

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA, JUDGE MBEYA, JUDGE CRUITNALL, PUBLIC-
ITION NO. 10, OF 2002; (Original Criminal Case No. 1 of 2000 of the
District Court of Rungwe at Lukuyu)

1. ii. LL. NANINE. MWAISUMU
2. FREDDY MWAIFUNGO (3 N, IBOTH MWAM; LULI) (PF) LICAN (S
...). 4. GILBERT M1-AMBEMBELE) VERSUS. THE REPUBLIC, ... i,

RULING

The applicants stand trial jointly on a charge of disturbing a religious assembly c/s 126 of the Penal Code. Having lost faith in the learned District Magistrate on alleged bias, they have applied for a revision order. By which the order may be undone. Mr. Naali, learned counsel, acts for them. The record of proceedings shows that the prosecution's case is as follows:

- On 14th September, 2002, after the accused persons were charged upon to make their defence, which they did on 3rd October, 2002, they called one I. witness, hmbukege Mwaungos (DW.5), to testify in their defence. The record shows further that Mr. Naali, learned counsel, was instructed to defend the applicant after DW.5 had testified. Immediately after taking up the conduct of the defence, Mr. Naali applied; and for and was successful. 'with' a copy of the record of proceedings. That upon receiving the copy of the trial court's record of
- proceedings, Mr. Naali applied for the disqualification of the trial magistrate on grounds of bias because, having read the proceedings, he claimed that his clients were disputing the correctness of that record. None of them filed an affidavit to show which part of the record was wanting. As the learned trial magistrate says in his ruling, Mr. Naali did not lead evidence to show which part of the record had been doctored. In the end, the application was dismissed.
- 2. Soon after the application was dismissed, Mr. Naali indicated that he was going to appeal. He ought to have known that his clients have no right to appeal against an interim order in a criminal proceeding. So he has brought this application

so.that the order;by which the trial magistrate refused to stand down from the trial P,\$, 'revised<\$O also"the.order of trial ' . ! ~... . !-;~*~;--t~_i:~ ... :~ L~.~:~i~ -J:: .. , !i ~ ~ court refusing to recall m-1. 5/ . - '•i~::~ _ , : _ ---\~! i-! *~~}- . Ji~ Mr. Naali contends in his finttl submissions that the application has been ') ' ~-; , • brought to. forest s:111 miscarriage of justice because th,e, applicants do not \J,, . . _ .:~:~}.i<'~'.L~.~ ~ ~ • •!•#_ \ .. ~::~#~JI>~ ~ -: • • :~ ' • . 1--;_ _ :~:~. believe that they will receiV"e:~UEi°tice~from~ the learned trial District Magistrate. On his part !'fir~ Mulokozi 1 learned Senior State Attor.n.e;y,t. sulomi ts that the 4PPJ.~c,'3,:!;i'ion i 9, a.s. . mis,conee.ivecl,'as • . "i :~t.J i~ ,9~ntenab-le . ' . in . law • . ,He contends that the purpose, of section\$ ' . 43 an,ct_~44 %/ o;f the :t1~6 istr,ate.s : Courts: . li.ct and \," , ~:ection 372 o;f ,tr;i~ Criminal

- : • . ~. ~. '!. .. ' .. I?rocedype : ' • ' ' . / 11ct.:ar-'e not unlimi te<h Ac.cording to j • jurisdiction of the High Court for purposes of "•• satisfying itself as to the correctness ,,:~legality qr proprie,ty of- roi.y. finding t sentence or order ••' • ,1' ' .. / ' . . and as to the regularity qf any pro,c;eedings ... ~" It is .his further• sub- . ' ' . .. ,i~ mission _that • . a m.p.g~strate. trying a c;3.se has di.spretion to~ withdraw or not , where hip positio:~) . s .impugn_e,d. In .. sum ~J is .Jhe, Republic I s submission that nothing vva9 done th.at justified .~' . gr~ting .. tl~i,; , applicant's desire~to have him ~ ' withdraw frQm the-; ,trial of .the. cas~.~ . Nor .wcIB: the.re any.. incorrectness, • (, . irregular:ity orI t, Illpropriety. ;T~at the. .. applicants , , , , . haviJ;J.g , •... • ' closed their • . defence . whether at that st1;J.ge. it:v,1:ci.1; ,ne.cessary, to re,fall .. ii.°witrt'iss. .. " . , • . Ji: mere statement ' tha:t the advocate ;ylas to pi'eP.are'. a~ pto:pt:~r, defence was no_t , _good cause to have the defence stca-t. -2-2.~ It is also :learned Senigr .State :ittorney' s contentiop. i;hat the.- c;1:pplicant~ .have not .prov:ed any-distortio.ns in_ the record of p.r.oceedi.ngs~ .r.: .~. 00 ./3 • , 3 , I affidavit of Mr'o :tugustin6 Raj ab Mohamed Na~L, \ learned counsel for. the . 'l {If: applicants. That af:fide,vit is not free froni, fatal irregularities •.. I will ' • , point them out. Firstly\ he swe:irs in paradtaph 3 that "••• I was informed li . i . that the evidence of DW.5 one AMBlJ1CTLE M~JAN<.1eSI: was faulte-d 11 • Dvl.5 did not. swear an affidavit to verify if • his testimony was incorrectly recorded or if 13,nyth:iing. he said was not recorded. Po.ragraj:~h 3 is, therefore, hearsay. ~ BGcondly 1 he swears in~ paragraph 14 that. "• u _the accused persons told me of !:~ . , . t.hE;~i.r- discontent •• 11 ;~ ~ None-"6-t tbo.\$e ac.<:::;!\$.~d persons swore . to verify o.nd disc,on_tent. the~ had~ if at all~' . 7.I~.~i}~- not~settled law. that no court in this . . - . . r t _ countr:f~w±n . cict-'on. -~an'-a-ffid- a'iFi,t_Rb.i.i;ili .is sourced . " , . . . from inforlllation: provided .) b/ third •persons i:f those persons do •not .s\leai- affidavits ;f. t,heir own on , • In paragraph 7 ivir,,, Naali swdars that~ if, the decision~ oJ the tri.al c~u,rt i , • is upheld it may oc~asion grave~ trii:::i'carriag~ -of' justic.e as the applicants
- i.: , , "TM- ~, , will be condemn~d. un.he~ard. Well tnts, • . arg~ent lacks.merit because the ...applicant~ ~ ' gave evidence in their .. d~ifence and called to that effect. I DW.5 Eve- .. if they. had not been: •given the opportunity to -be heard; paragrapl:~. 7 is a submission on a point of law, it is not a fact which can be contQine~ in an . affidavit,. Similarly; paragraph 9 contains legal arguments!' Paragraph 10 is a prayer, not a fact, • What

remains of the supporting affidavit, therefore, in paragraphs 5 and 6 regarding the right to recall DW.5 and the allegation that the trial court illogically refused to recall citations of section 147 (4) of the Evidence Act, 1967 and section 147 (4) of the Criminal Procedure Code;

- In the instant case the trial court declined to exercise its discretion because Vire Naali did not cite any procedural law which empowers it to reopen the defence for purposes of recalling a witness. It is submitted that an application to reopen the defence for purposes of recalling a witness is a matter for the discretion of the trial court. In the instant case the trial court declined to exercise its discretion because Vire Naali did not cite any procedural law which empowers it to reopen the defence for purposes of recalling a witness. It is submitted that an application to reopen the defence for purposes of recalling a witness is a matter for the discretion of the trial court.
- In the instant case the trial court declined to exercise its discretion because Vire Naali did not cite any procedural law which empowers it to reopen the defence for purposes of recalling a witness. It is submitted that an application to reopen the defence for purposes of recalling a witness is a matter for the discretion of the trial court.

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