

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

CRIMINAL APPLICATION NO. 40520 OF 2023

(Arising from committal proceedings and resultant committal order dated 23rd October 2023 in Economic Case No. 38 of 2023 in the Resident Magistrate's Court of Dar es Salaam at Kisutu (Hon. A.H. Msumi, PRM))

FATUMA ALLY MGWAMI.....1ST APPLICANT

OMARY JUMA KHAMIS.....2ND APPLICANT

AHMED UBWA SAID.....3RD APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

Date of last order: 18th April 2024

Date of Ruling: 2nd May 2024

MTEMBWA, J.:

In **Economic Case No. 37 of 2020**, the Applicants herein were arraigned for committal order before the Resident Magistrate's Court of Dar es Salaam at Kisutu for the offence of Trafficking in Narcotic Drugs contrary to ***section 15(1)(a) and (3) (i) of the***

Drugs Control and Enforcement Act, Cap. 95 RE 2019 read together with the First Schedule to and ***Section 57(1) and 60(2) of the Economic and Organized Crimes Control Act, Cap 200, RE 2019***. It was established that, the Applicants, on 17th April 2020, at Dar es Salaam port area within Dar es Salaam Region, were trapped trafficking in narcotic drugs named Heroin weighing 2.02 Kilograms.

That, upon completion of the committal proceedings, the Applicants were committed to the High Court for trial in **Economic Crime Case No. 31 of 2023**. When the matter was placed before the High Court for hearing on **1st August 2023**, the learned State Attorney representing the Republic entered *Nolle Prosequi* under ***section 91(1) of the Criminal Procedure Act, Cap 20 RE 2022***. Consequently, the Applicants were discharged.

Two days later, that is, on **3rd August 2023**, the Applicants were again arraigned for committal order for the same offence in the same committal Court, this time registered as **Economic Case No. 38 of 2023**.

The Applicants were not pleased at all. As result, on 9th August 2023, they filed a notice of preliminary objection containing two

points of law, to wit, that, the fresh commencement of the committal proceedings in respect to the same charge and facts was an abuse of Court process and violation of ***article 59B(4) of the Constitution of the United Republic of Tanzania of 1977 as amended*** and ***section 8 of the National Prosecution Service Act, Cap 430 RE 2022***. In the second preliminary objection, the Applicants insisted that, the initiated committal proceedings was *res judicata* to the committal proceedings in Economic Case No. 37 of 2020.

Having analyzed the rival arguments by the parties, the learned Principal Resident Magistrate overruled the objections on ground that, the Court had no jurisdiction to entertain them. Having finalized committal proceedings, the learned Magistrate then proceeded to commit the Applicants for trial before the Corruption and Economic Crimes Division of the High Court.

Still undaunted to demonstrate their rights, the Applicants on 20th December 2023 filed this Application with the following prayers and I quote in verbatim;

(a) That, this Honourable Court be pleased to call for and examine the records of the Economic Case No. 38 of 2023 between the Republic and Fatuma Ally Mgwami, Omary Juma Khamis and

Ahmed Ubwa Said at the Resident Magistrate's court of Dar es Salaam at Kisutu for the purposes of satisfying itself as to the regularity of the committal proceedings commenced on the 3rd August 2023 and on 24th October 2023 re-committed the Applicants into this Court for trial of Trafficking in Narcotic Drugs offence alleged to have been committed on the 17th April 2020 at Dar es Salaam Port, the charge which is similar to the one the Applicants were charged and committed into this Court on the 11th November 2022 vide a committal proceedings registered as Economic Crime Case No. 37 of 2020, and

(b) That, this Honourable Court be pleased to call for and examine the records of the Economic Case No. 38 of 2023 between the Republic and Fatuma Ally Mgwami & 2 Others at the Resident Magistrate's court of Dar es Salaam at Kisutu for the purposes of satisfying itself as to the correctness and legality of the order issued on the 24th October 2023 re-committed the Applicants into this Court for trial of Trafficking in Narcotic Drugs offence alleged to have been committed on the 17th April 2020 at Dar es Salaam Port, the charge which is similar to the one the Applicants were charged and committed into this Court on the 11th November 2022 vide a committal proceedings registered as Economic Crime Case No. 37 of 2020.

(c) That the Honourable court be pleased to revise the order aforesaid and accordingly set it aside.

The Application was brought under **Sections 372(1) and 246(I) of the Criminal Procedure Act, Cap. 20 RE 2019 (now**

RE 2022), Section 8 of the National Prosecutions Service Act, Cap. 430 RE 2022, Rule 8(4) of the Economic and Organized Crime Control Act, Cap. 200 RE 2019, Article 59B of the Constitution of the United Republic of Tanzania and section 44(1) a of the Magistrate's Court Act, Cap 11. R.E 2019. The same was supported by an Affidavit affirmed by Mr. Mashaka Ngole, the learned counsel for the Applicants.

On 12th February 2024, this Court ordered arguing of the Application by way of Written Submissions. It could appear, only the Applicants complied to the order. When the matter came for Ruling on 25th March 2024, the Applicants were represented by **Mr. Masuna G. Kunju**, the learned counsel whereas the Republic was represented by **Mr. Erick Kamala**, the learned State Attorney. Mr. Kamala conceded to have been unable to file the submissions in reply and as such, he prayed for extension of time. Considering the circumstances, I granted the prayer. However, it could appear, as per the records, he unjustifiably chose not to comply with the order which I hereby condemn. More glaring, the Respondent did not even file a Counter

Affidavit to resist the Application. In the circumstances, I will determine the Application *ex parte*.

In the conduct of this Application, **Mr. Mashaka Ngole**, the learned counsel, argued for and on behalf of the Applicants. As said before, the Respondent chose not to reply to the Applicants' submissions.

Having prefaced on what transpired before the Resident Magistrate's Court of Dar es Salaam at Kisutu in Economic Case No. 37 of 2020 and Economic Case No. 38 of 2023, Mr. Ngole implored this Court to call for the records of the subordinate Court and investigate on the following issues; ***One***, whether the Committal Proceedings re-commenced at the subordinate Court on 3rd August 2023 and the resultant committal order issued thereof dated 24th October 2023 was legally proper or correct; ***Two***, whether the committal order issued on 24th October 2023 by the subordinate Court re-committing the Applicants to the High Court for trial was legally justified.

Mr. Ngole continued to expound that, the Applicants, having been so charged in Economic Case No. 37 of 2020 and committed to

the High Court for their trial, the discharge or discontinuation of the charges by entering *Nolle Prosequi* under **section 91(1) for the Criminal Procedure Act (Supra)** did not entitle the prosecution to recommence or resume committal proceedings for the second time on the same charge and facts. He added further that, even if the charges were discontinued by *nolle prosequi*, still the committal proceedings and the resultant committal order in Economic Case No. 37 of 2020 did not phase out from the records.

He contended further that, in his understanding, the order of the Court once issued by the court of competent jurisdiction, remains on records unless challenged and or set aside by a superior Court. As such therefore, the committal proceeding in Economic Case No. 37 of 2020 are still valid, operative and binding, Mr. Ngole added.

As to whether the committal proceedings in Economic Case No. 37 of 2020 were withdrawn, Mr. Ngole submitted that, what was withdrawn at the High Court was the information filed by the Republic. The committal proceedings remained intact. He added further that, the Honourable Judge of the High Court has no jurisdiction to withdraw the charges in the subordinate Court. He was

of the views that, the provisions of ***section 91 (1) of the criminal Procedure Act (supra)*** do not confer powers to the subordinate Court either to set aside the committal order or withdraw the charges previously filed.

To bolster his arguments, Mr. Ngole cited the case of ***Republic Vs. Jilala Mayanda Dutu & 2 others, Criminal Revision No. 2 of 2023, High Court of Morogoro*** where the Court made a reference to the case of ***Republic Vs. Median Boastice Mwalc & Others, Criminal Session No. 77 of 2017 /2018/ FZHC 2217***, where it was observed that, once criminal proceedings are discontinued and the accused is discharged by the reason of entry of *nolle prosequi* by the DPP, the committal order by the subordinate court does not phase out of the existence if everything remains constant. That, prosecution may initiate proceedings on the similar facts without commencing fresh committal proceedings.

Mr. Ngole also insisted that, the recommencement of the committal proceedings at the subordinate Court was in a serious violation of ***section 246(1) of the Criminal Procedure Act (supra), Section 8 of the National Prosecutions Service Act***

(supra), section 8(4) of the economic and Organized Crimes Control Act (supra) and Article 59B (4) of the Constitution of the United Republic of Tanzania (supra).

Having so cited, Mr. Ngole submitted that, an order recommitting the Applicants to the High Court for trial on the same charge creating the same offence was a violation of the cited laws and clear misuse of procedure for dispensing with justice. He opined lucidly that, the proper procedure in the circumstance was to file the information in the High Court and not to recommence the committal proceedings. He viewed this deportment as misuse of the Court process which should be discouraged.

On the second issue for determination, Mr. Ngole submitted that, the latest committal proceedings and subsequent committal order issued therefrom was an abuse of court process lagging behind *nolle prosequi*. He cited the case of ***Adjane Abubakari Vs. Republic, Criminal Application No. 40 of 2021*** where the Court of Appeal of Tanzania (Hon. Maine JA) observed at pages 7 and 8 of the type script of Judgement that, recommitting the Applicants through fresh committal proceedings on the same facts of the case

after *nolle prosequi* was irregular, incorrect and illegal. He recited the case of ***Republic Vs. Median Boastice Mwalc & Others (supra)***.

In the end, Mr. Ngole beseeched this Court to revise, quash and set aside the committal Proceedings and subsequent committal order dated 23rd October 2023 issued by the Resident Magistrate's Court of Dar es Salaam at Kisutu in **Economic Case No 38 of 2023**.

Indeed, from what I have gathered hereinabove, Mr. Ngole is not in dispute at all with regard to the DPP's powers to discontinue proceedings thereby discharging the accused by entering *Nolle Prosequi* in terms of **section 91(1) of the Criminal Procedure Act (Supra)**. Equally, he is not disputing either the DPP's powers to resume or initiate the subsequent proceedings against the accused on account of the same charge and facts. What seems to be an issue to him is whether the DPP, having entered *nolle prosequi*, is legally justified to recommence committal proceedings if at all everything remains constant. That is where the entire Application rests.

Confronting the issue before me, I find it opt to inquire into what amounts to "Committal Proceedings". Indeed, Committal Proceedings are court hearings held in the Magistrates' Courts to

decide whether there is sufficient evidence against an accused person charged with a serious criminal offence to order them to face trial in a higher court. It plays a historic role in ensuring that an accused is not sent to trial if there is insufficient evidence against him or her. The purposes of the Committal proceedings can be traced from the case of ***Republic Vs. Mussa Ramadhani Magae, Economic Case No. 12 of 2019. High Court, Corruption and Economic Crimes Division at Dar es Salaam*** where it was observed that;

The purpose of filing information letter and committal proceedings is intended to ensure that accused person becomes conversant with the charge (s) against him, the intended witnesses, documentary, and physical exhibits which the prosecution intends to rely on to prove their case against the accused in relation to the charges against him. Committal proceedings serve the purpose that the accused person is not taken by surprise to any facts in respect of the case against him... it enables the accused person to prepare and present his defense and for the issues in dispute to be clearly defined.

The purpose of Committal Proceedings was also stressed by Mr. Justice J.A. Lee of New South Wales Supreme Court in his paper titled **'In Defence of the Committal for Trial'** presented at the 2nd International Law Conference in June, 1988 (as cited in the case of

Zephrine Galeba Vs. Hon. Attorney General, Miscellaneous Civil Application No. 21 of 2013, High Court Main Registry at Dar es Salaam). In his paper he identified two main functions of Committal Proceedings: **first**, to ensure that the accused is not put on trial unless there is either a probability of conviction, that is, existence of a “prima facie case”; and **second**, to appraise and ensure that the accused is fully informed and detailed of the case that has been brought against him. In that paper, Justice Lee added that:-

..... Speaking of myself, I cannot feel other than that the preliminary investigation provided by committal is a protection to an accused against wrongful prosecution of the same order as is the requirement at the trial that the charge against him be proved beyond reasonable doubt. Putting altogether to one side, the advantages which the accused himself may gain from the committal for use by him in the subsequent trial, there remain the fundamental feature that the committal ensures that a person is not put on trial unless it has been shown publicly that there is a prima facie case against him.

I am also of the same settled mind that, Committal Proceedings in capital offences serve a meaningful purpose in the dispensation and or administration of criminal justice, from the role they play to both the accused on one part, and the complainant and the Republic (the

general public) on the other. It suffices here to note that, a well conducted Committal proceedings relieves the accused of unexpected evidence during trial and enables him or her to prepare his or her defense. At this juncture, I will not delve to discuss as to whether Committal Proceeding in one way or another, is an impediment towards fair trial (for reference you may wish to read an article titled **Committal Proceedings and the Constitutional right to fair trial in Tanzania – mainland** authored by Aloyce Rugazia, published in Tanzania Lawyers (a Tanganyika Law Society's publication), Vol. 1 of 2017 No. 2).

There has been a debate on whether committal proceedings is necessary. The academicians, researchers, law reformers and or law enforcers have never been at one point in time at per. Some have been stressing to ensure that the magistrates have full powers to control committal proceedings including to grant bail and where necessary dismiss the charge where no sufficient evidences are placed before them during committal. Powers also to refuse to commit the accused person to the High Court if no prima facie case is established (see also ***Zephrine Galeba Vs. Hon. Attorney General (supra)***).

For purposes of this matter, I will not drag myself into such discussion.

The Economic and Organized Crime Contral Act (supra) (hereinafter "the Act") allows the applicability of ***the Criminal Procedure Act (supra)*** (hereinafter "the CPA") to offences triable by the Corruption and Economic Crimes Division of the High Court (hereinafter "the High Court") in respect to the investigation of all economic offences triable by it subject to some conditions as the case may be (see section 20(1) of the Act). Section 30 (1) of the Act mandates the subordinate Courts to conduct committal proceedings and have the accused committed to the High Court for trial. It provides that;

Upon receipt of the copy of the information and the notice, the district court shall summon the accused person from remand prison or, if not yet arrested order his arrest and appearance before it, deliver to him, or to his counsel a copy of the information and notice of trial delivered to it under section 29(8), and commit him for trial by the Court; and the committal order shall be sufficient authority for the person in charge of the remand prison concerned to remove the accused person

from prison on the specified date and to facilitate his appearance before the Court.

In furtherance of the above provisions of the law, the Honourable Chief Justice (retired) issued ***the Economic and Organized Crime Control Rules, GN No. 267 of 2016*** (hereinafter “the Rules”). According to rule 7 thereof, the Registrar upon receipt of the information, within seven days, shall forward the same to the District or Resident Magistrate’s Court for committing the accused for trial to the High Court. In view of rule 8 of the Rules, upon receipt of the information, the District or Resident Magistrate’s Court shall cause appearance of the accused person before it within fourteen days.

Having addressed the accused in terms of rule 8 (3) of the Rules and having conducted committal proceedings in terms of CPA, the learned Magistrate then is mandated to commit the accused to the High Court for trial in terms of rule 8 (4) thereof. The accused then is entitled to a copy of the committal proceedings which include, the information and statement of the evidence produced before the committing Court.

In terms of rule 10(1) of the Rules, having committed the accused person to the High Court, the learned magistrate then is obliged to dispatch the records together with information and committal proceedings to the Registrar of the High Court within thirty days. The Registrar is dictated to have the DPP informed. It is from then the committal proceedings is said to have been completed.

From what I have tried to endeavor hereinabove, under the Act, criminal proceedings are initiated by filing an information before the High Court depending on the nature of the offence. The information so filed is then transmitted to the District or Resident Magistrate's Court to conduct committal proceedings. Having conducted the committal proceedings, the committal Court is required to commit the accused to the High Court for his or her trial. The committal Court then is mandated to transmit the records (which include the original information filed and committal proceedings) to the High Court for trial. That what the law requires.

From the above, it is evident that, having transmitted the records to the High Court, the District or Resident magistrate's Court remains with nothing to hold, not even a single paper from the

committal proceedings can be traced. What is transmitted to the High Court is a bundle or full package of the records for trial. At this point I am of the settled mind that, the information originally filed in the High Court is useless unless committal proceedings are in place. Equally, within the ambit of the law, there can be no committal proceedings unless the information filed in the High Court is transmitted to the subordinate Court.

In my conviction therefore, the discontinuation of the criminal proceedings by entering *nolle prosequi* under **section 91 (1) of the Criminal Procedure Act** renders the information together with committal proceedings inoperative. I say this because there can be no information capable of being discontinued by the DPP if no committal proceedings conducted by the subordinate Court and transmitted to the High Court. With deepest respect I distance myself with Mr. Ngole's assertion that the discontinuation of the criminal proceedings by entering *nolle prosequi* or otherwise has an effect of preserving the previous committal proceedings. I find no substance on this considering the cited law above.

From the above therefore, it needs no interpolations that, once the criminal proceedings are terminated under the Act, the committal proceedings become inoperative and can not be used as a substitute to the subsequent proceedings on the same charges and facts. It follows therefore that, the committal proceedings in **Economic Case No. 37 of 2020** have nothing to do with committal proceedings in respect to **Economic Case No. 38 of 2023**. I don't see if there was impropriety. It might be an area which need reformation by amendment, but for the time being I cannot hold otherwise.

In the same footing, I hold the views that, committal proceedings in respect to **Economic Case No. 38 of 2023** in the Resident Magistrate's Court of Dar es Salaam at Kisutu is not *res judicata* to committal proceedings in **Economic Case No. 37 of 2020**. Equally, I don't see if there was any misuse of court process.

Mr. Ngole insisted that, the committal proceedings in respect to Economic Case No. 37 of 2020 could suffice to recommence proceedings in the High Court without necessarily embarking to recommence fresh committal proceedings in Economic Case No. 38 of 2023. I asked myself whether Mr. Ngole's assertion was correct.

Committal proceedings do not only intend to inform the accused of the charge (s) he or she is facing but also the substance of the prosecution evidence intended to be used at the trial. In such circumstances, there can be situations where prosecution may opt to add new evidences or drop some in the subsequent case. To hold Mr. Ngole's assertion as a point of law would mean preempting the prosecution and that would dent the principle of separation of powers.

Dispassionately, I went through the cited case of ***Adjane Abubakar (supra)*** only to note that the same was cited out of context. In that case, the point for determination was *inter alia* whether it was legally justifiable to recommence committal proceedings after rearresting the accused in the circumstances where there was an order of retrial by the Court of Appeal of Tanzania The Court observed that, it was improper. In the instant case, there was no order of retrial. The case of ***Republic Vs. Median Boastice Mwale (Supra)*** that was cited to me by the learned counsel, with deep respect, has not persuade me at all and I will deter to discuss it any further. I am therefore not prepared to fall into the same footing, although reluctantly.

While down to the end and by way of passing, I would like to cherish on the import and dictate of ***section 91(3) of Criminal Procedure Act (supra)***. For easy refence I will reproduce it;

Where the accused person is discharged under subsection (1) he shall not be rearrested and charged on the same facts unless there is sufficient evidence and that the hearing proceedings shall commence on his first appearance before the court.

The clear and unambiguous interpretation of the cited provision of the law, *inter alia*, is that, having been discharged by entering *nolle prosequi*, the accused should not be rearrested on the same facts unless there is sufficient evidence and in that circumstance, hearing proceedings should commence on his or her first appearance before the Court. The words **“hearing proceedings shall commence on his first appearance before the Court”** were not made in vain. They were intended to protect the accused from being rearrested for the same offence while the investigation is still incomplete. The intention of the legislature in my considered views was to protect the

liberty of the accused and condemn the misuse of court process by the Republic, if any.

It is on records that, on 3rd August 2023, having been rearrested, the Applicants appeared before the learned Magistrate for committal trial. To the surprise of the most, the learned state attorney was not ready on the pretext that investigation was not complete. Consequently, the matter was adjourned to 17th August 2023. Even after the pronouncement of the Ruling on the preliminary objection on 14th September 2023 still, the matter kept to be adjourned to 29th September 2023, 3rd October 2023, 4th October 2023, 9th October 2023, 17th October 2023 and lastly 23rd October 2023.

In my considered opinion, that was improper considering the import of the cited section. For future guidance therefore, subordinate Courts entrusted with the duty to hold committal proceedings, are enjoined to uphold and cherish the dictate of the cited section. Otherwise, the amendment would be a futile of decade. However, such impropriety, cannot be a base of setting aside the committal proceedings in the circumstance of this case.

In the upshot, the Application is refused. The committal proceedings and the resultant committal order dated 23rd October 2023 in respect of **Economic Case No. 38 of 2023** in the Resident Magistrate's Court of Dar es Salaam at Kisutu are hereby sustained. I order that, the records of committal proceedings be remitted to the Corruption and Economic Crimes Division of the High Court at Dar es Salaam where the Applicants were committed to for trial.

I order accordingly.

Right of appeal fully explained.

DATED at DAR ES SALAAM this 2nd May 2024.



**H.S. MTEMBWA
JUDGE**