

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

**(CORAM: MUGASHA, J.A., MWAMBEGELE, J.A And KEREFU, J.A.)**

**CRIMINAL APPEAL NO. 583 OF 2019**

**ALOISI HAMSINI MCHUWAWU ..... 1<sup>ST</sup> APPELLANT**

**GASPARI SIMON SHITUHU ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**AHAMADI HASSANI LIYAMATA ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mtwara)**

**(Lukelelwa, J.)**

**Dated 26<sup>th</sup> day of August, 2004**

**in**

**Criminal Appeal No. 01 of 2002**

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**JUDGMENT OF THE COURT**

16<sup>th</sup> & 19<sup>th</sup> November, 2020.

**MUGASHA, J.A.:**

This appeal is seeking to impeach the legality of the trial of the appellants before the Primary Court of Nanyamba within the District of Nanyamba, which led to their conviction for the offence of robbery contrary to sections 285 and 286 of Penal Code [Cap 16 R.E 2002] and subsequent sentence to serve a jail term of thirty (30) years.

The underlying background which led to the conviction of the appellants is briefly as follows: It was alleged by Ahamadi Hassani Manzi (PW1) the respondent herein that; on the 17<sup>th</sup> day of January, 2002 around

19:00 night hours he was together with his wife Somoe d/o Sefu (PW2) going back to their village known as Kitama. While on the way, PW2 went to purchase tobacco and PW1 remained behind conversing with colleagues and then proceeded to follow PW2 so that they continue with their journey. However, before reaching his wife, he was grabbed by the appellants and another person, cut on the hand with a knife and robbed of TZS. 20,000/=. He raised an alarm which was heeded to by his wife who rushed at the scene and found PW1 lying down injured. On seeing PW2 the appellants took to their heels and vanished. According to PW1, he identified the appellants as they were familiar to him because he regularly saw them passing by his farm when going to work as labourers on other farms. The matter was reported to the Village Secretary who offered accommodation facility to PW1 and PW2 and on the following day, the appellants were arrested. In their defence, the appellants denied each and every detail of the charge. After a full trial, upon being found guilty, they were convicted and sentenced to serve a jail terms of thirty years.

Aggrieved, they unsuccessfully appealed to the District Court of Mtwara, at Mtwara (Criminal Appeal No. 4 of 2002), which upheld the trial court's decision and sustained the conviction and the sentence. Similarly, their appeal before the High Court bore no fruit following the dismissal of

the second appeal. Still undaunted, they have now preferred the third appeal to this court. This being a third appeal, in terms of the provisions of section 5 (2) (c) of the Appellate Jurisdiction Act, Cap 141 RE 2019, (the AJA) the following was certified by the High Court as a point of law:

*"whether the primary court has jurisdiction to determine and decide on offences related to armed robbery contrary to section 285 & 286 of the Penal Code Cap 16 R.E. 2002".*

In that regard, in the Memorandum of Appeal the appellants have raised the following ground of complaint namely:

1. That the trial court had no jurisdiction to entertain a case in which a person is charged with armed robbery under sections 285 and 286 of the Penal Code.

At the hearing of the appeal, the appellants appeared in person unrepresented. The respondent did not enter appearance and according to the affidavit sworn by Edgar Edom Mwaiswaga, the process server, the respondent twice refused service. On that account, we had to proceed with the hearing in the absence of the respondent.

Upon being invited by the Court to argue the appeal, they maintained that the trial Primary Court did not have jurisdiction to entertain their trial

on the offence of armed robbery and thus urged us to allow the appeal and set them at liberty.

Having carefully considered the record before us and the ground of complaint, the point of law for determination is whether the Primary Court of Nanyamba was vested with jurisdiction to conduct a trial which is a subject of the appeal.

At the outset, we wish to restate that jurisdiction to adjudicate is a creature of statute and as such, it cannot be assumed or exercised on the basis of the likes and dislikes of the parties. In this regard, this Court in **FANUEL MANTIRI NG'UNDA VS HERMAN MANTIRI NG'UNDA & 20 OTHERS,** (CAT) Civil Appeal No. 8 of 1995 (unreported) had held thus: -

*"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature .. (T)he question of jurisdiction is so fundamental that courts **must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial....** It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."*

[Emphasis supplied.]

[See also **-RICHARD JULIUS RUKAMBURA VS ISSACK NTWA MWAKAJILA AND ANOTHER**, Civil Application No 3 of 2004, **TANZANIA ELECTRIC SUPPLY COMPANY LTD V. SHAFFI ALI NURU** (Legal Representative of the late Hassan A. Jambia), Civil Appeal No. 2 of 2018, and **COMMISSIONER GENERAL, TANZANIA REVENUE AUTHORITY VS JSC ATOMREDMETZOLOTO (ARMZ), CONSOLIDATED CIVIL APPEALS NOS 78 & 79 OF 2018** (all unreported)].

What was said in the above decisions in respect of a trial court on the issue in question is crucial here because before an appeal is determined on the merits on issues not touching on the jurisdiction(s) of the court (s) below, it must first be ascertained that the proceedings giving rise to the appeal were competently before that court or those courts. This is because a judgement in an appeal from proceedings which were a nullity is also a nullity.

As previously intimated, jurisdiction is a creature of law. On this accord, in our jurisdiction, a Primary Court is established under section 3 of the Magistrate Court Act, Cap 11 R.E 2019 (the MCA) and it is clothed with jurisdiction by virtue of the provisions of section 18 of the same Act. In terms of section 81 (1) (c) of the MCA, a Primary Court is clothed with jurisdiction to try offences listed under the first schedule Part I to the MCA

which includes the offence of robbery. That apart, Part II of the Third Schedule to the MCA limits the term of sentence which can be imposed for offences triable by the Primary Court whereby paragraph 2 stipulates as follows:

*“(1) Subject to the provisions of any law for the time being in force, a court may, in the exercise of its criminal jurisdiction, in the cases in which such sentences are authorised by law, pass the following sentences—*

- (a) imprisonment for a term not exceeding twelve months;*
- (b) a fine not exceeding ten thousand shillings.*
- (c) corporal punishment not exceeding twelve strokes:*

*Provided that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act \* which it has jurisdiction to hear, **it shall have the jurisdiction to pass the minimum sentence of imprisonment.**”*

Since the offence of robbery was alleged to have been committed by the appellants on 17/1/2002, the law applicable included the Minimum Sentences Act [CAP 90 RE, 2002] before it was amended subsequent to the creation of the offence of armed robbery under section 287A of the Penal Code vide the Written Laws (Miscellaneous Amendments) Act No. 2

of 2004. The Minimum Sentences Act by then in the First Schedule prescribed the following offences triable and punishable under the jurisdiction of the Primary Court as follows:

*" FIRST SCHEDULE*

- 1. Stealing by person in the public service contrary to sections 265 and 270 of the Penal Code (Cap 16).*
- 2. Stealing by servant contrary to sections 265 of the Penal Code where the offender is employed by a specified authority.*
- 3. Theft contrary to section 265 of the Penal Code where a thing stolen is a property of a specified authority.*
- 4. Robbery contrary to section 286 of the Penal Code.***
- 5. House breaking or Burglary contrary to section 294 of the Penal Code.*
- 6. Breaking into a building and committing a felony therein, or breaking out of a building having committed a felony therein contrary to section 296 of the Penal Code. "*

In view of the stated position of the law as it was, the offence of robbery contrary to sections 285 and 286 of the Penal Code, with which the appellants were charged, tried and sentenced was triable by the

Primary Court. Therefore, the Primary Court Magistrate had jurisdiction to try, convict and sentence the appellants with the offence of robbery.

In view of what we have endeavoured to discuss, the appeal is not merited and it is hereby dismissed.

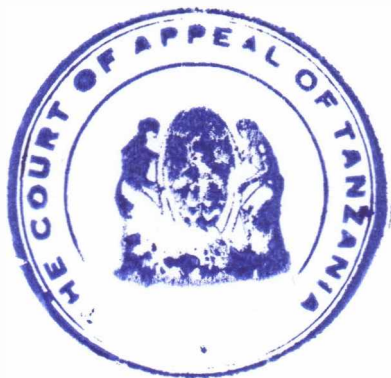
**DATED** at **MTWARA** this 19<sup>th</sup> day of November, 2020.

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

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

The Judgment delivered this 19<sup>th</sup> day of November, 2020 in the presence of the Appellants in person and in the absence of the Respondent, is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**