

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

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 133 OF 2006

**1. ALLY ATHUMAN
2. CHARLES MAZENGO** }**APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the Resident Magistrate's Court
at Dodoma)**

(Somi, PRM – Extended Jurisdiction)

**dated the 14th day of February, 2006
in
Criminal Appeal No. 73 of 2004**

JUDGMENT OF THE COURT

13 October, 2009

BWANA, J.A.:

When the appeal was called on for hearing, Mr. Patience Ntwina, learned Senior State Attorney, raised two preliminary points namely –

- (1) The Notice of Appeal from the District Court to the High Court was filed out of time;

(2) The Principal Resident Magistrate (Extended Jurisdiction) who eventually heard the appeal had not been assigned to do so, pursuant to the provisions of section 45 (2) of the Magistrate Courts' Act, Cap 11.

In the course of these proceedings, Mr. Ntwina, conceded, in respect of the first point, that the appellants did state their intention to appeal on the same day they were convicted and sentenced – that is, on 5th June 2003. Therefore we gave them the benefit of doubt.

As regards the second point, it is apparent that the Judge Incharge did invoke the provisions of section 45 (2) of the said Magistrate Courts' Act and transferred the said appeal to **be** heard by S. N. Mafuru, (PRM – Extended Jurisdiction). Subsequent to that, Ms Mafuru died. It is Mr. Ntwina's submission therefore, that the proper procedure should have been for the said case file to be returned to the Judge Incharge for re-assignment. That was not done. Instead, another Principal Resident Magistrate (presumably with extended jurisdiction), Mr. Somi, proceeded to hear and determine the appeal.

According to Mr. Ntwina, Mr. Somi had no authority to do so as he was not assigned to hear the appeal.

Both appellants were asked to comment on this legal issue that has arisen. Both of them seem to say that since the error that arose was not of their making, the present appeal should proceed.

We have considered this legal issue. We are aware that section 45 (2) of the Magistrates Act speaks of a specific resident magistrate thus –

“S.45 (2) –

*The High Court may direct that an appeal instituted in the High Court **be transferred to and be heard by a resident magistrate upon whom** extended jurisdiction has been conferred by section 45 (1)”* (Emphasis provided).

The spirit behind this provision, no doubt, is that the transfer is made to a specified magistrate. That provision is in our view, prone to create problems, such as the present one. There is a felt need,

therefore, to harmonise these provisions (section 45 (2)) with those of the other laws, such as section 6 of the Appellate Jurisdiction Act No. 15 of 1979 (as amended) so that such transfer is made to “a subordinate court exercising extended powers” (Section 6 of the Appellate Jurisdiction Act).

Be that as it may, the point of law before us, leaves no options except to agree with Mr. Ntwina, that the hearing of the appeal by Mr. Somi was not proper in law. Following the death of Ms Mafuru, the file should have been sent back to the Judge Incharge for re-assignment. That was not done and in our view, it was a fatal omission. In the circumstances, the “appeal” before us is incompetent. It has no legal legs to stand on before us.

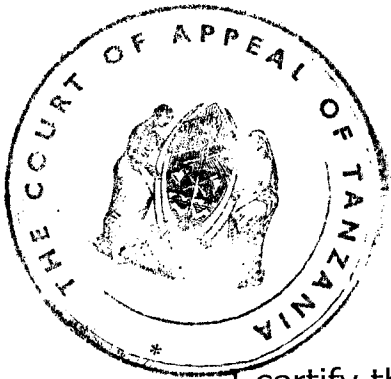
We therefore nullify the proceedings (and judgment) before Somi, PRM and direct the High Court (Judge Incharge) to take necessary action, with the view to having the appeal heard *de novo*, before the said High Court or invoke the provisions of section 45 (2).

DATED at DODOMA this 13th day of October, 2009.

J. H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL



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


(Z. A. MARUMA)
DEPUTY REGISTRAR