THE JUDICIARY OF TANZANIA

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA AT ARUSHA

CRIMINAL APPEAL NO. 000029647 OF 2025

DAVID GARANX ..... COMPLAINANT / APPELLANT / APPLICANT

ISABELLE GARANX ..... COMPLAINANT / APPELLANT / APPLICANT

JOY GARANX ..... COMPLAINANT / APPELLANT / APPLICANT

VERSUS

RAPHAEL ERNEST RAPHAEL ..... RESPONDENT / DEFENDANT

JUDGMENT

MWASEBA, J

27th March & 24th April 2026

This is an appeal against the decision of the District Court of Ngorongoro (*the trial court*), in Misc. Criminal Application No. 17813 of 2025. In that application, the appellants sought leave to institute and conduct private prosecution against the respondent, following the failure of the Office of the Director of Public Prosecutions (DPP) to undertake such prosecution. In its decision delivered on 25/08/2025, the learned trial magistrate granted the application, bestowing leave to the appellants to conduct private prosecution against the respondent. However, the grant of such leave was made subject to the sanction of the DPP.

Briefly, the matter arises from a road traffic accident involving a motor vehicle, a Toyota Land Cruiser registered as T.549 AZF, which was being driven by the respondent. It was alleged that the respondent drove the said vehicle carelessly, causing it to overturn while the appellants, together with two other passengers, were on board. As a result of the accident, all five passengers on board sustained bodily injuries.

Following the accident, it emerged that although a traffic case was instituted before the trial court, the particulars of the case did not fully reflect all the victims involved. Specifically, only two passengers were recorded as having been injured, whereas in fact all five passengers, including the appellants, had sustained injuries from the same accident.

Subsequently, the appellants, seeking justice and intending to pursue compensation through insurance mechanisms that require the existence of criminal proceedings, took steps to prompt the relevant authorities to act. Through their advocate, they addressed a letter dated 02/07/2025 to the National Prosecution Service (NPS), requesting the institution of criminal proceedings against the respondent for the offence of careless driving causing bodily injury. Despite this effort, no action was taken, and no response was received from the prosecution authorities.

In light of that inaction, and being desirous of pursuing the matter further, the appellants proceeded to lodge a formal complaint registered as Criminal Case No. 17376/2025. Thereafter, they filed the application whose ruling is subject to this appeal, seeking leave to institute and conduct a private



prosecution against the respondent. As pointed out, the trial court granted leave for private prosecution, but subject to the sanction of the DPP.

The appellants, being dissatisfied with the conditional nature of that order, have preferred this appeal advancing five grounds of appeal, which, for convenience, will be considered in the manner learned counsel argued them.

At the hearing of the appeal, the appellants were represented by Mr. Julius Karata, learned advocate, while the respondent was represented by Mr. Godfrey Mlingi, learned advocate. Hearing of the appeal proceeded *viva voce*.

Mr. Karata principally challenged the decision of the trial magistrate on grounds 1, 2, and 5, arguing that the magistrate erred in law and fact by granting leave for private prosecution subject to the approval of the DPP. Counsel contended that such conditional leave effectively amounted to a refusal, contrary to section 100(1) of the Criminal Procedure Act, Cap. 20 [R.E. 2023] (CPA), which vests discretion in a magistrate to permit any person to conduct prosecution without requiring prior consent from the DPP.

Counsel argued that the statutory requirement that a magistrate be "inquiring into or trying any case" had been satisfied, as a complaint had already been lodged and registered as Traffic Case No. 17376 of 2025. In support of this position, reliance was placed on **Edmund Mjengwa and 6 Others v. John Mgaya and 4 Others,** Criminal Appeal No. 18 of 1999 (Court of Appeal of Tanzania, Mbeya Registry), where the Court emphasized that the grant of leave for private prosecution is discretionary, provided the court is satisfied that relevant conditions, including the existence of a complaint, have



been met.

Counsel for the appellant further faulted the trial magistrate's interpretation of section 11(1)(a) and (b) of the National Prosecutions Service Act, Cap 340 [R.E. 2023], arguing that the provision does not require prior consent of the DPP but merely empowers the DPP to take over, continue, or discontinue proceedings after they have been instituted. He invoked the purposive rule of statutory interpretation as articulated in **Calico Textile Industries Ltd and Another v. Tanzania Development Finance Company Ltd,** Civil Appeal No. 25 of 1993, to support the argument that the legislative intent was to preserve the DPP's supervisory role rather than to impose a condition precedent to private prosecution.

It was further submitted that failure by the prosecution authorities to act, despite being notified through the letter dated 02/07/2025, justified the appellants' recourse to private prosecution. In that regard, reliance was placed on **Samuel Kamau Macharia and 2 Others v. Attorney General and Another**, Petition No. 244 of 2006 (High Court of Kenya), for the proposition that access to justice should not be defeated by inaction on the part of state authorities.

On ground 4, Mr. Karata argued that the trial magistrate improperly exercised caution by imposing conditions in the absence of any risk of abuse of process or victimization. It was emphasized that the respondent had admitted causing the accident and the resulting injuries, both in the counter affidavit and in his submission. Counsel for the appellant also referred to



Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977, arguing that denial of unconditional leave infringed the right to a fair hearing. He thus prayed that the appeal be found meritorious and hence be allowed.

In response, learned counsel for the respondent opposed the appeal save for ground 4, which he conceded. He submitted that the right to institute private prosecution is not automatic but is subject to the satisfaction of established legal criteria. In that regard, reliance was placed on **James Burchard Rugemalira and Another v. City Bank (T) Limited & Another**, Criminal Appeal No. 265 of 2023 (TanzLII), wherein the Court, citing with approval **Shamsher Kenya Limited v. Director of Public Prosecutions and Another**, Criminal Appeal No. 93 of 2015, outlined key conditions to be satisfied before leave for private prosecution may be granted. These include: that the matter must first be reported to the police with an opportunity for investigation; that the DPP must have declined to prosecute; and that such refusal must be shown to be unreasonable and without lawful justification.

Applying those principles, counsel for the respondent argued that the appellants failed to meet the required threshold. It was contended that although a complaint had been filed, it had not been procedurally attended to in accordance with section 129 of the CPA; thus, the application for private prosecution did not properly arise from any formal proceedings before the court.

Further, counsel submitted that the letter dated 02/072025 did not constitute sufficient notice to the DPP, as it merely sought guidance and was

followed shortly thereafter by the filing of the complaint, thereby denying the prosecution reasonable time to investigate and institute proceedings. Consequently, it was argued that there was no evidence of refusal by the DPP, nor proof that any such refusal was unreasonable.

On the issue of the role of the DPP, counsel maintained that requiring notification or involvement of the DPP does not negate the right to private prosecution but serves to safeguard the constitutional and statutory mandate of the DPP as the ultimate authority in criminal prosecutions.

Concerning ground 4, counsel conceded that the respondent admitted causing the accident and the resulting injuries, and therefore acknowledged that there was no apparent risk of abuse of process or victimization. However, counsel maintained that the conditional grant of leave by the trial court was proper and lawful in the circumstances. He concluded by urging the court to dismiss the remaining grounds of appeal.

In rejoinder, counsel for the appellant reiterated that the respondent's admission of liability negated any risk of abuse of process or victimization, which are key considerations as emphasized in ***Edmund Mjengwa*** (supra). Counsel further argued that the delay of several months from the date of the accident, 21/01/2025, to the date of the application demonstrated inaction on the part of the prosecution, thereby justifying private prosecution. On the issue of notice, counsel maintained that the letter constituted sufficient notice to the NPS, and that the subsequent failure to act amounted to an unreasonable refusal. He reiterated the prayers in the submission in chief.



Having considered the grounds of appeal, the record of the trial court, and the oral submissions by learned counsel for both parties, the main issue for determination is whether the learned trial magistrate properly exercised her discretion in granting the appellants leave to institute private prosecution against the respondent, subject to the sanction of the DPP.

In grounds 1, 2, and 5, counsel for the appellants challenged the legality of the trial magistrate's decision to grant leave for private prosecution subject to the approval of the DPP. The legal framework governing private prosecution is anchored in section 100(1) of the CPA, which empowers a magistrate to "permit the prosecution to be conducted by any person." The use of the word *"may"* denotes a discretionary power that must be exercised judicially. The guiding principles for the exercise of this discretion were laid down by the Court of Appeal in ***Edmund Mjengwa and Others v. John Mgaya and Others*** (supra), which remains the leading authority and must be read together with section 100. The Court clarified that while a prior formal charge is not strictly required, there must be a properly instituted complaint or proceedings before the court to trigger jurisdiction. It further emphasized that private prosecution does not displace the powers of the DPP, who retains authority to take over, continue, or discontinue proceedings under the Act, consistent with section 100(2).

The Court in that authority further held that the discretion to grant leave must be exercised only where there is reasonable and probable cause disclosing a prima facie offence, requiring the court to examine whether the

essential ingredients of the offence are apparent on the material before it. It also stressed the need to guard against abuse of process and victimization, warning that private prosecution must not be allowed to become an instrument of malice. At the same time, the Court recognized that private prosecution may be justified where there is demonstrable inaction by prosecuting authorities, thereby serving as a safeguard to access to justice. In synthesis, section 100 of the CPA provides the statutory power, while ***Edmund Mjengwa*** (supra) guarantees the controlling criteria, including: Existence of properly instituted proceedings, prima facie reasonable cause, absence of abuse, evidence of prosecutorial inaction where relevant, and preservation of the DPP's supervisory role.

Relating the above principles to the facts of the appeal before me, it is not in dispute that the appellants filed a complaint arising from a road traffic accident in which the respondent allegedly drove carelessly and caused the vehicle to overturn, resulting in bodily injuries to the appellants. The record further shows that the complaint was brought to the attention of the prosecuting authorities, including a written request dated 02/07/2025 to the NPS, but no action was taken, prompting the application for leave to institute private prosecution.

In light of the above authority, the existence of the lodged complaint satisfied the requirement that proceedings be properly instituted, while the alleged inaction by prosecuting authorities was capable of justifying resort to private prosecution. The material before the trial court also disclosed, on its

face, allegations of careless driving and resultant injury, thereby raising a prima facie case within the meaning of the governing principles. However, consistent with section 100 of the CPA and the caution in ***Edmund Mjengwa*** (supra), the court was still required to ensure that reasonable and probable cause was established and that the DPP's supervisory role was preserved, issues which formed the central controversy in the exercise of discretion now challenged on this appeal.

In view of the above, this court finds merit in the appellants' complaint that the trial magistrate misdirected herself by imposing a condition requiring sanction of the DPP, which is not contemplated under section 100(1) of the CPA. Such condition had the effect of hampering the magistrate's discretion and undermining the right to private prosecution as recognized by law. Accordingly, grounds 1, 2, and 5 succeed.

On ground 3, counsel for the appellants faulted the trial magistrate for failing to consider that sufficient notice had been given to the NPS, which failed to act. Counsel for respondent, however, argued that the notice given was insufficient and that the prosecution authorities were not afforded reasonable time to investigate and act.

The guiding principles on this issue are encapsulated in the preceding grounds and the authority in **Edmund Mjengwa** (supra), where the Court of Appeal emphasized that private prosecution may be justified in circumstances of inertia or inaction on the part of the authorities responsible for prosecution.



As indicated above, the record shows that the accident occurred on 21/01/2025, and that the appellants, through their advocate, addressed the letter dated 02/07/2025 to the NPS requesting that criminal proceedings be instituted against the respondent. There is no evidence on record that any prosecutorial action was taken thereafter. The appellants further contended that they seek to prosecute the respondent in order to pursue compensation for injuries sustained in the accident, which they attribute to careless driving, and they relied on the existence of the traffic case to support the allegation that such careless driving occurred, which the respondent's counsel admitted at the trial court and even in this appeal.

In light of the principles in ***Edmund Mjengwa*** *(supra),* read together with section 100 of the CPA, I am satisfied that the appellants demonstrated sufficient compliance with the threshold requirements for leave to institute private prosecution. The complaint was properly brought to the attention of prosecuting authorities, reasonable time elapsed without action, and the material placed before the court disclosed a prima facie basis of careless driving causing injury. Accordingly, and having regard to the efforts made by the appellants to trigger public prosecution, I agree with learned counsel for the appellants that the mandatory criteria for consideration of private prosecution were sufficiently met. The argument that the notice was insufficient does not outweigh the prolonged period of inaction preceding the application. Ground 3, therefore, succeeds.

The complaint in ground 4 is that the trial magistrate's decision to impose conditions on the grant of leave was based on possible abuse of process or victimization. Luckily, counsel for the respondent conceded this ground.

The principles governing this issue are clearly articulated in **Edmund Mjengwa** (supra), where the Court cautioned that a magistrate must guard against abuse of process and victimization, but only where such risk is apparent from the circumstances of the case. Notwithstanding the concession by counsel for the respondent, there is still no indication of malice, bad faith, or ulterior motive on the part of the appellants. On the contrary, the bid is grounded on injuries allegedly sustained as a result of the respondent's conduct, which has not been disputed. In the absence of any demonstrable risk of abuse of process, the imposition of conditions on that basis was not justified. Ground 4 accordingly succeeds.

In the final analysis, this court finds that while the trial magistrate correctly appreciated her powers under section 100(1) of the CPA, she erred in law by fettering her discretion through the imposition of a condition requiring the DPP's sanction, a requirement not envisaged by the law. Furthermore, the circumstances of the case, including the inaction of the prosecutorial authorities and the absence of any risk of abuse of process, justified the grant of leave for private prosecution without such a condition.

Accordingly, the appeal is hereby allowed. The order of the trial court granting leave, subject to the sanction of the DPP, is hereby set aside. In its



place, an order is made granting the appellants unconditional leave to institute and conduct private prosecution against the respondent in accordance with the law.

DATED at **ARUSHA** this 24th day of April, 2026

Dated at ARUSHA this 24th of April 2026 .



N. R MWASEBA

JUDGE OF THE HIGH COURT