IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LUBUVA, J.A., NSEKELA, J.A., And MBAROUK, J.A.)

CRIMINAL REFERENCE NO. 1 OF 2006

YOHANA NYAKIBARI & 22 OTHERS ..... APPLICANTS
VERSUS
THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Reference from the decision of a single Judge
of the Court of Appeal of Tanzania
at Mbeya)

(Mroso, J.A.)

dated the 13th day October, 2006
in
Criminal Application No. MBY 1 of 2005

R U L I N G

13 & 21 August 2007

LUBUVA, J.A.:

This is a reference from the decision of a single Judge of this Court (Mroso, J.A.) refusing leave to appeal to this Court from the decision of the High Court (Mackanja, J.) in High Court Criminal Revision No. 6 of 2004.

The background of the matter is brief. In the District of Njombe at Njombe, the appellants were charged on three counts with the offences of causing grievous harm; trespass and abusive

language, brawling and threatening violence contrary to sections 225, 299 (a) and 89 (a) of the Penal Code.

Apparently, at the commencement of the trial, the applicants raised objection to the appointment of the public prosecutor, a police officer, who was conducting the prosecution. The competence of the public prosecutor was also questioned with regard to the move to substitute the charges against the applicants. This did not find purchase with the trial magistrate who overruled the objection.

The matter was taken to the High Court as the applicants were not satisfied with the trial court's decision. The High Court also dismissed the application for revision. Still dissatisfied, the applicants sought to appeal to this Court against the High Court dismissal order by applying for leave to appeal. As the High Court refused to grant, leave the applicants applied before a single Judge of this Court (Mroso, J.A.) for the same.

Dealing with the application for leave to appeal, the learned single Judge took the view that the orders of the District Court overruling the objection to the public prosecutor were interlocutory orders. He further held that with regard to such orders the law under section 372 (2) of the Criminal Procedure Act, 1985 as amended bars appeals or revision. Consequently, on 1.12.2006 the learned single Judge dismissed the application for leave to appeal.

By letter dated 6th December, 2006, addressed to the Registrar, Court of Appeal, the applicants through the services of G.S. Ukwong'a, learned counsel, moved the Court under rule 57 (1) for this reference. In preferring this reference the Court is invited to consider what amounts to an interlocutory order.

Before us in this reference, Mr. Luguwa, learned counsel, appeared for the applicants and Messrs Ntwina, Malata and Mwenda, learned State Attorneys, represented the respondent, the Director of Public Prosecutions. Mr. Luguwa, started by briefly setting out the historical background of the matter. That it all started with criminal

proceedings in the District Court of Njombe at Njombe which are still pending to date. He pointed out that so far, there is no statutory definition of an interlocutory order. However, he referred to its general description to the effect that it is one which does not finally determine the rights of an individual. At the instance of the Court Mr. Luguwa conceded that this definition goes along with the provisions of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2002, No. 25 of 2002.

With regard to the grounds upon which he sought to fault the decision of the learned single Judge in dismissing the application for leave Mr. Luguwa prevaricated. First, he said the learned single Judge did not consider the fact that the trial court was not properly constituted. He maintained that in terms of the provisions of the Government Notice No. 135 of 1941 the police officer conducting the prosecution of the case had not been properly appointed. This is so, he further stated, because this Government Notice deals with the appointment of public prosecutors in customs prosecution.

However, when prompted by the Court to refer to the provisions of section 7 of the Magistrates' Courts Act, 1984 which sets out when a District Magistrate's Court among others, is constituted, he changed his position. He conceded that the trial District Court was properly constituted.

Second, he submitted that there were errors manifest on the face of the record which the learned single Judge did not address. Asked by the Court to elaborate on what was the error manifest on the face of the record, counsel insisted that it was a matter which goes to the root of the matter, namely the question of jurisdiction. This aspect, Mr. Luguwa maintained, the learned single Judge did not address.

Thirdly, having examined the decision of the Court in **Seif Sharif Hamad V S.M.Z.** [1992] TLR 43 and **Anderson Solomon V R** [1994] TLR 11 Mr. Luguwa said the legal position and practice of the Court regarding interlocutory orders in criminal cases was well settled even before the statutory amendment effected

under Act No. 25 of 2002. With the enactment of Act No. 25 of 2002, he further stated, the legal position on the issue was further sealed. Finally, Mr. Luguwa, while conceding that the criminal charge, subject of the application against the applicants is still pending in the District Court at Njombe, he adamantly insisted that the order complained against did not finally determine the criminal charge.

Mr. Ntwina, learned State Attorney, made brief but pertinent submissions opposing the application. In the first place, he said although this reference relates to an interlocutory order, it is unfortunate that Mr. Luguwa has been making submissions relating to new grounds and evidence which was not the basis of the decision by the learned single Judge. This, he also submitted, should not be allowed in a reference. Secondly, as the application relates to an interlocutory order, a fact which Mr. Luguwa apparently conceded, the law as reflected under Act No. 25 of 2002 does not allow appeal or revision in situations such as this one. Such being the position, there is no way in which to fault the learned single Judge. In support

of his submission, the Attorney referred to the cases of **Seif Sharif Hamad** and **Anderson Solomon** (supra).

This matter we think can be disposed of within a narrow compass. The question for consideration is whether the order of the District Court at Njombe overruling the applicants' objection to the police officer conducting the prosecution, could be entertained by the High Court on revision. This is the issue which the learned single Judge considered as crucial in determining the application for leave to appeal before him.

In discussing this issue, it is convenient to start with the question what is an interlocutory order. On this, Mr. Luguwa had stated that there is no clear and general definition of an interlocutory order. However, he referred to some general dictionary definition to the effect that it is one which does not finally determined the rights of an individual. This general statement regarding an interlocutory order accords with what was stated by the distinguished jurist, Sir William Douglas of the Privy Council in the case of **Haron bin Mohd**

Zaid V Central Securities (Holdings) Bhd (1982) ALL ER Vo. 2 at page 48. In part, it was stated *inter alia* :-

> **The appropriate test for determining whether an order was final or interlocutory was whether the 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.**

With this general statement of the principle relating to what constitutes an interlocutory order, an aspect, which as indicated before, Mr. Luguwa and Mr. Ntwina, were in agreement, we proceed to consider what is the legal position in Tanzania regarding such orders. We need not be delayed in this matter. It is common ground that the general principle in criminal matters in relation to interlocutory orders was settled long before the enactment of the Written Laws (Miscellaneous amendments) (No.3) Act, 2002, Act No. 25 of 2002 (hereinafter the Act). This is easily gleaned from the decision of the erstwhile Court of Appeal for East Africa in the case of

Uganda V Lule (1973) EA 362, a case from the High Court of Uganda. Speaking through Law, J.A. the Court *inter alia* said:-

> There is no appeal from orders of the High Court incidental to a criminal appeal but not involving the decision of the appeal.

Back at home, this Court had occasion to address the issue in the case of **Anderson Solomon** (supra). In that case, the Court stated among other things:

> **Held:** It is settled law that in criminal cases an 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 same point was underscored by this Court in **Alois Kula** and **Layandoi Lekoisa V R** (CAT) Criminal Appeal No. 121 of 1991 (unreported).

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 clearer but has also been statutorily provided in order to cover both criminal and civil cases.

At this juncture it may well be observed briefly that the intention of the legislature in enacting the law under the Act, was to ensure speedy expedition of trials particularly with regard to civil suits. Hence the amendments effected under the Act, of section 5 (2) (d) of the Appellate Jurisdiction Act, 1979; section 74 of the Civil Procedure Code 1966 and section 43 of the Magistrates Courts Act, 1984.

It is also common knowledge that these amendments are not without good and sound logic. Unrestricted appeals or applications for revision or interlocutory orders would undoubtedly lead to uncalled for delays resulting from the time spent while pursuing

appeals or application for revision on interlocutory orders which do not finally determine the suit or criminal charge.

In the instant case, even Mr. Luguwa, learned counsel, conceded that the criminal charge against the applicants is still pending in the District Court at Njombe since 2003. In that light, there is no denying the fact that the order of the trial District Court at Njombe was interlocutory.

In the circumstances, we are unable to accept Mr. Luguwa's ground for faulting the learned single Judge in holding that the order was not appealable to the High Court. Mr. Luguwa's insistence that there was manifest error on the face of the record which we could hardly perceive or that there was the question of jurisdiction at the trial Court is without foundation. First, there was no manifest error on the face of the record as alleged by Mr. Luguwa. Manifest error, should actually be manifest on the face of the record without any further ado. 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.

With regard to jurisdiction and composition of the trial court, suffice it to make reference to the provisions of section 6 (1) (b) of the Magistrates' Courts Act, 1989. This section provides for the constitution of magistrates' courts. Here, the situation complained against by Mr. Luguwa regarding the public prosecutor or complainant is neither here nor there in terms of the law. In our view, these complaints of dissatisfaction, if at all, are the sort of matters which, after conclusion of the case against the applicants, who, if found guilty and are dissatisfied, could be included in the grounds of appeal. This is the situation which is envisaged under the amendments effected by the Act.

All in all therefore, the learned single Judge having properly addressed and applied the law under the provisions of the Act, we can hardly find any fault in his decision to dismiss the application for leave to appeal. That in our view was the correct application of the

law with regard to an interlocutory order such as the one under the application before the learned single Judge.

Consequently, we find no merit in the reference which is dismissed with costs.

It is further ordered that the matter proceeds to hearing on merits in the District Court at Njombe without any further delay. It is so ordered.

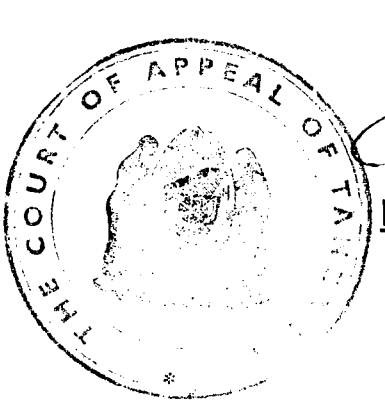
DATED at MBEYA this 15th day of August, 2007.

D.Z. LUBUVA
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

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



(J.H.K. UTAMWA)
DEPUTY REGISTRAR