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IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

ECONOMIC CRIME APPEAL NO.5 OF 1999

(FROM THE DECISION OF THE DISTRICT COURT OF ILALA
AT KISUTU IN ECONOMIC CRIMES CASE NO. 6 OF 1996)

THE DPP.....APPELLANT
(Original Prosecutor)

Versus

1. DEBORA JOSEPH MCHARO
2. HAWA MATELEKA .....RESPONDENTS
3. HILDA EMMANUEL MAKAIDI (Original Accused)

J U D G M E N T

MANENTO, J.

This is an appeal by the Director of Public Prosecutions against the ruling of the Principal Resident Magistrate of Kisutu Resident Magistrates Court who, on 2nd December, 1998 dismissed the charge and acquitted the accused persons under Section 230 of the Criminal Procedure Act, 1984. The ruling was made exparte after the prosecutor from the Prevention of Corruption Bureau failed to enter appearance for the continuation of the prosecution case after it had been adjourned.

It was on 24th November, 1998 when the case was to proceed on hearing and the prosecutor was absent, without known reasons. Then the learned counsel for the respondents made a brief submission that the case had not progressed since 4th June, 1998 due to failure of witnesses to come to court though they are residents of Dar es Salaam. He submitted further that the prosecution had failed to prosecute the case and so the court was asked to evaluate the evidence, and make a ruling of no case to answer as there was no prima facie case established against the accused persons. Indeed, the learned Principal Resident Magistrate acted upon the prayers of the learned counsel for

..../2.

the accused persons and came into a conclusion that there was no case against the accused persons to answer. He dismissed the charge and acquitted the accused persons under the powers and authority of Section 230 of the Criminal Procedure Act, No.9/1985. That action did not please the Republic so that they filed this appeal against the ruling of the learned Principal Resident Magistrate.

The two accused persons Debora Joseph Mcharo and Hilda Emmanuel Makaidi being 1st and 2nd accused resputively, were charged of corrup transactions contrary to Section 3(1) of the Prevention of Corruption Act, No.16/1971 as read together with paragraph of the first Schedule to Section 59 of the Economic and Organised Crimes Control Act No.13 of 1984.

The facts of the case were briefly that the 1st Debora John Mcharo on 26/10/1995 at Kimara Primary Court premises, Kinondoni District and Dar es Salaam Region being a primary court Magistrate employed by the Judiciary hence a public officer for the purposes of the Prevention of Corruption Act, did corruptly solicit a sum of Shs.50,000/= from one Joseph Kaswizi as an inducemtne to provide bail in Criminal Case No. 1015/95 in which case the Said Joseph Kaswiza was an accused person, a matter which was in relation to her principal's affairs.

Both the accused were charged in the 2nd count that on the same date (26/10/95) and same place at Kimara Primary Court premises being a Primary Court Magistrate and a Clerk employed by the Judiciary in their respective capacities did corruptly receive the sum of Shs. 50,000/= from Joseph Kuswiza as an inducement to grant bail to Joseph Kaswiza who was an accused person in Criminal Case No.1015/95 a matter which was in relation to their principal's affairs. The accused persons had all denied the charge.

After the trial magistrate had dismissed the charge and acquitted the accused persons, the Director of Public Prosecutions prepared this appeal with four grounds of appeal. However, on reading the memorandum of appeal, I have realised that the 2nd and 3rd grounds of appeal were

..../3.

nothing but a repetition of each other. Hence they amount to one ground of appeal, making the total of three grounds of appeal leave alone the prayer for this court to allow the appeal and order the continuation of the case before the Resident Magistrate's Court. The three grounds of appeal are as follows:-

1. That the learned Resident Magistrate erred in law and in fact in holding that the prosecution case has been closed for non appearance of the public prosecutor.

2. That the trial magistrate erred in law and fact in holding that the prosecution had failed to establish a prima facie case,

3. That the trial magistrate erred in law in dismissing the case under Section 230 of the Criminal Procedure Act, while the prosecution had not stated its case.

Before I proceed with this judgment, I think I should first put it correct the last but three word of the 3rd ground of appeal as it is not proper to say that the "prosecution had not stated its case" but that the prosecution had not closed its case. I think it was ment to mean "closed" and not "stated" as above stated.

It is agreed from the submission and the ruling of the trial court that the proceedings came into an end on 24/11/98 and by the words of the trial court, it was an abrupt ending of the proceedings due to failure by the prosecution to enter appearance for the hearing of the case as previously ordered. The proceedings also show that on 19/10/98 when the case was called for hearing the prosecutor from the Prevention of corruption Bureau was not prent. However, Inspector Minga told the court that he had been informed by the officials from the Prevention of Corruption Bureau that their prosecutor was on leave and that she would be back sometimes in November, 1998. Then the case was fixed for hearing on 24/11/98. When it was dismissed as there was no appearance by either a prosecutor from the police force or the Prevention of of Corruption Bureau.

In making submissions for the first ground of appeal, the learned state attorney submitted that the prosecution had called on four witnesses who had testified and they had not closed their case. Some more witnesses were to be called, but the court closed their case for

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the reason that the prosecutor was absent. However, the case was not dismissed for want of prosecutionbut it was dismissed for no case to answer. The learned State attorney urgued that a prima facie case can only be determed after the prosecution has closed their case under Section 230 of the Criminal Procedure Act, 1985. Further that the trial magistrate was to evaluate the prosecution evidence and come to a conclusion after the prosecution had closed their case and not just after some witnesses had testified in court. On this ground of appeal, the learned defence counsel, Mr. Lukwaro submitted that the trial magistrate had the powers to bring into an end the prosecution case for the non appearance of the prosecutor, and that as the court was not prepared for further adjournments, it had no option other than presuming that the prosecution case was closed and therefore it was entitled to proceed to look at the evidence before it and found that even a prima facie case had not been established against the respondents/ accused persons. The learned defence counsel strongly urgued in support of the act of the trial magistrate in presuming that the prosecution case was closed, and so he went on to urgue his case with a support of a decision of the Court of Appeal for Eastern Africa where it was held that:-

> "The court is entitled to presume that the prosecution case is closed when the prosecution declines to bring his witnesses." See the case of

Uganda Vs. Milenge and another (1970) EA 269. Secondly the case of DPP VS Martin Nguma and another (1977) LRT 38 where it was held that where adjournment is not ordered dismissal of a charge and acquittal of person becomes mandatory."

Though I agree with the holding of the decisions of the cases quoted above, I am of the considered opinion that they are distinguished from this case. The Uganda case shows that the prosecution were declining willfully to call their witnesses and in Martin Ngumas case, the court had refused adjournment at the request of the prosecutor and therefore, it had nothing more to do but to dismiss the charge and acquit the

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accused persons The court was complying to its own previous orders of last adjournment. But the facts in this case is that the prosecutor was not present. Could the court presume that the prosecution case is closed when the prosecutor was not present in court? The case had previously been adjourned for the reason that the prosecutor was on leave. That is all. It was not known whether he had returned from her leave or not. But what is the procedure provided by the Criminal Procedure Act, 1985 when the prosecutor, for this matter, the complainant is absent on the day and date and place where the hearing is to proceed? Section 222 of the Criminal Procedure Act 9/1985 is relevant. It provides as follows:-

> S.222 If, in any case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the Summons served upon him at the time and place appointed in the summons for the hearing of the case or is brought before the court under arrest, then if the complainant, having (underline mine) having had notice of the time and place appointed for the hearing of the charge does not appear, the court shall dismiss the charge and acquit the accused person, unless for some reason, it shall think it proper to adjourn the hearing of the case until some other date....."

Under this section, the court is empowered to dismiss the charge and acquit the accused person if the complainant, with knowledge didn't come to the court for the hearing. The word complainant includes a Public Prosecutor as per interpretation in Section 2 of the Criminal Procedure Act, 1985. It would be very proper and legally right for the trial learned Principal Resident Magistrate to dismiss the charge and acquit the accused persons because of the failure by the prosecutor to appear with knowledge. I say so because the recordsshows that 19/10/98 Inspector Minga had represented the prosecutor from the Prevention of Corruption Bureau and the hearing date was fixed on his presence and hearing, so it is correctly presumed that Inspector Minga had communicated to the Prevention of Corruption Bureau the order of the court.

The learned Principal Resident Magistrate would have done what he

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did, that is to say dismissing the charge and acquitting the accused persons under Section 222 of the Criminal Procedure Act, 1985 and not under Section 230 of the same Act, as the provision he used needs a close of the prosecution case and there is no any element of facts to show that he had the support of the Uganda case VS. Milenge and another (1970) EA 269 quoted above. He had no basis for the presumption that the prosecution had declined or failed to call their witness. This case could be of help if the prosecutor was present on 24/11/98 without a witness. But that was not the case. He jumped the hudles before he reached then, and hence he grossly erred in law in invoking the provisions of Section 230 of the Criminal Procedure Act, 1985 by acquiting the accused persons on a no case to answer while the prosecution had not closed their case instead of acqutting the accused persons under S.222 of the Criminal Procedure Act for want of prosecution. Though the end result of the two sections are the same, that is to say dismissing the charge and acquiting the accused persons, the reasons for reaching at that decision are very much different. The records of the court have therefore to be put correctly by this court when it is seen that the subordinate court misdirected itself in the use of the procedure which are to be complied with.

What I have so far said above disposes the grounds one and four of the petition of appeal, that the trial learned Principal Resident Magistrate erred in law in holding that the prosecution case was closed in non appearance of the prosecutor and secondly that he erred in dismissing the charge under 230 of the Criminal Procedure Act, 1985. Like wise, as I have held that the trial Principal Resident Magistrate was wrong to dismiss the charge under S.230 of the Criminal Procedure Act, it goes without saying that he was wrong to evaluate the prosecution evidence and reach to a conclusion that the prosecution had not established a prima facie case against the accused persons sufficiently to require then to make a defence as the prosecution case had not

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been closed and he was not, in the absence of the prosecutor, entitled to presume that the prosecution had declined or failed to call their remaining witnesses. I am therefore not, under the circumstances entitled to comment as to whether there was a case to answer made against the accused persons or not.

I sincerly simpathise with the accused persons who had been out of work for so many years, since 1995 when they were arrested, without the case facing them being condluded. First it is due to the prosecution in failing to complete the hearing of the case in short period, despite of the fact that their witnesses are all at easy reach as it was a pre planned case, and secondly the failure by the learned Principal Resident Magistrate to follow the procedure laid down by the Criminal Procedure Act, 1985 which necesitates this court to allow the appeal and quash the ruling.

In the final analysis, and for the reasons stated above, the appeal is allowed, the ruling of the subordinate court is quashed and set aside. It is ordered that the case proceed from where it ended, by the prosecution to call their other remaining witnesses, and if they fail, the consequence to follow and that the trial to be before another Resident Magistrate where the accused persons will have to have their rights addressed to them under section 214 of the Criminal Procedure Act, 1985.

The fact that the case has delayed for so long, the District Registrar has to see to it that the judgment is typed as early as possible so that the Kisutu Case file No.6/96 is returned to the court for further actions.

A. R. MANENTO
JUDGE
8/12/1999

8/12/1999

Coram: A. R. Manento, J.
Mr. J. Lukwaro for the appellants
Mr. Koneya: for the Respondents.
CC: Aza

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Court: - The judgment is read in the presence of the parties, including the appellants.

A. R. MANENTO
JUDGE
8/12/1999