

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

(CORAM: MUNUO, J.A., KILEO, J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 237 OF 2010

HAMAD KHAMIS KIZARO APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION-ZANZIBAR..... RESPONDENT

**(Appeal from the Decision of the Regional Court
of Zanzibar, at Vuga)**

(Hon. Mr. Khamis Ramadhan Abdalla – RM Extended Jurisdiction)

dated the 2nd day of May, 2010

in

Criminal Case No. 212 of 2009

JUDGMENT OF THE COURT

18th & 26th November, 2010

BWANA, J.A:

The appellant, Hamad Khamis Kizaro, was charged with the offence of first, Unlawful Trafficking in Narcotic Drugs contrary to section 15 (b) (i) and second and in the alternative, Unlawful Possession of Narcotic Drugs

contrary to section 15 (a) – both of the Drugs and Prevention of Illicit Traffic Drug Act No. 16 of 2003 (the Act). The trial court convicted him on the first count and he was sentenced to a prison term of twenty (20) years and to pay a fine of Tshs. Ten million (Tshs.10,000,000/-) in default, to serve a further prison term of 180 days.

Aggrieved by that decision of the trial court, the appellant has filed this appeal. The appellant was represented by Mr. Ajar Patel, learned counsel while Mr. Mgeni Jailan Jecha assisted by Mr. Suleiman Haji Hassan jointly represented the Respondent Director of Public Prosecutions (the DPP).

Mr. Patel drew the attention of the Court to some irregularities apparent on the record, irregularities he said were fatal to the proceedings. It was Mr. Patel's submission that the proceedings, judgment and sentence meted out by the trial magistrate were a nullity as the case had not been lawfully transferred to him by the Chief Justice. Further, Mr. Patel submitted that section 2 of the Act did not confer the trial magistrate with jurisdiction. In his further submission, Mr. Patel argued that if the court

had jurisdiction, then the said court was unlawfully constituted by sitting with assessors as if it were a High Court.

Mr. Mgeni controverted Mr. Patel's submission by stating that the trial magistrate with extended jurisdiction was competent to try the case. The case had been lawfully transferred to him and that drug related offences were triable with the aid of assessors. The extended jurisdiction empowered a magistrate to try cases which would, ordinarily, be triable by the High Court. Which is why this appeal came directly to this Court

On reflection, we are of the considered view that this appeal can be determined by examining the issues raised above by Mr. Patel. We need not go into the nitty – gritty of the appeal proper for reasons that are shown shortly.

Both the High Court Act No. 20 of 1985 and the Magistrate's Act No. 6 of 1985 confer jurisdictional and administrative powers to the Chief Justice, the Judges and Magistrates. For example section 13 of Act 20 of 1985 empowers the Chief Justice with the distribution of business in the

courts. He can therefore, invoke this provision to assign certain cases to Magistrates with Extended Jurisdiction. That is what is purported to have occurred in this particular case. Mr. Patel, however, drew the attention of this court to the fact that it was not the case here. The said case had, in fact, been transferred to Mr. Khamis, the trial magistrate, by Bakari, J. who was neither a chief justice nor acting in that capacity. We searched into the original trial court record and we were satisfied that what Mr. Patel said was the sober truth. Since Bakari, J. had no power, be it judicial or administrative, to transfer the said case to Mr. Khamis, Regional Magistrate with extended jurisdiction, it is our considered view therefore, that those proceedings are a nullity. The said magistrate had no jurisdiction since the case had not been lawfully transferred to him. What he did, by hearing and determining the case was null and *void ab initio*.

This point alone disposes of the matter. We are hesitant to go into the other points raised by both parties in the course of their submissions lest we consider other substantive issues that may come up in a subsequent appeal.

We need, however, to discuss the consequences of our finding herein above that the trial was null and void. Mr. Mgeni tried to convince us to hold that the error pointed out was not fatal – it were a minor and administrative one. With due respect we differ with him. It is not a curable error. A judicial officer conducting proceedings which he is not competent to conduct, commits a fatal error and therefore, nullifies the whole process. That is what happened herein. The only option we have is **to nullify the whole proceedings (including the judgment and sentence) of the trial court and order for a retrial before another competent judicial officer.**

It is accordingly ordered.

DATED at ZANZIBAR this 26th day of November, 2010

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL