

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MBAROUK, J.A., MASSATI, J.A. And MMILLA, J.A.,)

CRIMINAL APPEAL NO. 251 OF 2009

ADAM HAJI EDWARDAPPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
At Dar es Salaam)**

(Ihema, J.)

Dated 13th day of December, 2004

in

Criminal Appeal No. 80 of 2000

JUDGMENT OF THE COURT

8th & 16th July, 2015

MBAROUK, J.A.:

This is a second appeal. The appellant, Adamu Haji Edward was charged with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap 16 of the laws in the Resident Magistrates' Court of Dar es Salaam at Kisutu. He was convicted and sentenced to thirty (30) years imprisonment. His appeal before the High Court (Ihema, J.) was dismissed. Hence, he has now preferred an appeal to this Court.

In this appeal, the appellant appeared in person unrepresented, whereas, the respondent/Republic was represented by Ms. Rachel Magambo, learned Senior State Attorney.

Before proceeding to argue the appeal, the learned Senior State Attorney raised a pertinent preliminary point that the appeal is incompetent as the trial magistrate who conducted the proceeding at the trial court had no jurisdiction to try the case in the Resident Magistrate Court, hence the court was not properly constituted. She submitted that, this case was filed at the Resident Magistrates' Court, but it was the District Magistrate who took the appellant's plea. Thereafter, a Senior District Magistrate conducted the proceedings of the case and later wrote a judgment. Ms. Rachel further submitted that the conduct of proceedings by the Senior District Magistrate in a case which was filed at the Resident Magistrates' Court was contrary to section 6(1) (c) of the Magistrates' Court Act. She added that, the Senior District Magistrate had no jurisdiction to try the case. For that reason, she urged us to find that, the whole trial was a nullity and

that irregularity is not curable. In support of her argument, she cited to us the decision of this Court in the case of **Thomas Elias and Two others v. Republic** [1993] TLR 263.

She then prayed for the conviction to be quashed and the sentence be set aside. Ordinary, she said, she might have prayed for re-trial, but as the prosecution's evidence on identification was not watertight and as far as the alleged stolen watch was not tendered in court during trial, for the interest justice, she urged us to set the appellant free.

On his part, the appellant being a lay person not conversant with the legal technicalities, he left the matter to the Court to reach to a just decision. He further told the Court that if the Court decides to order a re-trial, the period he has served in prison should be considered.

After having carefully and closely considered the submission made by the learned Senior State attorney, we fully agree with her that, when the Senior District Magistrate

proceeded to try the case which was filed in the Resident Magistrates' Court, the court was not properly constituted. Even if the said Senior District Magistrate had jurisdiction to entertain the offence of robbery with violence, but as pointed out by Ms. Rachel in terms of section 6 (1) (c) of the Magistrates' Court Act (the MCA) the said Senior District Magistrate had no jurisdiction to sit in the Resident Magistrates' Court.

We think, it is helpful at this juncture to examine the contents of the provisions of section 6(1) (c) of the MCA which provides as follows:-

"(1) Subject to the provisions of section 7, a magistrates' court shall be duly constituted when held by a single magistrate, being-

- (a) in the case of primary court a primary Magistrate;*
- (b) in the case of a district court, a district Magistrate resident or a magistrate;*
- (c) **in the case of a Court of a resident Magistrate, a resident magistrate.***

[Emphasis added].

As in the instant case, the Senior District Magistrate had no jurisdiction to try the case by sitting in the Resident Magistrates' Court, we are forced to find the whole proceedings conducted by the trial Senior District Magistrate a nullity. See the decision of this Court in the case of **Thomas Elias and Two others** (supra).

Having established that the whole proceedings were a nullity for such fundamental irregularity, we are further of the view that such a defect is not curable under section 388 of the Criminal Procedure Act (the CPA). Ordinarily if such a defect is not curable, that might have led us to arrive to a decision to order a re-trial. But looking at the factors to be considered in ordering a re-trial, we think this is not a fit case to order a re-trial. According to the case of **Fatehali Manji V. R** (1966) E.A. 343, the erstwhile Court of Appeal of Eastern Africa stated as follows:-

"In general, a retrial may 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 purposes of enabling the prosecution to fill
in the gaps in its evidence at the first trial...
each case must depend on its own facts and
an order for retrial should only be made where
the interests of justice require it."*

Also see the decision of this Court in the case of
Athman Ndagala @ Mikingamo V. R, Criminal Appeal No.
63 of 2007 (unreported) to a name a few.

As pointed out earlier by the learned Senior State Attorney in the instant case the evidence of identification was not watertight as the complainant Innocent Chiunga (PW1) failed to give the description of the appellant, and as per his testimony, he identified the appellant at the police station. Apart from that the record shows that the alleged stolen watch was not tendered in court. We are of the view that, if retrial is ordered, that will enable the prosecution to go and fill in the gaps in its evidence.

All said and done, for the reasons stated above, we are constrained to invoke the powers of revision conferred upon us under section 4(2) of the Appellate Jurisdiction Act by

quashing the conviction and set aside the sentence of thirty (30) years imprisonment and order the appellant to be released from prison forthwith unless otherwise he is lawfully held. It is accordingly ordered.

DATED at **DAR ES SALAAM** this 13th day of July, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL