

IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CRIMINAL APPEAL NUMBER 99 of 2010

(Originating from District Court of Kinondoni Misc Cr Application No. 7/2010-
Rutehangwa-RM)

GODSON MUNISI.....

APPELLANT

VS

REPUBLIC.....

RESPONDENT

JUDGMENT

Date of last Order: 22-08-2011

Date of Judgment: 06-09-2011

JUMA, J.:

By a chamber application filed at the District Court of Kinondoni on 2nd August 2010 one M.D. Mganga (Assistant Superintendent of Police) on behalf of the respondent asked the district court to issue an order requiring the appellant (Godson Munisi) to execute a bond with sureties for good behaviour for a period not exceeding three years. ASP Mganga cited section 70, 72 and 73 of the **Criminal Procedure Act, Cap 20** to move the district

court. The application at the district court was supported by an affidavit taken out by ASP Mganga wherein he disclosed in paragraphs 6 and 7 why the respondent wanted the appellant to execute a Bond for good behaviour for a period not exceeding three years. According to the affidavit, ASP Mganga alleged that he had information that appellant was a notorious person who involved himself in the offence of Armed Robbery making him a danger to the community and should be placed under the control of the court in accordance with the law. The relevant paragraphs of the affidavit of ASP Mganga in verbatim states:-

6. *That I have reliable information that the respondent **[Godson Munisi]** is notorious and involving in the offence of Armed Robbery.*
7. *Furthermore I have reliable information that the respondent **[Godson Munisi]** is dangerous to the community thus, ought to be subjected and put under control of the court and police in accordance to the law of the land. **[Emphasis added]***

The trial district court granted the application requiring the appellant to execute a bond with sureties for good behaviour. The appellant was aggrieved by the order of the trial court and has in this appeal preferred four grounds of appeal. In his first ground, appellant contends that the trial magistrate did not

accord him of his right to be heard. According to his second ground, appellant contends that the learned trial magistrate erred in law by ordering the appellant to execute a bond without carrying out any prior investigation. In his third ground, appellant asserts that ASP Mganga had no power to seek an order requiring him to execute a bond. In the fourth ground, appellant contends that the trial magistrate issued an order which was not prayed for.

Parties to this Criminal Appeal Number 99 of 2010 were heard through their written submissions. Appellant's written submissions were drawn and filed by Mkali & Co. Advocates. Whereas the respondent's submissions were drawn and filed by the Attorney General's Chambers.

Submitting to support his contention that appellant was not given the right to be heard, Mkali & Advocates referred back to the record of proceedings of the trial court where the affidavit was read over to the appellant and his learned counsel counsel's role was limited to questioning the defect that was on the affidavit of ASP Mganga. According to the learned Advocate,

after overruling the appellant's objection against the affidavit of ASP Mganga, the trial magistrate should have given appellant a chance to show cause and hence contest the facts shown in the affidavit of the respondent herein. In his replying submissions on this first ground of appeal the respondent refutes the contention that appellant was not given a chance to show cause. According to the respondent, page 2 of the record of proceedings of the trial court show Mr. Chuwa, the learned counsel, verbally taking up the chance to show cause.

From submissions which the two learned counsel have made, I formulated two main questions for my determination of this first ground of appeal, and the first of the two issues is whether a right to be heard was an essential ingredient of the provisions which the respondent employed to move the trial court into issuing an order requiring the appellant to execute a bond with sureties for good behaviour. The second issue is whether the trial court accorded the appellant his fundamental right to be heard.

With regard to the issue of whether the right to be heard is an essential requirement under the provisions which the respondent

employed against the appellant, I must begin by pointing out that neither the respondent in his submissions before the trial court; nor the trial court itself, were clear which amongst sections 70, 72 and 73 of **Criminal Procedure Act, Cap. 20** was actually relevant to the facts contained in the affidavit of ASP Mganga. It is important to set out that the cited sections 70, 72 and 73 which cater for very different and distinct circumstances fall under PART III of the **Criminal Procedure Act, Cap 20**. This Part III is designed to prevent potential commission of offences by for example; requiring the execution of bonds for keeping the peace and for good behaviour. In other words, Sections 70, 72 and 73 confer distinct and separate types of bonds.

Section 70 of **Criminal Procedure Act**, is concerned with execution of the bond for purposes related to prevention of the breach of the peace, and maintenance of public tranquillity. Section 72 is on the other hand concerned with execution of security bond for good behaviour from suspected persons whose presence within the local limits of the magistrate's jurisdiction pose potential dangers. On its part, section 73 covers the execution of bonds designed to contain habitual behaviours of

robbers, housebreakers, thieves, or even habitual receivers of stolen property. In my opinion, by the trial court merely making general references to sections 70, 72 and 73 cannot be said to have given the appellant specific opportunity to show cause.

It is clear from their distinctive nature of bonds they cater for; sections 70, 72 and 73 of **CPA** cannot be used interchangeably. An invitation to the appellant to show cause must be specific to the question whether it is about prevention of the breach of the peace, and maintenance of public tranquillity (governed by section 70 of CPA) or good behaviour from suspected persons (governed by section 72 of CPA) or specific to habitual behaviours of robbers, housebreakers, thieves, or even habitual receivers of stolen property (covered by section 73 of CPA).

Once a court settles on specific section, then it has to comply with all the requirements under the section concerned. For instance, section 70 envisages two essential steps before an Order to execute a bond with sureties for good behaviour can be issued by the court. The first step is where the magistrate is informed on oath that there is a likelihood of the breach of the

peace or public tranquillity if a bond is not executed against a named person. The trial magistrate must scrutinize the affidavit containing the oath and be satisfied from that oath that indeed a specified breach is likely to result if an order to execute a bond is not issued. The second step under section 70 is where now the Magistrate asks the named person to show cause as to why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for a specified period. At the hearing of an application where the appellant is required to show cause, the appellant is supposed to be given a chance to show that he does not pose danger alluded to in the affidavit. Appellant must have been given a chance to defend himself if the trial court had satisfied itself that the affidavit in support of the application had made a *prima facie* case sufficient to establish a danger which the appellant posed if not contradicted.

The record of proceedings of the district court do not show at what stage the learned trial magistrate specifically gave the appellant a chance to show cause. In my opinion, what is recorded on page 2 of the record of proceedings is the submission by Mr. Chuwa who was objecting the validity of the

affidavit. After overruling Mr. Chuwa's objection, the trial magistrate proceeded in a hurry to look into the credentials of sureties and went on to fix a date for his Ruling. Even if the trial magistrate had employed section 70 of CPA, appellant will still in my opinion have a reason to feel aggrieved that he was not given a chance to be heard. I hereby find and hold that the record of proceedings does not show the trial court giving the appellant any opportunity to show cause.

There is another defect which is apparent on the face of the record of the trial court. It is not clear for how long the bond which the trial court issued on 30 August 2010 shall remain in force. The duration of the bond issued for the purposes of section 70 is **for such period, not exceeding three years, as the magistrate deems fit**. The relevant section 70 of the **Criminal Procedure Act, Cap 20** provides,

70.-(1) Whenever a magistrate is informed on oath that any person is likely to commit a breach of the peace or to disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility, the magistrate may, in the manner provided in this Part, require that person to show cause why he should not be ordered to execute a bond,

*with or without sureties, for keeping the peace for such period, **not exceeding one year, as the magistrate deems fit.***-[Emphasis provided]

Even if the trial magistrate relied on section 70 of CPA, the Order of the trial court arising from that provision will still be defective for failing to indicate the duration of the executed bond.

Apart from the defects that I have mentioned above, the record of proceedings and ruling of the trial magistrate has not complied with the mandatory requirements illustrated under sections 74 and 75 of the **Criminal Procedure Act**. The order issued to the appellant failed to show (a) the substance of the information received; (b) the amount of the bond to be executed; (c) the term for which it is to be in force. The relevant section 74 of **CPA** provides,

74. *When a magistrate acting under sections 70, 71, 72 or 73 of this Act deems it necessary to require any person to show cause under such section, he shall make an order in writing setting forth—*

- (a) the substance of the information received;*
- (b) the amount of the bond to be executed;*
- (c) the term for which it is to be in force; and*

(d) the number, character and class of sureties, if any, required.

75. *If the person in respect of whom the order is made is present in court, it shall be read over to him or, if he so desires, the substance of it shall be explained to him.*

In my opinion, section 73 (a) of CPA is more relevant to facts sworn in the affidavit of ASP Mganga in as much as it is concerned with the execution of the bond to contain the activities of a habitual robber, housebreaker or thief. Like section 70, section 73 of **CPA** also envisages two basic steps. The first step is where the magistrate is informed on oath about the danger posed by habitual robber, housebreaker or thief. The second step is when the magistrate invites the target of the envisaged bond to show cause, why an order to execute a bond should not be issued against him. The duration of executed bond issued under section 73 of **CPA** is described as “**such period, not exceeding three years, as the magistrate deems fit.**” The relevant section 73 of **CPA** provides,

73. *Whenever a magistrate is informed on oath that any person within the local limits of his jurisdiction—*

(a) *is by habit a robber, housebreaker or thief;*

(b)...

(c)...

(d).....

*... the magistrate may, in the manner provided in this Part, require him to **show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the magistrate deems fit.***

Again, nowhere in the record of trial proceedings is it shown the appellant being given any chance to show cause. It was very much later in his ruling when the learned trial magistrate discovered that between section 70 and section 73 he had to apply section 73 of the CPA,

*"..After going through the law, **I was able to discover that, section 73 of CPA 2002 R.E.** provides the powers of magistrate to order the person to execute bonds not exceeding three years, and the law stipulate the offence which fall, on that executed bond not exceeding three years. And Armed Robbery is one of the offences mentioned by that section 73 of CPA 2002 R.E.....*

Application allowed..." [Page 3 of the Ruling].

There is yet another apparent error on the face of the Ruling of the learned trial magistrate. In my opinion, the phrase "**or his good behaviour for such period, not exceeding three years, as the magistrate deems fit**" in section 73 of CPA expected the trial court to specify the time when the executed bond will end. With only the maximum provided, section 73 expected the learned trial magistrate to exercise his judicial discretion and specify the duration of the bond.

With my foregoing finding, it will serve no utility for me to address myself to the remaining grounds of appeal. Appeal is allowed and the Ruling of the trial court is set aside.

It is ordered accordingly.



I.H. Juma
JUDGE
06-09-2011

Delivered in presence of Ms Mariam Haji (State Attorney) for the Respondent.



I.H. Juma
JUDGE
06-09-2011

