

**IN THE HIGH COURT OF ZANZIBAR
AT TUNGUU**

CRIMINAL CASE NO. 1 OF 2024

DIRECTOR OF PUBLIC PROSECUTIONSPROSECUTOR

VERSUS

SHAIBU FAKI SHAIBU ACCUSED

R U L I N G O F T H E C O U R T

27th February, & 20th March, 2024

H S.K. Tetere J.:

This ruling emanates from a legal concern raised by Mr. Hassan Kijogoo, the Learned counsel for the Accused person, namely **SHAIBU FAKI SHAIBU**. On 4th January 2024, this court was informed by the Director of Pubic Prosecutions that the above-named accused is charged with the offence of murder contrary to section 179 and 180 of the Penal Act No. 6 of 2018, the law of Zanzibar.

The accused, denied the charge and the plea of not guilty was entered. Thereafter, on 12th/1/2024, the learned counsel for the accused



informed the court his intention to raise a legal concern in respect of the existing charge of murder against the accused. From there, the case was scheduled for hearing the legal concern on 27th /2/2024.

At the hearing day of the legal concern, Mr. Ali Yussuf Principal State Attorney assisted with Ms. Arafa Zubeir, and Ms. Asma Juma, Senior State Attorney and State Attorney, respectively entered appearance for the Director of Public Prosecutions, the Republic. On the other hand, Mr. Hassan Kijogoo, the learned counsel appeared for the accused.

On taking the floor, Mr. Hassan Kijogoo, the learned counsel for the accused, contended that this court is functus officio to hear the case because the information in which the prosecution side relied upon has been dismissed on 22nd /11/2023 by Hon. George Kazi J, in criminal case No. 13 of 2020. He said, initially the criminal case No. 13 of 2020 was brought against the accused for the offence of murder and later was substituted to manslaughter. The counsel Kijogoo further contended that the criminal case No. 13 of 2020 which was dismissed, constituted the same case number, same facts with the same accused person with the present case. He said, the remedy for dismissal order is to appeal and not



file a fresh case. He was on the view that since criminal case No. 13 of 2020 was dismissed and the prosecution didn't appeal against the dismissal order, it was a barred for the prosecution to institute the same case against the same accused person. Basing on that reason, he urged the court to discharged the accused.

In response, Ms. Arafa Zubeir, Senior State Attorney vehemently resisted the legal concern raised. She submitted that the present case is different with the former case. She said, the case which was dismissed by Hon. George Kazi, J, on 22nd November 2023 was a manslaughter while the present one is a murder case. She contended that, those are two different cases though they share the same facts and the same accused person. She stressed that even their ingredient is different because in manslaughter, one need to prove the unlawful killing whereas in murder the approval is on malice aforethought. She was on the view that those are two different offences and two different cases. To press her point, she cited the case of ***Twaha Hussein Vs Republic, Criminal Appeal No. 415 of 2017***, at page 7-12, where the prosecution was barred to institute a new case against a person who has been previously acquitted based on the same facts and the same offence.



Ms Arafa, also pointed out that the Director of Public Prosecutions has a power under Article 56A (1) of the Zanzibar constitution to institute any criminal case against any person. Therefore, it is correct for them to file the present case against the accused person.

Also, Mr. Ali Yussuf Principal State Attorney, joined hand with what have been submitted by his colleague, he added that if the CC number of the current case is the same with the former case, then it is correct to argue that they are the same case but, in his view, the two cases are different.

In rejoinder, counsel Hassan Kijogoo, strongly denied if the two are different cases. He asked the court to take a judicial notice for the matter. He also contended that the power of the DPP under article 56A(1) of Zanzibar constitution is subject to be lawfully exercises and the same apply to the Judges who require to exercise their power judicially. On that account, he asked the court to sustain the legal concern raised.

Having heard the argument of the parties, I found it prudent to go through the case file No. 13 of 2020 in order to satisfied myself on what actually transpired in criminal case No. 13 of 2020. Having gone through it,



the records revealed that the accused person was initially arrested and charged for the offence of murder since 19th November 2020 before (Hon. Abraham Mwampash J, as he then was). Subsequently, on 20/5/2021, the case was assigned to Hon. George Kazi J, after the first Judge being appointed to court of appeal of Tanzania. Thereafter, the case was called for several sessions and the prosecution prayed for adjournment again and again until on 30/3/2022 where the court made its last adjournment order. From there, the case was scheduled for necessary order on 19/5/2022, the prosecution side made a technical move and prayed to substituted the charge of murder to manslaughter. The prayer was granted and on the same date the new charge of manslaughter was read over the accused and plea of not guilty against the accused was entered.

Then, the prosecution side proceeded with hearing of the case and managed to parade one witness. From there, it took five months without further hearing. Consequently, the court on 22nd November 2022, dismissed the information for manslaughter and the accused person was discharged.



It is also in record that, the accused person lodged criminal application No. 216 of 2021 seeking for a bail under Section 152 (1) of CPA and on 6th July 2021, the court granted the prayer sought.

As earlier stated, this time around, the Prosecution side reinstitute the case of murder against the same accused person based on the same facts. Now, the point for my determination is whether the prosecution is bar to reinstitute the case of murder against the accused person after the earlier charge being substituted to manslaughter and the same being dismissed.

The law dealing with previous conviction or acquittal is governed by section 168 of Criminal Procedure Act No. 7 of 2018 which provides as follow:

"A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set a side, not be liable to be tried again on the same facts for the same offence."

The above cited provision bars the prosecution side against the person who has been previously convicted or acquitted by a court of competent



jurisdiction to charged again for the same facts and for the same offence, unless the said previous conviction or acquittal, has been reversed, or set aside.

In the instant case, there was no conviction or acquittal order instead there was a dismissal order of amended charge and discharged of the accused person. Thus, the dismissal order of the charge of manslaughter in criminal case No. 13 of 2020 did not expressly acquit the accused, however, it had effect of dismissing the charge regarding manslaughter and as such there was nothing pending to warrant the prosecution to institute another case against the accused based on the same facts for the same offence. This is because the dismissal order regarding manslaughter has not been reversed or set aside to date. That is the same position taken in ***Twaha Hussein Vs Republic, Criminal Appeal No. 415 of 2017, CAT (Unreported)*** at page 7-10. (Supra).

Therefore, if the present charge against the accused is manslaughter, then, the legal concern raised would have merit. But as correctly argued by Ms Arafa, Senior State Attorney, that the accused is currently charged for the offence of murder which is different offence with

manslaughter in the former charge. It should be noted here that, following the amendment order of the charge on 19th /5/2022, what stood thereafter is the amended charge which is manslaughter and the former charge remained as a reference of the court's proceedings. I'm saying so, because when a charge is substituted, the accused person requires to be called upon to plead for a new charge and thereafter, be informed of his right to require a recalling of the witness who had testified to either give evidence afresh or be further cross-examined. To do so, is to comply with the requirement of section 219 (1), (2), (3) and (4) of Criminal Procedure Act No. 7 of 2018. The omission to comply with the said provision renders the proceeding nullity. See for example the case of ***Ngalaba Luguga @ Ndalawa Vs Republic***, Criminal Appeal No. 66 of 2019, CAT, at Shinyanga, page 7, also ***Omar Juma Lwambo V Republic***, Criminal Appeal No. 59 of 2019, CAT at Dar es salaam, page 8.

However, before I pen down, I would like to make the following remarks. As correctly urged by the learned counsel Kijogoo, the power of the DPP to control criminal proceedings under article 56A of Zanzibar constitution are not absolute. They are under article 56A (8) of Zanzibar constitutions and read together with section 99 – (1) (2) & (3) of CPA No.



7 of 2018 subject to three conditions, namely; public interest, interest of justice and prevention of abuse of the court process. In a situation where the accused person has been arrested and charged for murder since 19th November 2020, substituted his charged to manslaughter, then, discharged by the court on 22/11/2023 and now reinstitute the case of murder against him based on the same facts is not in the interest of justice but an abuse of the court process. In relation to this, the Court of Appeal of Tanzania, in the case of the ***Director of Public Prosecutions v. Mahboob Akber Haji & Another, Criminal Appeal No. 28 of 1992 (unreported)*** held the following observation:

"Thus, although the powers of the Directors of Public Prosecutions under the Criminal Procedure Act appear to be wide, their exercise is limited by three considerations; that whenever he exercises these wide powers, he must do so only in public interest, in the interest of justice and the need to prevent abuse of the legal process. It is obvious that if the Director of Public Prosecutions acted mala fides, this would not be in the public interest, it would not be in the interest of justice and above all it would be an abuse of the legal process...."



It settles view of this court that any kind of abuse of the court process should not be encourage to take place as it is against the interest of justice.

After all said and done, this court agree with the Prosecutions that in the circumstances of the record of criminal case No. 13 of 2020 and No. 1 of 2024, it can be certainly concluded that the two cases involve two different offences though shared the same facts. On that account, the dismissal order of the information regarding manslaughter given by this court on 22 November 2023 has nothing to do with the offence of murder as the two are different offences.

In view of the foregoing, I find the legal concerns raised by the learned counsel for accused to have no merit and it is hereby decline.

It is accordingly ordered.

DATED at **ZANZIBAR** this 20th day of March, 2024.


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HAJI. S. K. TETERE
JUDGE

