

TANZANIA / JUDGMENT

Criminal Session Case 7793 of 2024 Ruling MrishaJ

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1 January 2024

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IN THE HIGH COURT OF TANZANIA (SUMBAWANGA DISTRICT REGISTRY) AT SUMBAWANGA
CRIMINAL SESSION CASE NO. 7793 OF 2024 (Originated from P.I No. 30 of 2023 before the
RMs'Ourrt of Sumbawanga) REPUBLIC VERSUS FRANK LEO SIMFUKWE
@MANOTI..... 1st ACCUSED NIKAS DOMINICK LUNGUYA @KAMONGO..... 2nd
ACCUSED EDFONSI MAFUNDA SIMSOKWE..... 3rd ACCUSED

RULING

28t March & 4t April, 2025 MRISHA, J. The present ruling emanates from the objection raised by defence counsel for the 1st, 2nd and 3rd accused persons on 24.03.2025; when the case was coming for further prosecution hearing. It appeared that before hearing could take off, Mr. Kurwa Ezlon Ngunga, learned advocate for the second accused person raised an objection on point of law that the accused persons were not supplied with dock briefs which containing committal proceedings contrary to section 249 (1) of the Criminal Procedure Act [Cap 20 R.E 2022] henceforth the CPA. 1 He submitted it is a trite law that the accused persons were required to be supplied with copies of committal proceedings without any payment before hearing of the prosecution case. He also argued that the said provision is coached in mandatory terms. He further argued that, it is a position of the law that the issue on point of law can be raised at any time even during hearing of the case. To bolster his position, the counsel referred the Court to the case of Simon Josephat v. Dar es salaam Sewage Corporation, Civil Appeal No.441 of 2021, CAT Dar es Salaam (Tanzlii) at page 9. Despite that, the learned advocate argued that on 07th March, 2025 he raised that issue of records whereby the Court adjourned the case and conducted an inquiry to find out if the accused were supplied with those documents. That through that inquiry, it was proved that the accused persons were not supplied with those records. However, he continued, the accused persons came to be supplied with the said documents on 12th March, 2025. Hence, it was his submission that the hearing was conducted without the accused being supplied with those documents and prosecution produced five witnesses. Again, he stated that the objectives of the provisions of section 249 (1) of the CPA is for the accused persons to prepare for their defence case and insured a fair hearing; to support that position, he cited the case of Fatuma Ally 2 Mgwari v. Republic, Criminal Application No.40520 of 2023 HCT at Dar es salaam. Based on the foregoing submissions and authorities, the learned counsel argued that failure to

comply with those provisions of section 249 (1) of the CPA, vitiates the whole proceedings from plea taking and preliminary hearing and also the hearing of all prosecution witnesses. Due to the above submission and reasons, the counsel for 1st and 3rd accused persons joined hands with their fellow defence counsel to implore me to set aside/ upend the proceedings of the case at hand and regulate the practice of this court in the exercise of its criminal jurisdiction. In reply, the counsel representing the prosecution Republic submitted that all objections from defence side are unmerited. In amplifying more, she began by arguing that the main stakeholder to perform the duty under section 249

- (1) of CPA is the Judiciary. The committal proceedings were closed on 7th June, 2024 before committal Court and section 249 (1) of the CPA was explained to the accused persons; and accused persons were given right to be represented and they chose to be represented by the counsel which is a legal right prescribed under section of 310 of the CPA. She further added that, once the accused person is represented by an advocate, any service must be made to him and once accused person's advocate has acknowledged the service of the document, that is equal to the 3 service made to the accused person, as it was stated in the case of Francis Itegeja v. Kampuni ya Kusindika Mbegu za Mafuta [1997] T.L.R 148. Moreover, the learned State Attorney denied the argument raised by the learned defence counsel that failure to comply with section 249 (1) of the CPA violates the right of the accused persons. She urged that, on 12th July, 2024 when the matter was scheduled for plea taking and preliminary hearing, the accused persons were represented by Mr. Charles Kasuku and Mr. Deogratius Sanga both learned advocates, but none of them raised the issue of not been supplied with dock brief. Furthermore, she submitted that on 4th March, 2025 when the case was scheduled for trial, the accused persons were represented and pleaded not guilty and trial was commenced whereby the prosecution side brought five witnesses to prove the case and their advocates got an opportunity to cross examine those prosecution witnesses. Not only that, but also the learned State Attorney contended that the presence of an advocate in Court to represent them, indicated that the said accused persons were supplied with dock briefs which proves that section 249(1) of the CPA was complied with. She further distinguished the case of Fatuma Ally Mgwari and Simon Joseph (supra). Thus, she urged this Court to find that the provisions of section 249 (1) of the CPA were complied with and, the accused persons intend to delay the case. 4 Rejoining, the counsel for the 2nd accused just reiterated what he submitted previously in relation to the objection raised. He further agreed with the prosecution submission that all accused persons were represented by advocates, he also agreed that the accused persons were represented by two advocates during plea taking and preliminary hearing. Regarding provisions of section 249 (1) of the CPC requires the records to be served to the accused and not their advocates. He further argued that service of dock briefs to the advocates does not mean the accused persons were served the dock brief. Before determining the merits or otherwise of the raised objection, I would like to commend the counsel for both parties for their good research and submissions which will help my work of determining the objection raised. Having said so, let me deal with the objection raised by counsel for defence, it has been argued that failure to supply

records for committal proceedings to the accused persons contravenes the provisions of section 249 (1) of the CPA which provides for the mandatory requirement for the committing Magistrate to furnish records to the accused, free of charge. On my part, I agree with the counsel for the accused persons that “a person who has been committed for trial before the High Court” shall be entitled to have a copy of the committal proceedings free of charge and shall be informed of this right at the time of being committed to the High Court for trial. In view of the above, I am settled in my mind that a purpose construction of Section 249 (1) of the CPA makes it clear that the spirit behind the law is to give chances for the accused persons to be able to know the charge brought against him and the material/evidence by which the charge is going to be substantiated by the prosecution. It is therefore, the duty of the committing Magistrate to furnish to the accused without delay and free of cost the copy of dock brief. In present case, it is on record that when the objection was raised on 07.03.2025, this Court adjourned the matter and conducted inquiry. Through that inquiry this Court noticed that the accused persons were not supplied with those records. Whereas, on 12.03.2025 the said documents were supplied to them that means, the documents were supplied after commencement of the hearing and the prosecution Republic brought almost five witnesses to prove the case beyond reasonable doubt which is contrary to the provisions and spirit of section 249 (1) of the CPA. Regarding the argument that the accused persons were represented during preliminary hearing and the main trial, and that that when the prosecution witnesses testified in Court, the learned defence counsel were given a right to cross examined those witnesses. 6 In my view, those arguments do not hold water because the provisions of section 249 (1) of the CPA requires the committing magistrate to avail the accused person with all documents intended to be used by the prosecution side during trial immediately before committing the accused to the High Court for trial. However, that was not done by the committing court which is why the accused have complained to have not been served with those documents. More so, even though it has not been disputed that the said accused persons were represented by the learned advocates, that does not legalize the none supply of those documents to each and every accused person. I am aware that the procedure in trials before the High Court is regulated under Part VIII of the CPA which prescribes the practice and mode of trial. It is not in dispute that section 264 of the CPA mandates this Court to regulate its own practice in the exercise of Criminal Jurisdiction, having stipulated as follows: - “The High Court may, subject to the provisions of this Act and any other written laws, regulate its own practice in the exercise of its Criminaljurisdiction. ”” The mandate of the High Court in exercising discretion in Criminal Jurisdiction is subject to not only to other provisions of the CPA, but also embraces other written laws which means that Section 264 of the CPA is not a stand-alone provision. The words used in the provision of Section 264 of CPA, embrace 7 the provisions of section 249 of the CPA according to which, in the event of non supply of the materials (a dock brief) mentioned under section 249 (1) of the CPA by the Magistrate which are to be relied upon by the prosecution, is a ground that can be successfully used for setting aside a conviction, had that complaint been raised at the appellate stage. (See: Gayadhar v. State of Orissa, 1985 Cr LJ NOC108 (Or); also available at pg. 447 of THE CODE OF CRIMINAL PROCEDURE, 21s Edition

(2013) by B.M. Prasad & Manish Mohan) However, since the complained omission was raised during trial to the extent of vitiating the whole proceedings from the stage of plea taking to the trial which involved recording of five prosecution witnesses, I am of the view that the proper approach to regulate the practice of this court, is to dismiss the charge and discharge the accused persons so that the Director of Public Prosecutions, if so wishes, can proceed against the accused persons after ensuring that all the procedural requirements have been met. Therefore, owing to the reasons I have just assigned hereinabove, I hereby dismiss the charge and discharge the accused persons. Order accordingly. A.A. MRISHA JUDGE
04.04.2025 DATED at SUMBAWANGA this 4th day of April, 2025. 8 A.A. MRISHA JUDGE
04.04.2025 9

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Prepared on 14 October 2026 · Esheria