IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., LUBUVA, J.A., And SAMATTA, J.A.)

CRIMINAL APPEAL NO. 21 OF 1997

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

AND

ANJELINA OJARE..... RESPONDENT

(Appeal from the judgement of the High Court of Tanzania at Arusha)

(Nchalla, J.)

dated the 24th day of March, 1997

in

Criminal Appeal No. 31 of 1996

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JUDGEMENT OF THE COURT

KISANGA, J.A.:

This appeal arises from the judgment of the High Court (Nchalla, J.) which upheld and affirmed the ruling of the resident magistrate's court granting bail to the respondent.

The background to the case may be set out briefly as follows: The respondent applied to the Resident Magistrate's Court for bail under section 148 (1) of the Criminal Procedure Act. The application was made at a time when proceedings of a preliminary inquiry into a charge of murder against the respondent were pending in that court. The application was resisted by the prosecution on the ground that under section 148 (5) (a) of the Criminal Procedure Act the offence of murder is not bailable, and that in any case the Resident Magistrate's Court has no jurisdiction to grant bail in respect of murder which was not triable by that Court. The magistrate overruled the objection and granted bail. The Director of Public Prosecutions appealed unsuccessfully to the High Court which,

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as already stated, affirmed the decision of the resident Magistrate's court, hence the present appeal to this Court.

Before us the appellant Director of Public Prosecutions was represented by Mr. K.M. Mussa, learned Principal State Attorney, while the respondent was advocated for by Mr. A. Mawai, learned advocate. Counsel pointed out that a nolle prosequi in respect of the charge had already been entered on behalf of the Director of Public Prosecutions, and that this appeal was now intended only to set the record right.

The memorandum of appeal contained the following grounds:-

1. That the learned Judge erred in assuming jurisdiction over a matter falling within the provisions of articles 12 to 29 of the constitution without complying with the provisions of the Basic Rights Duties Enforcement Act.

2. That the learned judge erred in law in granting bail contrary to section 148 (5) (a) of the Criminal Procedure Act.

3. That the learned Judge erred in holding that section 148 (5) (a) of the Criminal Procedure Act violates articles 13 (6) (b) and 15 (2) (c) of the Constitution and that the same cannot be applied and enforced by the courts;

4. IN THE ALTERNATIVE to ground 2 hereinabove the learned Judge non-directed himself on the position of the law as it existed before the enactment of section 148 (5) (a) before upholding and affirming the decision of the subordinate court.

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On the first ground the thrust of Mr. Mussa's submission is that the learned judge wrongly considered and decided on a matter falling within Articles 12 to 29 of the Constitution which matter came to the High Court by way of appeal from the district court. According to the learned counsel the matter could have been considered and decided upon by the High Court only if it was brought to that court pursuant to the procedure provided for under the Basic Rights and Duties Enforcement Act No. 33 of 1994. In response to that, Mr. Mawai maintained that the learned judge was justified to hear and decide the matter on appeal from the district court.

A glance through the record shows that the issue of the constitutionality of section 148 (5) (a) of the Criminal Procedure Act was raised in the district court. Submissions on behalf of the parties in that court were centered on whether or not that provision violated the fundamental right of personal freedom of the individual, and the right of an accused person to be presumed innocent until proved guilty as guaranteed under Articles 13 (6) (b) and 15 (1) of the Constitution of the United Republic, hereinafter to be referred to simply as the Constitution. That was clearly a matter falling within Articles 12 to 29 of the C Constitution, and the pertinent question that follows is: What was the procedure to be adopted in handling that question. That question was raised squarely in the High Court during the first appeal. There it was submitted that the trial magistrate had no competence to consider the issue of the constitutionality of section 148 (5) (a) of the Criminal Procedure Act, and that once that issue was raised before him he was obliged to refer it to the High Court for determination in terms of section 9 (1) of the Basic Rights and Duties Enforcement Act. That provision says that:-

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> "9 - (1) Where in any proceedings in a subordinate court any question arises as to the contravention of any of the provisions of section 12 to 29 of the Constitution, the presiding magistrate shall, unless the parties to the proceedings agree to the contrary or the Magistrate is of the opinion that the raising of the question is merely frivolous or vexatious, refer the question to the High Court for decision; save that if the question arises before a Primary Court the magistrate shall refer the question to the court of a resident magistrate which shall determine whether or not there exists a matter for reference to the High Court."

The learned judge, however, rejected the submission, proceeded to consider the constitutionality of section 148 (5) (a) and eventually upheld the decision of the trial magistrate which had granted bail holding, in the process, section 148 (5) (a) to be inconsistent with the Constitution.

In rejecting the submission the learned judge referred to sections 4, 5 and 10 of the Basic Rights and Duties Enforcement Act.

Section 4 provides:-

> "4. If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress."

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Section 5 provides in effect that an aggrieved person who goes to the High Court for redress pursuant to section 4, shall do so by filing a petition to that court. Then section 10 (1) provides that:-

> "10 (1) For the purposes of hearing and determining any petition made under this Act including references made to it under section 9, the High Court shall be composed of three Judges of the High Court save that the determination whether an application is frivolous, vexatious or otherwise fit for hearing may be made by a single Judge of the High Court."

The learned judge, therefore took the view that although the matter before him was not an application by way of a petition under section 5, he was nevertheless, entitled to deal with it pursuant to the option under section 4 whereby the aggrieved party could take any other action, like the appeal in the instant case. And since he was dealing with the matter as an appeal, he was again entitled to sit as a sirgle Judge, and so the requirement of three judges under section 10 (1) did not arise.

With due respect we cannot agree with the construction put by the judge on section 4 of the Act. We do not think that the expression "..... any other action ....." in that provision includes an appeal lying to the High Court. In the instant case, for example, the aggrieved person was Mrs. Ojare on whose behalf it was alleged that section 148 (5) (a) of the Criminal Procedure Act was violative of her basic right as guaranteed by Articles 13 (8) (b) and 15 (1) of the Constitution.

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In terms of section 4, therefore, it was Mrs. Ojare who had the option whether to go to the High Court or to take any other action lawfully available to her for redress. When the matter went to the High Court, however, this was not at the instance of Mrs. Ojare. It was at the instance of the Director of Public Prosecutions who was alleging, not that section 148 (5) (a) was violative of Mrs. Ojare's basic right but, that the district court had no competence to consider and decide on the constitutionality of that section. In other words the allegation or complaint by Mrs. Ojare and that by the Director of Public Prosecutions differed completely from each other. In the circumstances, therefore, it is plain that Mrs. Ojare has neither applied to the High Court for redress under section 4 of the Basic Rights and Duties Enforcement Act, which would involve filing a petition to that court under section 5 of the same Act, nor has she exercised any other option which was lawfully available to her. In other words the appeal to the High Court cannot be regarded as any other action which was lawfully available to Mrs. Ojare as the learned judge thought, because the appeal was not at the instance of Mrs. Ojare and it was not alleging any infringement of her basic right. Even assuming that Mrs. Ojare had lost in the district court and then appealed to the High Court, this could not have amounted to her exercising another action or option lawfully available to her in terms of section 4. Because at that stage Mrs. Ojare, having thus lost the action in the district court, would have only one option lawfully open to her, anyway, and that is to appeal to the High Court. No other option would be lawfully open to her and therefore the provision would be meaningless.

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We think that the expression "any other action .... lawfully available ...." as used in section 4 applies to situations where an alleged wrong, though capable of being redressed as a violation of a basic right under the Constitution, the victim of it, nevertheless, opts to seek redress under the ordinary law. Take, for instance, the wrong of unlawful confinement. A person who complains of it may, in terms of section 4 apply to the High Court for redress or institute criminal or civil proceedings under the ordinary law.

Thus we are satisfied that there was non-compliance with the provisions of section 4 of the Basic Rights and Duties Enforcement Act. The complainant on whose behalf it was alleged that section 148 (5) (a) of the Criminal Procedure Act was violative of her basic right as guaranteed under Articles 13 (6) (b) and 15 (1) of the Constitution neither applied to the High Court, nor exercised any other option which was lawfully available to her for redress. The learned judge therefore erred in failing to hold that there was such non-compliance.

The view we take of the matter is that when the issue of constitutionality of section 148 (5) (a) was raised in the district court, the trial magistrate should have proceeded in accordance with the procedure laid down under section 9 (1) of the Basic Rights and Duties Enforcement Act reproduced earlier in this judgement. Under that procedure the magistrate had a duty to refer that issue to the High Court for decision unless:-

(a) the parties agreed to the contrary,
or

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(b) the magistrate was of the opinion that the raising of that question before him was merely frivolous or vexatious.

Neither (a) nor (b) was applicable in this case, and so the trial magistrate had no option but to refer the question to the High Court for decision. This he did not do; he considered the question himself and decided on it. Obviously, in terms of section 9 (1) of the Act he had no competence or jurisdiction to do so. To that extent, therefore the proceedings were null and void, and the learned judge should have held so.

Mr. Mgwai submitted that section 9 (1) of the Basic Rights and Enforcement Act was not applicable because it was inconsistent with section 4 of the same Act quoted above. He contended that the use of the word "may" in that section meant that an aggrieved person has the option whether to go to the High Court or to a subordinate court for redress and that his client had opted to go to the district court. We noted, by the way, that this line of argument is different from that adopted by the learned judge who maintained that the complainant had referred the matter to the High Court through an appeal. The true position however, is that Mrs. Ojare did not go to the resident magistrate court to seek redress of a violation of her basic right. She had simply applied for bail in that court, and in the course of arguing the application by the parties or their representatives, the issue of constitutionality of section 148 (5) (a) of the Criminal Procedure Act arose. Then the point is that once the resident magistrate court had taken cognizance that a constitutional question had thus arisen, it had a duty to refer such question to the High Court for decision

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because, as has been demonstrated above, the conditions specified under S. 9 (1) for displacing that duty were non-existent.

In yet another attempt to show that section 9 (1) had no application here, Mr. Mgwai contended that in any case that provision sought to derogate from Article 30 (3) of the Constitution. The unofficial English version of that provision says that:-

> "30 (3) Any person alleging that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person any where in the United Republic, may institute proceedings for redress in the High Court."

Counsel reiterated the contention that the word "may" as used in the provision meant that the aggrieved person had the option or discretion whether to go to the High Court or to the district court for redress, and consistent therewith his client opted to go to the district court. Therefore, in his view, section 9 (1) of the Act cannot now be invoked to defeat or derogate from Article 30 (3) of the Constitution, the supreme law of the land.

The answer to this is that sub-Article (3) of Article 30 of the Constitution must not be read in isolation. It has to be read together with sub-Article 4 (a) of the same Article, again the unofficial English version of which reads:-

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"30 (4) Subject to the other provisions of this Constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this Article; and the state authority may enact legislation for the purpose of -

(a) regulating procedure for instituting proceedings pursuant to this Article;"

Pursuant to this sub-Article, Parliament enacted the Basic Rights and Duties Enforcement Act, so that sub-Articles (3) and 4 (a) of the Constitution have now to be read together with this Act. When that is done, the import is that a person who complains of a violation of his basic right has the option whether to seek redress in the High Court by filing a petition in that court, or to take any other action lawfully available to him such as instituting a civil suit under the ordinary law to recover damages, say, for unlawful confinement. But where in the course of any proceedings in the subordinate court the issue of violation of a basic right of a party arises, then the trial magistrate must refer such question to the High Court for determination. However if the parties agree that the question should not be referred to the High Court, then the magistrate may proceed under the ordinary law to dispose of the suit or proceedings before him. Again if, on that question being raised in the district court, the magistrate is of the opinion that the raising of it is merely frivolous or vexatious, then he can overrule it and proceed to conclude the proceedings under the ordinary law. His decision on whether the raising of the question was frivolous or vexatious is appealable or referable [illegible] to the High Court.

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It follows, therefore, that the trial magistrate had no competence or jurisdiction to hear and decide on the constitutionality of section 148 (5) (a) of the Criminal Procedure Act which was raised before him. That was a matter to be referred to the High Court for decision, which was not done. To the extent of such omission or error, the proceedings in the district court were null and void.

That then settles the first ground of appeal. Since the other grounds of appeal arise from matters which were purportedly decided on by the district court and affirmed by the High Court, it follows that the decision of the High Court was bad in law in as much as it was based on a nullity. It purported to be based on a matter which was not before the court, and to uphold a decision which was no decision at all or which did not exist in law. It is, therefore, not necessary to consider the other grounds of appeal.

In the result the appeal by the Director of Public Prosecution is allowed. The judgement of the High Court is quashed, and the ruling/order of the district court is declared null and void. Ordinarily we would have sent the matter back to the district court for continuation of the hearing of the matter according to law from the stage immediately following the raising of the constitutional issue before that court. However, such course of action is now overtaken by the event in the light of the nolle prosequi which was entered in this case.

DATED at DAR ES SALAAM this 1st day of July, 1996.

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R.H. KISANGA
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

( N.M. MWAIKUGILE )
SENIOR DEPUTY REGISTRAR