

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 516 OF 2016

(CORAM: LILA, J.A., MWAMBEGELE, J.A., SEHEL, J.A.)

VYUMPUHOLE s/o ETIEN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from decision of the High Court of Tanzania at Tabora)

(Mrango, J.)

Dated the 17th day of October, 2016

in

Miscellaneous Criminal Application No. 124 of 2016

JUDGMENT OF THE COURT

25th November & 3rd December, 2019

SEHEL, J.A.:

The present appeal arises from the decision of the High Court of Tanzania, Tabora District Registry that denied the appellant, Vyumpuhole s/o Etien an extension of time to lodge Notice of Appeal out of time to the Court of Appeal of Tanzania.

The history of the matter in brief is that the appellant was charged before the District Court of Kibondo at Kibondo with three counts of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 of the Revised Editions 2002 and a count of unlawful possession of firearm contrary to sections 4 (1) and 36 (1) of the Armament Control Act No. 1 of 1991. Upon a guilty verdict, he was convicted and sentenced to 30 years imprisonment term for each count of armed robbery and 10 years' imprisonment term for unlawful possession of firearm. The sentences were to run concurrently. He was aggrieved with both the conviction and sentence. He appealed to the High Court in (DC) Criminal Appeal No. 79 of 2007.

In terms of section 45 (2) of the the Magistrates' Courts Act, Cap. 11 Revised Editions of 2002 (the MCA) the High Court transferred the appeal, DC Criminal Appeal No. 79 of 2007 from the High Court to the court of the Resident Magistrate at Kigoma for hearing before S.J. Awasi, Principal Resident Magistrate (PRM) with Extended Jurisdiction. Before the Resident Magistrate's Court at Kigoma, that appeal was assigned a new case file

number, Criminal Appeal No. 9 of 2008. The appeal was heard by Awasi, PRM with Extended Jurisdiction as assigned and at the end he dismissed it.

Aggrieved, with that decision the appellant intended to appeal. However, he was late in lodging his notice of appeal to the Court of Appeal against that decision. He, thus, filed in the High Court Miscellaneous Criminal Application No. 55 of 2016 seeking an extension of time within which to file a notice of appeal out of time which was later on withdrawn.

Still in pursuit of his right to appeal, the appellant filed another application in the High Court, Miscellaneous Criminal Application No. 124 of 2016 seeking the same prayer for an extension of time to lodge notice of appeal out of time to the Court of Appeal. That application was heard by Mrango, J and he dismissed it for failure to demonstrate good cause warranting the grant for extension of time sought.

Following that dismissal, the appellant filed the present appeal. His memorandum of appeal contains six grounds but for the reasons which will be apparent shortly we take the liberty not to reproduce them.

At the hearing of the appeal, the appellant appeared in person whereas Ms. Mercy Ngowi, learned State Attorney appeared for the respondent Republic.

At the hearing, the Court wanted to satisfy itself as to whether the High Court had jurisdiction to hear and determine the appellant's application for extension of time to lodge notice of appeal to the Court of appeal bearing in mind that the appeal was heard and determined by Awasi, PRM with Extended Jurisdiction. We thus invited parties to address us on this aspect.

Understandably, the appellant being a layperson and this being a legal point he had nothing to say apart from letting the learned State Attorney to respond on the question posed, *suo motu*, by the Court and he reserved his right to rejoin, if any.

Without hesitation Ms. Ngowi was of the firm view that the appeal having been heard and determined by Awasi, PRM with extended Jurisdiction, the High Court had no jurisdiction to hear and determine the application for extension of time. Placing reliance on Court's decision in the case of **Zuberi Yahya v. The Republic**, Criminal Appeal No. 13 of 2016

(unreported), she contended that upon the order of transfer of appeal made under section 45 (2) of the MCA to the court of the Resident Magistrate then nothing remained in the High Court. She added that in terms of the provisions of section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition of 2002 (the AJA) the extension of time to file notice of appeal to the Court of appeal ought to have been filed and determined by the subordinate court with Extended Jurisdiction and not the High Court. In order to cure that anomaly, Ms. Ngowi urged us to invoke our revisional powers conferred under section 4 (2) of the AJA by nullifying the High Court proceedings, setting aside the Ruling and Order of the High Court and the appellant, if he so wishes should file his fresh application at the subordinate court with Extended Jurisdiction that heard and determined his appeal.

In rejoinder, the appellant supported the submission made by the learned State Attorney.

In light of what we have raised and what stands for our deliberation is the issue whether the High Court had jurisdiction to hear and determine

an application for extension of time in the matter that was transferred to the subordinate court with Extended Jurisdiction.

It is reflected at page 52 of the record of appeal that, the appellant's application in the High Court for an extension of time was preferred under section 11 (1) of AJA. The said provisions of the law provides:

*"Subject to subsection (2) of the High Court or, **where an applies 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 from 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."*[Emphasis is added]

Given the above position of the law, it means that where an appeal lies from a subordinate court exercising extended powers it is that subordinate that has powers to extend time. In the case of **Lukelo Uhahula v. The Republic**, Criminal Appeal No. 333 of 2016 (unreported) we had an occasion to consider the tenor and import of that provision of

the law. In that appeal, the Court was faced with the propriety of the appeal whose extension of time to lodge the notice of appeal was determined by the High Court while the impugned appeal was heard and determined by the subordinate court exercising extended jurisdiction. In an effort in trying to resolve that issue the Court reproduced section 11 (1) of AJA and thereafter said the following:

"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 the Extended jurisdiction, the appellant ought to file his application for extension of time to file notice of appeal before the Resident Magistrate's Court exercising the 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 transfer the Resident Magistrate's 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 appeal which had been entertained by a subordinate court in the exercise of its extended jurisdiction-See **Oscar Pendeza v. 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.” [At pages 6-7 of the typed judgment]*

In the present appeal, we have shown herein that the appeal was transferred to the Resident Magistrate’s Court at Kigoma to be heard by Awasi, PRM with extended jurisdiction. After hearing both parties on the appeal before him, the PRM with extended jurisdiction dismissed the appeal in its entirety. The appellant was not satisfied. Knowing that he was late in lodging his notice of appeal he invoked the provision of section 11 (1) of AJA by seeking an extension of time twice in the High Court. The initial application was withdrawn at his instance but the latter application was dismissed by the High Court. That final application which was dismissed by the High Court is the subject of the present appeal.

As rightly submitted by Ms. Ngowi on the basis of the above position of the law the High Court had no jurisdiction to hear and determine an application for extension of time on the appeal that was heard and determined by the subordinate court exercising extended jurisdiction. It is

only that subordinate court which heard and determined the appeal that has jurisdiction to entertain the application for extension of time to lodge notice of appeal.

In the case of **Zuberi Yahya v. The Republic** (supra) we expressed that once the appeal is transferred from the High Court to the court of the Resident Magistrate then nothing remained at the High Court. We said:

*"...when a case is transferred to the Resident Magistrate's Court so as to be tried by a Resident Magistrate with extended jurisdiction, nothing remains in the High Court. In that regard, 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. As such, a Resident Magistrate conferred with extended jurisdiction to hear an appeal in the High Court is deemed to sit at the High Court. Thus, the hearing and determination of that case is to be done in that court, and the appeal therefrom lies directly to this Court. See- **Bahati Ndunguru @ Moses v. The Republic**, Criminal Appeal No. 519 of 2015; **Elly Millinga v. The Republic**, Criminal Appeal No. 268 of 2014; and **Lukelo Uhahula v. The Republic**, Criminal Appeal No. 333 of 2016 (all unreported)." [At pages 4-5 of the typed judgment]*

With the transfer order of the appeal made by the High Court on the 12th day of May, 2008 to the court of the Resident Magistrate of Kigoma, a new file was opened in the Registry of the Resident Magistrate's Court at Kigoma, Criminal Appeal No. 9 of 2008 as such there was nothing remaining in the High Court. The High Court and the Court of the Resident Magistrate are two distinct courts each with its own registry. In the circumstances, it was wrong for the learned High Court Judge to conduct proceedings in the file of the Resident Magistrate's Court. The High Court Judge had no jurisdiction to hear and determine the application for extension of time in the instant matter, we are, thus, constrained to agree with Ms. Ngowi, that the whole proceedings before the High Court; the decision reached; and the order issued therefrom are absolutely a nullity.

On the basis of the foregoing, we invoke our revisional powers under section 4 (2) of the AJA by quashing and setting aside the proceedings, ruling and the order of the High Court in Miscellaneous Criminal Application No. 124 of 2016. Since the proceedings of the High Court were a nullity the appeal before us is incompetent and is hereby struck out. The appellant, if

he so wishes, is at liberty to file a fresh application for extension of time to lodge notice of appeal in the appropriate court.

DATED at **TABORA** this 2nd day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2019 in the presence of the appellant in person unrepresented and Mr. Tito Ambangile Mwakalinga, learned State Attorney appeared for the respondent/Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL