

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

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 274 OF 2015

**1. RICHARD ESTOMIHI KIMEI
2. EMMANUEL OFORO KIMARO }APPLICANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Moshi)**

(Rutakangwa, J.)

Dated 22nd day of September, 2003

in

DC. Criminal Appeal No. 47 of 2002

RULING OF THE COURT

22nd & 25th February, 2016.

MUSSA, J.A.:

In the District Court of Mwanga, the appellants were arraigned for rape, contrary to sections 130 (1) and 131 of the Penal Code, Chapter 16 of the Revised Laws. Upon conviction, they were each sentenced to serve a term of thirty years imprisonment. On appeal, the High Court (Rutakangwa, J. as he then was) made a finding that the offence committed was gang rape and, accordingly, the sentence was enhanced to life imprisonment.

The appellants were aggrieved by the decision of the first appellate court but, apparently, on account of the decision being pronounced in their absence, they were unable to file the Notice of Appeal within the prescribed period. To rectify the situation, they approached the same court by moving it to grant enlargement of time within which to lodge the Notice of Appeal by invoking the provisions of section 11 (1) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (AJA). On the 12th May, 2009 when the application, amongst others, was placed before Mchome, J., it was ordered thus:-

*"(DC) Criminal Appeal Nos. 102/2008; 113/2008; 10/2009; 12/2009; 13/2009; 14/2009; 15/2009; 16/2009; 16/2009; 58/2009 and 14/2009 also Misc. Criminal Applications No. 6/2009 and **7/2009** instituted in the High Court of Tanzania at Moshi are under section 45 (2) of the Magistrates Court's Act No. 2 of 1984 as amended, transferred to the Resident Magistrate's Court at Moshi for hearing Magistrate with Extended Jurisdiction."* [Emphasis supplied].

It is common ground that the bolded Miscellaneous Criminal Application No. 7 of 2009 was the one involving the appellants. Pursuant to the Order, a Miscellaneous Criminal Application No. 4 of 2009 was opened in the Resident Magistrate's Court at Moshi through which the designated Principal Resident Magistrate (P. M. Kente) heard and purportedly granted the desired extension on the 15th September, 2009. Thus, on the strength of the extension order, the appellants lodged a Notice of Appeal to this Court on the 17th September, 2009.

When, eventually, the appeal was called for hearing before the Court (Nsekela, J.A., Luanda, J.A. And Massati, J.A.) it was adjudged that in terms of the referred section 45 (2) of the MCA, what the High Court can lawfully transfer to a Resident Magistrate with extended jurisdiction is only an appeal and no other proceedings. Accordingly, it was held that the Principal Resident Magistrate had no jurisdiction to hear and determine the application for enlargement of time within which to lodge an appeal. In the upshot, it was ordered thus:-

***"Therefore all the proceedings and ruling
relating to Misc. Criminal Application No. 7 of***

2009 are null and void. In the exercise of our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, we quash the same. In the result, the appellant's application for extension of time to appeal in the High Court has yet to be heard and determined. It is ordered that the same be remitted to the High Court for it to determine the application... [Emphasis supplied].

We have purposefully supplied emphasis to the foregoing extracted portion of the Ruling. To begin with, it is discernible from the expression "*... all proceedings and ruling relating to ...*" that the Order of Mchome, J. which purported to transfer the application as well as the entire proceedings of the Resident Magistrate's Court were nullified. Nonetheless, Application No. 7 of 2009 was salvaged and the High Court was so ordered to sit and determine the same.

Unfortunately, what was ordered by the Court was not complied with by the High Court. It is noteworthy that instead of pursuing the pending

application No. 7 of 2009, the appellants preferred a fresh Miscellaneous Application No. 2 of 2013 seeking the same order of enlargement of time. Rather strangely, the High Court (Nyerere, J.) went along the appellant's approach and proceeded to hear and determine the latter application despite there being a similar application which stood undetermined. In the end result, the appellant's were granted the extension, whereupon they preferred the appeal presently before us.

Against the foregoing backdrop, we are of the settled view that the High Court (Nyerere, J.) wrongly sat and determined Miscellaneous Criminal Application No. 2 of 2013 whilst there was, before the same court, a similar application which stood pending and undetermined and, as it were, in disobedience to the directions of this Court. That being so, in the exercise of our revisional powers under section 4 (2) of AJA, we nullify the entire proceedings comprised in Miscellaneous Criminal Application No. 2 of 2013. Having nullified the High Court proceedings, the present appeal is left with no legs to stand on and it is, accordingly, struck out.

We will go further and refresh our earlier order to the effect that the High Court should hear and determine the pending Miscellaneous Criminal Application No. 7 of 2009. Given the fact that the application has been pending for a long time, we additionally order that the same be heard as expeditiously as possible.

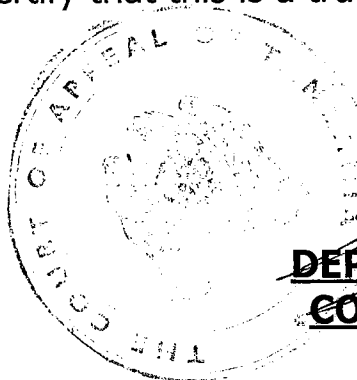
DATED at **ARUSHA** this 24th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

A circular seal of the Court of Appeal of Tanzania is visible on the left side of the page. The seal features the text 'THE COURT OF APPEAL OF TANZANIA' around the perimeter and a central emblem. Overlapping the seal is a handwritten signature in black ink, which appears to read 'E. Y. Mkwizu'. Below the signature, the text 'E. Y. MKWIZU' is printed, followed by 'DEPUTY REGISTRAR' and 'COURT OF APPEAL' in bold, underlined capital letters.

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL