IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MMILLA, J. A. And MKUYE, J.A.)

CRIMINAL APPEAL NO. 59 OF 2015

THE REPUBLIC .....APPLICANT

VERSUS

1. **FARID HADI AHMED**
2. **JAMAL NOORDIN SWALEHE**
3. **NASSOR HAMAD ABDALLAH**
4. **HASSAN BAKARI SULEIMANI**
5. **ANTARI HUMUD AHAMED**
6. **MOHAMED ISIHAKA YUSSUPH**
7. **ABDALLAH HASSANI @ JIBABA**
8. **HUSSEIN MOHAMED ALLY**
9. **JUMA SADALA JUMA**
10. **SAID KASSIM ALLY**
11. **HAMIS AMOUR SALUM**
12. **SAID AMOUR SALUM**
13. **ABOUBAKAR ABDALLAH MNGODO**
14. **SALUM ALI SALUMU**
15. **SALUM AMOUR SALUM**
16. **ALAWI OTHMAN AMIR**
17. **RASHID ALI NYANGE @MAPALA**
18. **AMIR HAMIS JUMA**
19. **KASSIM SALUM NASSORO**
20. **SAID SHEHE SHARIFU**
21. **MSELEM ALI MSELEM**
22. **ABDALLA SAID ALL @MDAWA**

.....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)
(Dr. Twaib, J.)
dated 19th day of December, 2014
in
Misc. Criminal Revision No. 101 of 2014

JUDGMENT OF THE COURT

14th June, & 5th July, 2017

MMILLA, JA.:

The Republic in this case is appealing against the decision of the High Court of Tanzania at Dar es Salaam dated 19.12.2014 in Misc. Criminal Application No. 101 0f 2014.

The background facts of the case are brief and simple. In July, 2014, Farid Hadi Ahmed and 21 others (the respondents), were charged before the Resident Magistrates Court of Kisutu (RM's court) with three counts; conspiracy to commit an offence contrary to section 27 (c) of the Prevention of Terrorism Act No. 21 of 2002; recruitment of persons to participate in terrorist acts contrary to section 21 (b) of that Act; and harbouring persons committing terrorist acts contrary to section 19 (a) of the same Act. The respondents were not asked to enter pleas because these offences are triable by the High Court.

In the course of the committal proceedings before that subordinate court on 3.9.2014, the respondents' advocates raised several issues which resulted into a decision that aggrieved the respondents, a fact which compelled their advocates to file on their behalf an application for revision before the High Court. In that application, they urged the High Court to exercise its revisional and supervisory jurisdiction to call for the record and proceedings of the RM's court for the purpose of satisfying itself as to the legality, correctness and propriety of the said proceedings, and the decision thereof made on 1.10.2014. The matters raised in those proceedings included those which touched on the jurisdiction of the committing court, lack of the mandatory consent certificate from the Director of Public

Prosecutions (the DPP) in certain instances, defects in the charge sheet for failure to disclose clear names of persons allegedly recruited, and failure to disclose factual particulars in certain instances, among others. They required the High Court to intervene and make consequential orders which, if granted, would result into the striking out of the charge sheet filed in the RM's court on 3.9.2014. Their alternative prayer was for a direction for each of the respondents to be arraigned and/or committed for preliminary inquiry in the subordinate court having jurisdiction in the area within which each respondent was arrested.

Likewise, the respondents' advocates were dissatisfied with the subordinate court's decision of 1.10.2014 which was to the effect that it had no jurisdiction to determine the matters they had raised, alleging that the finding amounted to abdication of duty conferred by law upon the subordinate court during committal proceedings.

After being served with the necessary documents of the application in that regard, the Republic filed a counter affidavit, and also raised three points of preliminary objection challenging the competence of the application.

After considering the competing submissions of both sides in respect of those points of preliminary objection, while he overruled the first ground

of preliminary objection, the High Court Judge sustained the other two grounds, and held that the application was incompetent. Nonetheless, the learned judge of the High Court did not strike out the application; instead he went on to decide the application on merit.

After brilliantly discussing the submissions of the counsel for the parties, the High Court Judge found that the subordinate court had jurisdiction to decide the matters which were raised before it. He consequently directed the subordinate court to determine the issues raised by the applicants on 3.9.2014 on the merits. That decision aggrieved the Republic, hence the present appeal which has raised three grounds as follows:-

1. That the Hon. Judge erred in law when he sustained the preliminary objection on points of law and then proceeded to determine the application on merits.
2. That the Hon. Judge erred in law and on facts in holding that there were two conflicting positions of law in the Court of Appeal.
3. That the Hon. Judge erred in law and on facts in directing the trial court to determine the issues *ultra vires* its powers.

Before us, Mr. Peter Ndjike, learned Principal State Attorney, represented the appellant Republic, while the respondents jointly enjoyed

the services of Mr. Juma Nassoro, assisted by Mr. Abubakar Salim, Mr. Rajabu Abdalla, and Mr. Abdalla Juma, learned advocates.

At the commencement of the hearing, Mr. Ndjike abandoned the first and second grounds of appeal. That left him with only the third ground of appeal to be proceeded with, which is a complaint against the direction by the High Court to the subordinate court to proceed with determination of the issues which were *ultra vires* its powers.

In his submission in support of this ground, Mr. Ndjike contended that the subordinate court had no jurisdiction to deliberate and decide on the matters which were raised by the respondents during committal proceedings. The matters he identified included the calling of the committing court to strike out all the counts in the charge sheet for failure to disclose factual particulars of the terrorist acts allegedly committed by two of the respondents (Sadick Absaloum and Farah Omary); the call to strike out the charge sheet for failure to show the names of the persons who were allegedly recruited to participate in the commission of the terrorist acts, as well as those who were harboured after committing the said terrorist act; and the allegation that the charge sheet was not clearly open as envisaged by section 135 (f) of the CPA. He submitted that those were legal matters to which the committing court had no jurisdiction to

deliberate and decide as they were a preserve for decision by the High Court upon committal of the respondents to that court for trial. Relying on the case of **The DPP v. Jumanne Rajabu** [1988] T.L.R. 144, Mr. Ndjike contended that where the committing court could have found that the charge was defective, the most it could do was to advise the prosecution to withdraw it.

For those reasons, Mr. Ndjike urged the Court to allow the appeal; quash the decision of the High Court; and direct the RM's court to proceed with the case from where it ended before the institution of the application for revision in the High Court.

On being probed to comment on the interpretation by the judge of the High Court of section 129 of the CPA, while agreeing that the subordinate court has powers expressed under that section in respect of cases in which such court is seized with power to try, Mr. Ndjike was firm that a subordinate court has no such powers during committal proceedings.

On the other hand, Mr. Nassoro submitted that the subordinate court had jurisdiction to deliberate and decide on matters which were raised before it during committal proceedings on powers envisaged by section 129 of the CPA. He insisted that the subordinate court has a vital role to play during committal proceedings, including satisfying itself that the

charge against the accused person is properly drawn. He also contended that section 246 (1) of the CPA require the committing court to summon the accused to appear before it, and in terms of subsection (2) of that section, upon appearance of the accused person before it, that court is required to read and explain, or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the DPP intends to call at the trial. He contended therefore that it is improper to argue that the committing court had no power to deliberate and decide on the matters which were raised because they were within the scope covered under section 246 (1) and (2) of the said Act. He was of the view that such duty is similar to that which was expressed in the case of **Republic v. Dodoli Kapufi,** Criminal Revision Nos. 1 and 2 of 2008, CAT (unreported). Although that expression concerned the question of bail, Mr. Nassoro said, the similarity of that case to the present lies on the fact that it was also a case which was not triable by the subordinate court. On the basis of that, Mr. Nassoro pressed the Court to dismiss this appeal.

Another contribution on the respondents' side came from learned advocate Salim. He faulted Mr. Ndjike for saying that the subordinate court had no power to deliberate and decide on those matters which were raised

before it. He reinforced the argument that the trial court had such power in terms of section 129 of the CPA. He repeated the prayer made by his colleague, Mr. Nassoro, that the Court dismisses the third ground of appeal and upholds the decision of the High Court.

We have anxiously considered the rival arguments of counsel for the parties. Taking on board the matters which were raised by the respondents before the subordinate court requiring answers during committal proceedings; the issue becomes whether or not the subordinate court had jurisdiction to decide those matters during committal proceeding. We wish to begin the discussion by making a general observation on the question of jurisdiction.

It is common ground that jurisdiction is court's power to hear and decide a case, and it is a creature of the law. It should be underscored that the jurisdiction of any court must be expressly given; it cannot be implied and/or assumed. Also note-worth is the point that **invariably such jurisdiction is limited**. Where a decision of any court may be found to have been reached without jurisdiction, such a decision risks the danger of being declared invalid by a higher court.

In our jurisdiction, the Penal Code Cap 16 of the Revised Edition, 2002 is the major statute prescribing the various offences which the law

prohibits and whose breach attracts prosecution. On the other hand, the CPA not only governs the procedure in trials of criminal offences, but also sets out the offences triable by subordinate courts, and those which are exclusively subject to trial by the High Court. In all those offences for which the High Court has original jurisdiction, there is a legal requirement for such offences to be instituted in the subordinate courts (the RM's Court and District courts), which are charged with duty to hold committal proceedings, and subsequently to commit such accused persons to the High Court for trial.

We wish to also point out that committal proceedings fall under Part VII of the CPA. The crucial provisions under that Part for the purpose of issues involved in the present case are sections 243 to 246 of the CPA. Our starting point is section 244 of the CPA which architectures the limitations and exceptions. That section provides that:-

> *"Whenever* ***any charge*** *has been brought against any person* ***of an offence not triable by a subordinate court*** *or as to which* ***the court is advised*** *by the Director of Public Prosecutions in writing or otherwise* ***that it is not suitable to be disposed of upon summary trial, committal proceedings shall be held according to the provisions hereinafter contained by a***

subordinate court of competent jurisdiction." [Emphasis provided].

We have no doubt that the wording of this provision clearly shows that the powers of the subordinate court in such proceedings are limited. This is in so far as it dictates that where an offence is not triable by the subordinate court, or to which the DPP may advise in writing that it is not suitable to be disposed of upon summary trial, the committal proceedings shall be held. It does not end there; it also directs that committal proceedings shall be held according to the provisions hereinafter contained, implying per section 246 thereof.

We note that the High Court Judge discussed about the import of section 246 (1) and (2) of the CPA. He was persuaded that the subordinate court had jurisdiction over the matters which were raised before it on the basis of the wording of section 246 (2) of the CPA which he held to entail that the committing court is not merely passive, but has duty to cause the charge to be read over to the accused and to explain it to him in order to afford him opportunity to know the nature of the charge against him.

This stand is supported by Mr. Nassoro who has submitted that it is improper to argue that the committing court had no power to deliberate

and decide on the matters which were raised because they were within the scope covered under section 246 (1) and (2) of the said Act.

On our part, we are, with due respect, holding a different view for reasons we are about to assign. However, before addressing those provisions, we feel it is essential to give a brief history of the relevant committal proceedings provisions, tracing the repeals and amendments of the Criminal Procedure Ordinance from 1930, through 1932, 1945, 1969 over to 1985, with particular focus on the powers of the committal court.

It will be recalled that about 87 years ago, committal proceedings in our jurisdiction were governed by the Criminal Procedure Code, No. 12 of 1930, when committal proceedings were commenced by an inquiry. In that era, the magistrate could read over and explain to the accused the charge against him, but the accused was not allowed to enter plea. Thereafter, the court recorded the statements of the witnesses made on oath and the accused was given opportunity to pose some questions to each witness. This procedure remained intact despite several amendments made since 1932 through 1945.

Where the court found that the examination of the prosecution witnesses established sufficient evidence for the purposes of committing

the accused for trial, then the magistrate framed the charge and called the accused and his witnesses, if any, to give evidence and address in defence.

After closure of the case on both sides, the magistrate considered the evidence in whole and if he was of the view that the prosecution evidence was insufficient to put the accused to trial, then the accused was discharged from the charge.

On the other hand, if the magistrate found that there was sufficient evidence, he committed him for trial in the High Court. Thereafter, on receiving a copy of inquiry record the Attorney General (the AG) the latter could direct further investigation to be conducted and additional witnesses if the need arose. Once satisfied that there was a strong case, he drew and filed the relevant information. The subordinate court could also grant bail for bailable offences. Then, all the intended evidence and witnesses were fully disclosed under the doctrine of 'full disclosure' in Criminal Cases.

However, in 1945 the Criminal Procedure Code of 1932 was repealed and replaced by the Criminal Procedure Code which came into force on September 28, 1945, and for the first time the Office of the Director of Public Prosecutions (DPP) was established. He became the controller of criminal prosecutions instead of Attorney General.

It is significant to note that the 1945 Criminal Procedure Code **did not save the powers hitherto vested in the magistrate in the subordinate court to conduct inquiry.** Even after the repeal of Criminal Procedure Code of 1945, and enactment of the new Criminal Procedure Act, 1985, whose main object was to provide for procedure to be followed in investigation of crimes and conduct of committal trial and for other related purposes, the former position remained the same, thus the active role of the magistrate in committal proceedings was done away with. See **Tanzania: Mixed Feelings On High Court Committal Proceedings (Online).**

It is on the basis of the above that under the CPA we have a situation where the role of the subordinate court magistrates is very minimal, whose power has become to merely read or cause to be read to the accused the statements of the witnesses after which the accused is committed to the High Court for trial. This is all what section 246 (1) and (2) of the CPA is all about.

In terms sub section (1) of section 246 of that Act, upon receipt of the copy of the information and the notice from the DPP, the subordinate court is duty bound to summon the accused person from remand prison or, if not yet arrested, order his arrest to compel appearance before it. After

that, the magistrate is required to read, or cause the statements of evidence to be read to the accused as directed by sub section (2) of the same section. Sub section (2) of section 246 of that Act provides that:-

> *(2) Upon appearance of the accused person before it, the subordinate court* ***shall read and explain or cause to be read*** *to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial."*

We need to point out here that the advantage of this requirement is to let the accused person know in advance of his trial, the kind of evidence and witnesses who will give evidence at his trial. In fact, he is (the accused) given copies of the statements of all the witnesses to afford him good chance to prepare his defence. See **Leonard Jonathan v. Republic**, Criminal Appeal No. 225 of 2007, CAT, (unreported).

It is equally essential to point out that in terms of section 245 (3) of the CPA, the magistrate is guided on what to address the accused. That section provides that:-

"(3) After having read and explained to the accused the charge or charges the magistrate shall address him in the following words or words to the like effect:

"This is not your trial. If it is so decided, you will be tried later in the High Court, and the evidence against you will then be adduced. You will then be able to make your defence and call witnesses on your behalf"."

When sections 245 (3) and 246 (2) of this Act are read together, it becomes clear that in committal proceedings the magistrate has no other role to perform in this regard beyond the mere requirement to cause the statements to be read to the accused, before it may commit such person for trial to the High Court. In that vein, we hold the view that those matters which were raised before the RM's court on 3.9.2014 were legal matters to which the RM's court had no jurisdiction to decide. Those matters ought to have been reserved with a view of raising them in the High Court upon being committed to that court for trial. We also agree with Mr. Ndjike that at most, where the subordinate court may be convinced that the charge is defective, the most the magistrate could have done was to advise the prosecution to withdraw the charge in line with what was stated in the case of **The DPP v. Jumanne Rajabu (supra).**

We now turn to discuss section 129 of the CPA which the learned advocates for the respondents believed it gives power to the RM's court to deal with matters such as those which were raised in the subordinate court in its proceedings of 3.9.2014.

We recall that in his ruling, the High Court judge stated in this regard that the subordinate court had power to discuss and decide those matters in terms of section 129 of the CPA which requires the magistrate, while admitting a complaint, to satisfy himself/herself that any complaint or formal charge made or presented under section 128 of that Act discloses an offence, and if not, to make an order refusing to admit the complaint or formal charge, with his/her reasons for such order.

It is certain that section 129 of the CPA gives power to the magistrates to reject complaints or formal charges presented to it upon finding that any particular complaint does not disclose any offence. That section provides that:-

> *"Where the magistrate is of the opinion that any complaint or formal charge made or presented under section 128 does not disclose any offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for such order."*

No doubt, this section echoes the salutary rule that no charge should be put to an accused person before the magistrate is satisfied, *inter alia*, that it discloses an offence known in law; the rationale being that no person should be subjected to the rigours of a trial based on a flawed charge.

In our view however, the power of magistrates under section 129 of this Act are confined to offences triable by the subordinate court because it does not fall under the provisions governing committal proceedings. Thus, we are convinced that it was improper for the High Court Judge to interpret those powers as extending to committal proceedings, because as already stated, matters of committal are covered elsewhere. Consequently, we agree with Mr. Ndjike that the High Court Judge erred in holding that the RM's court had jurisdiction to deliberate and decided on those matters on the basis of the power enacted under this section.

The learned advocates for the respondents had submitted similarly that the subordinate court had jurisdiction to decide the matters which were raised in the proceedings of 3.9.2014 on the authority of what was stated by the Court in the case of **Republic v. Dodoli Kapufi** (supra).

After carefully reading **Kapufi's** case, we have found that the main issue in that case was whether or not a committal court could grant bail in

bailable offences. The Court answered the issue in the affirmative because, *inter alia*, the law allows the committal court to grant bail in bailable offences. Particular reference was made to sections 245 (4) and 248 of the CPA. The Court stated that:-

> *"It would appear to us that on a true construction and contextual reading of section of section 148 (1) and 148 (5) (a) of the CPA, which are the principal provisions governing bail, subordinate courts are empowered to admit accused persons before them to bail for all bailable offences, including those triable by the High Court, save those specifically enumerated under section 148 (5) (a) thereof, for which no bail is grantable by any court."*

Thus, in **Dodoli Kapufi's** case the law provided for the powers on the subordinate court to grant bail in bailable offences. In our present case however, the contrast is that there is no any provision of law empowering the subordinate court to entertain the issues which were raised before the subordinate court magistrate as shown above. In the circumstances, **Dodoli Kapofi's** case is distinguishable from our present case.

For reasons we have assigned, we find and hold that the subordinate court magistrate had no jurisdiction to deliberate and decide the matters which were raised before it by the respondents' advocates. Therefore, the appeal has merit and we allow it. Consequently, we quash the decision of

the High Court, and direct the RM's court to proceed with the case from where it ended before the institution of the application for revision in the High Court.

Order accordingly.

DATED at **DAR ES SALAAAM** this 30th day of June, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPE

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL