

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CRIMINAL APPEAL NO. 544 OF 2016

THABIT SALEHE APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the decision of the RM's Court Ext. Jurisdiction
at Tanga)**

(Mkeha- SRM Ext. Jur.)

dated 8th day of March, 2013

in

Criminal Session No. 1 of 2013

RULING OF THE COURT

17th & 19th April, 2018

MBAROUK, J.A.:

This appeal arises from the decision in Criminal Session No. 1 of 2013 made by Senior Resident Magistrate with extended jurisdiction. The appellant, Thabit Salehe was charged with the offence of murder contrary to section 196 of the Penal Code Cap. 16 R.E. 2002. It was the prosecution's case that, the appellant on

8th day of February, 2008 at about 07: 00 hrs. at Chanika/Kofi village within Handeni District in Tanga Region, did murder one Rehema d/o Rashid. The trial court was satisfied with the adduced evidence and therefore convicted the appellant and sentenced him to suffer death by hanging. Dissatisfied with the decision of the trial court, the appellant has preferred this appeal.

In this appeal, Mr. Alfred Akaro, learned advocate represented the appellant, whereas Mr. Waziri Mbwana Magumbo, learned State Attorney represented the respondent/Republic.

At the hearing of the appeal, having found a pertinent issue, we were constrained to direct the parties in this appeal to address us as to whether the appeal was competent or not. This was for the reason that, looking at the record of appeal at page 4, there is an order of transfer signed by Judge in charge of the High Court of Tanzania at Tanga which reads as follows:-

**"IN THE HIGH COURT OF TANZANIA
AT TANGA**

CRIMINAL SESSION NO 5 OF 2010

THE REPUBLIC

VS

THABIT SALEHE @SELEMAN

ORDER

*In terms of Provisions of Section 173 (2) of the CR
Procedure Act Cap 20 R.E. 2002, I hereby transfer this
Appeal/Revision to RM's Court Tanga to be heard by
Mkeha PRM/SRM- ext. Jurisdiction.*

Sgd
JUDGE IN –CHARGE

DATE: 5/2/2013"

From that order, Mkeha, SRM with extended jurisdiction initiated to hear the proceedings of the case on 15th day of February, 2013 by taking the plea from the appellant. He

thereafter heard the prosecution's case and defence case, finally he delivered his judgment on 8th day of March 2013.

The question is whether the provisions of section 173 (2) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) cited in that order of transfer was proper to transfer a case from the High Court to a Resident Magistrate with extended jurisdiction.

On his part, Mr. Akaro readily conceded that it was not proper for the Judge-in-charge to cite section 173(2) of the CPA in transferring a case of the High Court to be heard by the Senior Resident Magistrate with extended jurisdiction. Hence, he therefore urged us to find that there was no transfer made to confer jurisdiction to Mkeha, Senior Resident Magistrate with extended jurisdiction to hear that case under the jurisdiction of the High Court.

For having no proper transfer Mr. Akaro prayed for the Court to exercise its revisional powers conferred upon it under

section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and nullify the proceedings conducted by the assigned Senior Resident Magistrate and his judgment. He further prayed for the case to be remitted back to the High Court to be heard and determined according to law.

On the part of Mr. Waziri Mbwana, he fully agreed with what was submitted by Mr. Akaro and added that instead of section 173 (2) of the CPA, the proper provision which should have been used to transfer the case to be heard by the Resident Magistrate with extended jurisdiction is section 256A of the CPA. As prayed by Mr. Akaro, the learned State Attorney too prayed to us to invoke section 4(2) of the AJA and nullify the proceedings conducted by Senior Resident Magistrate with extended jurisdiction and his judgment and thereafter order the case to be remitted back to the High Court to be heard and determined according to law.

Let us begin our discussion by examining the provisions of sections 173 and 256A of the CPA so as to differentiate them and see which between those two provisions is a correct one to be used in the situation at hand.

Section 173 provides as follows:-

"(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 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 powers;

(b)

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

Whereas, section 256A (1) of CPA provides the following:-

"(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."

(Emphasis added.)

Reading the provisions of section 173(2) of the CPA cited above to which the order of transfer was made to enable Mkeha, Senior Resident Magistrate with extended jurisdiction to hear the Criminal Session No. 1 of 2013 we find that section 173(2) of the CPA was wrongly applied in the transfer of the case.

In giving the interpretation of those provisions, this Court in the case of **Masana Mwita @ Marwa vs Republic**, Criminal Appeal No. 194 of 2012 (unreported) had the following to say:-

"The position we have taken in the 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."

It is therefore clear that the proper provision to be used by the High Court when transferring its cases to be heard and determined by the Resident Magistrate with extended jurisdiction is section 256A (1) of the CPA and not section 173(2) of the CPA. Also see **Abrahaman Ramadhan @ Chino vs Republic**, Criminal Appeal No. 130 of 2013 and **Thomas Gasper Mchami vs Republic**, Criminal Appeal No. 291 of 2013 (both unreported).

In the circumstances, from what has been examined above, we feel obliged to exercise our powers conferred upon us under section 4(2) of the AJA and quash all the proceedings and

judgment made by Mkeha, Senior Resident Magistrate with extended jurisdictions in Criminal Session No. 1 of 2013. We also set aside the sentence imposed on the appellant. Furthermore, we order the matter to be remitted back to the High Court to be attended and determined in accordance with the law.

It is so ordered.

DATED at TANGA this 18th 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