

**THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: LUBUVA, J. A., RUTAKANGWA, J. A., AND KIMARO, J. A.)

CRIMINAL APPEAL NO. 157 OF 2003

KHAMISI RAMADHANI @ RUPINDIRA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

**(Appeal from the Conviction of the High Court
of Tanzania at Moshi)**

(Mmilla, J.)

dated the 14th day of April, 2003

- in

Criminal Session No. 40 of 1999
.....

JUDGEMENT OF THE COURT
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21 September 2006 & 4 October 2006

LUBUVA, J. A.:

The High Court (Mmilla, J.) sitting at Moshi convicted the appellant of the offence of murder contrary to Section 196 of the Penal Code. The appellant was sentenced to death. Dissatisfied, this appeal has been preferred.

The facts giving rise to the appeal are generally not in dispute. During the subsistence of their marriage, the appellant and his wife, Gaudensia John had four children one of whom apparently died. Their marriage did not last for long, they divorced in 1998. Of the three surviving children, the appellant stayed with two children, namely the deceased Sophia d/o Ramadhani and Frank s/o Ramadhani. It was the prosecution case that on or about 7th January, 1999 at Sabuko Naibili Village, Hai District, Kilimanjaro Region, the appellant had sexual intercourse with the deceased, her three years old daughter against the order of nature. As a result of the appellant's act, her anus was severely ruptured which injury caused her death.

At the trial, the appellant raised the defence that he caused the death of the deceased without the requisite intention that there was no malice aforethought because he was intoxicated. The learned trial judge took the view that the

appellant must be taken to have known the consequences of his act. He was accordingly convicted of murder as charged.

In this appeal, as was the case in the High Court, the appellant was represented by Mr. Marealle, learned counsel. For the respondent Republic, Mrs. Lyimo, learned Principal State Attorney appeared.

Upon completion of submissions by counsel for both parties, judgment was reserved. In the course of composing the judgment of the Court it transpired that the proceedings in the High Court were tainted with a serious procedural irregularity which goes to the root of jurisdiction. This will presently be apparent.

From the record, the following position is reflected. First, the proceedings are titled **In the High Court of Tanzania at Moshi.** Second, on 12.7.2002, the proceedings commenced. The quorum shows A. C. Lyamuya, PRM, Extended Jurisdiction as the presiding magistrate. Mr. Mwaimu, State

Attorney, appeared for the Republic and Mr. Marealle, learned advocate, for the accused, the appellant in this appeal. Information for murder was read over and explained to the accused who did not plead guilty. A plea of not guilty was entered. Thereafter preliminary hearing was heard to determine matters which were not in dispute. In terms of the provisions of Section 192(3) of the Criminal Procedure Act, 1985 the preliminary hearing was concluded. A memorandum of matters not in dispute was prepared.

Both the accused, the appellant in this appeal, the State Attorney, the advocate for the accused and A. C. Lyamuya, PRM exercising extended jurisdiction, duly signed the proceedings. Next, on 26.2.2003 B. M. Mmilla, J. sitting with assessors, proceeded with the hearing of the case to its conclusion.

Our perusal of the record shows that there was no order transferring the case to and be heard by the Principal Resident Magistrate in terms of the provisions of Section 256A of the

Criminal Procedure Act, 1985 as amended by Act No. 2 of 1996. Section 256A provides that:

“The High Court may direct that the taking of a plea and the trial of an accused person committed for trial by the High Court be transferred to and be conducted by a resident magistrate upon whom extended jurisdiction has been conferred by section 173(1)”.

In the absence of the order transferring to and be heard by the magistrate in exercise of extended jurisdiction, it follows that A. C. Lyamuya, PRM. Extended jurisdiction had no jurisdiction to conduct the preliminary hearing. Furthermore, the magistrate sat in the wrong court, namely the High Court at Moshi instead of the Court of Resident Magistrate, Moshi. For these reasons, the preliminary proceedings presided over by A. C. Lyamuya, PRM. were of no legal validity. They were null and void as she lacked jurisdiction.

Consequently, the ensuing proceedings in this case though duly heard by a judge of the High Court, B. M. Mmilla, J. was based on invalid preliminary hearing. The provisions of Section 192(1), (2), (3) and (4) were not complied with. This Court has in a number of cases held that where the provisions of this section which are mandatory are not complied with, the proceedings are vitiated. See for instance, **Mt. 7479 Sgt. Benjamin Holela v. Republic** (1992) TLR. 121, **Efraim Lutambi v. Republic**, Criminal Appeal No. 30 of 1996 and **Liberty s/o Hubert v. Republic**, Criminal Appeal No. 28 of 1999, *(both unreported)* among others. In this case, the situation is even worse, with invalid preliminary hearing, it means that the proceedings in the case were not complete, the essential part involving preliminary hearing is missing. That is the part of the proceedings which was presided over by A. C. Lyamuya, PRM. Extended Jurisdiction, which as just pointed out was a nullity.

It hardly needs to be over emphasized that the provisions of Section 192 of the Criminal Procedure Act, 1985 are of fundamental importance. Not only are they meant to accelerate trials and disposal of cases, they are also intended to reduce cost to the parties and without prejudice to them as well.

In the upshot, the mandatory provisions of Section 192 of the Criminal Procedure Act, 1985 having not been complied with, the subsequent proceedings in the case were a nullity.

In the event, for these reasons, we are constrained to allow the appeal, quash the conviction and set aside the sentence of death. We order an expeditious re-trial of the appellant in compliance with the law set out under the Criminal Procedure Act, 1985 including Section 192.

DATED at ARUSHA this 4th day of October, 2006.

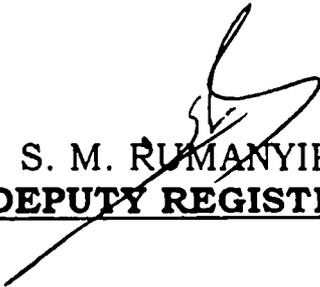
D. Z. LUBUVA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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




S. M. RUMANYIKA
DEPUTY REGISTRAR