IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LUBUVA, J.A., MROSO, J.A., And MUNUO, J.A.)

CRIMINAL APPEAL NO. 18 OF 1999

BETWEEN

1. EDMUND MJENGWA
2. LAWRENT MWANG'OMBE
3. RAPHAEL SIMWITA
4. STEPEN NDWENYA
5. SAID KIMATA
6. MHANGO MKATASA
7. GASPAL MLWILO

..... APPELLANTS

AND

1. JOHN MGAYA
2. NAPOLIONI MWAKAMYANDA
3. TELA KURUBAI
4. YASINI KABELEGE
5. PHILIPO CHINIKO

..... RESPONDENTS

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Kileo, J.)

dated 18th January, 1999

in

Criminal Appeal No. 127 of 1996

J U D G M E N T

LUBUVA, J.A.:

This appeal arises from the decision of the High Court (Kileo, J.) in Criminal Appeal No. 127 of 1996. The appellants, Edmund Mjengwa, Lawrent Mwang'ombe, Raphael Simwita, Stephen Ndenya, Said Kimata, Mhango Mkatasa and Gaspal Mlwilo, were aggrieved by the decision and hence have appealed.

The hearing of Criminal Appeal No. 127 of 1996 in the High Court was preceded by a protracted and chequered history. This matter was first heard by this Court in Criminal Appeal No. 8 (A) of 1997 in which the appellants had appealed against the High Court (Mwipopo, J.) order of 4.3.1997 which was based on the

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court's ruling of 24.1.1997. On 12.12.1997, this Court set aside the High Court order of 4.3.1997. Again in connection with the same High Court Criminal Appeal No. 127 of 1997, the respondents, John Mgaya, Napolioni Mwakamyanda, Fela Kurubai, Yasini Kabelege and Philipo Chiniko, filed in this Court Criminal Appeal No. 5 of 1997 against another order by Mwipopo, J. dismissing a preliminary objection they had raised in Criminal Appeal No. 127 of 1997. On 16.3.1998, the appeal was dismissed. Thereafter, the matter was taken back to the High Court for hearing whose decision as indicated earlier, has given rise to this appeal. Before the hearing of the appeal, there were several adjournments for various reasons.

The genesis of the matter is Mbeya Misc. Criminal Application No. 6 of 1996. In that application, the respondents sought under the provisions of section 99 (1) and (3) of the Criminal Procedure Act, 1985 (the Act) the court's leave for private prosecution against the appellants. The application was opposed by the appellants essentially on the ground that the application could not be maintained because it was not preceded by a formal charge or complaint. The learned Senior Resident Magistrate granted leave as prayed. The appellants were aggrieved and so, they appealed to the High Court.

In the High Court, the case for the appellants was briefly to the following effect. The learned trial magistrate erred in granting leave because the pre-requisite conditions under the provisions of section 99 (1) of the Act had not been fulfilled. In the first place, the application for leave is sought for conducting an existing case and not for the institution of a case. In this case it was urged that there was no case already

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instituted against the appellants in respect of which leave was sought. Secondly, the application for private prosecution under this section of the Act could only be granted if the application was preceded by a formal institution of a criminal charge before the magistrate. Thirdly, it was also strongly contended that the circumstances under which leave was sought were not such as to warrant the exercise of the court's power to grant leave. It was further contended that the affidavits in support of the application disclosed no sufficient reason for mounting private prosecution.

The learned judge, after what appears to us a detailed analysis of the rival submissions, dismissed the appeal on the following grounds. First, the judge held that to conduct private prosecution is not limited to carrying on proceedings already instituted but includes both the institution and carrying on of private prosecution. The judge further held that to grant an application for private prosecution prior to the formal filing of a charge or complaint in court does not offend the provisions of the Act. Second, that the filing of affidavits containing allegations of offences committed was sufficient ground for granting the application sought under the provisions of section 99 (1) of the Act. Thirdly, having regard to the circumstances of the case in which the police were not taking action to institute criminal proceedings against the appellants, the matter called for action on the part of the respondents by private prosecution. The appellants were still dissatisfied and hence this appeal.

In this appeal, Mr. Rweyongeza and Mr. Mkumbe, learned counsel, appeared for the appellants. For the respondents, Professor Safari and Mr. Jundu, learned counsel, appeared. The following grounds of

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appeal were filed:

1. THAT, the Appellate Judge, having found that the field of private prosecution in this country is not much developed, misdirected herself in law in failing to address herself under what circumstances should private prosecution be permitted.

2. THAT, the Learned Appellate Judge misdirected herself in law in failing to find that there are conditions precedent before the Court can be seized with jurisdiction to entertain an application for private prosecution.

3. THAT, the Appellants having denied by way of Counter-affidavits that there was a report made to the police, the Learned Appellate Judge misdirected herself in law in failing to analyse the totality of the evidence on record.

4. THAT, having regard to the interests of the Respondents, as stated in their joint Reply to the Appellants' Counter-affidavits, the Learned Appellate Judge misdirected herself in law in finding that the Respondents could conduct private prosecution on the charges preferred against the Appellants.

Mr. Rweyongeza's submission may be summarized in three categories. First, that it was an error in law for the learned judge on first appeal, and the trial magistrate to hold that it was not necessary to have a formal charge or complaint before leave for private prosecution was granted. Mr. Rweyongeza forcefully submitted that in order for the court to invoke the provisions of section 99 (1)

of the Act, in granting leave to institute private prosecution, certain pre-requisite conditions have to be fulfilled. He said that in establishing such conditions, the judge was handicapped because private prosecution is not a field which is much developed in our legal system. As a result, in arriving at the decision the judge did not have the benefit of previous decided cases on the application of section 99 (1) of the Act. One of the conditions, Mr. Rweyongeza stated, is that there should be a formal complaint or charge prior to the filing of the application for leave. In this case, as there was no formal complaint or charge, the trial magistrate granted leave for private prosecution contrary to the requirement of the law under section 99 (1) of the Act. Similarly, the learned judge on first appeal fell into the same error in holding that a formal charge or complainant was not necessary, he added. According to Mr. Rweyongeza, the logic behind the requirement for formal charge or complaint prior to the application for leave is to ensure that the individual seeking leave is genuinely interested in the prosecution of the case and not for malicious or frivolous purpose.

Professor Safari, learned counsel, countered the submission by Mr. Rweyongeza. He submitted that the law as provided under sections 99 (1) and 128 (1) of the Act was complied with when the respondents filed the application before the magistrate supported by affidavits to which the charge to be preferred against the appellants was annexed. He further stated that by filing the application, the respondents had made a complaint in terms of section 128 (1) of the Act and thereby instituting the proceedings. Professor Safari also contended that the affidavits in support of the application sworn by the respondents was sufficient indication

of the applicants' genuine interest in the case and not otherwise.

We wish to point out at once that it is not because the field of private prosecution in this country is not much developed that the misdirection on the part of the judge, if any, can be attributed to as alleged in ground one. With due respect, we think the learned judge was merely expressing a factual situation. If there was any misdirection, that we think would be attributed to the application of the law as provided under the Act. For our part, there is no denying the fact that private prosecution in this country is provided for under section 99 (1) of the Act. Upon a close reading of this section, we are unable to find any requirement of a prior formal charge or complaint in order for a magistrate to grant leave for private prosecution. The wording of the section reads:

> 99 (1) Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the President in this behalf shall be entitled to conduct the prosecution without such permission.

In our view, the operative words are <u>any magistrate inquiring into or trying any case</u> may permit the prosecution to be conducted by any person. It is therefore not possible for the magistrate to inquire into or try any case which is not brought before him. It follows therefore that it is until proceedings have been instituted in terms of section 128 (1) of the Act that the matter is properly before the magistrate for inquiry or trial. In this

case, when the respondents filed the application supported by the requisite affidavits and the charge sheet, proceedings were duly instituted in terms of section 128 (1) of the Act. Therefore, at that stage section 99 (1) of the Act can be invoked without any further ado as happened in this case. In the circumstances, we do not agree with Mr. Rweyongeza that there was a misdirection on the part of the learned judge in holding that no formal prior charge or complaint was required prior to the application.

While accepting that an individual has a right to institute private prosecution, Mr. Rweyongeza contended that this right is not unlimited. He said that only in exceptional and deserving circumstances an individual would be permitted to conduct private prosecution, a function which is otherwise discharged by the Director of Public Prosecutions. For instance, he said in the case of the police or Director of Public Prosecutions refusing or being indifferent to mount prosecution, then subject to the fulfilment of other conditions, an individual may be granted leave to institute private prosecution. In this case, he urged, the respondents have not shown that they reported the matter to the police who have refused to take action against the appellants.

Professor Safari took a different view on this point. He said private prosecution does not usurp the powers of the Director of Public Prosecutions. According to him, the right to private prosecution under the provisions of section 99 (1) of the Act, is in accordance with the individual's constitutional right. On this, Professor Safari was supported by Mr. Mbago, learned Principal State Attorney, who appeared as amicus curiae. However, Professor Safari went further to say that in this case private

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prosecution was warranted. He stated that from the affidavits filed in support of the application and the reports from the various committees formed to look into the matter, there was inertia on the part of the authorities responsible for instituting prosecution.

It is common ground that private prosecution does not usurp the powers of the Director of Public Prosecutions. Under the provisions of section 90 (1) (b) and (c) of the Act, the Director of Public Prosecutions is empowered to take over and continue or discontinue any such criminal proceedings that have been instituted. As stated by Lord Wilderforce in the case of Gourie v. Union of Post Office Workers (1978) A.C. 435, "the individual's right to prosecute remains a valuable constitutional safeguard against inertia or partiality on the part of authority." In this case and as Professor Safari submitted, from the affidavital depositions in support of the application, it can hardly be said that the authorities concerned with prosecution were free from inertia in mounting prosecution against the appellants. Apparently, the matter has for long gone the rounds in Mbarali District and the Regional level without any action to institute prosecution. This is borne out from the affidavit of Francis Merere who deponed that he reported the matter to the Regional Police Commander Mbeya to no avail. For this reason, we agree with Professor Safari that the respondents had cause to resort to private prosecution.

In grounds 3 and 4, Mr. Rweyongeza's complaint was that had the learned judge considered the totality of the evidence in the application laid before the magistrate, she would have found that no sufficient ground had been shown for private prosecution. He urged that it was a misdirection on the part of the judge in

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considering the counter-affidavits of the appellants in which they had denied that a report had been made to the police.

As Professor Safari submitted, there was no misdirection on the part of the learned judge. We have already held that as a matter of law a formal charge or complaint is not necessary prior to the application for leave. The affidavits and counter-affidavits referred to in grounds 3 and 4 relate to a formal report to the police. From the record, we are satisfied that the learned judge considered the whole evidence that was laid before the magistrate and came to the conclusion that the magistrate judicially exercised his discretion to grant leave.

On the third category of the grounds of appeal, Mr. Rweyongeza urged that the learned judge erred in failing to address herself on the circumstances justifying private prosecution. He submitted that without examining closely the circumstances on which the application was based, there was the danger of granting leave for private prosecution on vexatious and frivolous charges. The danger is even greater in Tanzania where, unlike England, public interest is not defined in the Criminal Procedure Act, 1985 Mr. Rweyongeza stressed. He said that it was not enough to make generalized accusations against the appellants without indicating how the appellants are linked with the proposed offences in the charge. In this case, he further stated, it is not shown in the charge sheet or affidavits who, among the appellants received the money or that the money was handed over to the appellants. Mr. Rweyongeza contended that before granting leave, the magistrate should at the very least, ascertain whether the alleged offence is known to the law and if so whether

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essential ingredients of the offence are prima facie present. For this proposition, Mr. Rweyongeza referred to the case of Reg. v. Tower Metropolitan Bridge Stipendiary Magistrate, Ex parte Chaudhry (DC) extracted and referred to in the report of the Law Commission of England and Wales, Criminal Law, September 22, 2001, Part V Appendix C Page 340.

Responding to these submissions, Professor Safari maintained that the offences proposed in the charge sheet annexed to the affidavits in support of the application are known to the law, namely stealing by agent and cheating. Furthermore, he submitted that although it is not necessary at the stage of the application to give detailed particulars of the offence, nonetheless, the essential ingredients of the proposed offences had been shown. On the whole, he said that the magistrate had judicially exercised his discretion to invoke the provisions of section 99 (1) of the Act which are only pemissible. Mr. Mbago, learned Principal State Attorney was also of the view that section 99 (1) of the Act is not couched in mandatory terms, it is for the magistrate to exercise his discretion to allow or refuse leave.

From the submissions by learned counsel for both parties on this ground, we think the central issue is whether the magistrate in dealing with the application for leave addressed and satisfied himself that there were reasonable and probable cause for mounting private prosecution. Mr. Rweyongeza firmly maintained that the magistrate did not. It is to be observed that section 128 (1) and (2) of the Criminal Procedure Act, 1985 provides for the institution of criminal proceedings. Sub-section (2) of this section also provides for the parameters in which an individual

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may make complaint to a magistrate of competent jurisdiction. According to this sub-section, in order for any person to make a complaint to the magistrate with a view to institute proceedings, it is necessary to show that such a person believes from a reasonable and probable cause that an offence has been committed.

With regard to this requirement, we think, with respect, that the case of Reg. v. Tower Bridge cited and extracted in the Report of the Law Commission of England and Wales to which Mr. Rweyongeza called our attention, provides helpful guidance on this point. In this case, a judicial review was sought in connection with the decision of the Tower Bridge Metropolitan Stipendiary Magistrate refusing to issue a summons, the equivalent of the application for leave in this appeal, Lord Justice Kennedy read the judgment of the Divisional Court of the House of Lords (1994) Q.B. 340. In the course of the judgment, reference was made to another decision of the House of Lords in Reg. v. West London Metropolitan Stipendiary Magistrate, Ex parte Klahn [1979] 1 W.L.R. 933. In that case, Lord Widgery C.J. at pp. 935 - 936 inter alia, said:

> A summons is the result of a judicial act. It is the outcome of a complaint which has been made to the magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons. It would appear that he should at the very least ascertain: (i) whether the allegation is of an offence known to the law and if so whether the essential ingredients of the offence are prima facie present; (ii) that the offence alleged is not out of time; (iii) that the court has

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> jurisdiction; (iv) whether the informant has the necessary authority to prosecute. In addition to the specific matters it is clear that he may and indeed should consider the allegation is vexatious.

Then the Court further stated:

> The magistrate must be able to satisfy himself that it is a proper case in which to issue a summons.

These principles are, as urged by Mr. Rweyongeza relevant and applicable in our country. The provisions of section 99 (1) of the Criminal Procedure Act relating to permission to conduct private prosecutions are almost similar to the equivalent provisions in England and Wales as shown in the Law Commission Report. It was imperative therefore for the magistrate to satisfy himself that the essential ingredients of the offence to be preferred against the appellants prima facie were present. Upon a perusal of the record, it is doubtful that the magistrate brought his judicial mind to bear on this aspect before deciding to grant leave. This is evident from the record in which the affidavits and the charge in support of the application which do not show who, amont the appellants, received the money contributed, how much of it was spent on the school project, who was responsible for its custody and how much of it was unaccounted for. In the charge, the particulars of offence in the various counts of stealing by agent, in general terms state that the appellants, jointly and together, stole specified sums which had been received by them, for and on account of Mbarali Education Trust. From such generalized allegations it can hardly be said that the essential

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ingredients of the offences were prima facie shown. The magistrate, understandably, and as he stated in his ruling was dealing for the first time with a case of this nature. So, as can be seen from the ruling he did not address the basic essential ingredients of the offences. Rather, he was more concerned with the fact that the court had jurisdiction to try the offence and that it was a deserving case in which to grant leave for private prosecution. This, we think was not enough to warrant the magistrate to grant leave for private criminal prosecution. Unfortunately, on appeal to the High Court, the learned judge, with respect, did not also address this aspect. As a result, she reached the same conclusion as the magistrate that this was a fit case for granting leave. It is our view that in all applications of this kind, unless the magistrate judicially applies his mind to all the circumstances in which to grant leave for private prosecution, the danger of victimization and abuse of process is imminent. The essential ingredients of the offence is one such factor that should not be overlooked.

Of course, it goes without saying that the respondent as well as the members of the public in Mbarali, may well have a genuine concern for the proper utilization of money and other resources mobilized for the purpose of constructing schools. However, in ensuring accountability, when criminal proceedings are resorted to as was the case here, the basic essential ingredients of the offence should, prima facie be shown. This was not the case here.

In the circumstances, we are satisfied that both the magistrate and the learned judge on first appeal had not addressed

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and satisfied themselves that there was reasonable and probable cause that an offence had been committed to warrant private prosecution. Had this been done, we think the application would not have been granted.

In the event, and for the foregoing reasons, we allow the appeal, quash and set aside the decision of the High Court.

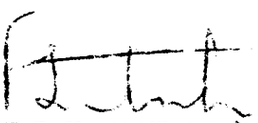
DATED at MBEYA this 9th day of April, 2003.

D.Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

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



(F.L.K. WAMBALI)
DEPUTY REGISTRAR