and discharge the respondents. Contrary to the said case, in the case before the trial court, the applicant was ready to proceed with hearing of the case and presented three witnesses for that purpose.

I find the trial court to have committed a fatal irregularity to dismiss the charges against the accused persons for want of prosecution and discharge the respondents under the then circumstances prevailing before the trial court. In my firm view, the court was supposed to adjourn the matter to another date of hearing or find an alternative way to conduct hearing through other means available to court and the parties such as by video conferencing.

I am alive to the fact that a discharge of the respondents under section 225(5) of the CPA does not operate to bar the prosecution to prefer subsequent charge against the respondent for the same offence as alluded by Mr. Kabelwa. However, I find the present case distinguishable from the case of **Twaha Hussein** (supra) cited by Mr. Kabelwa. In the cited case, the accused person was previously tried and acquitted by a competent court on similar offence/facts, while in the present case, the accused persons were

discharged under section 225(5) of the CPA upon dismissal of the criminal charges for want of prosecution, which allows the prosecution to prefer subsequent charges against the respondents.

It means that the applicant would have chosen to initiate similar charges against the respondents and not preferring the present revision. However, much as the law allows re-institution of similar charges against the respondents, the order subject of the present revision is tainted with material irregularity where section 225(5) was wrongly applied in inapplicable circumstances. Re-institution of the charges against the appellant would be a wastage of resources and time of the court, the prosecution, the accused persons, witnesses, and all players in the criminal justice system especially in this case where a total of eight prosecution witnesses had already given their testimonies.

Further, the order of dismissal and discharge of the respondents was made in inappropriate circumstances. It would have been different if the order of dismissal and discharge of the respondents was made in an appropriate circumstances, that is, if the prosecution was unable to proceed with hearing. In circumstance, I find the present matter fit for revision for the Court's intervention through its supervisory powers.



Based on the above findings, I invoke my revisional powers under section 372(1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] to quash the proceedings of the Resident Magistrate Court of Morogoro in Economic Case No. 30 of 2022 dated 12/12/2023, and set aside the orders stemming thereof. I further remit the file to the trial court with an order that the hearing of the trial continues from the proceedings immediately before 12/12/2023. It is so ordered.

DATED at MOROGORO this 14th day of March 2024.



A handwritten signature in blue ink, appearing to read "H. A. Kinyaka".

H. A. KINYAKA

JUDGE

14/03/2024