

TANZANIA / JUDGMENT

director of public prosecution vs denis gaudence shirima 2024 tzhc 4 8 january 2024

COURT
TZHCDECIDED
8 January 2024

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI DISTRICT REGISTRY AT MOSHI CRIMINAL APPEAL NO. 000041184 OF 2023 (Appeal from the decision of the District Court of Moshi at Moshi dated 6th day of December 2023 in Preliminary Inquiry no. 000038074 of 2023) THE DIRECTOR OF PUBLIC PROSECUTION APPLICANT VERSUS DENIS GAUDENCE SHIRIMA RESPONDENT

JUDGMENT

4th & 8th January, 2024 A.P.KILIMI, J.: The respondent hereinabove was charged for the offence of Murder contrary to section 196 and 197 of the Penal Code in Criminal Session no.1 of 2022 in this court. When said case was at the hearing stage on 17th November 2023, the Director of Public Prosecutor “hereinafter DPP” withdrew the case by entering a Nolle Prosequi under section 91(1) of Criminal Procedure Act Cap 20 R.E.2022 “CPA”. And then the High Court granted the prayer and discharged the respondent, but allowed the prosecution to use section 91(3) of CPA and further directed that the prosecution shall not be barred from re-institute as it shall deem fit. 1 It was on 24/11/2023 the prosecution re-institute the said case by filing a Preliminary Inquiry “hereinafter P.I.” number 000038074 of 2023 at Moshi District Court. On 5/11/2023 when the said P.I. proceeding went for hearing before the District Court, the same was objected by the respondent who had the legal service of Mr. Alfred Sindato learned counsel. Upon considering submissions of each party in respect to the objection, the trial court proceeded to uphold the objection and reasoned that, the matter was wrongly instituted before it, because it has already disposed of this matter by committing respondent to the High Court, thus, it cannot create another committal proceeding on the same charge arising from the same facts unless, otherwise directed by the High Court. Aggrieved by the above decision, the appellant has decided to step in into this court with one ground of appeal which is to the effect that; the trial Magistrate erred in law and fact when ruled that the Republic wrongly instituted the Preliminary Inquiry No. 000038074 of 2023 before the District Court of Moshi followed by the Nolle Prosequi in Criminal Session case no. 1 of 2022. 2 When this appeal came before me for hearing, the appellant was represented by Mr. Frank Wambura learned State Attorney, whereas the respondent appeared

represented by Mr. Alfred Sindato learned advocate. Arguing in support of the above ground of appeal Mr. Wambura submitted that, the prosecution started at P.I. stage, because Criminal Session Case No. 1 of 2022 was withdrawn by Nolle Prosequi, therefore that order of the court did not affect Criminal Session no. 1 of 2022 alone but also P.I. No. 16 of 2022 which committed the respondent at the High Court. Therefore, it was not proper for the court to file information at the High Court, if no Preliminary Inquiry to commit the respondent to the High Court. To buttress her point urged this court to see the decision of the court in Criminal Appeal No. 325 of 2019 between Boniphace Thomas Mwimbwa vs. Republic, wherein it was observed when Nolle Prosequi is entered also discharge P.I. done. Thus, prayed this court to direct the District Court to continue with the P.I. in order the respondent be committed to this court for hearing.

Responding to the above, Mr. Sindato contended that, the decision of District Court was right not to proceed with the committal proceeding, because the recent of Amendment made on 7th February, 2022 by inserting 3 section 91(3) of CPA through Misc. Amendment Act No. 1 of 2022 has put conditions limiting the applicability of section 91(1) of the CPA, that prohibits the DPP to abuse his power by acting as he wishes in withdrawing cases and arresting the accused person. He further argued that in Criminal Session No. 1 of 2022 already two witnesses were already testified, thus to allow committal proceeding, is to allow the DPP to fill gaps, therefore the case cited of Boniface Thomas Mwimbwa (supra) did not face the same circumstances of filling gaps. Mr. Sindato further submitted that, re-institution of case under section 91(3) of CPA, is when then DPP has sufficient evidence to re-institute, and on the first day was supposed to proceed with the hearing on the same previous P.I. no. 16 of 2022 of the High Court. To fortify his assertion the counsel referred the case of Republic vs. Jalala Mayanda Dutu and 2 others Criminal Revision No. 2 of 2023 High Court, Adjane Abubakari vs. Republic Criminal Application No. 40 of 2021 CAT and also the case Republic vs. Median Boastice Mwale and 2 others Criminal Session No. 77 of 2017. The counsel for respondent also added that, in case the prosecution had a problem on proceeding of on previous P.I., the law allows by section 4 289 of CPA to bring additional witnesses or additional exhibits, therefore to entertain another P.I. is unfair trial but there might be environment of filling gaps which renders section 289 of CPA meaningless. Therefore, the counsel prayed the appeal be dismissed and respondent be absolute discharged. Mr. Sindato further contended in the following circumstances that; first, that in respect to the case of Boniphace Thomas Mwimbwa (supra) is distinguishable because, in this matter, the prosecution entered nolle prosequi in Criminal Session No. 1 of 2022 while the hearing of two witnesses PW1 Dr. Alex Mremi and PW2 CPL. Edward, were done, therefore hearing has already commenced while the circumstance of the referred case is not the same, hence going to fresh committal will amount to unjustly filling gaps or will apply as a tool of losing a case on part of prosecution which is prejudicial to accused's right. Secondly, the counsel for respondent argued that, the cited case is on money laundry, charged in Anti money laundry act, which attract lesser punishment whereas in this matter the offence is murder attracting death by hanging, thus, he invited this court to look on Republic vs. Mtei 1971 HCD 451 and Republic vs. Ansogai Hermsin Dionis and Another Criminal Session No. 2 of 2019 (HC unreported). Third, the counsel argued that in 5 the case of Boniphace Thomas Mwimbwa (supra) the case did not interpret section 91(3) of CPA recently inserted in our laws on 7th day of February, 2022. Fourth, Mr. Sindato asserted that in

that case, it was just comment of the judges in passing, therefore it was an orbiter dictum and the same did not decide the said case. In respect to the fifth circumstance, Mr. Sindato argued that, the cited case of Adjane Abubakari vs. Republic (supra) which was involved by the trial court in granting objection is the recent case compared as the one cited by the Republic, since Adjane case was delivered on 26th July, 2023 as compared to case of Boniphace Mwimbwa (supra) delivered 19th April, 2023. In regard to what was envisaged in the proceedings of Criminal Session No. 1 of 2022, Mr. Sindato was of the view, it portrays that the DPP is doing forum shopping which is contrary to the interest of justice, because after DPP being granted order by this court to bring additional witness or exhibits under section 289 of the CPA, still the DPP fail to proceed with hearing and yet he entered Nolle prosequi then he illegally re-arrested the accused as a second bite. He invited this court to look Christ Peter Maina Amicus Curie brief in the case of Attorney General vs. Jeremiah Mtobosya Civil Appeal 6 No. 65 of 2016 Court of Appeal of Tanzania at Dar-es-Salaam. Wherein at page 6, Prof. Peter Maina argued that forum shopping should not be encouraged in the High Court or Court of Appeal of Tanzania. Further in respect to sufficient evidence, Mr. Sindato contended that the DPP did not furnish proof on the sufficient evidence to warrant hearing of the matter at the first appearance which is the gist of 91(3) of CPA, which also intend to stop the abuse of the power of the DPP, he further reasoned that in his scanning of record of 1 of 2022 portray serious disparity of evidence to a large extent, he stated for instance, seizure certificate which shows that the accused is Athanatia Ernest Mushi, and the said Emei number differed with the actual evidence of PW2. Thus, prayed the respondent be discharged absolutely. In respect to the prayer sought by the appellant, it was Mr. Sindato contention that; the Appellant is praying to allow the appeal and to order the P.I. be conducted at the subordinate court, this shows that the DPP seems to invite a prayer for restoration of the none existing committal proceeding, conducted at District Court at Moshi in P1 000038074 which was struck out by the District Court, instead Mr. Sindato prayed confirmation of Criminal Session No. 1 of 2022 which is before this court, it is merely for the DPP to 7 satisfy there is sufficient evidence to warrant commencement in its first appearance basing on the same committal order emanating from P.1 No. 16 of 2022 dated 30 October, 2022. Then Mr. Sindato concluded that granting a prayer is tantamount to appeal grant without specific prayer and it amount to restoration of P.1 No. 000038074 which could have resolved by two application one for appeal and one for restoration. Therefore, since P.1 No. 000038071 was dismissed, and P.I. 16 of 2022 which is still existing, the counsel prayed this court to invoke section 91(3) of CPA to go to the hearing in the first appearance in this court. In brief rejoinder, Mr. Wambura contended that the prosecution doesn't pray committal to fill gaps but rather is the requirement of the law under section 246 of CPA which require the accused person charged with Murder must be committal to the High Court. In respect to the case of Boniphace Mwingwa (supra) he maintained that is relevant to this appeal as per page 13 it has stated the principle and not opinion or obiter, and further said the said Nolle prosequi entered goes also to P.I. preceding. Arguing in respect to sufficient evidence, Mr. Wambura asserted that on the first day, the prosecution informed the court that investigation was 8 complete and that is why they prayed for committal. Also added that the said P.I. was not struck out, but the District Court dismissed it and is the one appealed for. In respect to the prayer by the respondent's counsel that this court has to scan the file of Criminal Session No. 01 of 2022, Mr.

Wambura resisted and said is not the duty of this court at this stage. Therefore, insisted this court to allow this appeal by quashing the Ruling of District Court and order committal proceeding be conducted. I have dispassionately given thought and weighed the contending arguments from both sides. There is no dispute that accused person was discharged by the High Court upon the DPP entered a Nolle Prosequi, also there is no dispute according to the contention by the parties for re- arrest of the respondent, but what is in dispute is which court the accused should appear and be heard. The appellant as said above sent him at the District Court for committal proceeding while the respondent is objecting that he was required to be sent at the High Court by using previous Committal Proceeding sent him there for the case which was withdrawn. But also, the respondent's counsel alleges that the DPP has no sufficient evidence to send the respondent at the trial as provided by the law. 9 The law governing administration of the powers DPP in respect to the invocation of the nolle prosequi is provided under section 91 of the CPA, and same provides as follows; "91.-(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a nolle prosequi, 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 person shall at once be discharged in respect of the charge for which the nolle 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 added] To start with the worries of the respondent's counsel that at the alleged criminal session which discharged the respondent after the DPP had entered a nolle prosequi, two witnesses were already testified, therefore there is a possibility of feeling gaps. In my view of the law above, despite the fact the counsel has advantage of having previous witnesses' statements testified in that previous session, which he may impeach them in the next session if it will appear to be different. It the requirement of the law stated above that nolle prosequi may be entered at any stage before the verdict, therefore the number of witnesses testified is immaterial. The second requisites provide by the law above, is that once nolle prosequi is entered the accused person is discharged, but the same shall not operate as a bar to any subsequent proceedings against him on account of the same facts. In this matter at hand, there is no dispute that the respondent was re- arrested after being discharged on the same facts and offence. Thus, the law above allows. From the above contention by the parties, the most important question I must ask myself, is whether it was right for the DPP to file a Preliminary Inquiry before a District court after re-arrest of the respondent. The argument by the appellant is that he was right to institute a committal proceeding because the Nolle Prosequi entered in Criminal Session Case No. 1 of 2022, goes further to extinguish P.I. No. 16 of 2022 which committed the respondent at the High Court. Therefore, it was not proper for the court to file information at the High Court as the respondent alleges, if no Preliminary Inquiry conducted to commit the respondent to the High Court. The appellant referred to me the case of Boniface Thomas Mwimbwa and Another vs Republic [2023] TZCA 192 (TANZLII) which was opposed and distinguished by the respondent's counsel. I have passed through the decision by the court in Boniface Thomas Mwimbwa and Another (supra) therein it was subjected in the second ground of appeal, the issue subjected to arguments at the court was that, whether a nolle prosequi does

not discharge the proceedings in a Preliminary Inquiry (P.I.) neither does it preclude the filing of another information based on the facts disclosed at the PI. The court distinguished the cited case with Kenyan origin and observed at page 13 that; “Mr. Ndaskoi had a different argument with which we agree. The nolle prosequi was entered in Criminal Sessions Case No. 61 of 2015 arising from PI No. 60 of 2015 and that was the end of everything in connection with it. There was nothing left of the committal proceedings from which the prosecution could file a fresh information based on the same proceedings in the P.I.” [Emphasis is mine] Thus, the court at page 14 proceeded to resolve this ground that the proceedings in PI No. 60 of 2015 ended with Criminal Sessions Case No. 61 of 2015 upon the Director of Public Prosecutions (the DPP) entering a nolle prosequi. Therefore, from the above excerpt, it is not true as alleged by Mr. Sindato that the decision of the court was just an obiter dictum and that it was dealt by the way, this was the ground raised and decided by the court, and from that decision the ratio decidendi stated above is extracted. The counsel for the respondent also in respect to this case, claimed that the cited case of Adjane Abubakari vs. Republic (supra) which was considered by the District court in granting objection is the recent case compared to Boniphace Mwimbwa (supra) cited by the Appellant. It is true that its decision was delivered on 26th July, 2023 which is more recent. But, I have considered the circumstances and the decision of the court in Adjane Abubakari case, in that case the court did not decide in respect to preliminary inquiry conducted by subordinate court, as did in the case of Boniphace Mwimbwa (supra). 13 In the case of Adjane Abubakari (supra) the facts reveal that, the court of appeal having heard the appeal nullified the proceedings of the High Court and quashed the conviction and sentence thereof. On top of that, it ordered for retrial of the same at the High Court and further ordered the appellant shall remain in the custody pending a retrial which has to be expediated. When the matter went to the High Court for the trial de novo, the DPP entered a nolle prosequi and re-arrested the accused and filed a committal proceeding before a subordinate court. In that regard the argument by the applicant at the court, was that the DPP withdrawal of the charge and the subsequent re-arrest 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. In resolving the above the court asked itself 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. In resolving the above First; the court observed that 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. Thus, the court proceeded to hold that the order of the High Court discharging the applicant was quite right. Secondly; in respect to the Preliminary Inquiry conducted, the court observed that it was premature to be decided by the court since it was decision of subordinate court which ought to be appealed to the High Court first, consequently it dismissed the application. In its wording at page 10 the court had this to say; “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.” 15 From the excerpt above, it is not true as Mr. Sindato argued that this case issued an authority that when a nolle prosequi is entered at the High Court, the previous P.I. remain intact to move the court at the High Court. Thus, having elucidated as above, I am satisfied this case is distinguishable from this case at hand, also I have considered the other cited cases by respondent’s counsel, are High Court cases which by the doctrine of stare decisis cannot subside the decision of the court in Boniphace Mwimbwa (supra). In the above regards, I am of settled opinion that the decision of the Boniphace Mwimbwa (supra) which said when the nolle prosequi is entered it goes with its P.I. conducted remained the authority in this aspect. In conclusion thereof Boniphace Mwimbwa (supra) remained the good law to date. In respect to respondent allegation that, the court in Boniphace Mwimbwa (supra) did not interpret the provision of section 91(3) of the CPA, in my view non interpretation does not affect the above principle which remains intact to be applied by this court. I am saying so because the above provision was introduced by legislature to stop the DPP abuse of provision of section 91(1) of the CPA, thus in my view, for ease of reference let me reproduce the above law hereunder; 16 “91 (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” [Emphasis added] From the above, the law has introduced the following requirements; first, that the DPP may re-arrest and charge the accused when he has sufficient evidence. According to the proceeding of the trial court, the DPP prayed the subordinate court for committal proceeding and told the district court the investigation was complete. If there were insufficient evidence, they could have said investigation is incomplete. Therefore, I am settled this requirement was met. Secondly requirement which was also subjected to intensive arguments from Mr. Sindato, is that the hearing of proceedings shall commence on his first appearance before the court. In this regard, there is no dispute in Murder cases, the trial court is the High Court and the accused person must be committed to the High Court upon subordinate court receive a copy of information from the DPP. This is accordance to the law and for 17 purpose of clarity I wish to reproduce the provision of section 246 (1) of CPA hereunder; “246.-(1) Upon receipt of the copy of the information and the notice, the subordinate court shall summon the accused person from remand prison or, if not yet arrested, order his arrest and appearance before it and deliver to him or to his counsel a copy of the information and notice of trial delivered to it under subsection

- (7) of section 245 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.” [Emphasis added] From the excerpt above, the accused person cannot be tried at the High court unless is committed thereto from subordinate court, taking regard the principle stated in the case of Boniphace Mwimbwa (supra) pave a way that the new committal proceeding must be done. Therefore, the first appearance before the High court for the

offence of murder and other scheduled offences which P.I. is conducted, in my view should not be 18 interpreted in narrow approach. In this context at hand, it means is when the accused person step into the door of High Court in Criminal Session scheduled by the Deputy Registrar. This is different to other offences which in law does not require committal and usually are heard by subordinate court. On the premises and from what I have endeavoured to discuss above, I find and hold that the appeal is meritorious and I allow it. Consequently, the decision of the Trial district court in P.I. 000038074 is hereby quashed and set aside. I also order the District Court to continue with the hearing of P.I. No. 000038074 filed in that court in order lawfully to commit immediately the respondent to this court for hearing of his case. It is so ordered. DATED at MOSHI this 8th day of January, 2024. X JUDGE Signed by: A. P. KILIMI 19 Court: - Judgment delivered today on 8th day of January, 2024 in the presence of Mr. Frank Daudi Wambura, learned State Attorney for the Appellant and Mr. Alfred Sindato learned Advocate for the Respondent, also respondent present in person. Sgd: A. P. KILIMI JUDGE 8/01/2024 Court: Right of Appeal explained. Sgd: A. P. KILIMI JUDGE 8/01/2024 20

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/307234/source_file/director-of-public-prosecution-vs-denis-gaudence-shirima-2024-tzhc-4-8-january-2024.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/director-of-public-prosecution-v-denis-gaudence-shirima-NolleProsequi-tzhc-2024--6a3ea52d3b1caa9129826f9b

Prepared on 14 October 2026 · Esheria