

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MBAROUK, J.A., MZIRAY, J.A., AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 42 OF 2016

PAULO BENITO MWENDA APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the decision of the Resident Magistrates' Court of
Singida at Singida)**

(H.A. Shaidi PRM- Ext. Jurisd.)

dated the 26th day of October, 2015

in

Criminal Appeal No. 6 of 2015

RULING OF THE COURT

26th February & 6th March, 2018

MBAROUK, J.A.:

In the District Court of Kongwa at Kongwa, the appellant, Paulo Benito Mwenda was convicted of the offence of Armed Robbery contrary to sections 285 and 287A of the Penal Code, Cap. 16 as amended by Act No. 4 of 2004. He was then sentenced to serve thirty (30) years imprisonment.

Dissatisfied, the appellant appealed to the High Court of Tanzania at Dodoma.

According to the record of appeal at page 51, the Judge Incharge, High Court, Dodoma on 16-10-2015 in terms of the provisions of section 45(2) of the Magistrates' Court Act, Chapter 11 R.E. 2002 transferred the appeal from the High Court to be heard by H.A. Shaidi, Principal Resident Magistrate with extended jurisdiction. The record of appeal at page 52 shows at the title of the proceedings in that appeal, that Shaidi, PRM with extended Jurisdiction sat in the High Court of Dodoma and heard the appeal and delivered his judgment by upholding the conviction and the sentence passed by the District Court of Kongwa. Still Aggrieved, the appellant has preferred this second appeal.

Initially, this appeal was set for hearing on 27th February, 2018. Before hearing the appeal on merit, we wanted to satisfy ourselves as to whether the appeal had been properly filed before the Court. We were therefore

constrained to ask the parties to address us as to whether the omission in the charge of armed robbery found in the charge sheet to show on whom the threat or use of violence was directed to was a fatal defect. Both, the appellant and Ms. Beatrice Nsana, learned State Attorney who represented the respondent/Republic agreed that the defect is fatal. We therefore adjourned the matter so that we could go and write our decision.

While discussing the fate of the issue we raised earlier, we further found a pertinent issue touching on the propriety of the first appeal heard by Shaidi, PRM with extended jurisdiction. We are saying so, because, this appeal arises from that decision of Shaidi, PRM with extended jurisdiction. We therefore found it prudent to call the parties again to address us as to whether Shaidi, as PRM with extended jurisdiction had powers to sit in the High Court and proceed to hear the appeal he was assigned by the Judge Incharge of the High Court of Tanzania at Dodoma.

When the appeal was called for hearing for the second time, the parties appeared as before. We started by asking the learned State Attorney as to the propriety of the first appeal heard by Shaidi, PRM with extended jurisdiction assigned to him in terms of the provisions of section 45(2) of the Magistrates' Courts Act, 1984 (the MCA), who heard the appeal sitting in the High Court.

Outrightly, Ms. Nsana reacted by submitting that, it was wrong for Shaidi as PRM with extended jurisdiction to sit in the High Court and proceed to hear that appeal. In support of her submission, she cited to us the decision of this Court in the case of **Nyawaje John and Three Others Vs. Republic**, Criminal Appeal No. 14 of 2007 (unreported), which, in a situation like the present, nullified the entire proceedings of Lyamuya PRM with extended jurisdiction and ordered the appeal to be heard again by the High Court. In the instant matter, Ms. Nsana also prayed, just like in **Nyawaje John** (Supra), for the Court to nullify the proceedings conducted by Shaidi PRM with extended

jurisdiction and order the appeal to be heard by the High Court.

On his part, the appellant prayed for the Court to set him free, because the mistake found by the Court was not done by him but by the court and therefore he should not be taken to shoulder the blame. He added that, it is not for the interest of justice to remit the file back at the High Court to be heard afresh. He then asked the Court to take into account the period he has already served in prison.

As pointed out earlier, after the appellant was aggrieved by the decision of the District Court of Kongwa at Kongwa in Criminal Case No. 110 of 2012, he instituted an appeal before the High Court of Tanzania at Dodoma in DC Criminal Appeal No. 54 of 2013. By invoking the provisions of section 45(2) of the MCA, the Judge Incharge High Court of Tanzania at Dodoma transferred that appeal to be heard by H.A.Shaidi, PRM with extended jurisdiction. Instead of sitting in the Resident Magistrates' Court, Shaidi, PRM with

extended jurisdiction sat and heard the appeal in the High Court. The record of proceedings at page 52 of the record of appeal shows it clearly as follows:-

"IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC CRIMINAL APPEAL NO. 54 OF 2013

*(Originating from the District court of Kongwa at
Kongwa Criminal Case no. 110/2012)*

PAULO BENITO MWENDA APPELLANT

VERSUS

THE REPUBLICRESPONDENT

PROCEEDINGS

DATE: 23/10/2015

Coram: Hon. H.A. SHAIKI, PRM (EXT.JURISD.)"

From the above evidence, it clearly shows that Shaiki, PRM with extended jurisdiction instead of sitting in the Resident Magistrates' Court to hear that appeal assigned to him, he heard the appeal sitting in the High Court of Tanzania at Dodoma.

There is no doubt that section 45(2) of the MCA confers the High Court with powers to transfer an appeal instituted in the High Court to be heard by a resident magistrate with extended jurisdiction, but such a magistrate will only be deemed to be a judge of the High Court, because he is not an actual judge of the High Court. In expounding that position, this Court in the case of **Shiminimana Hisaya and Another Vs. Republic**, Criminal Appeal No. 6 of 2004 (unreported) stated as follows:-

"The resident magistrate exercising extended jurisdiction is deemed to be a judge of the High Court because he is not, in fact, a judge of the High Court and the court of resident magistrate in which he sits when exercising extended jurisdiction is deemed to be the High Court because it is not in fact the High Court. If a resident magistrate exercising extended jurisdiction was expected to sit in the High Court then it would make no sense to say that such court would be deemed to be the High

Court. The rationale, therefore, is that a resident magistrate with extended jurisdiction to whom a High Court appeal is transferred to hear would sit in their court – the court of resident magistrate.”

Showing the correct procedure to be followed, this Court in the case of **Erney Gasper Asenga Vs. Republic**, Criminal Appeal No. 238 of 2016 (unreported) stated as follows:-

“It is now trite laws that once such 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.”

The effect of a resident magistrate with extended jurisdiction who sits in the High Court to hear an appeal transferred to him/her renders the proceedings and decision a nullity. In the case of **Shiminimana Hisaya** (Supra) this Court stated that:-

"Thus, where a Resident Magistrate with extended jurisdiction sits in the High Court to hear an appeal which was not transferred to a Resident Magistrate with extended jurisdiction in terms of section 45 (2) the proceedings and decision will be null and void."

A plethora of authorities from the decisions of this Court have reached to that conclusion for instance also See **Fedrick Kayanda @ Makoroboi Vs. Republic**, Criminal Appeal No. 24 of 2005, **Shariff Ahmed Salim Vs. Kullaten Abdalla Khamis**, ZNZ Civil Application No. 3 of 2005 (both unreported) to name a few.

In view of the above stated circumstances, we are constrained to invoke our revisional powers conferred upon us under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.B. 2002 and quash the proceedings and judgment made by Shaidi, PRM with extended jurisdiction and further order the appeal to be heard by the High Court expeditiously.

If the appellant's appeal is going to be dismissed by the High Court, the term of sentence he has already served in prison should be taken into account. It is so ordered.

DATED at DODOMA this 4th day of March, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is true copy of the original.



E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL