

**IN THE COURT OF APPEAL OF TANZANIA**

**AT TANGA**

**(CORAM: MBAROUK J.A., MWARIJA, J.A. And MWANGESI, J.A.)**

**CRIMINAL APPEAL NO.265 OF 2016**

**NICHOLAUS MGONJA @ MAKAA.....APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the Resident Magistrate's Court of Tanga  
at Tanga)**

**(Mazengo, PRM–Ext. Jurisdiction.)**

**dated 27<sup>th</sup> day of May, 2016**

**In**

**Criminal Session No. 6 of 2014**

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**RULING OF THE COURT**

18<sup>th</sup> & 23<sup>rd</sup> April, 2018

**MWARIJA, J.A.:**

The appellant was tried in the Resident Magistrate's Court of Korogwe for the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 24/9/2012 at Mkuza Village in Lushoto district, Tanga region, the appellant murdered one Frida Michael @ Tindikali. The appellant denied the charge.

The information for murder was initially filed in the High Court as Criminal Sessions Case No. 22 of 2013. On 5/2/2014 however, by the order of the High Court dated 5/2/2014, the case was transferred to the Resident Magistrate's Court of Tanga for it to be heard by Mkeha, PRM with Extended Jurisdiction (Ext. Jur.). It was then registered in that Court as Criminal Sessions Case No. 6 of 2014. The learned Principal Resident Magistrate (Ext. Jur.), took the appellant's plea and also conducted a preliminary hearing.

On 22/4/2016 through another transfer order, the case was re-transferred to Mazengo, PRM (Ext. Jur.). Both orders transferring the case (the transfer orders) to the Resident Magistrate's Court of Tanga were made under section 173(2) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA).

At the trial, the prosecution case depended on the evidence of seven witnesses while the appellant was the only witness for the defence. After a full trial, the trial court, Mazengo, PRM (Ext. Jur.) found the appellant guilty as charged. She consequently convicted and

sentenced him to the mandatory death penalty. He was aggrieved hence this appeal.

When the appeal was called on for hearing on 18/4/2018, the appellant was represented by Mr. Warehema Singano, learned counsel while the respondent/Republic was represented by Ms. Shose Naiman, learned State Attorney.

In his memorandum of appeal, the appellant raised four grounds. Upon being assigned to represent the appellant however, Mr. Singano filed an additional memorandum of appeal containing five grounds, thus making a total of nine grounds of appeal which the learned counsel intended to argue. Before he embarked on arguing those grounds however, he raised and argued, with the leave of the Court, a point of law concerning the propriety or otherwise of the transfer orders.

He submitted that the orders were improperly made under S. 173 (2) of the CPA. He argued that the proper provision which vests the High Court with the power of transferring a case triable by it to the

resident magistrate's court to be tried by a resident magistrate with extended jurisdiction, is S. 256 A of the CPA.

The learned counsel submitted that since the transfers were made under inapplicable provision of the law, the transfer orders were invalid. In the circumstances, he argued, the proceedings were a nullity. He urged us to invoke the Courts revisional powers under s. 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA) to quash the proceedings and the judgment of the resident magistrate's court set aside the conviction and the sentence, and remit the case to the High Court to be proceeded with in accordance with the law.

Ms. Naiman agreed with the submission made by the learned counsel for the appellant that the transfer orders were legally ineffective because the same were made under inapplicable provision of the law. She conceded also that as a result, the proceedings and the judgment were a nullity.

Section 173 (1) – (3) of the CPA provides as follows:

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

*(a) invest any resident magistrate with power to try any category of the offences which, but for the provisions of this section, would ordinarily be tried by the High Court and may specify the area, within which he may exercise such extended power; or*

*(b) invest any such magistrate with power to try any specified case or cases of such offences and such magistrate shall, by virtue of the order, have the power, in respect of the offences specified in the order to impose any sentence which could lawfully be imposed by the High Court.*

*(2) Nothing in this section shall affect the power of the High Court to order the transfer of cases.*

*(3) For the purposes of any appeal from or revision of his decision in the exercise of such jurisdiction such resident*

*magistrate shall be deemed to be a judge of the High Court, and the court presided over by him while exercising such jurisdiction shall be deemed to be the High Court."*

As stated above, the transfer orders were made under subsection (2) of S. 173 of the CPA. That provision does not empower the High Court to make a transfer of a case. It merely states that nothing in S.173 of the CPA shall affect the High Court's power of transferring a case, meaning that there is a specific provision which vests the High Court with such power. As submitted by Mr. Singano, that provision is section 256 A (1) of the CPA which provides as follows:

*" 256 A-(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 conducted by a resident magistrate upon whom extended jurisdiction has been granted under subsection (1) of section 173."*

The authorities to the effect that, the powers of the High Court of transferring a case which is ordinarily triable by it to the resident magistrate's court is S.256A (1) and not S. 173 of the CPA, are

abundant. In the case of **Masana Mwita @ Marwa v. The Republic**, Criminal Appeal No. 194 of 2012 (unreported), for example, the Court had this to say:

*" The position we have taken in interpretation of section 173 (1) (a) and (b) and section 256A (1) of the CPA is that it is section 256A (1) which vests the High Court with powers to transfer a case to a specific resident magistrate upon whom extended jurisdiction has been vested by the Minister pursuant to section 173(1) of the CPA –See for example Criminal revision No. 18 of 2006 – **The Republic versus Banyayirubusu & four others, Abrahaman Ramadhani @ Chino versus The Republic, Criminal Appeal No. 130 of 2013 and Thomas Gasper Mchamisi versus The Republic**, Criminal Appeal No. 291 of 2013 (all unreported)."*

Similarly, in the case of **Juma Lyamwiwe v. The Republic**, Criminal Appeal No. 42 of 2001, the Court stated as follows:

*"where the High Court desires to direct a transfer then an order for such transfer should be made under s. 256A (1) of the Criminal Procedure Act, 1985 as amended. **Certainly, it is not correct to make an order under s. 173 of the said Act...**"*

[Emphasis added].

Section 256 A (1) of the CPA being a proper provision under which the transfer orders should have been made, we agree with Mr. Singano and Ms Naiman that the transfer orders made under S. 173 (2) of the CPA were legally ineffectual. As a consequence, the proceedings in the Resident Magistrate's Court of Tanga before the two Resident Magistrates with Extended Jurisdiction were a nullity- See for example, **The Republic v. Banyanyirubusu Gaspary & 4 others** (supra). In that case, the Court aptly stated that the effect of making a transfer under 173 of the CPA, which is not an applicable provision, renders the proceedings a nullity.

On the basis, of the above stated reasons, we exercise the powers of revision vested in the Court by S.4 (2) of the AJA and

hereby quash the proceedings conducted by Mkeha, PRM (Ext. Jur.) as well as the proceedings and the judgment of Mazengo PRM (Ext. Jur.). The conviction and the sentence imposed on the appellant are also set aside. As a consequence, we order that the record be remitted to the High Court for the case to be dealt with in accordance with the law.

**DATED** at **TANGA** this 21<sup>st</sup> day of April, 2018.

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

A. G. MWARIJA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

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

  
E.Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**