

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

**(CORAM: MJASIRI. J.A, MUGASHA, J.A. And LILA, J.A.)**

**CRIMINAL APPEAL NO. 420 OF 2015**

**JUMA S/O JACOB.....APPELLANT**

**VERSUS**

**THE REPUBLIC.... RESPONDENT**

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

**(Somi, PRM, Ext. Jur.)**

**dated the 28<sup>th</sup> day of October, 2003**

**in**

**DC. Criminal Appeal No. 4 of 2003**

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**JUDGMENT OF THE COURT**

**16<sup>th</sup> & 20<sup>th</sup> February, 2018**

**LILA, J.A.:**

It all started as Criminal Case No. 258 of 2001. In that case the appellant was charged before the District Court of Nzega with the offence of Rape contrary to Section 130 and 131 of the Penal Code. He was convicted as charged and was sentenced to a jail term of thirty (30) years and also to suffer twelve (12) strokes of the cane. Aggrieved, the appellant filed his appeal in the High Court in Criminal Appeal No. 7 of 2003. But the appeal was heard at the Resident

Magistrates' Court of Tabora, at Tabora in its extended jurisdiction. It was registered as DC. Criminal Appeal No. 4 of 2003. Mr. J. M. Somi, PRM Extended Jurisdiction presided over the appeal. Apart from dismissing the appeal, he ordered the appellant to pay a "fine" of Tshs. 100,000/= which he said was overlooked by the trial magistrate.

As expected, the appellant was aggrieved and wanted to appeal to the Court but was late. He accordingly filed an application before the High Court seeking for extension of time to appeal to the Court. That was (HC) Misc. Criminal Application No. 101 of 2014. It was heard and granted by Mgonya, J. on 22/6/2015. Hence the present second appeal.

Initially, the appellant lodged a six-point memorandum of appeal and later a supplementary one containing three grounds of appeal. He adopted both of them and urged all his grounds of appeal be considered.

When the appeal was called on for hearing the appellant appeared in person and was unrepresented. He accordingly fended

for himself. The respondent Republic had the services of Mr. Tumaini Pius, learned State Attorney.

Upon examination of the record we realized that the appellant's first appeal was heard and determined by Mr. Somi, PRM exercising Extended Jurisdiction but we could not find a transfer order by the High Court to have the appeal heard by a Resident Magistrate vested with Extended Jurisdiction. We, further, realized that the appellant's application for extension of time to appeal to the Court in (HC) Misc. Criminal Application No. 101 of 2014 was heard and granted by the High Court (Mgonya, J.) on 22/6/2015. We asked the parties to address us on the propriety of the proceedings conducted in the Resident Magistrates' Court and the High Court.

Mr. Pius was brief and direct to the point that there was no transfer order issued by the High Court in terms of Section 45(2) of the Magistrate Courts Act, Cap. 11, R. E. 2002 (the MCA). He was of the view that it is the transfer order which vests with the requisite jurisdiction a resident magistrate who is vested with extended powers to hear and determine an appeal filed in the High Court. In its absence, a magistrate who heard and determined the appeal

lacked jurisdiction and the relevant proceedings and judgment are a nullity, he insisted.

In respect of the application for extension of time to appeal to the Court which was heard by the High Court, he strongly argued that as the decision sought to be impugned was heard and determined by the Resident Magistrates' Court exercising extended powers, then it was the same court which had powers to hear and determine that application in terms of section 11 (1) of the Appellate Jurisdiction Act, Cap. 141, R. E. 2002 (AJA). He said the proceedings and orders of the High Court were, on that account, a nullity because it lacked jurisdiction.

The appellant agreed with the learned State Attorney and urged the Court to allow his appeal and set him free.

We, on our part entirely ascribe with the submissions by the learned State Attorney. The law as to the transfer of an appeal instituted in the High Court for hearing and determination by a magistrate upon whom extended jurisdiction has been conferred under Section 45(2) of the MCA is settled. The section requires that a transfer order be made by the High Court directing an appeal

instituted in the High Court be heard and determined by a magistrate with Extended Jurisdiction. It states: -

*"(2).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 import of the above provisions of the law is that it is the transfer order which mandates a magistrate who has extended powers to hear and determine an appeal instituted in the High Court.

Upon a careful review of the record we are unable to see the transfer order which transferred Criminal Appeal No. 7 of 2003 to be heard and determined by Mr. Somi, PRM, Extended Jurisdiction. In terms of Section 45(2) of the MCA the presiding Principal Resident Magistrate lacked the requisite jurisdiction to hear and determine that appeal which was registered as DC. Criminal Appeal No. 4 of 2003. The proceedings and judgment in DC. Criminal Appeal No. 4 of 2003, are for that reason, a nullity. The Court encountered an identical situation in the case of **Nyawaje John and Two Others**

**Vs. Republic**, Criminal Appeal No. 14 of 2007 (unreported) and it categorically stated that:

*"Since Lyamuya, PRM, Extended jurisdiction heard Criminal Appeal No. 20 of 2002 without the High Court, under Section 45(2) of the Magistrates' Courts Act, 1984, transferring it to the Court of Resident Magistrate to be heard by her, she assumed powers which she did not have. Even if the case had been properly transferred, it would still be wrong for the Resident Magistrate with Extended jurisdiction to sit in the High Court while determining the appeal. Under the circumstances the entire proceedings by Lyamuya, PRM. Extended jurisdiction was a nullity and we declare the proceedings and the decision thereon null and void."*

Now assuming that there was a transfer order by the High Court, the issue arising is whether it was proper for the High Court to hear and determine the appellant's application for extension of time ((HC) Misc. Criminal Application No. 101 of 2014).

We are at one with the learned State Attorney that the High Court had no jurisdiction to entertain the application for extension of time. The law governing extension of time to appeal to the Court from a decision by the subordinate court exercising extended jurisdiction is Section 11 of AJA. That section 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 the 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 making the application has already expired.**"*  
(Emphasis added).

In the instant case, assuming, again, that Somi, PRM, Ext. Jur. had jurisdiction, after he had heard and determined DC. Criminal Appeal No. 4 of 2003, and the appellant wanted to appeal to the Court but was late, an application for extension of time ought, in terms of Section 11(1) of AJA, to have been made in the Resident Magistrates' Court of Tabora exercising extended powers. The

reason is simple that once a transfer has been made under section 45(2) of the MCA to the Resident Magistrates' Court, the record can no longer be considered as a record of the High Court. (See: **Elly Millinga Vs. Republic**, Criminal Appeal No. 517 of 2016, and **Clemence Mpondelo and Another V. Republic**, Criminal Appeal No. 138 and 139 of 2011 (both unreported)). The proceedings before the judge were thus a nullity.

Ordinarily, we would have returned the record to the High Court so that it can hear and determine the appellant's appeal (Criminal Appeal No. 7 of 2003), but we refrain from doing so for the reasons that the appellant has been behind bars for almost 17 years serving an illegal sentence on the basis of a defective charge placed at his doors for failure to specify the specific category of rape he was charged with. He was charged for committing rape contrary to sections 130 and 131 of the Penal Code which are general provisions. The way it was framed, violated the provisions of section 135(a) (ii) of the Criminal Procedure Act (Cap. 20 R.E. 2002) which require a charge to contain a reference to the specific section of the enactment creating the offence (See: **Mussa Ramadhani Vs. Republic**, Criminal Appeal No. 368 of 2013 (unreported)). In the



circumstances, we ascribe to the learned State Attorney's submissions that it would not be in the interest of justice to order the appellant be returned to the High Court so that his appeal can be heard.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant should be released from prison immediately unless held therein for any other lawful cause.

**DATED** at **TABORA** this 19<sup>th</sup> day of February, 2018.

S. MJASIRI  
**JUSTICE OF APPEAL**

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

S. A. LILA  
**JUSTICE OF APPEAL**

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

  
A.H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**