

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., MJASIRI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 47 OF 2010

MUSSA ALLY ONYANGO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the conviction and sentence of the High Court of Tanzania
at Moshi)**

(Munuo, J.)

dated the 20th day of February, 2002

in

Criminal Appeal No. 3 of 2001

JUDGMENT OF THE COURT

24th & 26th February, 2015

MJASIRI, J.A.:

The appellant was convicted by the District Court of Hai at Hai with the offence of rape contrary to section 130 (2) (e) and 131 of the Penal Code [Cap 16 R.E. 2002]. He was sentenced to thirty (30) years imprisonment and to suffer twelve (12) strokes of the cane. Aggrieved with the conviction and sentence, the appellant appealed to the High Court. His appeal to the High Court was unsuccessful, hence this second appeal.

At the hearing of the appeal, the appellant was unrepresented, having no access to a legal representation as a matter of right. The respondent Republic had the services of Mr. Khalili Nuda, learned State Attorney who was assisted by Ms Adelaide Kassala, learned State attorney.

Before the commencement of the appeal the Court **suo motu** raised the issue of the competence of the appeal, the notice filed by the appellant being invalid. What transpired is that the appellant did not file his notice of appeal within the prescribed time. He then filed an application for extension of time to file a notice of appeal. His application was duly granted by a Principal Resident Magistrate with extended jurisdiction. Now the crucial question is whether the learned Principal Resident Magistrate had jurisdiction to grant an order for extension of time to file a notice of appeal.

Section 45 of the Magistrates' Court Act provides under:-

"45(1) The Minister may, after consultation with the Chief Justice and with the Attorney General, by order published in the Gazette-

(a) invest any resident magistrate in relation to any category of cases specified in the orders, with appellate jurisdiction ordinarily exercisable by the High Court; or

(b) invest any resident magistrates in relation to any particular case specified in the order, with the appellate jurisdiction ordinarily exercisable by the High Court.

(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)."

Section 45(2) of the Magistrates; Courts Act [Cap 11 R.E. 2002 limits the powers of such magistrates to appeals only.

Mr. Khalili, learned State Attorney submitted that the Principal Resident Magistrate had no jurisdiction to hear an application for extension of time to file a notice of appeal under section 361(a) and (b) of the Criminal Procedure Act. [Cap 20, R.E. 2002]. He stated that the proceedings before the Principal Resident Magistrate were a nullity, rendering the appeal incompetent. He asked the Court to strike out the appeal.

The appellant on his part being a layman had nothing much to say on the legal issue. However he lamented that this was an error made by the court and he left matters in the hands of the Court.

Section 45(2) is crystal clear. It is only appeals originating from the District Courts which can be transferred to a resident magistrate with extended jurisdiction. See the case of **Zakaria Magamba v Republic**, Criminal Appeal No. 113 of 2006 and **Rashidi Mtemi v Republic**, Criminal

Appeal No. 129 of 2012 CAT (both unreported). The chamber application for extension of time to file the notice of appeal out of time was erroneously heard by the Principal Resident Magistrate with extended jurisdiction. The proceedings for that application were therefore a nullity.

Given the circumstances, what is the status of the appeal before us? Once the proceedings in respect of the application for extension of time are a nullity, is the appeal before us competent?

In criminal appeals it is the notice of appeal which institutes an appeal. Therefore given that the proceedings before the Principal Resident Magistrate were a nullity, the notice of appeal is invalid.

Rule 68(1) of the Tanzania Court of Appeal Rules, 2009 provides as under:-

"68(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in triplicate with the Registrar of the High

*Court at the place where the decision against which it is desired to appeal was given, within thirty days of the date of that decision, **and the notice of appeal shall institute the appeal.**"*

[Emphasis provided].

This means that once the notice of appeal is invalid, there is no competent appeal. We therefore strike out the appeal for being incompetent

Given the irregularities in the proceedings in respect of the application for extension of time to file the notice of appeal, we exercise our powers of revision under section 4(3) of the Appellate Jurisdiction Act [Cap 141, R.E. 2002] and quash the entire proceedings which were conducted by Mr. Kente, Principal Resident Magistrate with extended jurisdiction and the order for extension of time to file a notice of appeal. We order that the record be remitted back to the High Court so that the application for extension of time to file a notice of appeal can be heard. As the appellant has been in custody for a long time since 2000 when he was

convicted, and in the interest of justice we direct the High Court to deal with the application as soon as is practicable to avoid any further delay.

It is so ordered.

DATED at **ARUSHA** this 25th day of February, 2015.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL