THE HIGH COURT OF ZANZIBAR

AT TUNGUU

CRIMINAL REVISION No. 04 OF 2024

(From the order given in the Criminal Case No. 100 of 2020 of the Regional Magistrate's Court at Vuga Zanzibar, Hon. Makame M. Simgeni, RM)

DPP

VERSUS

ROSTISLAV PENCHEV RAYKOV

RULING

21st & 30th October, 2024

A. I. S. Suwedi, J

The point raised herein got my attention after the above-named accused filed application No. 01 of 2024, requesting revision against an order given in Criminal Case No. 70 of 2023 in which the learned advocate for the accused prayed for the trial Court to order that the case was already decided and the accused was acquitted. Unfortunately, the prayer was objected to by the prosecution's side, and the Court agreed with the prosecution's side and finally ordered to proceed with the case. Hence, the Application No. 01 of 2024 was filed.

I initially decided to examine the foundation to determine what happened before the parties arrived at that situation. I found that the accused was brought to court for Criminal Case No. 100 of 2020 with unlawful possession of Narcotic Drugs. Records show that the case was adjourned several times due to the lack of an interpreter, as the accused is a foreigner who does not understand Kiswahili and English. Finally, on 20/04/2021, the charge was dismissed, and the accused was acquitted under section 209 (1) of the Criminal Procedure Act, No. 7/2018 (the Act), for the failure of the prosecution's side to proceed with the case. Then, the prosecution's side opted to open another case, Criminal Case No. 70 of 2023, which was said earlier to be the subject of Criminal Application No. 01 of 2014. This time, the offence was the Trafficking of Narcotic Drugs and Attempted Trafficking of Narcotic Drugs as the alternative count. However, the cause of action was the same as that of the Criminal Case No. 100 of 2020.

After perusing the records and learning the case's history, I told myself that the problem started with the accused person's acquittal. Hence, I decided to invoke powers under section 359 of the Act to examine the order in Criminal Case No. 100 of 2020 to see if the trial court correctly acquitted the accused person. Therefore, I invited the parties to address me on the argument so tabled.

On that day, Mr Annuwar Saadun, learned Principal State Attorney, appeared for the Director of Public Prosecutions, and the accused was present and represented by the learned counsel Rajab Abdallah.

PSA Saadun believed that the trial Court erred in acquitting the accused person under section 209 (1) of the Act. The provision allows the Court to accept or reject the adjournment prayer. The situation is similar to the one in which the prosecution's side failed to start the hearing of the case in time. The Court can reject the adjournment prayer and may dismiss the charge and discharge the accused person. Still, here, the accused person was acquitted, and he cited the case of **DPP v. Elia Masaka @ Funyizi and Another**, Criminal Appeal No. 137 of 2021, page 7. PSA Saadun said that the acquitted accused could not be charged again and prayed for the correct order to be issued.

On the other side, counsel Rajab had different thoughts from the prosecution's point of view. Initially, he appreciated section 209, which needs no further interpretation, but he distinguished the case cited since the matter does not concern the closure of evidence. He stated that the learned trial Magistrate had inherent powers to acquit even when the case on the prosecution's side was not yet heard. He strengthened his argument with the case of the High Court of **DPP v. Yahaya Upanga**

and Another (1983) TLR 151, and he insisted that what was done was legal.

I started by using my time to read the two cases presented by the parties. The first one is of **Elia Masaka @ Funyamizi** cited by the prosecution. The appeal originated from the High Court case whereby the trial Judge marked the closure of the prosecution case for failure to continue with cases after hearing five witnesses. Then, the trial Judge continued to make a ruling that a prima facie case was not made, and the accused persons were subsequently acquitted of the murder charge. The Court of Appeal of Tanzania relied on its previous decisions and believed that the trial Judge's closure of the prosecution case was illegal. So, the order was quashed and nullified. In the several decisions referred to in this appeal, the trial courts are required; when such a situation is faced, the court may dismiss the charge, discharge the accused, and not close the prosecution case. In **Director of Public Prosecutions v. Iddi Ramadhani Feruzi**, Criminal appeal No. 154 of 2011 (unreported), the Court of Appeal held that:

> The above said, it is our considered view, that in the circumstances of the instant appeal what was proper in law for the trial judge was to discharge the accused person.

Based on PSA Annuwar's argument, the Regional Magistrate Court should have followed the stated position of law, but it acquitted the accused person.

The second case was the decision of the High Court in an appeal of **Yahaya Upanga, and another**, quoted by counsel Rajab. The original case in this High Court appeal had similar facts to the original case in the appeal by the Court of Appeal stated earlier. But in this instant appeal, after the case had been adjourned several times and on the last day the prosecution did not appear, the District Court of Mwanza dismissed the charge and acquitted the accused under section 198 of the Criminal Procedure Code, Laws of Tanzania.

The main issue discussed in this appeal was the reason for non-attendance by the prosecution. The Court also addressed the remedy that the Court could have taken. The appeal Judge quoted the case of **D.P.P. v. Leonard Rugemereza and 7 Others**, Criminal Appeal No. 188/80 whereby it was stated that:

> I agree, however, that a period of over two years is inordinately long to have to prosecute such a case. The remedy, however, is not in acquitting them. The trial Magistrate could have invoked the inherent power of the court to discharge the accused……

The part of the decision shows that the remedy to be taken by the trial Court is to discharge the accused person in case the Court refuses an adjournment prayer by the prosecution's side rather than an acquittal order. The judgment did not end there; it also explained the two rules set by the case of **D.P.P. v Martin Nguma and Others**, Criminal Appeal Nos 48 and 69/76. The High Court Judge, after quoting the part of the judgment, explained the two rules set in the following words:

> As I see it the quoted passage of Court Appeal's judgment has two sets of rules. The first rule is that if under any circumstances, the court refuses to grant the application for adjournment then it may dismiss the charge and discharge the accused in which case the prosecution could subsequently recharge the suspect of the same offence based on identical facts. The second rule, which I have emphasized by underlining it is the court refuses to adjourn the case after an application for adjournment whether or not the case was ready for hearing on that day on which the refusal is made and if the circumstances of the case are exceptional the court may invoke its inherent power by dismissing the charge and acquitting the accused. The court emphasises that the invocation of the inherent power should be resorted to when it is strictly necessary and desirable, and that it should be exercised judicially.

I am more convinced by the explanation given that if the trial Court refuses to grant an adjournment order for failure to proceed with the hearing, whether the hearing was already started or not, then it can dismiss the charge and discharge the accused or dismiss the charge and

acquit the accused person. What was emphasized is that the court will acquit if there are exceptional circumstances.

I believe the trial Court may invoke both remedies depending on the circumstances. Under normal circumstances, the Court may refuse to grant adjournment; it may dismiss the charge and discharge the accused person. If this happens, the prosecution's side may bring fresh charges based on the same facts. Under exceptional circumstances, the court may dismiss the charge and acquit the accused if it refuses to adjourn. The fact that the law barred further proceedings in case of acquittal, as said in the case of **Haynes v. Davis** [1915] 1 KB 332, where the Court held:

> No matter what way the person obtains acquittal, he is entitled to protection from further proceedings.

Hence, it would be proper for the trial court's records to show those exceptional circumstances before acquitting the accused. This is to say, the trial Court must disclose why it is acquitting the accused before invoking inherent powers to acquit.

In the case of **Yahaya Upanga,** relied on by counsel Rajab, the High Court upheld the trial magistrate's order for acquittal because there were exceptional circumstances at the time of which the Court demanded to clean their long pending cases after prior caution and warning to the prosecutors.

In the instant case, records of the trial Court do not show the exceptional circumstances that led to the issuance of an acquittal order. The case failed to start the hearing because an interpreter was unavailable, and it is the duty of the Court to ensure the availability of an interpreter in case the accused person had a language barrier. Henceforth, it was not suitable for the trial Court to blame the prosecution's side. Based on this, I think the Court was wrong to acquit the accused person.

Having said so, by the powers under section 359 and section 361 (b) of the Act, the part of the order given on 20/04/2021 in Criminal Case No. 100 of 2020 is revised, and an order of discharge is hereby issued.

DATED at TUNGUU ZANZIBAR this 30th October 2024

A. I. S. Suwedi

JUDGE