

TANZANIA / JUDGMENT

20090608 TZHC Dar es Salaam

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- 1 IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CRIMINAL APPLICATION NO 2 OF 2009 i'ROR. DR.COSTA MAHALU i 5 T APPLICANT GRACE ALFRED MARTIN 2ND APPLICANT !'-_ ' VERSUS .., REPUBLIC ... /', RES PO Nr>FNT \

RULING

Mlay, J: ~ The applicants Prof. Dr. Costa Ricky Mahalu and Grace · Alfred Maj~tin through their advocates Law Associates; Marando, , Mnyele & Co and ADILI ATTORNEYS, filed an application by Chamber Summons under Sections 43(1) and A 4 (1) of the Magistrates Courts Act [Cap 11 RE. 2002; ar:td Sections 372 and 373

- (1) (b) of the Criminal Procedure Act [Cap. 20 f.E. 2002]. V. According to the Chamber Summons, the Applicahts are seeking for the following orders:
- (a) That this Honourable Court may be pleased to call for and examine the record of the Resident Magistrate's Court of Dar es Salaam at Kisutu. in Economic . . --~,"- ~-". ' ' Crime Case No. 01/2007 for purposes of satisfying itself as to its correctness, . legality · or propriety of said proceedings and as .to their regularity and revise them accordingly.
- (b) Any orders(s), directions · or relief(s) as· this Honourable Court may deem just · and fit to pronounce to ends of justice. The application is supported by an affidavit jointly deponed to by the two Applicants. On 28/5/09 in the absence of the parties,, the application was set for mention on 1/06/09. On that date of mention, the 1st Applicant was represented by Mr. Bob Makani and Mr. Mngongolwa learned advocates while Mister C. Tenga learned advocate represented the 2nd Applicant. The Respondent was represented by three learned State Attorneys led by Mr. Boniface, Principal State Attorney. Mr. Boniface Principal State Attorney informed the court that the Respondent needed time to -file a Counter affidavit and also a Notice of Preliminary objection, that the application is incompetent and improperly before the court, by reason of the provisions of Act No. 25/2002. Mr. Bob Makani did not have any objection to the Respondent,s / prayer. . This court asked the parties to address the court on the . 1., 3 This court asked the parties to address the court on the . competence of the application in view of the provisions of Act 25 of 2002, even without a formal notice being filed, as it is well known that the provisions of the said Act, have amended vanous

provisions of different written laws, to bar applications for revision on preliminary or interlocutory decisions or orders of courts of law. Mr. Bob Makani prayed for time to prepare before addressing the court on the matter. Counsels for both sides appeared before this court on 3/6/2009 and addressed the court and hence the present ruling. The representation of the Applicants and the Respondents was the same except for the 1st Applicant who, in addition to Mr. Makani and Mr. Mgongolwa, was also represented by Mr. Marando, learned advocate. Mr. Marando on behalf of the learned counsels representing the 1st Applicant was the first to address the court. Mr. Marando conceded that Act 25 of 2002, amends sections 43 of the Magistrates Courts Act. [Cap 11 RE 2002] and section 372 of the Criminal Procedure Act [Cap 20 RE 2002], by providing that no revision will be preferred against an order or decision which is not of a final nature. Mr. Marando submitted that, fortunately, the court of Appeal has had the occasion to interpret the relevant provisions, which interpretation Mr. Marando contended, was in the Applicant's favour. Mr. Marando referred to the Appellate Jurisdiction Act [Cap 141 RE 2002], which was also amended by Act 25 of 2002 in Section 5 (2) by introducing a new paragraph n (b)" to subsection (2), for the same purpose of barring revision on preliminary or interlocutory decisions or orders. Mr. Marando cited two cases in which the Court of Appeal of Tanzania interpreted the application of the said provisions as amended by Act 25 of 2002. The first case is CIVIL APPLICATION NO. 163 OF 2004 VIP ENGINEERING AND MARKETING LTD VERSUS MICHMAR CORPORATION MALAYSIA BERHAD MALAYSIA. Mr. Marando referred to pages 7-10 of the typed ruling. He said in that case there had been an application for revision and the effect of section 5(2) (d) of the Appellate Jurisdiction Act was considered. He contended that in effect, the Court of Appeal said where there are irregularities and illegalities regarding the conduct of the case, the higher Court will intervene where the matters complained of are not orders or decisions made, but there is confusion. In that case, the Court of Appeal will intervene. The Court of Appeal made the following finding and decision, and I quote starting from page 9 the second paragraph, sixth line of the typed ruling. "There is no interlocutory decision or order which is being sought to be revised. There is a services general complaint by the applicant that so far the proceedings in the High Court are in a state of confusion and being conducted in a haphazard manner. Apparently the parties do not know what court order to follow! With this background information, though scanty for obvious reasons since we are only dealing with the preliminary objection, we are of the view that section 5(2) (d) of the Appellate Jurisdiction Act, 1979 as amended, is not applicable to such proceedings " 6 ~ n Earlier on in the ruling, the Court of Appeal had referred to and quoted from its earlier decision in (1) FAHARI BOTTLERS LTD (2) SOUTHERN HIGHLANDS BOTTLERS LTD. V. THE REGISTRAR OF COMPANIES (2) THE NATIONAL BANK OF COMMERCE [1997] LTD (Unreported) in which the court observed inter alia: "It is obvious to us that the proceedings in the High Court were affected by confusion and that the confusion was deepened by the changes of judges who presided over the proceedings. When such a situation occurs, there is likely to be a confusion, unless the succeeding judges thoroughly study the record of previous proceedings. This does not seem to have been done in this case Such irregularities

and the accompanying confusion in our view are not emendable to the appellate process for remedy. They are amenable to the revisional process.,; 7 The second case cited by Mr. Marando is MABIBO BEER WINERAND SPIRITS LTD VERSUS 1. LUCAS MALLYA aka BARAKA STORES 2. COMMISSIONER FOR CUSTOMS TANZANIA REVENUE AUTHORITY, CIVIL APPLICATION NO. 116 of 2008. Mr. Marando submitted that this case which also dealt with Section 5(2) (d) of the Appellate Jurisdiction Act, is even more important because it deals with a case in the subordinate r Court though the High Court to the Court of Appeal. He contended that it is similar to the Applicants Case. Mr. Marando reiterated that, where there are irregularities and confusion, its is for the higher Court to intervene. Mr. Marando told this Court that, the Applicants were before this Court because of senous irregularities particularly relating to jurisdiction of the trial Court. He contended that they protested but were ignored. He contended further that, one of the complaints on jurisdiction, is the lack of the consent of the Director of Public Prosecutions, which confers jurisdiction upon the trial Court. He referred this Court to a charge sheet annexed to the Application as Annexure A". He submitted I/ that according to the two decisions which the Applicants have 8 cited, this court has powers to intervene where there ls an apparent lack of jurisdiction. Mr. Marando further submitted that, authorities are abound that. without consent there is no jurisdiction. He cited one of such authorities as BITA THOMAS V. REPUBLIC [1996] TLR 371. He reiterated that Annexure "A" does not show the consent of the DPP. Replying to a question by the Court, Mr. Marando stated that they informed the Court of the matter but he was not sure if there was a ruling on it. He argued that, even if there was a ruling on it, it is a question of jurisdiction which merits the intersection of this Court and that is not a decision which is prohibited by the amending provisions of Act 25/2002, because it goes too the root of the trial. Mr. Marando raised a second point on jurisdiction. He contended that the Court of the Resident Magistrate of Dar es Salaam did not have the geographical jurisdiction in terms of section 5(1) of the Magistrates Courts Act [Cap 11 R.E. 2002] and GN 68/1981 which establishes that Court. He contended that the Charge Sheet [Annexure "A"] and the Memorandum of Facts, show that th~ offences (with which the applicants stand charged in the Resid~n t Magistrates Court of Dar es Salaam), were committed in 9 ') Rome. He argued therefore that the Court of the Resident Magistrate had no jurisdiction to try the case, unless its jurisdiction is extended by the chief Justice, under Section 5(3) of the Magistrates Courts Act. Mr. Marando contended that there are confusions in the proceedings and that he raised these matters and to the best of his knowledge, there was no formal decision made and there was no ruling. Mr. Marando submitted that this warrants intervention by way of revision, otherwise the trial wiII continue and the whole trial wiII be a nullity. Mr. Marando raised yet another point touching on jurisdiction. He submitted that by virtue of Sections 5, 6, 7 and 8 of the Diplomatic and Consular Immunities and Privileges Act [Cap 356 R.E. 2002] and the First Scheduled to it, The Vienna Convention on Diplomatic Relations has the force of law in Tanzania. Mr. Marando submitted that, by reason of Article 39(2) of the Vienna Convention, the Applicants had diplomatic immunity in respect of acts done as members of the Mission. He submitted therefore that the Resident Magistrates Court had no jurisdiction to try the two diploma ts (Applicants) for the acts they performed as members of

the Mission. Mr. Marando contended that procedures of lifting their diplomatic community exist but were not followed. He cited and provided copies of tests from A MANUAL OF INTERNATIONAL LAW by GEORG SCHWARZENBERGER 5 th Edition Pg.101, PRINCIPLES of PUBLIC INTERNATIONAL LAW by IAN BROWNLIE 3 rd Edition [Pg 306 307 and PUBLIC INTERNATIONAL LAW by MAHESH PRASAD TANDON and RAJESH TANDON (Pg 169)]. Mr. Marando contended that he raised the issue of diplomatic immunity but was brushed aside. Mr. Marando asked this Court to intervene by reason of these irregularities. Lastly, Mr. Marando contended that the trial Court heard evidence by teleconferencing, without an enabling provision of the law. He submitted that the Criminal Procedure Act does not make provision for this. Mr. Marando contended further that the trial Court relied on Section 40A of the Evidence Act as amended by Act 15 / 07. He argued that Section 40A does not empower the Court to do so and that the trial Court acted illegally. Mr. C. Tenga for the 2nd Applicant joined hands with Mr. Marando's submissions. He however added that, since the court of ' ' 11

- ' Appeal in its civil jurisdiction has been liberal, this Court should be even more liberal in its criminal jurisdiction ·because of the nature of criminal cases in which the rights of the accused are protected by the Constitution. He contended that the doors of revision are not closed where the lower Court misconducts itself. He posed the question whether this Court would not intervene if the subordinate Court tries a case of homicide. Mr. Baniphace learned Principal State Attorney submitted that Section 43(2) Magistrates Courts Act and Section 372(2) of the Criminal Procedure Act, both as amended by Act 25/2002, specifically bar applications for revision on preliminary and interlocutory matters in the subordinate Court, and the defence Counsels know it. Mr. Boniphace cited the case of YOHANA NYAKIBARI & 22 OTHERS Versus THE DIRECTOR OF PUBLIC PROSECUTIONS, CRIMINAL REFERENCE NO. 1 of 2006. In this reference the Court of Appeal dealt with a case in which the accused raised a preliminary objection in Criminal proceedings in the District Court, which was overruled, and the accused applied for revision to . the High Court which dismissed the application. The accused was ., ·, i refused leave to appeal to the Court of Appeal by a single Judge who took the view that the orders of the District Cou_r_t overruling the objection, were a interlocutory orders and that, Section 372(2) of the Criminal Procedure Act, 1985 as amended by Act 25/2002, bars appeals or revision and dismissed the application for leave to appeal, and hence the reference. The full Court referred to its earlier decision in the case of ANDERSON SOLOMON v. R. [1994] TLR 11 where the Court held: .,It is settled law that in Criminal Cases on appeal does not lie from an interlocutory order and the application before the High Court should have been rejected with directions to the District Court to continue with the case, accordingly, there is no legal basis upon which to entertain this appeal." The Court of Appeal having referred to two other cases in which the above holding was underscored, stated at page 10 of· the typed

ruling:

13 • "With the enactment of the Act in 2002, it goes without saying that legal position, as Mr. Luguwa, learned Counsel put it was sealed. That is that the position has not only been made clear but has also been statutorily provided in order to cover both 11 Criminal and Civil Cases. The Court of Appeal went on to state at page 9 starting from the 9th line of the Second paragraph to top of page 12 of the typed ruling, as follows: " At any rate, even if it is granted that there were such errors, this would not be a warrant for circumventing the clear provisions of the law under the Act. Appeals or revision on interlocutory orders are clearly barred." M.r. Boniphace referring to this decision, submitted that the Court of Appeal was very clear that even in matters of irregularities, the provisions as they are to day do not allow for revision. He further submitted that those errors must be apparent on the face of the record and even then, revision does not lie as it would be to , 14 circumvent the provisions. He referred to page 11 of the ruling in the HOHANA NYAKIBARIS case whose relevant contents have been reproduced above. Mr. Boniphace argued that the Court of appeal distinguished between errors and serious errors bringing confusion so that the parties do not know what to do/ in which case/ the Court would intervene. He contended that in the VIP ENGINEERING case cited by Mr. Marando/ there were two orders and the parties did not know which one to follow and for that reason/ the Court of Appeal had to intervene. He submitted that in the MABIBO BEER/ WINES AND SPIRIT Case/ the Court of Appeal used similar under regarding. serious irregularities. He further submitted that the position has been taken by the courts in a number of decided cases that they should not intervene in such situations. Mr. Boniphace referred to CRIMINAL APPEAL NO.276 OF 2006/ THE ATTORNEY GENERAL VERSUS WILFRED ONYANGO MGANYIS @ DADII AND 11 OTHERS in which the Court of Appeal stated that appeals on interlocutory matters are not maintainable. Mr. Boniphace then referred to one of the irregularities canvassed by Mr. Marando for the court's intervention. He started with video conferencing or what Mr. , 15 Marando called teleconferencing. Mr. Boniphace contended that, since Mr. Marando stated that the trial Court made a ruling on the use of teleconferencing, the only way out was to appeal against that decision. He submitted that it is a ground of appeal and not of revision. The second complaint referred to by Mr. Boniphace is Marando's complaint that the charges lacked the consent of the DPP. Mr. Boniphace contended that the record will show that the charge sheet was accompanied by the consent of the DPP. He also argued that, even if there was no such consent, this should be raised before the trial court as it has been raised in this court for the first time. On Mr. Marando's contention that the trial court lacked jurisdiction by reason of the offences having been committed in Rome, Mr. Boniphace argued that the particulars of the offences alleged that the offences were committed at the Tanzania Embassy in Rome and not just in Rome, Italy. He argued that for this reason, the offences were committed in the Tanzania Embassy in Rome and so the trial Court had jurisdiction to entertain the case against the Applicants. On Mr. Marando's contention that the Applicants had diplomatic immunity for acts done as members of the Tanzania Mission, Mr. Boniphace submitted that such acts did not include the committed offences, which included stealing by public servant and using documents to mislead the principal. He further submitted that the Applicants could not be heard to say that they had

diplomatic immunity to commit offences. Mr. Boniphace further contended that the issue of diplomatic immunity was not raised during trial. Finally, Mr. Boniphace submitted that, even if the decision in the two cases cited by Mr. Marando were applied to the Applicants' case regarding serious errors causing confusion, Mr. Marando had not shown that there was such a situation to warrant the exercise of the courts jurisdiction in revision. Mr. Boniphace reiterated that the Applicants should have waited to raise the matters as grounds of appeal. For the above reasons Mr. Boniphace prayed that the application be struck out. Upon advise by the Court, Mr. Boniphace handed out a copy of the written Consent by the DPP which he alleged was attached to the charge sheet. At first, Mr. Boniphace erroneously handed out a copy ~, of the DPP's Certificate for the Economic offences to be tried by the 17 ' ' subordinate court, but corrected the error and handed over a copy of the alleged consent by the DPP. Mr. Marando left the task of replying to the Respondent's submissions to Mr. Mngongolwa. Mr. Wmgongolwa contended that Mr. Boniphace had misinterpreted the parameters of the application of Section 43 of the Magistrates Courts Act and 372 of the Criminal Procedure Act, as amended by Act No. 25/2002. He submitted that a clear and understandable interpretation can be found in the VIP Engineering case, and he referred to pages 7 from line 11 of the ruling. He argued that, if the application is against orders made, it would be visited by the said provisions. He contended that this application was different in that, some of the matters were raised but no decision was made and this Court can intervene as a supervisory court. He again referred to page 7 of the Ruling in the VIP Engineering Case, lines 14 to 17 and contended that the Court of Appeal posed the question if irregularities can continue unabated and answered that the court must intervene. Mr. Mngongolwa distinguished the two cases cited by Mr. Boniphace, arguing that the latter two cases are against orders or decisions and it is clear that they would be barred by the provisions. He therefore submitted that the two cases cited by Mr. Boniphace are inapplicable, because they challenged orders and decisions, while this application does not. He further submitted that the two cases cited by Mr. Marando [V.I.P. ENGINEERING and MABIBO BEER WINES AND SPIRITS] are relevant to the application and that, this application was made with these decisions in mind. He further submitted that this application raises serious irregularities and confusion in law. He contended that, in law, there is nothing more serious than the issues of jurisdiction. He submitted that issues of jurisdiction have to be determined first even if the parties did not raise them. He further submitted that the taking of evidence is governed by the Criminal Procedure Act and the Evidence Act, which he contended were very strict and that the trial Court could not take evidence electronically produced. Mr. Mngongolwa further submitted that if they waited for an appeal as suggested by Mr. Boniphace, they would be abdicating their responsibilities for not bringing up the irregularities to the attention of this Court which has supervisory powers. He prayed that this Court uses its supervisory powers over the proceedings of the subordinate Court. Mr. Mngongolwa then passed the ball back to Mr. Marando, to reply the Respondent's submissions on diplomatic immunity. Mr. Marando however started off with the document evidencing the consent by the DPP to the charges against the Applicants. He contended that the consent document is dated 24th April 2007, while the charge sheet was filed on 22/1/2007 when the Applicants appeared in court to plead to the charges. Mr. Marando therefore contended that the consent was filed after the commencement of the case.

Mr. Marando referred to section 76 of the Economic and Organised Crime Control Act under which the consent is given, and argued that, it is provided that the trial should not commence except with the consent of the D.P.P. He further argued that trial starts when the accused are charged and asked to plead. Mr. Marando contended that the consent document was made up after the trial commenced and it should not influence the mind of this Court. Coming back to the issue of diplomatic immunity, Mr. _2_0 _____ Marando again referred this Court to the three texts of the treatises by the three authors on International Law. He contended that the Embassy is in Rome Italy and there is no literature which states that the Embassy becomes the territory of the receiving state but that, it remains the territory of the receiving state. IV1r. Marando further contended that, even if the Embassy was part of Tanzania, it still remains outside the jurisdiction of the Magistrates Court under Section 5 of the Magistrates Courts Act. He further argued that, the so called extra territorial principle is only legal fiction which has now been settled not to be in existence. He therefore prayed that the proceedings be nullified and the accused persons (Applicants) be discharged. The brief facts leading to the application which gave rise to the issue of whether an application for revision lies, can be stated as follows. The Applicants were charged in the Court of The Resident Magistrate of Dar es Salaam at Kisutu, with two Counts of offences under the Penal Code, Cap 16. These are Conspiracy to steal and Stealing by Public Servant. They were also charged with three other 21 Counts for offences under the Prevention of Corruption Act, which ... are also offences under the Economic and Organized Crime Control Act, Cap 200 RE 2002, which require a certificate of the DPP to be tried by a subordinate court and also, the consent of the DPP. the case proceeded to hearing up to the end of the prosecutions evidence, which end is alleged in the affidavit supporting the Chamber Summons, to have been ordered by the trial Court. The trial Court then decided that the accused had a case to answer, which has also been complained of in the applicants affidavit. Before the case proceeded to defence, the Applicants convinced that there are irregularities and confusion in the proceedings, made an application to this court for revision. The issue is whether an application for revision lies to this court in the light of the provisions of sections 43(2) of the Magistrates Courts Act and 372(2) of the Criminal Procedure Act, all as amended by the Written Laws (Miscellaneous Amendments) Act No.25 of 2002. Section 43(2) of the Magistrates Courts Act as amended, which has similar wording to Section 372(2) of the Criminal Procedure Act as amended, provides as follows: ---- ,I/ (2) Subject to the provisions of subsection (3), no appeal or application for revision shall lie against or be made in respect of any preliminary on interlocutory decision or order of the district court or of the court of a resident magistrate unless such decision or order has the effect of finally determining the criminal charge or the suit." Section 372(2) of the Criminal Procedure . Act is similarly worded and states: ,1/2" Notwithstanding the provzswns of subsection (1), no application for revision shall lie or be made in respect of any preli1ninary on interlocutory decision or order of a subordinate court unless such a decision or order has the effect of finally determining the criminal charge" (emphases mine). In Criminal Reference No.1 of .2006 YOHANA NYAKIBANZI AND. 22 OTHERS which was cited by Mr. Boniphace, the Court of Appeal . . _ adopted the meaning of an interlocutory order given by Sir ., 23 . William Douglas in the case of HARON BIN MOHD ZAID v. CENTRAL SECURITIES (HOLDINGS) Bhd (1982) All ER Vol.2 at page 48: "The -appropriate test for

determining whether an order was final or interlocutory was whether judgment or order, as made, finally disposed of the rights of the parties. If it did, it was a final order, but if it did not, it was an interlocutory order" I Applying the above definition to the present application, and assuming without deciding that an order or decision was made by the trial court, since the criminal proceedings are still pending in the trial court and are at the stage of the applicants defending themselves, the order or decision would be an interlocutory order or decision, because the charges against the applicants have not finally been determined. That being the position, an application for revision would not lie as it is clearly barred by the provisions of both section 43(2) of Cap 11 RE 2002 and section 372(2) of Cap 20 R.E. 2002. This is also the effect of the Respondents submission that the application made by the two applicants is barred by the above provisions. This position is put beyond debate by the two decisions of the Court of Appeal in the YOHANA NYAKIBARI'S case and THE ATTORNEY GENERAL v. WILFRED ONYANGO MGANYI'S case cited by the Respondent's Counsel., Mr. Boniphace. The Applicants through the submissions by Mr. Marando and Mr. Mgongolwa in effect, concede that an application for revision against orders or decisions which do not finally determine the charge does not lie. They in effect argued that in the applicants case, the trial Court made no decisions or orders. Mr. Marando contended that the matters complained of were raised but no decisions or rulings were made. In same instances Mr. Marando has used the words that, "they were brushed aside". If Mr. Marando's contention is correct, and if the record does not show that the matters were in fact raised or rulings made on them, it would follow that the record would not upon inspection by this court, show any errors or irregularities on the face of the record. In this case, this court would not have any justification to exercise its revisional powers. MR. Marando and Mr. Mgongolwa have however argued that pursuant to the decisions of 25th the Court of Appeal in V.I.P. ENGINEERING and in MABIBO BEER WINE AND SPIRITS cases, this Court has powers to intervene, where there are serious irregularities and confusion in the proceedings. Upon reading the decisions of the Court of Appeal in the VIP Engineering case which was followed or applied in the MABIBO BEER,WINE AND SPIRIT case, it is clear that in those cases there were no orders or decisions made which were of interlocutory nature. Secondly, the Court found that there was confusion in the proceedings. As pointed out by Mr. Boniphace learned Principal State Attorney, in the VIP Engineering Case there were two orders made by two different judges and the parties did not know which of the two orders to follow. The Court of Appeal found that revision was not barred because there were no interlocutory orders or decisions involved but the irregularities causing confusion, warranted the Court's intervention. The question is whether this situation arises in the case of the applicants in the trial court. Starting with confusion, the Respondents have not been able to point out any confusion in the proceedings of the trial court. On the 26th of May 2011, contrary, the trial appears to be going on smoothly and it has reached a stage where the Applicants are required to give their defence. Both the trial Magistrate and the parties involved in the trial, know exactly what they have to do. Unlike in the VIP Engineering case, the proceedings are not stalled by any confusion which merits intervention of this court, to move the case one way or the other. The Respondents have however pointed out a number of alleged serious irregularities. Many of the alleged

irregularities, are directed towards the jurisdiction of the trial court. It has been argued that the court lacks jurisdiction on a number of grounds. One ground is that the offences are said to have been committed in Italy or outside Tanzania and therefore the trial court lacks geographical jurisdiction, in terms of Section 5(2) of the Magistrates Courts Act. Another ground is that the Applicants being diplomats, their actions have diplomatic immunity by virtue of the Vienna Convention on Diplomatic Immunities. A third ground is that the court lacks jurisdiction as the charges requiring consent of the DPP, were not consented to. It has been submitted by the Respondent's Counsel ' 27 that these complaints based on jurisdiction have not been raised in the trial court. It is trite law that the issue of jurisdiction is so important that it can be raised at any stage of the proceedings and even on appeal. The Applicants therefore still have the chance to raise the matters pertaining to jurisdiction during their defence or in the final submissions or failing, if there should be an appeal, during the appeal. There is therefore a remedy for their complaint in the on- going proceedings or during appeal. There is therefore absolutely no reason for this court to intervene by way of entertaining an application for revision on grounds of lack of jurisdiction, at this stage. As stated by the Court of Appeal in the YOHANA NYAKIBARI'S Case, this would be circumventing the clear provisions of the said provisions as amended. Since the defence doubted that the Charge Sheet was consented to and the Respondent asserted that there was written consent, this court was tempted to ascertain the fact by looking at the record, as the Applicants have not shown that they perused the record of the trial court. The record ~. •\~. • ----.'t~ •. ,. ~ •. ' . ,.~:~ shows that there are two charge sheets both of which were consented to. The first charge sheet which is dated 11/1/2007, a copy of which the Applicants have appended to their application, is seen to have been consented to by • one LAWRENCE KISENGE NZIAJOSE KADURI, Acting Director of Public Prosecutions. This Charge Sheet is seen in the Court record to have been subsequently substituted by a new Charge Sheet. The substitution occurred after Nolle Prosequi had been entered for the third accused. The new Charge Sheet containing only two accused persons who are the present applicants, is dated 23 rd April 2007 and was consented to by ELIEZER MBUKI FELESHI, the Director of Public Prosecutions. The complaint regarding lack of consent or that the consent was made up, would perhaps have not been made or raised as a ground for revision, if the • applicants had perused the record. Be it as it may, this matter can be raised and determined by the trial court or raised on appeal. While still on the record, the issue of video conferencing or teleconferencing, appears to have been raised on two different occasions and on each occasion, the trial magistrate made a decision on it. Mr. Marando also conceded that the trial magistrate did apply "-. 29 ' l the provisions of section 40 A of the Evidence Act, as amended which Mr. Marando thinks was wrong or irregular. Whatever may be the • position of the application of section 40A of the Evidence Act, for as long as a decision was made, it is an interlocutory decision against which an application for revision does not lie. The same applies to the decision of the trial court that the Applicants have a case to answer. The court made a decision even if it was wrongly arrived at, that decision does not finally determine the charges against the Applicants and for this reason, an application for revision does not lie. The question of diplomatic immunity, in so far as it is

alleged, that it makes the trial court to lack jurisdiction, can also be raised before that court or on appeal, like the other issues touching on jurisdiction. I do not find any merit in the contention that not to raise it before this court, would be to abdicate the responsibilities of an advocate. The Applicant's advocates based their submissions on immunity, on Article 39(2) of the Vienna Convention. However, if they would wish to pursue the matter in the trial court or later on appeal, Article 31 sub article (4) of the same Convention which is the 30 First Schedule to the Diplomatic and Consular Immunities and Privileges Act, Cap 356 is of interest as it provides as follows:- Article 31 "4. The immunity of diplomatic agents from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state." On the question of jurisdiction of the trial Court, the Applicants may also at the appropriate time, I wish to consult the provisions of section 6(b) of the Penal Code Cap 16, which provides as follows: u 6. The jurisdiction of Mainland Tanzania for the purposes of this Code extends to - (a)

- (b) any offence committed by a citizen of Mainland Tanzania in any place outside Mainland Tanzania" As stated earlier on in this ruling, issues of jurisdiction can be raised at any stage of the proceedings of the trial court or even on appeal, which have not been raised or decided by the trial court, can be raised before that court or on appeal. We do not find that the mere fact that the issues of jurisdiction have not been considered by the trial court, amounts to a confusion within the parameters of the decision of the V.I.P. Engineering Case, for this court to intervene. In the final analysis and for the reasons given above, we are satisfied that the Application for revision made by the Applicants to this court for the proposed revision of the proceedings in Economic Case No. I of 2007 in the Court of the Resident Magistrate at Kisumu, is incompetent and improperly before this court and it is accordingly struck out. It is directed that the record of the trial court be immediately returned to that court and the court to proceed with the case from where it stopped. JUDGE - 08/06/2009 I, 31 appeal. We do not therefore think that serious as the issue may be, as stated by Mr. Mngongolwa, this court should intervene at this stage by way of revision, on grounds that the trial court has not considered it. The opportunity to raise the matter before the trial court still exists. As it was stated by the Court of appeal in the YOHANA NYAKIBARIS CASE; unrestricted appeals or applications for revision on interlocutory orders would undoubtedly lead to uncalled for delays resulting from time spent while pursuing appeal on application for revision on interlocutory orders which do not finally determine the suit or charge." This application contains interlocutory decisions or orders, such as on the use of video conferencing or teleconferencing and on the applicants having a case to answer and also on the closure of the prosecutions case. An application for revision is therefore barred by the said amended provisions. There has not been any confusion in the proceedings in the like of the proceedings in the V.I.P ENGINEERING Case and the complaints relating to jurisdiction

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