IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J. A., WAMBALI, J. A. And LEVIRA, J. A.)

CRIMINAL REVISION NO. 3 OF 2019

THE REPUBLIC .... APPLICANT

VERSUS

FRANCIS LIJENGA .... RESPONDENT

**(Revision from the proceedings of the Resident Magistrate's Court of
Morogoro at Morogoro .)**

(Hon. Kwey Rusema, PRM – Extended Jurisdiction.)

**dated the 15th day of August, 2014
in
Criminal Session Case No. 16 of 2014**

(EXTENDED JURISDICTION)
....

RULING OF THE COURT

26th August, & 9th September 2019

MUSSA, J.A.:

In the High Court of Tanzania, at the Dar es Salaam District Registry,

the respondent herein Stands arraigned for murder, contrary to section 196

of the Penal Code, Chapter 16 of the Laws.   The information laid at his

door alleges that, on or about the 16th day of June 2008, at Idete Village,

within Kilombero District in Morogoro Region, the respondent murdered a

certain Desderia Matanga.

Upon the filing of the information, the case facing the respondent was designated as "*Criminal Sessions Case No. 85 of 2010*'. Subsequent to the committal of the respondent for trial in the High Court, on the 4th day of August 2014, the Judge-in-charge of the Dar es Salaam Zone directed that the case be transferred and be heard by Honorable Kwey Rusema, a Principal Resident Magistrate with Extended Jurisdiction. Thereafter, the case was transferred to the Resident Magistrate's Court of Morogoro and re-designated as "*Criminal Sessions Case No. 16 of 2014 (Extended Jurisdiction)*." On the 15th day of August 2014, the assigned Principal Resident Magistrate presided over preliminary hearing proceedings which were also attended by Ms. Rosemary Mgeni for the Republic and Mr. Punge for the defence. As to what transpired in court, it is best if we let the record of proceedings speak for itself:-

> "*Information of murder c/s 196 of the Penal Code read over and explained to the accused person In own language (Swahili) and he is required to plead there to;*
>
> **Accused plea***: It is not true*
>
> **Court***: Entered as a plea of not guilty*
>
> **Sgd***: Kwey Rusema*

Ms. Mgeni: *I am ready for preliminary hearing I pray to present the facts*

Court: *Facts read to accused*

MS. Mgeni: *I pray the statement of facts to form part of this court record*

Mr. Punge: *No objection*

Court: *The statement of facts to form part of this court record.*

Ms. Mgeni: *We intend to call seven witnesses as they appear on the statement of facts list.*

Ms. Mgeni: *We intend to tender the exhibits as they appear in the statement of facts list.*

MEMORANDUM OF UNDISPUTED FACTS

1. *Name and address of accused*
2. *The accused and deceased were lovers*
3. *That Desderia Matango is dead*
4. *He was arrested in connection with the death of Desderia Matango.*

DISPUTED FACTS

The rest of the facts

Sgd: *STATE ATTORNEY*

Sgd: *DEFENCE CONSEL*

Sgd: *ACCUSED*

Sgd: Kwey Rusema
PRM (Ext. Jurisdiction)
15/08/2014

Mr. Punge: *We intend to call two witnesses. The accused himself and one Anita Pesagali if the prosecution won't call her.*

Defence Exhibits: *NIL*

Ms. Mgeni: *I pray for an adjournment*

Order: *Case adjourned for hearing to another date which will be fixed by the District Registrar.*

Sgd: Kwey Rusema
PRM (Ext. Jurisdiction)
15/08/2014"

We need not recite the much referred statement of facts which are appended at page 60 of this record and, suffice it to remark that, from the foregoing excerpt, it is palpably clear that the deduced memorandum of undisputed facts was not read over and explained to the respondent ahead of appending his signature thereto.

A good deal later, the anomaly was noted by Mutungi, J., the learned

Judge – in – Charge of the High Court, Dar es Salaam Zone, in the course

of routine inspection. In her immediate response, on the 14th August, 2017

the learned Judge-in-Charge penned a letter to the Hon. Acting Chief

Justice, (as he then was), to express her concern about the apparent

omission. In the upshot on the 1st day of April, 2019 the Chief Jusitice

directed the initiation by the Court, *suo motu*, of the civil proceeding at

hand. Thus, it is for sheer convenience that the parties were respectively

designated "Applicant" and "Respondent."

When, eventually, the matter placed before us for hearing, the

applicant entered appearance through two Senior State Attorneys, namely,

Ms. Christine Joas and Ms. Jenipher Masue. On the other side, the

respondent had the services of Mr. Nuhu Mkumbukwa, learned Advocate.

In a nutshell, Ms. Joas who stood to argue the application, faulted

the learned Principal Resident Magistrate for not reading over and

explaining to the respondent the contents of the memorandum of

undisputed matters. The requirement, she urged, is mandatory and,

accordingly, its non-compliance vitiated the entire preliminary hearing

proceedings. On the way forward, the learned Senior State Attorney

advised us to nullify the preliminary hearing proceedings under the

provisions of section 4(3) of the Appellate Jurisdiction Act, Chapter 141 of the Laws (AJA). In addition, she further advised that we should, in revision, vacate the referred transfer order dated the 4th August, 2014 and in lieu thereof, remit the matter back to the High Court for it to re-assign the case to another Magistrate with Extended jurisdiction.

On his part, Mr. Mkumbukwa fully concurred with the submissions as well as the advise extended to us by the learned Senior State Attorney. To buttress the concurrent positions taken by either counsel, the learned advocate for the respondent referred to us two unreported decisions of the Court in Criminal Appeal no. 293 of 2016 – **Republic v. Petro Joctan @ Isinika @ Chinga;** and Criminal Appeal No. 109 of 2002 – Joseph Munene and Another v. Republic.

Having heard the learned concurrent views of counsel from either side, it is now opportune for us to consider and determine the matter. Fortunately, the contetious issue is within a very narrow compass which is whether or not the preliminary hearing process abided with the law and, if not, what should be the consequences. That being so, we think it is instructive to set out the provisions of section 192 (3) of the Criminal Procedure Act, Chapter 20 of the laws (CPA) which goes thus:-

" At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and **the memorandum shall be read over and explained to the accused in a language that he understands**, signed by the accused and his advocate, (if any) and the public prosecutor and then filed. "[Emphasis supplied.]

The bolded portion of the provision tells it all: The presiding officer is enjoined to read over and explain to the accused person and his advocate, (if any), the contents of the memorandum of undisputed facts. Speaking of the requirement, in the case of **MT. 7479 Sgt. Benjamin Holela v. Republic** [1992] T.L.R. 121 the Court observed:-

" Section 192 (3) of the Criminal Procedure Act, 1985 imposes a mandatory duty that the contents of the memorandum must be read over and explained to the accused. "

All said, we entirely share the concurrent views taken by counsel from either side and, accordingly, we invoke section 4(3) of AJA and nullify the entire preliminary hearing proceedings. It is, indeed, unfortunate that, in the just ended sessions of the Court held at Dar es Salaam, we had to grapple with a simililar problem in three matters originating from the same

presiding Principal Resident Magistrate. In the same vein, we vacate and set aside the transfer order of the High Court dated the 4th day of August, 2014 and, in lieu thereof, we remit the matter back to the High Court for it to re-assign the case to another Magistrate with extended jurisdiction. Order accordingly.

DATED at **DAR ES SALAAM** this 2nd day of September, 2019

K. M. MUSSA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 9th day September 2019 in the presence of Ms. Komba Kono, Senior State Attorney for the Respondent/Republic and Upendo Mmbaga H/b for Nuhu Mkumbukwa, Counsel for the Respondent is hereby certified as a true copy of the original.
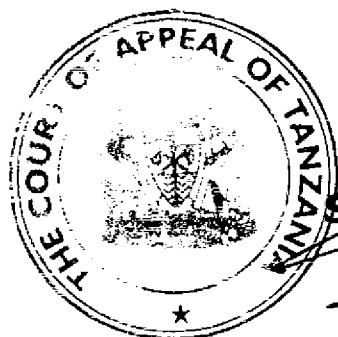
E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL