

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DODOMA**

**CRIMINAL APPEAL NO. 358 OF 2014**

**(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)**

**SHABANI WILLIAM ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania at Dodoma)**

**(Rutatinisibwa – PRM (Extended Jurisdiction))**

**dated the 19<sup>th</sup> day of June, 2014**

**in**

**Criminal Appeal No. 31 of 2013**

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**JUDGMENT OF THE COURT**

28/05/2015 & 01/06/2015

**KILEO, J.A.:**

The appellant was arraigned on an information for Murder contrary to sections 196 and 197 of the Penal Code. On 19/10/2009 he appeared before the High Court (Kwariko, J) in Criminal Sessions case No.148A of 2007 for plea taking and Preliminary Hearing. At the conclusion of the session of plea taking and Preliminary Hearing the learned judge made an order that the accused be tried at the next convenient sessions of the High

Court. Subsequently to that, on 15/08/2013 the case was assigned to Hon. R.I. Rutatinisibwa, Principal Resident Magistrate with Extended Jurisdiction (PRM EJ) in terms sections 256A of the Criminal Procedure Act, Cap 20 R. E. 2002 (CPA) and 45 of the Magistrates Courts Act, Cap11 R. E. 2002. The learned PRM EJ re-conducted the Preliminary Hearing and proceeded with the hearing of the case. At the conclusion of the hearing he found the appellant guilty and sentenced him to suffer death by hanging.

Being aggrieved, the appellant preferred the appeal which is now before us. He filed a memorandum of appeal which his learned advocate, Mr. Hubert Lubyama, asked to adopt alongside with the petition that he (the advocate) had filed. Mr. Marcelino Mwamnyange represented the respondent Republic at the hearing.

For reasons that will soon become apparent we shall not need to narrate the facts of the case as they transpired at the trial.

The petition of appeal that was filed by Mr. Lubyama contained three grounds. Ground two however centred on the question of jurisdiction. The appellant complains in this ground that the trial PRM EJ erred in law and in fact by lacking jurisdiction to try the case as it had already commenced

before the High Court judge. Considering that this ground alone could dispose of the appeal we asked both counsel to address us first on it.

Mr. Lubyama, drawing our attention to the proceedings of the PRM EJ appearing at page 36 of the Court record argued that it was not proper for the learned PRM EJ to re- conduct the Preliminary Hearing as this amounted to overturning or setting aside the proceedings of the High Court judge who had conducted the Preliminary Hearing. Referring to section 256A of the CPA, the learned counsel further submitted that once the High Court had conducted the Preliminary Hearing, the Judge in charge lacked powers to transfer the case for trial before a PRM EJ. Mr. Lubyama asked us to nullify all the proceedings that were conducted by the PRM EJ. He further asked us to set the appellant free considering the circumstance of the case and the time that his client had spent in custody.

Mr. Mwamnyange conceded that the PRM EJ lacked jurisdiction to handle the case as it had already been commenced in the High Court by the taking of plea and conducting the Preliminary Hearing. He also kindly availed the Court with a decision of this Court in **Ezra Mkota & Majuto Ismail versus the Republic** – Criminal Appeal No. 23 of 2013

(unreported) which had dealt with a similar matter. Mr. Mwamnyange advised that the way forward in the circumstances of this case would be to order a remittance of the case to the High Court for it to proceed with the trial of the accused.

It befits at this point to reproduce the order of the High Court upon conclusion of the Preliminary Hearing. The judge made the following order;

“ORDER:

*The accused will be tried in the next sessions **of this court.** Meanwhile the accused is further remanded in custody” (emphasis provided)”*

We have, in a number of occasions in the past, dealt with the scope of powers of resident magistrates upon whom extended jurisdiction has been vested pursuant to section 256A of the Criminal Procedure Act. The provision states:

**“256A.-(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."**

In Criminal Appeal No. 132 of 2012, **John Matudule @ Ngosha v. the Republic** (unreported) the Court stated:

*"..... The language used in Section 256A (1) above is clear and straight forward. It needs no interpretation. It simply says that a **transfer** of a case pending in the High Court to a Resident Magistrate's Court ought to be done **before a plea of the accused is taken**. As it has been observed, this case was transferred from the High Court at Dodoma to the Court of the Resident Magistrate, Dodoma, after a **Plea** was taken and a **Preliminary Hearing** was conducted, on 12/03/2010 before the learned Judge, M.A. Kwariko. It was actually transferred to the Court of the Resident Magistrate when the case was ready for trial. As correctly submitted by counsel, in effecting the transfer of the case, the provisions of section 256A (1) were not complied with. Therefore the subsequent trial in the Court of the Resident Magistrate by R.I. Rutatinisibwa, PRM, with Extended Jurisdiction (EJ), was a serious irregularity which rendered the proceedings, decisions and orders of the trial court a nullity – see the cases of **Ndaso Yohana @ Kibyala,***

*(supra), Juma Lyamwiwe v R, Criminal Appeal No. 42 of 2001 and The Republic vs. Banyanyirubusu s/o Gaspariy and Others, Criminal Revision No. 18 of 2006 (all unreported)."*

Also in **Hamis Mchachali v. R.** – Criminal Appeal No. 2005 of 2006 (unreported) we stated:

*"It is our view that any transfer of a case for trial from the High Court to a Resident Magistrate with Extended Jurisdiction should be effected before the plea is taken and preliminary hearing is conducted. The same should be conducted by the PRM – Extended Jurisdiction. This is so because and as has been stated by this Court in its various decisions, **"Preliminary hearing proceedings are part and parcel of the trial of a case ....** The rationale behind this is that in a preliminary hearing important issues of fact may be agreed upon which later form the basis of the decision of the case" (See **Majaliwa Guzuye vs Republic** Criminal Appeal No. 213 of 2004; **Juma Lyamwiwe vs Republic**, Criminal Appeal No. 42 of 2001). A Resident Magistrate with Extended Jurisdiction to whom a case has been transferred should therefore take the plea and conduct the preliminary hearing. **In our view, a trial includes a preliminary***

*hearing. As was stated in the Lyamwiwe case, 'it is not intended that the High Court will take a plea, conduct a preliminary hearing and then transfer the case to a Resident Magistrate with Extended Jurisdiction': Rather, the transfer should be effected **before.** "*

In view of the above, it is obvious that the learned PRM EJ lacked jurisdiction to try the case as the plea and Preliminary Hearing had been conducted in the High Court. Mr. Lubyama also had a point when he submitted that the PRM EJ had no powers to disturb the order of the High Court judge which had stated that the appellant be tried in the next sessions of the High Court by ordering a re-conducting of the Preliminary hearing.

In the end we find merit in ground number 2 of the petition of appeal filed by Mr. Lubyama. The proceedings by the PRM EJ were obviously a nullity. The appeal on that ground is allowed. We in the circumstances quash and set aside all the proceedings, judgment and orders of the PRM EJ. The order of transfer of the case to the PRM EJ is set aside. We noted also that in transferring the case the Hon. Judge in charge cited S. 45 of the Magistrates Court Act; Cap. 11 R.E. 2002. For the benefit of every one concerned, section 45 of the Magistrates Courts Act deals only with

transfer of appeals to Resident Magistrates who are vested with extended jurisdiction.

In the event we order that the case be remitted to the High Court for it to proceed with the trial should the Director of Prosecutions deem it fit to continue with the prosecution of the appellant.

It is accordingly ordered.

**DATED** at **DODOMA** this 29<sup>th</sup> day of May, 2015.

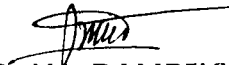


E. A. KILEO  
**JUSTICE OF APPEAL**

M. S. MBAROUK  
**JUSTICE OF APPEAL**

S. A. MASSATI  
**JUSTICE OF APPEAL**

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

  
P. W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**