

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: LUBUVA, J.A., MBAROUK, J.A., and OTHMAN, J.A.)

**CRIMINAL REVISION NO. 1 OF 2008
C/F NO. 2 OF 2008**

**THE REPUBLIC PROSECUTOR
VERSUS**

**1. DODOLI KAPUFI]
2. PATSON TUSALILE]..... ACCUSED(S)**

**(Revision from the decision of the High Court
of Tanzania at Mbeya)**

(Lukelelwa, J.)

**dated the 4th day of June, 2007
in**

Misc. Criminal Application Nos. 15 and 16 of 2007

RULING OF THE COURT

1 & 14 July 2008

OTHMAN, J.A.:

This revision is excisable by the Court, *suo motu*, under
Section 4 (3) of the Appellate Jurisdiction Act, 1979 [R.E. 2002].

In brief, the matter arises this way: In dealing with two applications for bail, while committal proceedings were being conducted before the District Court of Mbeya in which the

applicants were charged with attempted murder c/s 211 (1) of the Penal Code, Cap. 16 [R.E. 2002], the High Court (Lukelelwa, J.), respectively, in **Patson Tusalile V. R.**, Misc. Criminal Application No. 15 of 2007 and **Dodoli s/o Kapufi v. R.**, Misc. Criminal Application No. 16 of 2007, relying on sections 178, 148 (5) (a) – (e), 149, 244, 245 (3) and (4) of the Criminal Procedure Act, 1985, Cap. 20, R.E. 2002 (hereinafter referred to as the CPA) *inter alia*, held that when proceedings in respect of offences triable by the High Court are under preliminary investigation by a subordinate court, it is that court that has jurisdiction to grant bail, this with the exception of the offences referred to in section 148 (5) (a) of the CPA, for which no bail can be granted by any Court. Having found out that he had decided *per incuriam* with reference to the decision of this Court in **Director of Public Prosecutions v. Boniface Muhuma and 8 Others**, Criminal Appeal No. 81 of 2000 (CAT), (unreported), the learned Judge drew this Court's attention so that the correctness, illegality, or propriety, if any, of his decision can be examined. Hence the instant revision.

At the hearing of the revision on 1st July 2008, the Court consolidated Revision Applications Nos. 1 and 2 of 2008 under Rule 3 (2) (a) of the Court of Appeal Rules, 1979, after noticing that the legal issues raised therein were the same.

Mr Mushokorwa, learned counsel, appearing as *amicus curiae*, supported the rulings on revision. At the forefront, he submitted that in committal proceedings conducted by subordinate courts under section 244 of the CPA, they have the power under section 148 (1) thereof to grant bail for offences triable by the High Court, save for those offences for which no bail is grantable under section 148 (5) (a). He pointed out that the key words in section 148 (1) were “at any stage of the proceedings before the Court to give bail”. That when read with section 128 (1) which defines the institution of proceedings as the institution of a complaint or the bringing before a magistrate of a person who has been arrested with or without a warrant, which are followed by issuance of

process under section 129, then subordinate courts have jurisdiction to grant bail.

He went on to submit that all cases triable by the High Court have to go through committal proceedings before a subordinate court in terms of sections 244 and 246 of the CPA. That furthermore, sections 245 (4) and 248 (4) of that Act which come into play in the process of committal proceedings also specifically empower subordinate courts either to commit a person to remand prison or to grant bail.

He indicated that criminal proceedings for offences triable by the High Court have to be demarcated into two stages. Namely, committal proceedings conducted by subordinate courts and trial proceedings, the domain of the High Court. That in its wisdom the Legislature decided to empower subordinate courts in committal proceedings to grant bail. That the law was clear, unambiguous and left no room for misinterpretation. That if parliament were to deprive the subordinate courts the power to do anything the High

Court does, then it would not have empowered the later to deal with committal proceedings. That it did not say that for offences triable by the High Court a person should be taken straight to the High Court. That instead, it decided that all offences triable by the High Court should pass through committal proceedings before subordinate courts. That accordingly it empowered them to remand an accused in prison or to grant him bail.

Relying on **Attorney General v. Akoonay** (1995) T.L.R. 80 at 89, Mr. Mushokorwa submitted that it was a cardinal principle of construction that in construing a statute the Court should not arrive at an interpretation that would result in absurdity. That Parliament has no absurdity. That if it granted jurisdiction to subordinate courts to conduct committal proceedings then it would be an absurdity to say that the same court should not grant bail simply because the offence is triable by the High Court. That, he said, would defeat the whole purpose of committal proceedings and the law.

Mr. Mushokorwa implored this Court not to interfere with the rulings on revision as there was no irregularity.

On its part, the Republic, represented by Mr. Luoga, learned State Attorney, faulted the rulings in the revision, subject of current examination. He urged the Court to interfere. He submitted that subordinate courts do not have the power to grant bail to accused persons facing offences triable by the High Court as was the instant case involving attempted murder c/s 211 (1) of the Penal Code. He contended that when subordinate courts are dealing with committal proceedings they have no power to do anything that can be done by the High Court. That the charges laid before subordinate courts are provisional or holding charges for the purposes of preliminary investigations. That the accused are not even allowed to plead. That a proper charge is only laid at the time the information is filed by the Director of Public Prosecutions (D.P.P.) before the High Court. That in case of offences triable by the High Court, proceedings commence when the information by

the D.P.P. under section 245 (6) of the CPA is lodged before that Court. He suggested that the only option available to an accused before a subordinate court to be granted bail in the case of a bailable offence triable by the High Court is to apply to the High Court for the same.

When asked by the Court whether the High Court has the power to grant bail to a person who has not yet been committed to it for trial and who at that stage is before a subordinate court, Mr Luoga responded that the High Court can only deal with bail at the stage when the information is lodged before it by the D.P.P. under section 245 (6) of the CPA.

In a short rejoinder, Mr. Mushokorwa pointed out that an accused is not committed for trial to the High Court on the filing of an information by the D.P.P. under section 245 (6) of the CPA. That the actual filing of an information thereunder is not automatically the stage of committal of an accused person for trial.

This takes place, he urged, under section 246 (1) thereof.

Adverting next to the issues for determination, it is undisputed that the offence of attempted murder c/s 211 (1) of the Penal Code is triable by the High Court or in the Resident Magistrates' Courts by a resident magistrate invested with extended jurisdiction under section 173 of the CPA, and as *per* the First Schedule of that Act, Part A, Column 5. Furthermore, section 177 of the same Act provides that 'every court has authority to cause to be brought before it any person who is within its local limits of jurisdiction and is charged with an offence committed in Tanzania or which according to law may be dealt with as if it had been committed in Tanzania and to deal with the accused according to its jurisdiction'. In essence, that section deals with trial.

It is common ground that the offence of attempted murder c/s 211 (1) of the Penal Code is a bailable offence, it is not among those offences specifically listed under section 148 (5) (a) of the CPA (i.e. murder, treason, armed robbery, defilement) for which no bail is grantable by *any* Court. The particular facts of the instant revision reveal that the bail applicants have not yet been committed for trial to the High Court under section 246 (1) of that Act; the subordinate court is still seized with the conduct of committal proceedings under sections 243 and 244, and no information has been filed by the DPP in the High Court pursuant to section 245(6) thereof. On the material available, the relevant bail period at issue in this revision is *from* the bringing of a person under section 245 (1) in respect of the commission of an offence triable by the High Court, before a subordinate court *to* his committal for trial to the High Court by the issuance of a committal order under section 246 (1). Section 245(1) of the CPA require that upon arrest of a person or under completion of investigations and arrest of a person in respect of an offence triable by the High Court, he be brought

before a subordinate court to be dealt with "according to the law". For convenience, we shall call this period *pre committal*. The bail applicants, Dodoli Kafupi and Patson Tusalile, respectively, appeared before the Mbeya District Court on 30.10.2006 and 15.01.2007, when the charges were read over, and as required by law they were not required to plead thereto under section 245(2).

All the above considered, it would appear to us that the central issue for determination in this revision is whether or not a subordinate court has the power to grant bail to a person before it, for the bailable offence of attempted murder c/s 211 (1) of the Penal Code, which is triable only by the High Court, *prior* to his committal for trial to that Court, and during the period a subordinate court is seized with the conduct of committal proceedings? Essentially, this is a question of statutory construction. However, regard must be taken of the stage reached in the criminal proceedings.

It is an elementary principle that the primary object of statutory construction is to ascertain the intention of the legislature as expressed in the words used. The bounded duty of the Court, indeed its only duty, is to give effect to that intention as articulated in the Act. In this regard, the purposive approach to construction has been admitted by the Court in **Joseph Warioba v Stephen Wassira** (1997) T.L.R. 272; **R. v. Asafu Tumwine**, Criminal Revision No. 1 of 2006, (CAT) (unreported)). In **Joseph Warioba's** case, the Court in interpreting section 114 of the Elections Act, 1985 adopted a purposive approach to divine the real intention of the legislature. By recourse to the objectives of that Act, it held that the words "corrupt or" illegal practice could be read into section 114 of the Elections Act to reflect the legislative intention.

In **Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd** (1920) CLR 129 at pp.161-162, it was stated:

“The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means in its ordinary and natural sense it is our duty to obey that meaning even if we think the result to be inconvenient, impolite or improbable”.

In Prakash Kumar Prakash Bhutto v State of Gujarat

[2005] INSC 35, a decision of the Supreme Court of India, the Court stated:

“no part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in place. It is also trite that the statute or rules made thereunder

should be read as a whole and one provision should be construed with reference to the other provisions consistent with the object sought to be achieved”.

Having closely examined the rulings in the instant revision, and due account taken of the submissions by Mr. Mushokorwa and Mr. Luoga, and on a proper construction of sections 148(1), 148(5) (a), 244, 245(1), 245(4) and 248(4) of the CPA, read in their entire context and in the light of the scheme and its objects and purposes, we are of the respectful view that a subordinate court at the stage of the committal proceedings has the power to grant bail for the bailable offence of attempted murder c/s 211 (1) of the Penal Code, which is triable by the High Court.

First, section 148(1) and 148 (5) (a) of the CPA provide:

“148 (1). Where any person is arrested or detained without a warrant by an officer in charge of a police station , or appears or is brought before a court, and

is prepared at anytime while in the custody of that officer **or at any stage of the proceedings before that Court to give bail,** the officer or **the court,** as the case may be, may, **subject to the following provisions of this section, admit that person to bail;** save that the officer or the court may, instead of taking bail from that person, release him on his executing a bond with or without sureties for his appearance as provided for in this section.

(2)

(3)

(4)

(5) A police officer in charge of a police station, or **a court before whom an accused person is brought or appears,** shall not admit that person to bail if-

(a) that person is accused of murder, treason, armed robbery, or defilement."

(Emphasis added)

It would appear to us that on a true and contextual reading of sections 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.

Second, that view is reinforced by a combined and harmonious construction of the specific provisions either referring to bail or allowing the grant of bail during the period subordinate courts are seized with committal proceedings under sections 243 and 244 of the CPA, for offences only triable by the High Court. After having read and explained to an accused person the charge or charges, of which he is not required to plead (section 245(2)) the magistrate is also required to address him to the effect that the committal proceedings are not his trial, which is to be before the High Court (section 245 (3)). Thereafter section 245 (4) provides:

245 (4). “After a person is committed to remand prison or on bail by a subordinate court.....” (Emphasis added).

Furthermore, section 248 (4) which governs adjournments of committal proceedings also provides:

248 (4). “Subject to the provisions of section 148 the Court may admit an accused on remand to bail”.

(Emphasis added)

From this provision, in our view there is no controversy that the word “court” in that section refers to the subordinate court, and not the High Court.

Having anxiously considered the matter, and paying best attention to the purpose of committal proceedings, it would equally appear to us that on a fair reading of sections 245 (1) (4) and 248 (4) read together with section 148 (1) and 148 (5) (a) that during

the relevant period at issue, i.e. *pre committal*, a subordinate court is empowered to admit an accused to bail for a bailable offence triable by the High Court. It is the law that committal proceedings in respect of offences triable by the High Court are only conducted by subordinate courts with competent jurisdiction (section 244). Mr. Mushokorwa's point is well taken that an accused charged with an offence triable by the High Court is not taken straight to it, but must first appear before a subordinate court. By expressly allowing a subordinate to admit an accused person to bail during committal proceedings, we cannot but agree that it was the legislative intention that those courts have such powers during that stage of the criminal proceedings. In our respectful opinion, such a construction makes sections 245 (4) and 248 (4) functional. This view was also expressed in the case of **J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. State of Uttar Pradesh** (1961) S.C. 1170 at 1074 in which it was stated:

“In the interpretation of Statute the Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect”.

Third, it is well settled that jurisdiction can be, *inter alia*, personal, subject matter, temporal, territorial and pecuniary. By the clear provisions assigning to subordinate courts the committal of an accused for trial to the High Court for offences triable by it, and the mandatory requirement for those person to be brought before the former courts and dealt with in terms of section 245 (1) (2) and (3) of the CPA, it goes without saying that those courts have as well **personal jurisdiction** over those persons during the relevant period.

Fourth, an examination of the legislative history of the general provisions governing bail and those specifically related to committal proceedings, before the enactment of the CPA (then termed preliminary inquiry), and as contained in the repealed

Criminal Procedure Code, Cap. 20 R.E. 2002 also reinforces the view we have respectfully held.

In that regard, section 123 of the repealed Criminal Procedure Code (which corresponds to section 148 of the CPA stipulated:

“123(1) When any person, other than a person accused of murder or treason, is arrested or detained without a warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in custody of such officer or at any stage of the proceedings before such court to give bail, such person may be admitted to bail.” (Emphasis added)

While it does not appear that that section was the subject of an authoritative interpretation by the Court of Appeal for East Africa, in **Mwambola v. Republic** (1968) E.A. 136 at 138 the

High Court, (Mustafa, J. as he then was) expressed the view, *obiter*, on section 123 that :

“It seems to me that a subordinate court can grant bail for any offence apart from the offence of murder or treason”.

(Emphasis added)

That apart, advertng to the provisions specifically dealing with committal proceedings by subordinate courts, of accused persons for trial before the High Court, section 221 of the repealed Criminal Procedure Code related to committal for trial was more specific. It read:

**“221: When the provisions of section 220 have been complied with the Court shall commit the accused for trial to the High Court and shall until the trial either admit him to bail or send him to prison for safe keeping.
.....”** (Emphasis added)

Furthermore section 223 on adjournments of those proceedings is almost in *pari materia* with section 248 of the CPA. Equally, section 233 (4) of the former, identical to section 248 (4) of the CPA, also provided that subject to section 123 **“the Court may on a remand admit the accused to bail”**. It should be noticed that section 245 (4) of the CPA, which we referred to earlier which deals with a bail situation is new. All considered, including the consistency of the language employed between the repealed Code and the CPA, as well as the legislative history of the relevant provisions of the CPA, it would appear to us that no change in terms of the power of subordinate courts to grant bail for bailable offences triable by the High Court, pre committal, of accused persons for trial to the High Court, was intended by Parliament. Rather, it was envisaged that continuity be maintained.

That settled, the prime question in this revision can also be posed another way? That is, whether or not the High Court in the

particular circumstances of the bail applicants has jurisdiction to grant bail? The answer in our considered view, reinforces the opinion we had earlier reached.

Sections 178, of the CPA on the powers of the High Court provide:

“178. The High Court may inquire into and try any offence, subject to its jurisdiction in any place where it has power to hold sittings; save that except under section 93, **no criminal case shall be brought under cognizance by the High Court unless the same shall have been previously investigated by a subordinate court and the accused person shall have been committed for trial before the High Court.**” (Emphasis added).

Furthermore, section 246 (1) thereof stipulates:

“246(1) Upon receipt of the copy of the information and the notice, the subordinate court shall summon the accused person from remand prison or, if not yet arrested, order his arrest and appearance before it and deliver to him or to his counsel a copy of the information and notice of trial delivered to it under sub-section (7) of section 245 and commit him for trial by the court, and **the committal order shall be sufficient authority for the person in charge of the remand prison concerned to remove the accused person from prison on the specified date and to facilitate his appearance before the court.**”

(Emphasis added)

In **Asafu Tumwines case**, *supra*, the Court, when dealing with section 246(1) agreed with the Republic’s submission that an accused person is not properly before the High Court in the

absence of a formal committal order by the committing subordinate court. It went on to state:

“we find no rationale for the law to require the subordinate court to hold a preliminary inquiry if at the end of the day the accused remains within the jurisdiction of the same court. It is our decided opinion that a subordinate court in a case triable by the High Court ceases to have jurisdiction over the case after it has formally committed the accused in the case for trial by the High Court”. (Emphasis added).

It went on to add:

“It is only a specific order of committal at the end of this exercise [i.e. committal proceedings] which formally and properly submits an accused to the jurisdiction of the High Court”. (Emphasis added).

This being the position, which we entirely agree with, it is difficult to appreciate how the High Court in the instant revision could have the power to grant bail to the applicants, pre committal, and in the absence of any committal order under section 246(1) of the CPA, which would have submitted them to its jurisdiction.

Not only, that. Save for exhibit to the High Court of an information by the D.P.P. under section 93 (1) of the CPA, section 178 creates a bar against the taking of cognizance by the High Court, of a criminal case, unless the same has been properly investigated by a subordinate court *and* the accused person has been duly committed to it for trial.

The term cognizance is neither defined in the CPA nor the Penal Code. In **Ajit Kumar Palit v. State of West Bengal and Another** (1963) S.C.R. 765 at 766, the Supreme Court of India explained it thus:

“The word “cognizance” has no esoteric or mystic significance in criminal law or procedure. **It merely means become aware of and used in reference to a Court or a Judge, to take notice of judicially. Taking cognizance** does not involve any formal action; or indeed action of any kind, but **occurs as soon as a Magistrate, as such applies his mind to the suspected commission of an offence. Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled”.**

(Emphasis added).

‘Cognizance is taken of cases and of the offence; not of the offender’ (See, Cerf Finance Ltd. V. Shree Shanti Homes AIR (2005) S.C. 4284; West Bengal v Mohamed Khalid and Others (1995) 1 S.C. 684).

Once again, it is difficult to see how the High Court at that stage of the criminal proceedings can have the power to grant bail with the bar against taking cognizance of the criminal case still operational. In our respectful opinion, these two considerations strengthens the view we held that subordinate courts, pre committal, and during preliminary inquiry have jurisdiction to grant bail to persons accused of offences only triable by the High Court, which are bailable. Without the criminal cases involving the bail applicants having been brought under cognizance by the High Court, they being preliminary investigated by the subordinate court, and absent a committal order which formally and properly submits them to the jurisdiction of the High Court, the Republic's submission that the High Court has, pre committal, jurisdiction to grant bail, has no leg to stand on. For clarity, it should be pointed out that under section 148 (3) of the CPA the High Court has the power of superintendence in that it may in any case direct the

subordinate court that any person be admitted to bail or that the bail it had required be reduced.

Before concluding this matter, we wish to point out that we are wide awake to the powerful rival arguments raised by both Mr. Mushokorwa and Mr. Luoga on **Boniface Muhuma's** case for which we are grateful. However, it is to be observed at once that our decision in this matter has been based on the particular circumstances of the High Court ruling in Misc. Criminal Applications Nos. 15 and 16 of 2007 and the interpretation of the applicable law as analysed.

In the final analysis, for all the foregoing reasons, we are of the considered view that there is no illegality in the ruling of the High Court in Misc. Criminal Applications No. 15 and 16 of 2007 that would warrant any correction or interference by this Court under section 4 (3) of the Appellate Jurisdiction Act. It is so ordered.

Dated at Mbeya this 14th day of July 2008.

D.Z. Lubuva
Justice of Appeal

M.S. Mbarouk
Justice of Appeal

M.C. Othman
Justice of Appeal

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



DEPUTY REGISTRAR