

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 333 OF 2016

LUKELO UHAHULA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Lyamuya SRM- Extended Jurisdiction.)

dated the 3rd day of May, 2013

in

DC. Criminal Appeal No. 8 of 2013

JUDGMENT OF THE COURT

5th & 10th December, 2018

MUGASHA, J.A.:

In the District Court of Chunya the appellant and three others who were acquitted were charged with two counts; conspiracy contrary to section 384 and armed robbery contrary to section 287 of the Penal Code Cap 16 RE. 2002 respectively. It was alleged that, on 19th November, 2011 at Makongorosi within Chunya District they did conspire to steal Tshs. 500,000/= the property of Mbwana s/o Salum and on the same date stole

Tshs. 500,000/= the property of the said Mbwana s/o Salum whom they threatened with a weapon immediately before such stealing. The appellant was found guilty and sentenced to thirty years imprisonment.

Aggrieved, the appellant filed an appeal to the High Court whereby pursuant to section 45 (2) of the Magistrates Courts Act, Cap 11 RE,2002, the appeal was transferred from the High Court to the Resident Magistrates' Court and heard by the Senior Resident Magistrate with Extended Jurisdiction, who dismissed it on 1st June, 2013.

The appellant made two unsuccessful attempts to apply for extension of time to appeal to the Court. In both instances the applications were struck out on account of being incompetent. Besides, the appellant unsuccessfully appealed to the Court but his appeal was struck out on account of the notice of appeal being defective. Still undaunted, the appellant lodged before the High Court an application seeking extension of time to appeal to the Court vide Misc. Criminal Application No. 16 of 2015. The application was granted on 20th June, 2016 by Mambi J. Subsequently, the appellant filed an appeal to the Court seeking to challenge the decision of the Senior Resident Magistrate with Extended jurisdiction.

In the memorandum of appeal he has raised eight grounds of appeal. However, for reasons which will be apparent in due course we shall not reproduce them.

At the hearing, we *suo motu* required to satisfy ourselves on the propriety of the appeal since the extension of time to lodge the notice of appeal was determined by the High Court Judge while in the impugned decision, the appeal was dismissed by the Resident Magistrate with extended jurisdiction.

Mr. Ofmedy Mtenga, learned State Attorney, who represented the respondent Republic, submitted that, the appeal is not properly before the Court because the notice of appeal was filed pursuant to the grant of extension of time granted by the High Court instead of the Resident Magistrates' Court. He argued this to be contrary to section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 RE. 2002 and urged us to find the appeal not competent and proceed to strike it out.

On the other hand, the appellant asked to be given a proper direction by the Court so that he can pursue his appeal.

At the outset, we deem it crucial to point out that, section 45 (2) of the Magistrates Courts Act mandates the High Court to transfer appeals to the court of Resident Magistrates' to be heard and determined by a Resident Magistrate with extended jurisdiction. The said provision categorically states as follows:

"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)".

The status of appeals transferred from the High Court to Magistrates with extended Jurisdiction was articulated in the case of **ELLY MILLINGA VS REPUBLIC**, Criminal Appeal No. 268 of 2014 (unreported) where we said:

"In essence we are of the opinion that, when a Resident Magistrate is conferred with extended jurisdiction to entertain a specific hearing of a case or an appeal in the High Court, his status and that

of the Court to which he has been assigned to sit does not change and make him as a judge or sitting in the High Court, he is merely deemed to be a judge or deemed to sit at the High Court. That is why once a formal order of transfer has been made, the transferred appeal shall be registered in the Court of Resident Magistrate, given a fresh number and be heard and determined by that court. Thereafter, an appeal from that decision of that court lies directly to this Court."

Corresponding remarks were made by the Court in **BAHATI NDUNGURU @MOSES VS THE REPUBLIC**, Criminal Appeal No. 519 of 2015 (unreported) where the Court said:

" ...when a case is transferred to the Resident Magistrates' court so as to be tried by a Resident Magistrate with extended jurisdiction nothing remains in the High Court. The hearing and determination of that case is to be done in that court and the appeal therefrom lies directly to Court."

In the present matter, since the appeal was transferred and determined by a Resident Magistrate with extended jurisdiction, the extension of time to file a notice of appeal to the Court is governed by section 11(1) of the Appellate Jurisdiction Act, Cap. 141 RE.2002 which provides:

"Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired".

Notwithstanding that, the High Court and the Court have concurrent jurisdiction in the exercise of powers conferred under section 11(1) of AJA, similarly, a subordinate court exercising extended jurisdiction has powers

to extend time in respect of the matter it had tried in that capacity. In the light of the stated position of the law, in the case at hand, as the appeal was heard and determined by the Resident Magistrate with Extended Jurisdiction, the appellant ought to have filed his application for extension of time to file the notice of appeal before the Resident Magistrates' Court exercising extended jurisdiction not the High Court. In this regard, it was improper for the High Court to entertain the application for extension to file the notice of appeal on a matter which was not in the High Court Registry following its transfer to the Resident Magistrates' Court. In the circumstances, the order by the High Court granting extension of time is invalid because it has no powers to grant extension of time in an appeal which had been entertained by a subordinate court in the exercise of its extended jurisdiction. See - **OSCAR PENDEZA VS THE REPUBLIC**, Criminal Appeal No. 363 of 2015 (unreported). This adversely impacts on the purported appeal which is for that reason not properly before us.

On the way forward, we invoke our revisional jurisdiction provided under section 4 (2) of AJA to nullify the order of the High Court in Misc. Criminal Application No. 16 of 2015. Having nullified the order granting the extension, the notice of appeal lodged on 21st June, 2016 was filed out of

time beyond seven months from the date of the impugned decision. Since it is the notice of appeal which institutes an appeal in terms of rule 68 (1) of the Tanzania Court of Appeal Rules, 2009, the purported appeal becomes incompetent for want of a valid notice of appeal. As such, the incompetent appeal is hereby struck out. If the appellant so wishes, he may file a fresh application for extension of time to lodge notice of appeal to the Court in the same subordinate court.

It is so ordered.


DATED at **MBEYA** this 7th day of December, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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


A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL