

TANZANIA / JUDGMENT

20160212 TZHC Dar es Salaam 1

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- - - - - IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY I •, AT
DAR ES SALAAM MISC. CRIMINAL APPLICATION NO 67 OF 2015 (Originating from Kisutu
RM Court) HARUNA MUSSA LUGEYE 1 ST APPLICANT MWAJUMBE WENDU
BAKARI. :..... 2No APPLICANT ~ - VERSUS THE REPUBLIC
RESPONDENT

RULING

MKASIMONGWA, . HARUNA MUSSA LUGEYE and MWAJUMBE WENDU BAKARI apply from the court for the following orders:-

1. That the court may be pleased to call for and examine the record of Criminal Proceedings in Kisutu Resident Magistrates' Court (PI) Criminal Case No. 8 of 2015 pending at the court in order for this court to satisfy itself as to the correctness, legality and/or propriety thereof.
2. That the court may be pleased to revise and/or quash the proceedings dated 3rd February, 2015 withdrawing PI No. 45 of 2014 and substituting thereof PI. No. 08 of 2015.
3. That the court may be pleased to enter a finding that the procedure adopted by the Respondent in withdrawing PI. No. 45 of 2014 when 1 the 2nd Applicant was granted bail was illegal and/or irregular and amounted to abuse of judicial process, an abuse of prosecutorial and derogation of the Independence of the Judiciary.
4. That the court may be pleased to grant any other orders and/or reliefs that it may deem fair Just and proper. The Application is made against the Republic by way of Chamber Summons filed Under Section 43 (1) and 44 (1) (a) of the Magistrates Courts Act [Cap. 11 R.E 2002], Sections 372 and 373 (1) and (b) of the Criminal Procedure Act [Cap. 20 R.E 2002] and it is supported by the Affidavit of Mr.ABUBAKAR SALIM. In the Affidavit Mr. ABUBAKAR SALIM, avers that the Applicants are remanded at Segerea Remand Prison awaiting trial of which a Preliminary Inquiry No. 8 of 2015 is currently pending in the Resident Magistrate Court of Dar es Salaam at Kisutu. HARUNA MUSSA LUGEYE and MWAJUMBE WENDU BAKARI (the applicants) were arrested on 2nd December, 2014 and 3rd December, 2014 respectively and the two were on the 10th December 2014 arraigned before the Resident Magistrates Court of

Dar es Salaam at Kisutu where they were charged with, inter alia, Terrorism Offences under the Preliminary Inquiry No. 45 of 2014. In the said charge whereas the 1st Appellant was charged with terrorist offences and some other offences triable by the lower court the 2nd Applicant was charged with offences under the Armaments Control Act which Offence is triable by the lower court and is a bailable one. On 20th January, 2015 the court granted the 2nd Applicant with bail upon application and it accordingly set bail conditions. 2 Before the 3rd February, 2015 the date for mentioning the case the Respondent went to the court secretly and applied to withdraw the charge sheet in PI No. 45 of 2014 and substituted thereof PI No. 8 of 2015 in which all applicants were charged with offences under the Prevention of Terrorism Act, 2002, the Armaments Control Act and the Penal Code. Some Offences are triable by the lower court. Proceedings at the said Kisutu Resident Magistrates Court are in the nature of Preliminary Inquiry as the Appellants stand charged with offences triable by the High Court. The Respondent had no right and it was un procedural to substitute the charge sheet in PI No. 45 of 2014 and immediately thereafter charge the Applicants and in particular the 2nd Applicant with offences under the Prevention of Terrorism Act on the same facts only with purposeful intent to deny her bail. On the other hand the Respondent filed a Counter Affidavit sworn by Mr. PETER NDJIKE the Principal State Attorney. The latter states in the counter affidavit that the two Applicants are currently arraigned before the Kisutu Resident Magistrates court facing various offences contrary to the Prevention of Terrorism Act No. 21 of 2002 in PI No. 8 of 2015. Prior to the current charges the applicants were charged before the same court in PI No. 45 of 2014. On 6th February, 2015 the prosecution requested the court to issue a Removal Order to have the accused persons in PI No. 45 of 2014 been brought before the court and the counsel for the accused was duly informed. On the 6th February, 2015 when the accused persons were brought before the court the prosecution entered "Nolle Prosequi" in respect of PI No. 45 of 2014 and filed in lieu thereof PI No. 8 of 2015. 3 When the matter came up before me for hearing Mr. ABUBAKAR SALUMU, Learned Advocate appeared for the applicants whereas Mr. PETER NDJIKE, Learned Principal State Attorney, represented the Respondent. In his submission Mr. Abubakar prayed the court that he adopts the contents of the affidavit filed in support of the chamber summons and not expunged by the court. He added that the act of the Respondent of withdrawing a PI No. 45 of 2014 and substitute thereof PI No. 8 of 2014 aimed at prosecuting the second Applicant with an un bailable offence and this is because the 2nd Applicant had been granted with bail, for nothing had changed in the investigation of the matter. Mr. Abubakar, referred the court to its decision in WILFRED RWAKATARE AND ANOTHER V/S REPUBLIC, MISC. CRIMINAL APPLICATION NO. 14 OF 2013, in which Kaduri, J stated/held that the DPP has wide powers which have to be questioned by the court where he uses the powers arbitrarily. At the stage the case had reached the DPP had no powers neither to withdraw nor amend the charges. This position was well narrated by the court in a case of R V/S SULEIMAN SALEH ALLY

(1985) TLR 96 which was cited by the court in MISC CRIMINAL APPLICATIN Nos. 32 and 43 of 2014, RAZA HUSSEIN LADHA & NINE OTHERS V/S DPP. The court there discussed on the application of Section 234 (1) of the Criminal Procedure Act and found that the Section applies at the trial stage of the matter. As the matter before Kisutu Resident Magistrates Court was not for trial the DPP had no powers to withdraw or amend the charge and what he did does not conform to the 4 procedure as it is -provided-for Under Sections 91 ,rnd 150-- of the Criminal - - Procedure Act. Mr. Abubakar went on submitting that since the 2nd Applicant was granted with bail in PI No. 45 of 2014 she ought to have been heard before the charges were withdrawn by the DPP. He said the right to be heard is a fundamental right which the 2nd Applicant was denied. On the basis of the above submissions, Mr. Abubakar invites this court to find that there were irregularities in dealing with this matter, that the DPP had a negative intention against the second Applicant and that the DPP aimed at denying the second Applicant with bail. If the court so finds, the PI No. 8 of 2015 be nullified and PI No. 45 of 2014 should be restored. On the other hand Mr. Ndjike, too, sought to adopt the contents of the counter affidavit in his submission. He added that the DPP had rightly acted under Section 91 (1) of the Criminal Procedure Act, in respect of PI No. 45 of 2014. Neither the records of the lower court nor submission made to the court show that the DPP was motivated by an ill will in withdrawing the matter before the court. What is there is just speculation that there was an ill will on the part of the DPP. The allegation needed production of evidence to prove, which evidence was not led to the court. Mr. Ndjike distinguished the case of RAZA HUSSEIN LADHA AND NINE OTHERS (Supra) from this now at hand stating that the two cases have no same facts. Mr. Ndjike contended that the main grievance by the applicant against the DPP is that, the later has misused his powers. In his view Mr. 5 Ndjike stated that whether the DPP had or not misused his powers could be best dealt with by way of a Judicial Review. It cannot be done by way of Revision as it is done in this matter. He prays the court that it dismisses this application. In rejoinder submission Mr. Abubakar contended the submission by his learned brother the Principal State Attorney that powers of the DPP should be questioned by way of judicial review is not tenable. The applicants question the decision of the lower court granting the application to withdraw the charge by the DPP without observing the law. The two authorities cited are highly persuasive for they dealt with this similar situation now in court. Mr. Abubakar reiterates his prayer to have this application granted. That is all from the parties. After considering the records before me and submission made to the court, it is clear to the court that on 10th December, 2014 the applicants were arraigned before the Resident Magistrates Court of Dar es Salaam at Kisutu when they were charged with offences under the Prevention of Terrorism Act, Armaments Control Act and the Penal Code vide PI No. 45 of 2014. Of the offences the 2nd applicant was charged with bailable ones and she was granted with bail on 20th January, 2015. She had no surety by then, consequently was remanded in custody. According to the court file in PI No. 45 of 2014, on 6th February, 2015 the DPP wrote to the Resident Magistrate In charge of the Resident Magistrates Court of Dar es Salaam, at Kisutu seeking for 6 _ issuance_of a removal-order-that-the -accused-be brought before the

-court where the DPP will a prayer to make. The record shows that the Accused persons were brought before the court on 9th February, 2015 when Ms. Kapanga, State Attorney, is recorded to have stated as follows:- "For mention both accused persons are present. We have made our pray for removal order we pray to withdraw this charge under Section 91 of Cap. 20 R.E 2002" The court then stated that:- "Prayer is granted the charge against the accused persons are withdrawn under Section 91 of Cap. 20 R.E 2002 and accused person are set at liberty unless they are arrested for further prosecution" On the same day that is the 9th February, 2015 the Applicants were jointly or severally charged with offences under the Prevention of Terrorism Act, 2002, Armaments Control Act [Cap. 246 R.E 2002] and the Penal Code [Cap. 16 R.E 2002]. In this matter it is alleged by the Applicant that:-

1. The DPP had no powers neither to withdraw nor amend charges in Pl. No. 45 of 2014.
2. In withdrawing the matter (Pl. No. 45 of 2014) the DPP aimed at denying the second applicant bail. From the allegations two issues arise which need to be determined by the court. The first issue is whether the Respondent (DPP) had powers to withdraw the charges in PI No. 45 of 2014. As it is shown above PI No. 45 7 of 2014 was withdrawn in terms of Section 91 of the Criminal Procedure Act. The Section reads as follows:- "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 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 recognizances shall be discharged; but such discharge of the accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts" This section provides for power of the Director of Public Prosecutions to enter Nolle Prosequi. According to the Section the Director of Public Prosecution has powers to enter Nolle Prosequi in any Criminal Case and at any stage thereof before verdict. The section does not oblige the Director of Public Prosecution to assign any reasons why he enters Nolle Prosequi. As such, basically, where the Director of Public Prosecution enters nolle prosequi in proceedings the courts must readily comply with his move. I have read decision in WILFRED LWAKATE AND ANOTHER CASE (Supra) in which the Director of Public Prosecution withdraw/entered a Nolle Prosequi while it (PI No. 37 of 2013) was pending for ruling in respect of bail application, a submission on the validity of the Terrorism charges in view of information contained in the particulars of the offences 8 ' ' thereof and on the propriety of the accused being asked to enter a plea in a court which had no jurisdiction to record the plea. Again, after withdrawing the charges, the accused in PI No. 37 of 2013 was re-arrested and charged on the same facts in PI No. 6 of 2013. With due respect, here is not the case. By the time the DPP entered Nolle Prosequi in PI No. 45 of 2014 there was nothing pending determination by the court. Secondly it is clear and undisputed that the 2nd Applicant faced offences in PI No. 8 of 2015 other than those she was facing in PI No. 45 of 2014. LWAKATARE's case is therefore distinguishable from this one. Mr. Abubakar submitted that the DPP aimed at denying the 2nd Applicant bail when he

withdrew PI No. 45 of 2014 and instituted PI No. 8 of 2015. As stated above the DPP is not obliged to give reasons why he enters a Nolle Prosequi in Criminal Proceedings. As such it is difficult to gauge the DPP's intention to withdraw the matter. An allegation that in the cases at hand the DPP had intended to deny bail to the 2nd Application is just a speculation. What is clear is that the way Section 91 (1) is couched, gives room to the DPP to abuse the exercise of his powers. Any by the DPP can be challenged. However one cannot challenge the abuse of powers conferred to the DPP under Section 91 (1) of the CPA by seeking from the court for a revisional order in terms of Sections 43 (1) and 44 (1) of the Magistrates Courts Act. I am of the view that that can best be dealt with by way of a Judicial Review. This in my view answers the second issue, that emanates from the allegation and that is whether in 9 (,

- -withdr-aw iRg PI Ne. 45--of 2014 th-e DPP-aimed- at aenyng-the-2-nd -Applic:ant bail. - From the above discussion, upon examining the records in PI No. 45 of 2014 as well as PI No. 8 of 2015 I find nothing material to necessitate the court to enter a finding that the procedure adopted by the Respondent in withdrawing PI No. 45 of 2014 was illegal, irregular and amounted to abuse of judicial process, prosecutorial and it derogated the independence of the Judiciary. As such, this Application is devoid of merit and it is hereby dismissed. Records of the lower to be returned to the lower court so that PI No. 8 of 2015, pending in the court vontinues. Dated at Dar es Salaam this 12th day of February, 2016. ~ E.J.Mka~ JUDGE \ 12/2/2016 10 ---~Date: 12/212016 Coram: Mkasimongwa,J For the Applicants: Mr Abubaka, (Advocate) For the Respondent C.C. Judith Mr. Abubakar (Advocate): My lord, the matter is coming up for Ruling. The Respondents are not in court. On our part we are prepared to receive the ruling. Court: Ruling delivered in Chambers this 12th day of February, 20156 I the presence of Mr. Abubakar for the Applicants and the Applicants. Right of Appeal is explained. c:5~ E. J. Mkasimongwa JUDGE 12/2/2016 11

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