

TANZANIA / JUDGMENT

20140303 TZHC Sumbawanga

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"I" ____J:!..-- . . . -----c- IN. - THE . HIGH . COURT I .- OF ., - TANZANIA .. -... . • AT SUMBAWANGA,... . •• I I I CRIMINAL JURISDICTON . CRIMINAL SESSIONS 'CASE NO. S OF 2009 i I i THE REPUBLIC I VERSUS· NEVY MGALAI& ANOTHER 25 th February & 3rd March, 2014

RULING

MWAMBEGELE, J.: On 04.03.2009, information for manslaughter was filed in this court against Nevy Mgala and Shimiton Shega i,t being alleged that the duo did

- : ! ' I unlawfully kill one George Marekani on 02.08.2008 at Muie Villlage within ·i , I I the Sumbawanga District of Rukwa Region. On 09.09.,2010 Shimiton was granted bail by this court. Nevy ha6 also applied fof bail but when his I I I ., • application came up for hearing, he dad passed away. , When this matter came up for he~ring on 21.11.2013 both Nevy and I :. Shimiton did not enter appearance. :Neither did Shimiton(s sureties. The . court was informed that Nevy _Mgala was no more.I The proceedings against him therefore abated under the provisions of ~ection 284A of the Criminal Procedure Act, Cap. 20 of t_he Revised Edition, 2002 (henceforth "the CPA"). When this case was, once again, called on for hearing on 17.02.2014, Shimiton (for the sake of easiness of reference, I shall hereinafter refer to him as "the accused" but for sure he is not as his case was withdrawn by a no/le proseqw) did not appear. Again, neither did his sureties. The Republic, having realised the accused had jumped bail, entered a no/le prosequi under the provisions of section 91 (1) of the CPA. However, Mr. Hyera, the learned State Attorney who appeared for the Republic, was quick to pray for warrants of arrest to issue against the accused person and his sureties. A no/le prosequi having been entered under section 91
- (1) of the CPA, the court accordingly marked _the case withdrawn and ordered the arrest warrants to issue to the accused person and his sureties. Consequent upon that order, at different times, the accused and his sureties were arrested. The accused person and one of his sureties; Saston Shega, were brought before me on 24 & 25.02.2014 to show cause why their bonds should not be forfeited in favour of the Government. Mr. Hyera, the learned State Attorney who appeared for the Republic o_n those dates was of the view that the accused person and his surety should be held responsible for breaching the bail bond conditions. When asked as to why he did not enter appearance when his case was being called on for hearing on several occasions, the accused person said he was all along not

aware of his case being fixed for hearing and that in January this year he travelled to Lupatingatinga in Chunya District of Mbeya Region to work as a casual labourer expecting that his sureties would inform him when his case would be fixed for hearing. Likewise, the surety; the said Saston Shega, stated that he was not aware that the case was being fixed for hearing as he expected another surety who lived in Sumbawanga Municipality to inform them. This issue has caused me some anxiety. I have given my anxious consideration to the submissions of the learned State Attorney and the submissions of the accused person and his surety. The learned State Attorney is of the view that the accused person and his sureties should be held responsible for the bail bonds they executed. And on the other hand, the accused person and his surety, ostensibly, are prepared to be such liable in the line of the learned State Attorney's proposition. I, for one, I much as I am aware of the provisions relating to bail, recognisances and bonds under Part V (e) of the CPA which, with the help of case law in this jurisdiction, I have dispassionately read and understood, the question which has occupied my mind ever since the accused person Shimiton Shega and his surety Saston Shega who, ostensibly, is the accused person's brother, were brought before me, is whether or not the provisions under this part; that is Part V (e) of the CPA, can be applicable in situations where a person who was granted and jumped bail is found, and more especially in a situation where the Director of Public Prosecutions (henceforth "the DPP") has entered a *no/le* *prosequi* under section 91 (1) of the CPA in his favour. As bad luck would have it, there is a dearth of decided cases in this jurisdiction on this point, or rather, I have not been able to lay my hands on any case law in this jurisdiction on this point. Most of the authorities I have come across during my research on this point dealt with situations where an accused person had jumped bail and the provisions of Part V (e) respecting bail, recognisances and bonds were brought into play while the case still existed. There is a string of them. In the case at hand the case is nonexistent as it was terminated by a *no/le* *prosequi* entered by the DPP. It is a peculiar situation. However, logic has prompted me to hold that once a *no/le* *prosequi* is entered by the DPP, an accused person is set free and therefore the duty of the surety to bring him to court which is the subject of the bail bond executed by the surety, diminishes. Likewise, on signing the bond, the surety, *inter alia*, enters into an agreement with the court that he will make sure the accused person is available whenever required by the court. Upon these premises, once, by whatever lawful reason or reasons, the accused is not required to attend the court, the duty of the surety to make sure the accused is brought before the court ends there and therefore, like the accused, becomes discharged of the bail bond liability. I shall demonstrate. Let me, firstly, start with the effect of a *no/le* *prosequi* entered in favour of the accused person who was out on, and had jumped, bail. A *no/le* *prosequi* once entered, simply denotes the Republic is no longer interested to pursue the case against an accused person. It has the effect of discharging the accused person not only of the charges leveled against him but also, if on bail, on the bond conditions he signed upon his being granted bail. This seems to be a situation envisaged by the provisions of section 91 (1) of the CPA under which a *no/le* *prosequi* is entered. For easy reference, let me reproduce it hereunder:

4 r... -- -- "In any criminal case and at any stage thereof before verdict or judgment, as the

case may ~e, the Director of Public Prosecutions may enter a no/le proseqw; either by stating in court or by informing the court concerned in writing on behalf of the Republic that the proceedings shall not continue; and thereupon the accused shall at once be discharged in respect of the charge for which the no/le prosequi is entered, and. if he has been committed to prison shall be released, or if on bail his recognisances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts." [Emphasis supplied]. As can be gleaned from the foregoing quoted provision, once a no/le prosequi is entered in favour of an accused person, if in prison, he must forthwith be released, and if on bail, like in the present case, the recognisances thereof must mandatorily be discharged. The discharge of an accused person, so this section provides, does not operate as a bar to his being further prosecuted basing on the same set of facts once the Republic finds it imperative so to do. Iri the case . at hand, . the appellant . 5 .. was on . bail.... Therefore, when the DPP entered a no/le prosequi on 17.02.2014 in his favour, he was dis~harged and his recognisances were as well disch~rged accordingly. What about the surety? This is the question to which I now turn. I have already observed above that the surety's duty is essentially to produce an accused person released on bail all the time he is required by the court to do so. Once the duty of the accused person to attend court ceases, the duty of the surety also comes to an end. In the instant case, the surety signed the following bond: "Bond and Bail Bond After Arrest Criminal Form No. 14 (Approved by Under Warrant (S.112 Cr. P.C.) the High Court Under Section 352 of One surety. The Criminal Procedure Code) THE UNITED REPUBLIC OF TANZANIA IN THE HIGH COURT OF TANZANIA AT SUMBAWANGA MISC. CRIMINAL APPLICATION NO.12 OF 2010 THE REPUBLIC VERSUS SHIMITON SHEGA (To be filled in by Surety) I, SASTON; MWENIWANDA SHEGA of IKONYA VILLAGE KATA YA ITAKA 10/10 STAZIA MWAMENGO do hereby declare myself surety for the above named accused SHIMITON SHEGA that he/she shall attend at the High Court of Tanzania Court of Tanzania at Sumbawanga on the day of..... 20 at a.m. to answer to the charge on which he/she has been arrested, and shall continue so to attend until otherwise directed by the Court and in case of his/her making default therein. I hereby bind myself to forfeit to the Republic the sum of shs.10,000,000/= Ten million shillings. 6 ~ ~ .~ " ~ ~ ~ \J,- r•~-,.. ,t.->1'"-i'. r,,.,, ,,,"~ :,":*,~<:.. <' : , -:: . :~; ;~-:,~. • :~ • • ., '~ • ~ " ... '>; ;~ ~- 0\$1 • ,. ~. , , ... _., -_~_ • "' ' , !:~ __ .. ', . ~ ~""~.of::~ - . , , :\.>~'f•,.,, .. ,

~ ,~ . . , w• ,,,;, ~ ~ " . .. ::t- ~ , f't~ . ~ , ~ r. Dated this 9th day of September, 2010. WITNESS: SGD: SASTON M. SHEGA ' Sgd: (Court Clerk) (Signature of Surety) 0757659666" As can be deciphered from the bail bond, the surety bound himself to bring the accused person in court to continue to attend his case until otherwise directed by the Court. In case of defa'ult, the surety bound himself to , I forfeit to the Republic the sum of Tshs. 10,000,000/=. After the DPP entered no/le prosequi in favour of the a~cused person it connoted that the ' Republic was no longer interested in prosecuting him. His appearance before the court was therefore no longer necessary. In the same token, I the surety's duty to bring the accused p'erson to

court was also no longer necessary. His bond therefore automatically discharged after the no/le prosecui. In this jurisdiction case law on this point is scarce. So is the case in the i Commonwealth jurisdictions on which material I could lay my hands on. I But other jurisdictions are rich of case law on this point and I do not find it I offending to borrow a leaf from. Jasoh D. Katz, in his work titled When i Does a Discharge of a Bail Bond Discharge the Surety? [cited as: I I Jason D. Katz, "When Does a Disch~rge of a Bail Bond Discharge the I • Surety?" (October 14, 2003). bepress/ Legal Series. bepress Legal Series. I Working Paper 92. Available at <http://law.bepress.com/expresso/eps/92>] has written about the American I Florida State experience. In Chapte_r VIII of his work subtitled When Does a Discharge Actually Discha~ge the Surety's Liability he states 7 one of the situations where a surety is discharged from liability. One of the situations is when the State/Republic enters no/le prosecui in favour of 1 the accused person. Referring to an American case of Allied Fidelity Insurance Co. Vs State, 40s So. 2d 756 (Fla. Dist. Ct. App. 1982), he states: "A bond will be cancelled when it is no longer necessary to look to the surety to guarantee the appearance of the accused at subsequent court proceedings. This situation may occur if the State drops the criminal charges against the defendant [accused], through either a 'no action' or a 'nolle prosecui'" [Emphasis mine]. The learned author (profile available at <http://www.martindale.com/Jason-D-Katz/4974621-lawyer.htm>) goes on: "Allied Fidelity Insurance Co. v. State held that if the state brings a 'no action,' the accused is released, and the surety is also released from liability of the bond. Even if the charges are filed in the future, the bond has been "discharged, 8 and the surety is not/ responsible for producing the defendan~ [accused]." [Emphasis supplied]. I The Allied Fidelity Insurance case wat followed with approval in State ~ of Florida Vs Jorge O/iv(J caJe No. 94,097 (available at • www.floridasupremecourt.org/.. /briefs/oLt/94097a.pdf) in which it was I held as follows: I "When the State discontinues prosecution, a I defendant [in our cas¢ the accused] is ' released from the jurisdiction of, and any obligation to, the court". ! In the United States, especially the Fldrida State under reference, like in Commonwealth jurisdictions of which tJe United States is not part, a no/le I prosecui is entered when the State or/ Republic is no longer interested in prosecuting the accused person. It is qbvious therefore that the position is i in pari materia with ours under sectionr 91 (1) of the CPA. I am therefore satisfied that in Tanzania, the A~erican cases of Allied Fidelity Insurance and Jorge Olivo decided ~Y the Supreme Court of Florida are ' of high persuasive authority. i I At this juncture, let me recapitulate: i~ Tanzania, when an accused person is granted bail on a bond signed by hitn and his surety, the accused person

- - • II • • 9' on bail and his surety are bound by the bail bond conditions in the bail bonds they executed. Once the DPP enters a no/le prosecui in the accused person's favour, both the accused person and his surety are discharged. That is to say, both the accused person and his surety are released from liability of the bonds. Even if the charges are filed in the future, the bonds have been discharged, and the surety is not responsible for producing the accused person. That is to say, the Republic will not have any recourse against the surety in respect of the bond previously executed, for it will be no longer necessary to look to the surety to

guarantee the appearance of the accused at subsequent court proceedings after a no/le prosequi is entered. As for the accused person who, having been discharged under the provisions of section 91 (1) of the CPA, can be re- prosecuted basing on the same set of facts. I wish to state here by way of postscript that the Republic has brought us into the present predicament. Much as the powers to enter no/le prosequi are the province of the DPP which the court cannot question, it is not clear to me why in this case the no/le prosequi was entered in the first place and subsequently the person who entered the no/le prosequi prayed for arrest warrants of the accused person and his sureties. The purpose for which the no/le prosequi was entered has all along remained to me blurred. In my considered view, the proper course to take would, in the circumstances, have been to pray for warrants of arrest to issue to the accused person and his sureties without entering a no/le prosequi. That would have made the way forward simpler as, once arrested, the accused person's bail could have been cancelled and the court could have accordingly proceeded to deal with their recognisances. That would make appropriate application of the provisions under Part V (e) of the CPA relating to bail, recognisances and bonds against the accused person and his sureties. Having carefully considered the issue before me, and in the light of what I have endeavoured to state hereinabove, regrettably, I am unable to persuade myself that an accused person who was out on bail and in whose favour a no/le "f)rosequi was entered by the DPP, is still bound by the bail bond he executed. Neither have I persuaded myself that the surety who bailed him out can be bound by the bail bond conditions after the DPP entered the no/le prosequi. The appropriate course to be taken by the Republic, in my very well considered view, is to leave the surety Saston Shega free and re-file information against the accused person Shimiton Shega, if it so wishes; a process which, so the learned State Attorney intimated to the court, has been instigated. DATED at SUMBAWANGA this 3rd day of March, 2014. J. C. M. MWAMBEGELE JUDGE 11

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