

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

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 238 OF 2007

ERNEY GASPAR ASENDA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(LYAMUYA, PRM. J.)

dated the 20th day of January, 2000

in

Criminal Appeal No. 77 of 1999

JUDGMENT OF THE COURT

23rd February 2010

RUTAKANGWA, J.A.

The appellant was convicted by the District of Hai District, of the offence of armed robbery c/ss 285 and 286 of the Penal Code, Cap. 16, Vol.1 the laws. He was sentenced to 30 years imprisonment. Aggrieved by the conviction and sentence, he appealed to the High Court at Moshi. His appeal was registered as Criminal Appeal No. 77 of 1999.

Following the lodging of the appeal the same was adjourned on a number of diverse dates from 1st October, 1999, before one A.C. Lyamuya who doubled as PRM – E.J. and District Registrar High Court. While the High Court was seized with the jurisdiction to hear and determine the appeal, on 12th November, 1999, the said A.C. Lyamuya ordered the respondent Republic to file a written submission by 15th December, 1999. The respondent complied with the order. “Judgement” on appeal was delivered by the same “A.C. Lyamuya, PRM/DR/EXT. JURD.” On 20/1/2000, in which the appeal was dismissed in its entirety. Aggrieved by the decision of the “High Court”, the appellant preferred this appeal. We have deliberately put the words High Court in inverted commas. This is because in our considered opinion the said Criminal Appeal has never been heard and determined by the High Court.

Proceedings in the High Court are validly conducted and determined by a Judge of the High Court duly appointed under the provisions of the Constitution. It is common ground here that Ms. A.C. Lyamuya was never a judge of the High Court at the time she

purported to determine the appellant's appeal in the High Court at Moshi.

We understand, all the same, that under section 45 (1)(a) of the Magistrates' Courts Act, Cap 11, Vol. 1 R.E. 2002, (the Act), the Minister for Justice may "invest any resident Magistrate, in relation to any category of cases specified in the order, with appellate jurisdiction ordinarily exercisable by the High Court,".... That Ms. A.C. Lyamuya, P.R.M had been vested with such jurisdiction is not in dispute here. The critical issue here appears to be whether she exercised that jurisdiction properly, in view of the clear provisions of section 45 (2) of the Act.

Sub-section (2) of section 45 reads thus:-

" 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)".

It is now trite law that once such a formal order of transfer has been made, the transferred appeal shall be registered in the Court of Resident Magistrate, given a fresh number and be heard and determined in that court. An appeal from a decision of that court under those circumstances lies directly to this Court.

This Court in the case of **SHIMINIMANA HISAYA & ANOTHER v REPUBLIC**, Criminal Appeal no. 6 of 2004, lucidly said:-

" Now if a resident magistrate with extended jurisdiction who, of course, is not a judge of the High Court, purports to sit in the High Court to hear a High Court appeal which was transferred to them, the proceedings and

decision will be null and void because of want of jurisdiction.....”

That is one aspect of section 45 (2) of the Act. The other aspect covers a situation where no formal order of transfer is made by the High Court. This is what actually transpired in the case of the appellant’s appeal. Ms A.C. Lyamuya, P.R.M. – EJ. actually heard and purported to determine the appellant’s appeal in the High Court without any order of the High Court transferring it to her. The consequences are the same as in the earlier discussed situation.

It is now settled law that in the absence of a formal order by the High Court transferring the appeal to a Resident Magistrate with extended jurisdiction, the proceedings before such a Magistrate and the decision therefrom are equally a nullity. See, for instance **CHILINGAZI KAJE & TWO OTHERS v. REPUBLIC** Criminal Appeal No. 9 of 2000 and **HERIEL ADAM KIMARO & FOUR OTHERS v. REPUBLIC**, Criminal Appeal No. 237 of 2007 (both unreported).

of the Appellate Jurisdiction Act, Cap 141 R.E 2002 to remedy the situation. We accordingly quash the entire proceedings before Mrs. Lyamuya, PRM and her "judgment." We order that High Court Criminal Appeal No. 77 of 1999 should be heard by the High Court at Moshi as soon as possible but not later than three months from the date of this judgement.

DATED at ARUSHA this 23rd day of February, 2010.

E.M.K RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original


M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL