

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT PAR ES SALAAM CRIMINAL APPEAL NO. 11642 OF 2024 (Appeal against the Ruling of the Resident Magistrate's Court of Dar es Salaam at Kisutu (Hon. Pamela Mazengo, PRM) delivered on 18th December, 2023 by Hon. Richard Kabate, PRM dismissing Miscellaneous Criminal Application No. , 01 of 2023) JAMES BURCHARD RUGEMALIRA (JBR)..... 1st APPELLANT VIP ENGINEERING AND MARKETING LTD (VIP)..... 2nd APPELLANT VERSUS SGS SOCIETE GENERALE DE SURVEILLANCE (SGSSA)..... 1st RESPONDENT SGS TANZANIA SUPERINTENDENCE COMPANY LTD (SGSTZ)..... ..2nd RESPONDENT

JUDGMENT

26th Aug. & 7th Oct.,2024 DYANSOBERA, J.; This appeal is against the ruling and order of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Miscellaneous Criminal Application No. 1 01 of 2023 delivered on 18th December, 2023 dismissing the appellants' application for want of merits. A brief background to the present matter can be traced from the appellants' affidavit. Under paragraph 18 thereof, the 1st appellant averred that: - "That, in the course of carrying out its mandate business activity No. 7120 of Technical Testing and Analysis in Tanzania, the 1st respondent fraudulently falsely classified and certified precious minerals worth USD 84 billion equivalent to more than TZS 188 trillion which were exported as MAKINIKIA, thereby the 1st respondent committing similar frauds like the issuance of fake preshipment inspection reports complained of by the 2nd applicant in Commercial Case No. 16 of 2000. Further that, since the issue of TZS 360 trillion Makinikia was again raised in the September, 2022 Session of the Parliament of the United Republic of Tanzania and reported in the Mwananchi Newspaper of 28th September, 2022 at pages 1 and 4 with the title "TZS 360 trillion Makinikia bado pasua kichwa". Seeing this, James Rugemalira and VIP Engineering and Marketing Ltd (the 1st and 2nd appellants herein) decided to exercise their allegedly statutory rights under the cited provisions in the JBR MEMO DD DEC 11, 2020 to apply for the leave of the court to commence and to conduct private criminal prosecution proceedings against the respondents to recover from them more than 10.86 trillion for VIP Engineering and Marketing Ltd, more than 4.66 trillion for the TRA and more than TZS 188 trillion for the Government of the United Republic 2 of Tanzania suffered because of the SGS SA's and the SGS TZ's criminal frauds and issuance of fake preshipment inspection reports and fake preshipment certificates. The application was- resisted

by the respondents by way of counter affidavit who, through Mr. Seni Malimi, learned advocate, urged the court to dismiss it for lack of merit and for being misconceived. . After hearing the application both orally and by written submissions, the learned Principal Resident Magistrate found that though conducting private prosecution was a constitutional right, the conditions for sanctioning the conduct of such private prosecution by the applicants were not satisfied. She concluded her ruling thus: For that failure to meet the conditions to warrant the court grant the application, I proceed to dismiss the application. This being a criminal case, I am not going to make an order for costs' The above ruling and order aggrieved the appellants hence this appeal. The appeal was, by leave of the court, argued by way of written submissions. Messrs. Sisty Bernard and John Chuwa, learned advocates, 3 represented the appellants, drew and filed both the appellants' written submission in chief supporting the appeal and the appellants' rejoinder submission while for the respondents, learned counsel Mr. Dennis B. Maganga, stood. He drew and filed the respondents' reply submission. After taking pains and perusing the so-called petition of appeal, I am in agreement with counsel for the respondents that the appeal has been filed in contravention of the law for failure to conform to the requirements of the above provisions. The said provisions run as hereunder: - '362. -(1).....

- (2) the petition of appeal shall contain particulars of the matters of law or of fact in regard to which the subordinate court appealed from is alleged to have erred. According to the above provisions, the petition of appeal must state the grounds or reasons on which the appellant is appealing against the lower court's decision and it must contain sufficient particulars of any points of law or facts which the appellant claims the lower court erred. The present so-called petition of appeal lacks these crucial ingredients. In this regard, the present appeal is incompetent. 4 I am not, however, in oblivion of the provisions of Section 388 of the Criminal Procedure Act which qualifies the imperative nature of the word 'shall' under the Criminal Procedure Code as elucidated by the Court of Appeal in the case of Bahati Makeja v. R., Criminal Appeal No. 116 of 2006 (Unreported). Nevertheless, even if the appeal were to be taken to be competent, still the same would fail for lack of merits. I will explain. In the appellants' written submission in chief supporting Criminal Appeal No. 11642 of 2024, learned counsel for the appellants, after adopting the grounds of appeal and the prayers set out in the 'so-called petition of appeal' filed on 3.5.2024, contended that in Miscellaneous Criminal Application No. 01 of 2023, the appellants were not requesting the trial court to determine any criminal charge against the respondents; rather, they were requesting for permission to file criminal complaints and to commence private criminal prosecution against the respondents under sections 99 (1), (2), (3) and 128 (2) and (5) of the Criminal Procedure Act [Cap. 20 R.E.2022] read together with Sections 10 (1) (b) and 17(2) (a) of the National Prosecutions Act [Cap. 230 R.E.2022] allegedly mainly in the national and public interest of Tanzania and that, part of the complaints are against the criminal frauds perpetuated by the 1st and 2nd respondents against the 2nd applicant. 5 With regard to the relevant provisions supporting this application, the appellants placed reliance on some provisions of the Criminal Procedure Act, the National Prosecutions Act, the Penal Code, the Money Laundering Act, the Economic and Organized Crimes Control Act and the

Constitution of the United Republic of Tanzania. This court was also referred to a plethora of case laws. In conclusion, the learned counsel for the appellants prayed that since it is well settled principle that non-citation or wrong citation of statutory provisions is not fatal, provided the statutory provisions exist they may be cited and inserted at any time and since under Sections 10 (1) (b) and 17

- (2) (a) of the National Prosecutions Act, the Director of Public Prosecutions . has all along been copied can take over at any time as the appellant and while still considering the taking over may issue directives for any specified information or document or to be furnished to the Director of Public Prosecutions by the Respondents. It was also prayed by the advocates for the appellants that the court be pleased to issue an order directing the Resident Magistrate's Court of Dar es Salaam at Kisutu to invoke Section 99
- (1) (3), 128 (1) (3) and (5) of the Criminal Procedure Act to grant permission to the appellants to commence and conduct private criminal prosecution proceedings against the two respondents to recover from them more than TZS 10.86 trillion for VIP Engineering and Marketing Ltd, more 6 than TZS 4.66 trillion for the Tanzania Revenue Authority and more than TZS 188 trillion for the Government of the United Republic of Tanzania, suffered because of the respondents' conspiratory criminal frauds and issuance of fake Pre-Shipment Inspection Report and False Pre-Shipment Export Certificate of Gold and other precious minerals from the United Republic of Tanzania. Further, advocates of the appellants prayed for any orders which the Honourable court may deem fit and justified to grant. In the Written Submission in Reply, learned counsel for the respondents, the appellants' complaints were narrowed to a single issue that is, whether the learned Resident Magistrate erred in law and in fact for . dismissing the appellants' application for want of merits. According to learned counsel, section 99 (1) of the Criminal Procedure Act allows any person other than a public prosecutor, and with leave of the court to institute a private prosecution proceeding and that in *Gouriet v. Union of Post Office Workers* [1978] AC 435, 498 private prosecution was termed as a valuable constitutional safeguard against inertia or partiality of authorities. It was submitted on part of the respondents that the appellants' application was accompanied by an affidavit duly sworn by Mr. James 7 Burchard Rugemalira, the first appellant, stating the grounds and/or reasons within which such application was premised. Counsel for the respondents, however, contended that the appellants failed to substantiate which offences were committed by the respondents to warrant prosecution, leave alone, private prosecution. Calling in aid to the case of *Edmund Mjengwa and 6 others v. John Mgya and 4 others* [2004] TLR 200 in which the grounds upon which leave for private prosecution may be granted, learned counsel for the respondents urged the court to find that the appellants have failed to establish the four ingredients set out by the Court of Appeal in the above cited case. The said ingredients are first, whether the allegations is an offence known to the law and if so, whether the essential ingredients of the offence are prima facie present. Second, that the offence alleged is not out of time. Third, that the court has jurisdiction and fourth, that whether the informant has the necessary authority to prosecute, inertia or partiality on part of the DPP. As regards the first ingredient, it was the

respondents' learned counsel that the establishment of a prima facie case as a ground ought to be established by clearly stating specific offences under the laws and deponing in the affidavit the grounds and/or reasons which constitute such offences. 8 According to counsel, attaching a draft charge sheet containing the intended counts would have stipulated the offences alleged to have been committed by the respondents and not just giving general allegations which are unfounded. In relation to the second ingredient, counsel for the respondents submitted that the appellants failed to substantiate at what exactly time the alleged offence were committed. Counsel contended that the appellants are basing the allegations upon reports on newspapers and failed to state whether such offences are still within statutory period to be prosecuted. On the third ingredient, counsel for the respondents asserted that the appellants' affidavit in support of the application indicates that the nature of offences being fronted shows some of the offence to be economic which are not triable by the Resident Magistrate's Court but the High Court with necessary certificates being issued. Counsel was of the view that the said court in which the application was instituted lacks the jurisdiction. With respect to the fourth ingredient, counsel for the respondents contended that the appellants had to prove that the informant had the necessary authority to prosecute of over inertia or partiality on part of the DPP. It is his further contention that the DPP is empowered with the task of all public prosecutions though the law allows private prosecution where this 9 authority is blinded with inertia in prosecuting an offence. It is contended also on part of the respondents that the appellants did not establish inertia or partiality on part of the DPP for failure to prove that they and contacted the DPP, laid down their allegations and evidence to back up the same and that the DPP had failed to take any steps to prosecute the respondents. Having carefully considered the records before me and the submissions of the parties' learned counsel, the issue calling for determination is whether the appellants' appeal has merit. The power by the magistrate inquiring into or trying any case to permit the prosecution to be conducted by any person other than a public prosecutor and the parameters for an individual to make a complaint to a magistrate of competent jurisdiction are, respectively, provided under Section 99 (1) read together with Section 128 (2) of the Criminal Procedure Act [Cap. 20 R.E.2022] as follows: '99. -(1) Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the President in this behalf shall be entitled to conduct the prosecution without such permission. io 128.- (2) Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint of the offence to a magistrate having competent jurisdiction'. Understandably, section 99 (1) the said Act do not contain parameters which such magistrate has to consider when granting the permission to the private prosecution. Luckily, the courts have come to the aid. For instance, the Court of Appeal in *Edmund Mjengwa and 6 others v. John Mgaya and 4 others* (supra) when discussing the provisions of section 99 (1) together with section 128 (1) and (2) of the Criminal Procedure made the following pertinent observation: 'It is to be observed that section 128 (1) and (2) of the Criminal Procedure Act, 1895 provides for the institution of criminal proceedings. Sub-section (2) of this section also

provides for the parameters in which an individual may make complaint to a magistrate of competent jurisdiction. According to this sub- section, in order for any person to make a complaint to the

- magistrate with a view to institute proceedings, it is necessary to show that such a person believes from a reasonable and probable cause that an offence has been committed. ii With regard to this requirement, we think, with respect, that the case of *Reg. v. Tower Bridge*, cited and extracted in the Report of the Law Commission of England and Wales to which Mr. Rweyongeza called our attention, provides helpful guidance on this point. In this case, a judicial review was sought in connection with the decision of the Tower Bridge Metropolitan Stipendiary Magistrate refusing to issue a summons, the equivalent of the application for leave in this appeal, Lord Justice Kennedy read the judgment of the Divisional Court of the House of Lords (1994) Q.B. 340. In the course of the judgment, reference was made to another decision of the House of Lords in *Reg. v. West London Metropolitan Stipendiary Magistrate Ex parte Klahn* [1979] 1 WLR
933. In that case, Lord Widgery C.J. at pp. 935-936 inter alia said: A summons is the result of a judicial act. It is the outcome of a complaint which has been made to the magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons. It would appear 12 that he should at the very least ascertain: (!) whether the allegation is of an offence known to the law and if so, whether the essential ingredients of the offence are *prima facie* present; (ii) that the offence alleged is not out of time; (iii) that the court has jurisdiction; (iv) whether the informant has the necessary authority to prosecute. In addition to specific matters, it is clear that he may and indeed should consider the allegation is vexatious. Then the court further stated: 'The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons'. After making the above quotation, the Court of Appeal went on to hold that: 'These principles are, as urged by Mr. Rweyongeza relevant and applicable in our country. The provisions of Section 99 (1) of the Criminal Procedure Act relating to permission to conduct private prosecutions are almost similar to the equivalent provisions in England and Wales as shown in the Law Commission Report. It was imperative therefore for the magistrate to satisfy himself 13 that the essential ingredients of the offence to be preferred against the appellants *prima facie* were present.' Likewise, in the case in question, it was imperative for the learned Principal Resident Magistrate to satisfy herself that the above essential ingredients of the offence sought to be preferred against the respondents *prima facie*, were present. As the record of the lower court clearly shows, the learned trial Principal Resident Magistrate discharged her obligation by bringing her judicial mind to bear on this aspect particularly where the applicants failed to demonstrate the existence of a charge sheet which could show what offence was committed, under what law and when was it committed. This could have assisted her to assure herself whether the offence known to the law was committed, what *prima facie* were the ingredients and the time its commission occurred. In short, the appellants failed to *prima facie* show that a crime had been committed by an identifiable offender and the evidence had been obtained or was

known to be available in order to prove the offence. Further, the appellants were also duty bound demonstrate that there was a proper motive of bringing the offender to justice and were not motivated purely by self-interest. 14 However, the presence of the learned State Attorneys during the proceedings at the trial on the alleged watching brief, left a lot to be desired on part of the Director of Public Prosecutions. That notwithstanding, I align myself with the argument by learned counsel for the respondents that the appellants did not establish the ingredients for the grant of the permission to commence and conduct the private prosecution proceedings. In light of the aforesaid, I find nothing to fault the ruling and order of the learned trial Principal Resident Magistrate. This appeal being not only incompetent but also meritless, should be. and is hereby dismissed. This judgment is delivered under my hand and the seal of this Court this 7th day of October, 2024 in the presence of the 1st appellant and Mr. Sisty Bernard, learned counsel for the appellants. The respondents are absent 15

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