IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

CRIMINAL APPLICATION NO. 17 OF 2014

VERICE KIHWILI .....APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application from the decision of the High Court of Tanzania at Songea)

(Fikirini, J.)

dated 17th day of June, 2013
in
Criminal Application No. 33 of 2013

RULING

17th & 27th August, 2015

MWARIJA, J. A.:

The applicant was charged in the District Court of Songea with the offence of Rape contrary to sections 130 (2) (a) and 131 (1) of the Penal Code [Cap. 16 R.E. 2002]. He was convicted and sentenced to thirty years imprisonment with hard labour. He was aggrieved and thus wanted to appeal to the High Court.

Since he did not file his notice of intention to appeal within the prescribed time, on 6th September 2011, he filed in the High Court, Songea, an application for extension of time to

institute a notice of appeal. The application was purportedly transferred to the Resident Magistrate's Court and assigned to W.P Dyansobera, Principal Resident Magistrate with Extended Jurisdiction (PRM – Ext Jur) who heard and determined it. In his ruling, the learned PRM – Ext. Jur dismissed the application on the ground that the applicant did not establish sufficient reasons for the delay in instituting the notice.

On 24th August 2012, the applicant filed a fresh application to the same effect. Although in its heading, the Chamber Application in respect of that application shows the name of the court as the Court of Appeal of Tanzania, the application was intended and was actually heard and determined by the High Court. That second application was dismissed by Fikirini, J for obvious reason that it was not appropriate for the applicant to file a fresh application after dismissal of his first application on the same matter. It was after the dismissal of his second application that the applicant filed the present application. The same is shown to have been brought under Rule 47 of the Court of Appeal Rules, 2009 (the Rules).

At the hearing of the application, the applicant appeared in person and unrepresented. On the other hand, the respondent Republic was represented by Mr. Mwegole, learned State Attorney.

Mr. Mwegole started by raising a point of law to the effect that the application stems from an irregular proceedings, thus rendering it incompetent. He argued that the transfer of the applicant's first application filed in the High Court was improper in law and that as a result, that application is still pending because the PRM-Ext Jur. who heard and determined it did not have jurisdiction. Because of the point of law raised by the learned State Attorney, it was not necessary to consider the appropriateness or otherwise of this application which, as stated above is shown to have been brought under Rule 47 of the Rules.

Mr. Mwegole argued that the first application, which was filed in the High Court, was wrongly transferred to the Resident Magistrate's Court. His argument is pegged under S.45 (2) of the Magistrates' Courts Act [Cap. 11 R.E. 2002] (the MCA). He

contended that under that provision, it is only an appeal which may be transferred to the Resident Magistrate's Court for hearing by a PRM – Ext. Jur.

Citing the case of **Asili Ndenje v. The Republic,** Criminal Appeal No. 68 of 2012 (CA) (Unreported), Mr. Mwegole submitted that on that ground, the proceedings and the ruling of W.P Nyansobera, PRM- Ext. Jur were a nullity because he acted without jurisdiction. The learned State Attorney thus urged the court to exercise its revisional jurisdiction under S. 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA) and nullify the said proceedings and the ruling.

Mr. Mwegole argued also that the second application filed by the applicant in the High Court was wrongly entertained because after the decision had been made, though without jurisdiction, the applicant was not entitled to file a fresh application on the same subject matter. He thus prayed that the proceeding and the decision of the second application be also nullified.

On his part, the applicant did not have any useful reply to make. He prayed to the court to order that his application, which was wrongly transferred to the Resident Magistrate's Court, be heard by the High Court according to the law.

Having heard the submission made by the learned State Attorney and the applicant, I agree with Mr. Mwegole that the application filed by the applicant in the High Court on 6th September, 2011 was wrongly transferred to the Resident Magistrate's Court. As stated above, the transfer was purportedly made under S.45 (2) of MCA. That section provides as follows.

> *" 45 (1).....*
>
> *(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)."*
>
> (Emphasis added).

It is clear from that provision that it is only an appeal which may be transferred by the High Court to the Resident Magistrate's Court for hearing by a PRM – Ext. Jur. In the case of **Asili Ndenje** (supra) cited by Mr. Mwegole, like in this case, the application for enlargement of time to institute a notice of appeal filed in the High Court was transferred to the Resident Magistrate's Court under S. 45 (2) of the MCA. Upon interpretation of that provision, this court stated as follows:

> *"... under Section 45 (2) of the MCA, a Principal Resident Magistrate has no jurisdiction to hear and determine an application for extension of time."*

Since therefore, in this case W.P. Nyansobera, PRM – Ext Jur. did not have jurisdiction to hear and determine the application filed by the applicant in the High Court, the proceedings before him and the ruling were a nullity. Under the powers conferred on this Court by S. 4(2) of the AJA therefore, the said proceedings and the ruling are hereby nullified. The application filed in the High Court therefore

remains pending. For that reasons, the applicant should not have filed the second application in the High Court or resort to this Court by way of this application which is obviously misconceived.

Mr. Mwegule argued also that the proceedings and ruling on the applicant's second application were a nullity because, having filed his first application, and although it was wrongly transferred, the applicant was not entitled to file a fresh application on the same subject matter. Although I agree in principle with the learned State Attorney, a decision ought to have been made on that application. The learned judge decided, and in my view correctly so, that after his first application had been dismissed by the Resident Magistrate's Court, it was improper for the applicant to file a fresh application in the High Court. The only irregularity in that decision however, is that instead of finding the application incompetent and thereupon strike it out, the learned judge dismissed it. Accordingly therefore, that decision is revised to the extent that it should have been struck out.

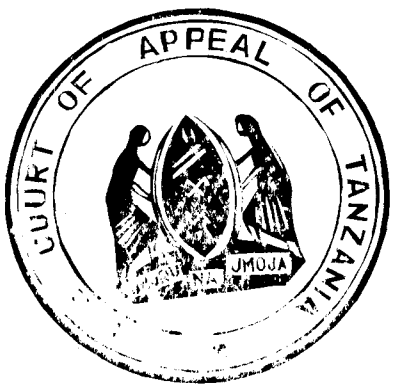
application which was wrongly transferred to the Resident Magistrate's Court be heard by the High Court according to the law. As for this application which is misconceived, the same is hereby struck out.

It is so ordered.

DATED at **IRINGA** this 25th day of August, 2015.

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL