

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA
(CORAM: KILEO, J.A., MASSATI J. A. AND ORIYO, J. A.)

CRIMINAL APPEAL NO 193 OF 2008

BETWEEN

ENOCK SHILA..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the Resident Magistrates'
Court of Singida (Extended Jurisdiction)
at Singida
[Somi, PRM Extended Jurisdiction.]**

**dated 20th December 2005
in
Criminal Sessions No. 4 of 2005**

RULING OF THE COURT

16th March 2010 & 23rd March, 2010

KILEO, J. A.

The appeal before us was preferred by Enock Shila following his conviction in the Resident Magistrates' Court of Singida (Extended Jurisdiction) of the charge of murder contrary to section 196 of the Penal Code. He was sentenced to the mandatory death penalty. Being aggrieved he has come to this Court. At the hearing before us he was represented by Mr. Zakayo Njulumu, learned advocate. He has appealed on the following grounds:

1. That the learned trial court erred in law and in fact in delivering its judgment without considering the appellant's defence.
2. That the trial court erred in law and in fact to impose the sentence of suffering death by hanging to a person under the age of majority
3. That the trial court erred in law and fact in entering its judgment relying solely on uncorroborated retracted confession.

When the matter came up for hearing, Ms Neema Mwanda, learned Senior State Attorney appearing for the Respondent Republic raised a preliminary point of objection, Notice of which she had filed earlier on and served upon the appellant. The single point raised in the Notice of preliminary objection is to the effect that the appeal is improperly before the Court.

Submitting on the point of objection she raised, the learned Senior State Attorney pointed out to the Court that the case, which was initially filed in the High Court was handled there up to the stage of taking Plea and Preliminary Hearing. Thereafter it was transferred to a Principal Resident Magistrate with Extended Jurisdiction who continued with it to finality. Referring to the decision of this Court in **Hamisi Mchachali v. R.** (CAT) Dodoma Criminal Appeal No. 205 of 2006 (Unreported), she argued that once the Plea taking and Preliminary Hearing was done in the High Court, it was improper for the case to be transferred to a Resident Magistrate with Extended Jurisdiction and that consequently the trial conducted by the PRM with Extended Jurisdiction was a nullity. She urged us, in the circumstances to strike out the appeal, quash the proceedings before the PRM, set aside orders made thereby and order the matter to be tried in the High Court.

Mr. Njulumu agreed with the submission of the learned Senior State Attorney. He urged us however, to set his client free considering that he had already spent a long time in prison. He argued that it would not be fair for his client to be sent back for trial as it will take a long time before witnesses are traced.

The point raised in the Notice of Preliminary Objection is that the appeal is improperly before the Court. We wish to observe however, that the argument advanced in support of the impropriety of the appeal does not go to impropriety as such. Basically there is nothing improper about the appeal before us. The learned Senior State Attorney's submission merely re-enforces the appellant's cause for complaint.

The record in this case shows that the late Kaji, J. as he then was, took the plea of the accused and conducted the preliminary hearing of this case in the High Court on 6/10/2003. At this time, after the plea of the accused had been taken, a memorandum of matters not in dispute was recorded. Thereafter the case was adjourned for hearing. At a later stage, (12/10/2005) Kaijage, J., in terms of section 256 A (1) of the Criminal Procedure Act –Cap 20 (CPA) transferred the case to be tried by a Resident Magistrate with Extended Jurisdiction.

The scenario in this case is similar to the one in **Hamisi Mchachali** cited by Ms Mwanda. The Court in that case, while interpreting section 256 A (1) of the CPA, held that any transfer of a case under this section has to be effected before the plea is taken and preliminary hearing is conducted. The said section states:

256 A (1) 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 granted under subsection (1) of section 173.

We need not detain ourselves further. Section 256 A (1) of the CPA is unambiguous and in any case this Court has already laid down the position as far as time of transferring cases to Resident Magistrates with Extended Jurisdiction is concerned. We find the proceedings before the PRM with Extended Jurisdiction to have been a nullity. In the exercise of powers vested in this Court in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 we quash the proceedings before the PRM with Extended Jurisdiction and set aside the orders made thereby.

Mr. Njulumu asked us to set the appellant free instead of ordering a retrial on account of the long period that he has been in prison. We cannot however accede to his plea. In the first place, the appellant is not serving a prison term so as to consider the time he has been in jail. He was sentenced to death by hanging. Secondly, we have found that the original trial was a nullity and in the circumstances an appropriate order would be one for retrial. Restating principles for ordering a retrial, the Court of Appeal for East Africa in **Fatehali Manji v. The Republic** (1966) E. A. 343 held:

“(i) in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where conviction is set aside because of insufficiency of evidence or for the purpose enabling the prosecution to fill up gaps in its evidence at the first trial; even when a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must

depend on its facts and circumstances and an order for retrial should only be made where the interests of justice require it;"

We have already found that the proceedings before the PRM with Extended Jurisdiction were a nullity. Given the circumstances of this case, which involves a grave matter, we are satisfied that this is a fit case for ordering a retrial. In the event we order that the matter be remitted to the High Court for it to proceed with the trial of the appellant in accordance with the law.

Dated at Dodoma this 18th Day of March 2010.



E. A. KILEO
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "E. Y. Mkwizu", is written over a horizontal line.

E. Y. MKWIZU

DEPUTY REGISTRAR