

TANZANIA / JUDGMENT

adjane abubakar vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM (CORAM: MKUYE. J.A., MAIGE, 3.A. And MAKUNU. J.A.) CRIMINAL APPLICATION NO. 40 OF 2021 ADJANE ABUBAKARAPPLICANT VERSUS THE REPUBLICRESPONDENT (Application for revision against the order of the High Court of Tanzania at Dar es Salaam) (Mgonya, J.) dated the 30th day of August, 2021 in Criminal Sessions Case No. 14 of 2015 RULING OF THE COURT 18TK& 26th July, 2023 MAIGE. J.A.: At the High Court of Tanzania at Dar Es Salaam (the High Court), the applicant together with four other persons not parties in this application, were initially charged, in Economic Criminal Sessions Case No. 5 of 2012, with two counts, namely; conspiracy to commit an offence contrary to section 22(a) of the Drugs and Prevention of Illicit Trafficking in Drugs Act; and trafficking in narcotic drugs contrary to section 16 (1) (b) of the same Act. Upon entry of nolle prosequi by the Director of Public Prosecutions (the DPP), the applicant and the said persons were discharged under section 91(1) of the Criminal Procedure Act (the CPA). Soon thereafter, they were rearrested; and, upon a fresh preliminary inquiry being conducted at the Resident Magistrate Court of Dar Es Salaam at Kisumu (the committal court) vide PI No. 22 of 2015, they were committed to the High Court for a trial vide Criminal Session No. 14 of 2014. In the course of the trial, it would appear, the charge against three of the accused persons was withdrawn and the trial proceeded against the applicant and a person called Diaka Brama Kaba. In the final result, the two were convicted and sentenced to 22 years imprisonment each and in addition, to pay a fine of Tanzania Shillings 3,705,090,000/=. On appeal, the Court nullified the proceedings of the High Court and quashed the conviction and sentence thereof on account that; notwithstanding the charge against the three persons being withdrawn, the trial proceeded against the two without the charge being amended and the remaining accused persons caused to enter plea thereto. On top of that, it ordered for retrial in the following words: 2 "In addition , having considered the nature and the circumstances of the offence, we are of the view that this , is a fit case for an order of retrial. Hence we hereby order for retrial of the case before another judge with a new set of assessors and further should the appellants be convicted, the period already served by them in custody be considered in the course of imposing a sentence. , Meanwhile the appellant shall remain in the custody pending a retrial which has to be expediated. " When the case was remitted back to the High Court for retrial, and, while Diaka

Drama Kaba had already passed away, the DPP entered a nolle prosequi against the applicant under section 91(1) of the CPA. As a result, the applicant was discharged and released from custody. On the same day, he was rearrested and produced to the committal court for committal proceedings vide PI No. 03 of 2021. The applicant believes that the retrial order of the Court has not been observed and the entry of nolle prosequi in the circumstances subjected him to unfair trial and was an abuse of the court process. Therefore, by a notice of motion supported by his own affidavit, he has lodged the instant application calling upon the Court to invoke its 3 revisional powers under section 4(3) of the Appellate Jurisdiction Act and revise the order in question to cure the abuse of the court process. When the matter came up for hearing, the applicant was represented by Mr. Nehemia Nkoko, learned advocate; whereas the respondent Republic was represented by Mr. Laiton Mhesa, learned Principal State Attorney assisted by Ms. Jenipher Massue, learned Senior State Attorney, Ms. Edith Mauya, learned State Attorney and Mr. Cathbert Mbilingi, also learned State Attorney. In support of the application, Mr. Nkoko, having adopted the notice of motion and affidavit, submitted at first that, the withdrawal of the charge and the subsequent rearrest and prosecution of the applicant did not amount to the compliance of the order of the Court but rather an abuse of the court process which occasioned injustices to the applicant. That, he submitted, was invalid as the powers of the DPP to control court proceedings cannot supersede a court order. The order of the Court being specific that retrial should be made expeditiously, he submitted, an order with the effect of the case commencing afresh and which was made before re-hearing had started, cannot amount to compliance of the same. The counsel submitted further that, under Article 59B (4) of the Constitution of the United Republic of Tanzania (the Constitution) read together with section 8 of the National Prosecutions Service Act, (The NPSA), the powers of the DPP to control court proceedings are subject to three considerations, namely; interest of justice, prevention of abuse of the court process and public interest. He submitted, therefore that, in a situation where the applicant has been in custody for 13 years, an order with the effect of his case starting afresh is not in the interest of justice but an abuse of the court process. Seemingly in the alternative, it was Mr. Nkoko's submission that, if the entry of nolle prosequi was appropriate, the applicant should have been charged under the same committal order and not as it was, by initiating a fresh committal proceeding. At the end, he prayed that the application be granted and the applicant set free for the interest of justice. In rebuttal, Mr. Mhesa supported the order of the High Court and the subsequent committal proceedings. He submitted that the retrial order of the Court was complied with as the discharge of the applicant pursuant to entry of nolle prosequi by the DPP was made on the date when the matter came 5 for hearing before the High Court. In his submission, that was well within the purview of section 91(1) of the CPA in that; it was at the stage before verdict or judgment. He submitted, therefore that, section 8 of the NPSA was not violated. Neither the provisions of Article 59B (4) of the Constitution. He prayed thus the application be dismissed. There was nothing new in Mr. Nkoko's rejoinder submissions. From the notice of motion, affidavits and rival submissions, it would appear, the question which we have to consider is whether in the circumstances, it was proper for the charge to be withdrawn at the instance of the DPP under section 91(1) of the CPA and the matter to commence afresh and if so, whether it was proper for the applicant to be subjected to a fresh committal proceeding. We subscribe to Mr. Nkoko that,

the powers of the DPP to control criminal proceedings, including the power to withdraw criminal proceedings under section 91(1) of the CPA are not absolute. They are, under Article 59B

- (4) of the Constitution read together with section 8 of the NPSA, subject to three considerations, namely; interest of justice, prevention of abuse of the court process and public interest. In relation to this, we held in the case of 6 the Director of Public Prosecutions v. Mahboob Akber Haji & Another, Criminal Appeal No. 28 of 1992 (unreported) thus: "Thus although the powers of the Directors of Public Prosecutions under the Criminal Procedure Act appears to be wide, their exercise is limited by three considerations; that whenever he exercises this wide powers, he must do so only in public interest, in the interest of justice and the need to prevent abuse of the legal process. It is obvious that if the Director of Public Prosecutions acted mala fides, this would not be in the public interest, it would not be in the interest of justice and above all it would be an abuse of the legal process.... " At this juncture, it may be necessary to note that, what is faulted in this application is the order of the High Court discharging the applicant consequential upon the DPP's entry of nolle prosequi. This being the case, therefore, our decision shall confine itself to the correctness, validity and legality of the order and its obvious implications. Under section 91(1) of the CPA, the DPP can, at any stage before the conclusion of the criminal trial, enter a nolle prosequi with the effect of the accused being discharged forthwith. It is also the law that, the discharge 7 under the respective provisions cannot operate as a bar to any subsequent proceedings against the respective accused on account of the same facts. Nonetheless, the right of the DPP to commence a fresh proceeding under the same facts is, in view of the amendment brought by Act No. 1 of 2022, subjected to the provisions of subsection (3) of the same section which provides as follows: "(3) 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" In this case, the DPP entered a nolle prosequi after the record had been remitted to the High Court for retrial. In consequence thereof, the High Court discharged the applicant. It is submitted that, in withdrawing the charge and re-filing it to a subordinate court, the order of the Court was not obeyed, and, therefore, what was done was an abuse of the court process. Perhaps, we should start our discussion by a comment on conceptualization of the term retrial. It has not been statutorily defined. In its natural meaning however, it entails in effect that, the matter should be heard afresh as if no 8 hearing at all had been made in respect thereof. On this, we are persuaded by the following statement of the Supreme Court of Nigeria in *Kajubo v. State* (1988) LPELR- 1646(SC), thus: "An order for a retrial or a new trial or trial de novo or venire de novo is an Order that the whole case should be tried de novo or tried anew as if no trial whatsoever had been had in the first instance" As we understand the law, when a higher court makes an order for retrial, the same is directed to the trial court and not the parties. In effect, therefore, an order for retrial does not by itself deny the inherent right of Republic or the plaintiff, as the case may be, to withdraw its own case if it does not have interest to prosecute it. By entering a nolle prosequi, therefore, the DPP was addressing the High Court that the Republic had no interest to prosecute the case.

Under section 91(1) of the CPA, it is trite law, once the DPP enters nolle prosequi, the trial Judge or magistrate has no option other than to discharge the accused. In our view, once the accused is discharged, it is not for the trial court to decide whether or not he should be rearrested and subjected to a fresh charge in respect of the same facts. This remains within the powers of the DPP which however has to be exercised subject to the provisions of Article 59 B (4) of the Constitution and more specifically in consideration of the conditions set out in subsection (3) of section 91(1) of the CPA, which provide for safeguards against possible abuse of the powers. In the circumstances, the order of the High Court discharging the applicant was quite right. There was a complaint that a fresh committal proceeding should have not been commenced but rather the applicant should have been charged under the initial committal order. Be it as it may, the claim appears to be premature because the revisional jurisdiction of the Court under section 4(3) of the Appellate Jurisdiction Act is limited to proceedings and decisions of the High Court and not of subordinate courts. The applicant, if he thought that the institution of a fresh committal proceeding or commencement of a fresh proceeding in respect of the same facts was against the retrial order of the Court, he would first challenge the same to the High Court. The right to appeal to the Court or apply for revision thereto, as the case may be, would conceivably accrue as it was in the case of *Public Prosecutions v. Mahboob Akber Haji & Another* (supra), after a decision had been made by the High Court in respect thereof. [See also *Ephata Lema v. R*, Criminal Appeal No. 2 of 1990 (unreported)]. In our opinion, therefore, the application is devoid of any merit and it is accordingly dismissed. DATED at Dar Es Sataam this 24th day of July, 2023. R. K. MKUYE JUSTICE OF APPEAL I. J. MAIGE JUSTICE OF APPEAL

0. 0. MAKUNGU JUSTICE OF APPEAL The Ruling delivered this 26th day of July, 2023 in the presence of the Applicant appeared in person and Ms. Edith Mauya, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

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