

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

(CORAM: LILA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 203 OF 2017

THE REPUBLIC APPELLANT

VERSUS

1. DAVID JIMMY KIMITI @ MBUGUA 2. JOHN SABAS @ TARIMO @ GODII 3. WENSLAUS FLORENCE KAVISHE @ SIJALI	} RESPONDENTS
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**(Appeal from the Ruling of the Resident Magistrate's Court of the Moshi
at Moshi)**

(Mpepo, Ext. Jurisdiction)

**dated the 17th day of March, 2016
in
Criminal Session No. 01 of 2016**

JUDGMENT OF THE COURT

19th & 29th August, 2019

MWANDAMBO, J. A.:

This is a short appeal. It arises from an interlocutory order of the Resident Magistrate's Court of Moshi at Moshi before B. Mpepo, Senior Resident Magistrate exercising extended jurisdiction pursuant to a transfer order made by the High Court under section 256A (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (hereinafter referred to as the CPA). The

appellant seeks to impugn an order of the Resident Magistrate with extended jurisdiction made on 17th March, 2016 in Criminal Session Case No. 01 of 2016 admitting a statement of PW2 as a defence exhibit at the instance of the third respondent's advocate. The memorandum of appeal contains two related grounds of appeal but for reasons which will become apparent later, the determination of the appeal turns outside the said grounds.

The facts that have given rise to this appeal are not in controversy. According to the information the appellant had filed in the High Court at Moshi, the respondents were alleged to have caused the death of Nickson s/o Edmund @ Mushi on 9th November, 2013. Following the filing of that information, the respondents were arraigned before that court to answer to the information of murder of the said Nickson s/o Edmund @ Mushi contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002 in High Court Criminal Sessions Case No. 57 of 2014. On 3rd September, 2015, the respondents appeared before Sumari, J. before whom they pleaded not guilty to the charge. Immediately thereafter, the learned Judge conducted a preliminary hearing in terms of section 192 of the CPA. Two exhibits were

tendered by the prosecution whilst others were deferred till trial. After drawing matters not in dispute pursuant to section 192 (3) of the CPA and marking the end of the preliminary hearing, the learned judge made an order for the trial of the case to another date to be fixed by the Deputy Registrar.

Six months later, the learned Judge acting in the capacity of Judge In charge of the said Court made an order under section 256A (1) of the CPA and 45 (2) of the Magistrate's Courts Act, Cap. 11 R.E. 2002, transferring Criminal Session Case No. 57 of 2014 to the Resident Magistrate's Court at Moshi for hearing. That order mentioned B. Mpepo, Senior Resident Magistrate with Extended Jurisdiction to preside over the case. From that moment, the Resident Magistrate's Court at Moshi extended jurisdiction was seized of the case as Criminal Session Case No. 01 of 2016.

Having been seized of the matter, Mpepo, SRM Extended Jurisdiction proceeded with the case starting with taking fresh pleas from the respondents followed by a preliminary hearing under section 192 of the CPA before the trial commenced. In the course of the hearing when Lillian Nickson Mushi (PW2) was answering questions in cross-examination, the

learned advocate for the 3rd respondent sought to have PW2's statement made before the Police admitted in evidence. The learned advocate made that prayer for the purposes of impeaching PW2's credibility in pursuance of section 164 (1) (c) of the Evidence Act. Cap. 6 R.E. 2002. Despite an objection from the prosecution, the learned Senior Resident Magistrate, Extended Jurisdiction overruled the same in his ruling made after hearing arguments for and against. He acceded to the prayer for the admission of PW2's statement as exhibit D1. It is that order which aggrieved the appellant Republic who has preferred two related grounds of appeal as follows:-

1. *The trial Magistrate erred in law by admitting witness statement of Lilian w/o Nickson Mushi (PW2)*
2. *That the trial Magistrate erred in law by admitting witness statement of Lilian w/o Nickson Mushi (PW1) as defence exhibit without following legal procedures.*

At the hearing of the appeal, the appellant was ably represented by a team of four learned State Attorneys namely: Mr. Abdallah Chavula, Senior State Attorney as lead counsel, Mr. Ignas Mwinuka, Ms. Verediana Mlenza and Ms. Akisa Mhando learned State Attorneys. Messrs Wilhad Kitali and

Patrick Paulo learned Advocates entered appearance for the first and second respondents, respectively, whilst Ms. Jane James also learned Advocate appeared for the third respondent.

Before we let the learned counsel argue on the merits and demerits of the appeal, we invited them to address us on the propriateness or otherwise of the proceedings before Mpepo, SRM Ext. Jurisdiction in the light of section 256A (1) of the CPA. Mr. Chavula learned Senior State Attorney was the first to take the floor. He readily conceded that section 256A (1) of the CPA governing the transfer of cases triable by the High Court to be heard by Magistrates with extended jurisdiction was not adhered to.

In amplification, Mr. Chavula argued that whilst the High Court has power to transfer a case to be tried by the Resident Magistrate's Court with extended Jurisdiction under section 256A (1) of the CPA, that power was not properly exercised in the case giving rise to the instant appeal. This is so because, the learned Senior State Attorney argued, the High Court purported to transfer a case in which it had already taken pleas from the respondents followed by a preliminary hearing and an order fixing the

same for trial at a later date on notice by the Deputy Registrar. Mr. Chavula argued further that that aside, in the absence of an order of a superior court nullifying the proceedings before the High Court, the proceedings in Criminal Session case No. 57 of 2014 remained intact notwithstanding the purported transfer. As a result of the said transfer, the learned Senior State Attorney submitted, the respondents were subjected to taking fresh pleas before Mpepo, SRM Ext. Jurisdiction followed by a preliminary hearing. According to him, that did not accord with the spirit under section 256 A (1) of the CPA. By reason of his arguments, the learned Senior State Attorney urged the Court to hold that the transfer order was a nullity so were the proceedings and all orders made by Mpepo, SRM Extended jurisdiction. Being a nullity, the learned Senior State Attorney invited the Court to quash the order purporting to transfer Criminal Sessions Case No. 57 of 2014 as well as the proceedings before the Resident Magistrate with extended jurisdiction in exercise of the Court's power under section 4(3) of the Appellate jurisdiction Act, Cap. 141 R.E. 2002 (the AJA). By the dint of the above, Mr. Chavula took the view that the appeal before us had no legs on which to stand. If we understood him correctly which we have no doubt we did, in the end, the Court was invited

to make an order directing the High Court to proceed with the trial of the case before it.

The learned Advocate for the respondents were all in agreement with the submissions by Mr. Chavula that there was a clear violation of section 256A (1) of the CPA attracting an order quashing the transfer and the ensuing proceedings that followed before the lower court with extended jurisdiction.

Having heard the submissions from the learned counsel, it is no longer in controversy that they all agree that the order purporting to transfer Criminal Sessions Case No. 57 of 2014 to Hon. Mpepo, SRM with extended jurisdiction was irregular it being made in contravention of section 256A (1) of the CPA. That section stipulates:-

"(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 be conducted by a resident magistrate upon whom extended jurisdiction has been granted under subsection (1) of section 173."

Luckily, we are not travestying in a virgin territory on the issue under our consideration. The non-compliance with section 256A(1) of the CPA has surfaced in various cases ranging from failure to specify the name of a Magistrate with whom a transfer of a case is made to instances such as this one involving transfer of a case to a subordinate court after the accused had been arraigned before the High Court. For instance, in **Omary Juma Mayunga vs. The Republic**, Criminal Appeal No. 84 of 2003 (unreported), the appellant had been arraigned before the High Court at Dar es Salaam before he pleaded to the information of murder followed by a preliminary hearing. Subsequently, the case was transferred to the Resident Magistrate's Court of Dar es Salaam at Kisutu. The order transferring the case to the lower court omitted to specify the name of a Resident Magistrate who could try the case in his exercise of extended jurisdiction. The Court had the following to say:

"The second aspect of this conditional jurisdiction which comes out clearly from the above quoted provision, is that such a transfer can only be legally effected before the High Court formally arraigns the accused by taking his/her plea and conducting a preliminary hearing".

The Court echoed what it said earlier in **Richard Sipriano and Steven Kaulule @ Mwanakugolola v R.**, Criminal Appeal No. 50 of 2013 (unreported) in which it stated:

"...jurisdiction over the offence of murder belongs to the High Court. This jurisdiction... to try offences of murder can only be transferred to a resident magistrate who has extended jurisdiction conferred to him under subsection (1) of section 173 of the CPA. In other words, jurisdiction of a resident magistrate with extended jurisdiction is a conditional or contingent jurisdiction..."

A similar aspect occurred in **Stephano Shauri Baha & 5 Others vs. The Republic**, Criminal Appeal No. 159 of 2014 (unreported) and the Court quoted with approval its earlier decision in **Hamisi Mchachali v. Republic** in which it expressed itself thus:

". . . any transfer of a case for trial from the High Court to a Resident Magistrate with Extended Jurisdiction should be effected before the plea is taken and preliminary hearing is conducted. . . . This is so because and as has been stated by this Court in its various decisions, 'preliminary hearing proceedings are part and parcel of

the trial of case'. . . . The rationale behind this is that in a preliminary hearing important issues of fact may be agreed upon which later form the basis of the decision of the case. . . ." [Emphasis provided].

In **John Madutule @ Ngosha v. Republic**, Criminal Appeal No. 132 of 2012, CAT (unreported) we held as follows:-

"The language used in section 256A (1) above is clear and straight forward. It needs no interpretation. It simply says that a transfer of a case pending in the High Court to a Resident Magistrate's Court ought to be done before a plea of the accused is taken. . . ."

What transpired before the High Court and the Resident Magistrate's court with extended jurisdiction is very similar to what happened in the cases referred to above to the extent they relate to the transfer of the case to a magistrate with extended jurisdiction. It is plain that the transfer of the case in Criminal Sessions Case No. 57 of 2014 from the High Court to be tried by the resident magistrate court in its extended jurisdiction after the taking of pleas and conducting a preliminary hearing was, with respect

in clear noncompliance with section 256A (1) of the CPA. The consequences flowing from of irregular transfer be it on account of failure to name a specific resident magistrate to whom a case is transferred for trial or transferring a case after the accused person is arraigned before the High Court has been held to be fatal to the purported transfer.

In **Ndorosi Kudekei vs. The Republic**, Criminal Appeal No. 158 of 2014 **(unreported)** for instance, the Court aptly stated:

*"In view of the above, we agree with Ms. Michael and Mr. Chavula that the Principal Resident Magistrate with Extended Jurisdiction lacked jurisdiction to try that case for two reasons: **one** that, it was transferred to him after the High Court had taken the plea and conducted the preliminary hearing; and **two** that, it was not specifically transferred to B. B. Mwingwa, the Principal Resident Magistrate with Extended Jurisdiction as it ought to have been. In the circumstances, the trial of that case by him was a serious irregularity which rendered the proceedings, judgment and sentence which were meted by that court to the appellants a nullity. It is on this basis that we were urged to*

invoke our revisional jurisdiction and correct the obvious faults”.

Having so held, the Court invoked the revisional powers conferred upon it under section 4 (2) of the AJA and quashed the proceedings, judgment, conviction and sentences the trial court had meted against the appellant. We are constrained to take a similar approach in this appeal by quashing all the proceedings before the resident magistrate with extended jurisdiction and the order which prompted the instant appeal. As rightly submitted by Mr. Chavula supported by the learned Advocates for the respondents, there could not have been any valid appeal from an order emanating from the proceedings which we have held to be a nullity. The purported appeal is, for all intents and purposes, has no legs to stand on and the same is hereby struck out.

In the exercise of our revisional powers under section 4(2) of the AJA we quash and set aside the respondents’ trial and all orders made by the Resident Magistrate’s Court with Extended Jurisdiction. Having quashed the proceedings before the Resident Magistrate with Extended Jurisdiction, we order the High Court at Moshi to expedite the trial of the case in Criminal Sessions Case No 57 of 2014 from the stage it reached immediately before

the purported transfer as soon as is practicable. In the meantime, the appellants shall remain in custody pending trial. We so order.

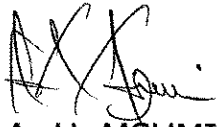
DATED at **ARUSHA** this 29th day of August 2019.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 30th day of August, 2019 Ms. Agnes Hyera for the Appellant and respondents appeared in person is hereby certified as a true copy of the original.


A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL