IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., BWANA , J.A., LUANDA, J.A., MASSATI, J.A. And MANDIA, J.A.)

CIVIL APPEAL NO. 59 OF 2012

1.JAYANTKUMAR CHANDUBHAI PATEL @ JEETU PATEL
2.DEVENDRA K. VENODBHAI PATEL
3.AMITI NANDY **.....APPELLANTS**
4.KETAN CHOHAN

VERSUS

1.THE ATTORNEY GENERAL
2.REGINALD ABRAHAM MENGI
3.THE DIRECTOR OF PUBLIC PROSECUTION **..... RESPONDENTS**

(Appeal from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)

(Jundu, J.K, Kaijage, and Juma, JJ)

dated the 25th day of October, 2011
in
Misc. Civil Cause No. 30 of 2009

.....

JUDGMENT OF THE COURT

2nd September, 2014 & 15th April, 2016

LUANDA, J.A.:

Following the dismissal of their petition on the strength of the preliminary points of law raised by the respondents, the above named appellants have preferred this appeal to this Court to challenge the same.

In order to appreciate the nature of the appeal, we find it appropriate to start by giving a brief historical background of the case. The

background of the matter as we have gleaned from the record is to this effect. The appellants are faced with a series of criminal cases in the Court of the Resident Magistrate of Dar es Salaam sitting at Kisutu. However, before the commencement of hearing of those cases, the 2nd respondent (Reginald Abraham Mengi) issued and published statements in his media i.e. Radio One, newspapers and Television which they claimed to have the effect of portraying and influencing the general public that the appellants are guilty of the offences they are charged with.

It was the contention of the appellants that the action taken by the 2nd respondent went contrary to one of the principles of criminal justice in that a person accused of a criminal case is presumed to be innocent unless and until found guilty by a competent court. The said principle is enshrined in our Constitution vide Article 13(6)(b). Believing that not only their constitutional rights had been infringed but had also resulted in a mistrial, they accordingly filed a petition in the High Court of Tanzania (DSM Registry) under sections 4, 5 and 6 of the Basic Rights and Duties Enforcements Act, Cap. 3 RE 2002 (the Act) and sought the following redress.

a) A declaration that the publications made by the 2nd respondent and other people, through the

electronic and other media violated the constitutional rights of the petitioners and resulted into a mistrial of criminal cases numbers 1153 of 2008, 1153 of 2008, 1155 of 2008 and 1157 of 2008 at the Court of the Resident Magistrate at Kisutu and an order that a mistrial was thereby occasioned in each of those cases.

b) A declaration that it was the duty of the 3rd Respondent (the DPP) to terminate the criminal proceedings in each of the above mentioned cases as soon as it discerned that a mistrial had been occasioned by the impugned publications.

c) An order that the charges in each of those cases are dismissed and the accused persons in each of the above cases are discharged.

d) Any other relief as the Honourable Court shall deem meet (sic) the circumstances of the case.

The filing of the petition in the High Court as earlier stated was met with preliminary points of objection raised by all the respondents. The 1st and 3rd respondents jointly raised five points namely:

1. *That the Petition is misconceived and bad in law for inviting the Court to exercise its powers against the provisions of the Constitution of the United Republic*

of Tanzania 1977 (as amended) and the laws governing criminal prosecutions.

2. *That the Petition is incompetent and misconceived as the reliefs sought are not tenable under the Basic Rights and Duties Enforcement Act Cap 3 R.E 2002.*
3. *That the Petition is bad in law for contravening Section 8 (2) of the Basic Rights and Duties Enforcement Act Cap 3 R.E 2002.*
4. *That the Petition is frivolous, vexatious and an abuse of the court process.*
5. *That the Petition is incompetent for being supported by an incurably defective joint affidavit of Devendra K. Vindbhai Patel, Amit Nandy and Ketan Chohari.*

On the other hand, the 2nd respondent raised the following points:-

a) *that being a private person, the 2nd Respondent has been and is improperly impleaded and or joined in the Petition;*

b) *that the Petition is bad in law for non-joinder of parties whose joining and presence is legally necessary for a proper, complete and effectual*

determination of the issues raised and or complained of by the Petitioners;

c) *that the Petitioners' grievances or complaints against the 2nd Respondent are matters justiciable in the realm of private law whose redress and remedies are not sought in and grantable by constitutional courts but ordinary civil courts. A constitutional court therefore has no jurisdiction to admit, entertain and determine the Petitioners' complaints as against the 2nd Respondent;*

d) *that constitutional court has no jurisdiction or power or authority to order dismissal or withdrawal of criminal proceeding instituted and pending trial in the subordinate courts and in particular where public resources and funds are at issue hence of great public interest;*

e) *that the affidavits including the supplementary affidavit in support of the originating summons are incurably defective for containing speculations, arguments, opinions and conclusions; and*

f) *that the petition as against the 2nd Respondent is an afterthought, frivolous vexatious and abuse of the court process.*

After hearing the parties, the High Court sustained most of the preliminary points raised, save a few which were of less importance. The petition was dismissed with costs.

Aggrieved by that decision, the appellants as stated earlier on, have come to this Court on appeal to challenge that ruling.

In this appeal, the appellants were represented by Mr. Mabere Marando, Mr. Richard Rweyongeza, Mr. Mpaya Kamara, Mr. Joseph Tadayo and Mr. Martin Matunda, learned advocates. Mr. Edwin Kalokola and Ms. Nkasori Sarakikya learned Principal State Attorney and State Attorney respectively appeared for the 1st and 3rd respondents. The 2nd respondent was represented by Mr. Michael Ngalo, learned counsel.

The appellants have raised seven grounds in their memorandum of appeal which run as follows:-

1. *The Learned, High Court Judges grossly erred in law by confining/limiting the court venue to a judge or magistrate, and hence its holding that a judge or a magistrate cannot be influenced by what is said in the media.*

2. *The Learned High Court Judges grossly erred in law in holding that it is the subordinate court where petitioners are facing criminal trials, which has adequate means of addressing the complaints*

which the Appellants had by way of petition, brought to the High Court.

3. *The Learned High Court judges erred in law in holding that the petitioners should have first sought intervention of the subordinate concerned while the complaints had been preferred under Articles 30 (3) and (4); 108 (e), 10 (A (92) (a) and (c) the* ***Constitution of the United Republic of Tanzania*** *of 1977 (as Amended) and Sections 4, 5 and 6 (a) – (f) of the* ***Basic rights and Duties Enforcement Act*** *(Cap. 3 R. E 2002).*

4. *The learned High Court Judges grossly erred in law in holding, that media publicity per se does not constitute of itself a violation of a party's right to a fair hearing, without affording the Appellants an opportunity to state their case and to show that the media publicity had resulted into a mistrial through evidence.*

5. *The learned High Court Judges grossly erred in law to hold that resort to the procedure of basic rights under the Basic rights and Duties Enforcement Act cannot be taken lightly as a matter of course without first giving adequate space to the subordinate court concerned to deal with any complaint.*

6. *The learned High Court Judges grossly erred in law when they equated the reliefs sought by the Appellants in the petition to interference with the constitutional powers of the DPP.*

7. *The learned High Court Judges erred in law in holding that the High Court has no power to direct the Director of public Prosecution to do anything even if he contravenes the rights of persons.*

The parties in this appeal through their learned counsel submitted at length on their respective positions. Mr. Marando and Mr. Rweyongeza who spoke on behalf of their colleague basically submitted to the effect that the appellants are facing a number of criminal cases. That alone does not mean they had committed the offences they are being charged with. And so the course taken by the 2nd respondent in publishing in his media amounted to convicting the appellants. That action defeats the whole concept of presumption of innocence as enshrined in Article 13(6)(b) of the Constitution.

Because Article 13 (6)(b) of the Constitution was infringed, they contended, hence the filing of the petition in the High Court which was dismissed on the strength of the preliminary points raised. Mr. Marando attacked the ruling of the High Court as shown in the memorandum of

appeal and argued with force that the decision of the High Court was wrong. As to what really they are seeking from the DPP, Mr. Marando said they were seeking for a declaration for failure on the part of the DPP to terminate the criminal proceedings. Mr. Marando heavily relied on the decision of this Court in the Case of **DPP v. Mehboob Akber Haji and two Others**, Criminal appeal No. 191 of 1994 (Unreported). In that case the respondents were charged in the Economic Crimes Court with a number of economic offences. The trial commenced whereby the prosecution called nine witnesses and closed its case. The case was covered by the press. Then the defence took the floor. Before the second defence witness gave evidence, Dr. Masumbuko Lamwai who advocated for the respondents, made an application to have the trial terminated on the ground that there was a mistrial occasioned by an adverse commentary made on the state radio, namely Radio Tanzania. The application was brought under Article 13(6) (a) (b) and (e) of the Constitution. The High Court sitting as an Economic Crimes Court sustained that application. The trial was terminated and the respondents were acquitted.

The DPP was aggrieved by that decision. He filed an appeal in the Court of Appeal of Tanzania. The Court of Appeal partly allowed the appeal by setting aside the order of acquittal and substituted thereof with

the order of discharge. Otherwise the appeal was dismissed as there was a mistrial. As to whether the course taken was proper, Mr. Marando referred us to S.4 of the Act.

On the other hand Mr. Kalokola assisted by Ms. Sarakikya for the 1st and 3rd respondents and Mr. Ngalo for the 2nd respondent supported the finding of the High Court.

As regards the case of **Mehboob,** Mr. Ngalo said the facts are distinguishable from the case under discussion. In any case, there was no mistrial because the trials are yet to commence. Turning to the question of declaration, that the DPP ought to have said so, Mr. Ngalo said that the DPP's powers and duties are granted by the Constitution and the Criminal Procedure Act, Cap 20 R.E. 2002. Further, the appellants have an alternative remedy which is available by way of a civil action.

Mr. Kalokola said he does not expect the trial Court to be swayed by public outcry. It is the evidence which will decide the cases. He also said that there are other remedies which are available to the appellants. He made reference to S. 8 (2) of the Act.

In rejoinder Mr. Marando said there is no alternative remedy. And one of the way to cure the situation is by way of invoking S. 9 of the Act.

We have carefully read the record as well as the submissions of the parties. On our part we think the crux of the matter in this appeal is whether while the appellants are being charged in the Resident Magistrate Court of Dar es Salaam sitting at Kisutu with a series of criminal cases they can at the same time apply in the High Court for enforcement of their basic rights following the said publication in the newspapers, TV and radio by an individual who is not a party to those criminal proceedings to the effect that the appellants were the kingpin of corruption which publication the appellants contended that it infringed the constitutional presumption of innocence as enshrined in the Constitution.

First and foremost, we wish to point out that there are two separate regimes governing this matter under discussion, namely civil and criminal; that of Kisutu is criminal while in the High Court is civil. Each has a separate procedure of conducting its business to its logical conclusion. Normally the two do not go together.

In our case we have seen the appellants are basically trying to apply the civil platform, to nullify the criminal proceedings in the name of enforcing basic rights. But the appellants did not attempt to say under what provisions of the law they were taking such action. However, in their

written submissions they said they relied on *inter alia*, S.4 of the Act. S.4 of the Act reads:

> *4. If any person alleges that any of the provisions of sections (sic) 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.* [Emphasis ours]

Assuming the basic rights of the appellants were infringed, was the course taken to enforce their rights proper? To put it differently, the question is whether the application to nullify the criminal proceedings by way of a civil action is sanctioned by the law. We have shown that civil and criminal cases are two separate and distinct matters all together. Each has its own procedure and generally even the burdens of proof are quite different. As such it was not proper to seek redress in the High Court through such a novel method. It follows therefore that the action taken by the appellants was not sanctioned by S.4 of the Act reproduced supra; it is not lawfully available. The case of **Mehboob** as correctly pointed out by Mr. Ngalo is distinguishable. In that case it was a criminal case throughout and by then the Basic Rights and Duties Enforcement Act was not yet promulgated. With due respect, we are unable to agree with Mr. Marando

in that it cannot be said that the course taken was lawfully available to the appellants.

The petition before the High Court was, therefore, misconceived. The same was properly dismissed.

That said, the appeal is devoid of merits. The same is dismissed with costs to the respondents.

It is so ordered.

DATED at **DAR ES SALAAM** this 29th day of March, 2016.

J.H. MSOFFE
JUSTICE OF APPEAL

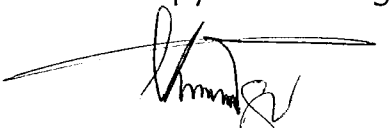
S.J. BWANA
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL