

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR-ES-SALAAM**

**(CORAM: MUGASHA, J.A., NDIKA, J.A. And LEVIRA, J.A.)**

**CRIMINAL REVISION NO. 3 OF 2017**

**THE REPUBLIC.....APPLICANT**

**VERSUS**

**AHMAD ALLY RUAMBO.....RESPONDENT**

**(Revision from the Revisional Order of High Court of Tanzania,  
At Mtwara)**

**(Gwae, J.)**

**dated the 7<sup>th</sup> day of May, 2013**

**in**

**Criminal Revision No. 3 of 2016**

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**RULING OF THE COURT**

25<sup>th</sup> February & 6<sup>th</sup> March, 2020

**MUGASHA,JA.:**

These *suo motu* revision proceedings were prompted by the direction of the Chief Justice, following a letter from the Judge Incharge of Mtwara on the stalemate of the proceedings in Criminal Case No. 4 of 2012 pursuant to the Revisional Order of the High Court revising partial proceedings before F. Lukosi, RM in Criminal Case No 4 of 2012

When the Revision was called on for hearing, the applicant had the services of Mr. Genes Tesha and Ms. Lucy Uisso, both learned Senior State

Attorneys. The respondent did not enter appearance as he could not be traced for the purposes of service and as such, the hearing had to proceed in his absence in terms of Rule 65 (6) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In order to appreciate the merits or otherwise of the matter, the following background is crucial: In Criminal Case No. 4 of 2012 which was wrongly referred to as Economic Case No. 4 of 2011 before the courts below, the applicant commenced criminal charges against the respondent on: two counts of forgery contrary to section 333, 335 (b) and 337 of the Penal Code [**CAP 16 RE.2002**]; six counts of use of documents intended to mislead principal and one count of embezzlement and misappropriation contrary to sections 22 and 28 (1) respectively, of the Prevention and Combatting Corruption Act, Act No. 11 of 2007. Initially, F. Lukosi, RM presided over the plea taking, preliminary hearing and recorded the evidence of Saidi Yusuph Ismail who testified as PW1. Subsequently, the trial continued before A.O Nzowa, RM. who recorded the evidence of Iddi Mbowelo (PW2), Lukas Ndombele (PW3), Danes Nzambi Manumbu (PW4) and Hussen Yusuph Mawa (PW5) and recorded the evidence of the defence witnesses namely, Ahamad Ally Rwambo (DW1) and Mahamud Abdalla Libandike (DW2). Then, the matter was scheduled for delivery of judgment

on 30/3/2016 which did not materialize after A.O Nzowa, RM realized that Lukosi, RM., who took the plea of the respondent and recorded the evidence of PW1 was a Primary Court Magistrate was not vested with jurisdiction to sit and preside over in the District Court. Thus, the High Court *suo motu* revised the proceedings before F. Lukosi, RM whereby it ordered what is reflected at page 93 of this record as follows:

*"It is trite law that a court must always be satisfied that it has jurisdiction to determine the matter before it equally a magistrate or a judge has to ensure that he has power to hear a case placed before him or her. In our instant case Mr. Lukosi was Resident Magistrate but of Primary Court, he thus had no power to adjudicate case filed in the District Court.*

*By virtue of section 30 (1) (i) of the Magistrate Court Act, I hereby only revise proceedings conducted by Mr. Lukosi for reason that he had no power to hear criminal case filed in the District Court, other steps as to dispensation of justice in*

*this particular economic case to proceed in accordance with the law."*

The said order, technically expunged from the record, all what transpired before F. Lukosi, RM who had taken the plea of the accused and presided over the preliminary hearing and recording the evidence of PW1. Thus, as the remaining proceedings were left intact, A.O Nzowa RM found it impossible to comply with the High Court Order which entailed composing the trial court's judgment. As such, through the Judge In-charge the matter was brought to the attention of the Chief Justice.

At the hearing, the learned Senior State Attorney supported the application arguing that, it was improper for the Resident Magistrate designated to preside over adjudication in the Primary Court to preside over Criminal Case No 4 of 2012 before the District Court. On being probed by the Court on the propriety or otherwise of the remaining proceedings before A.O Nzowa, RM he submitted those the proceedings are equally a nullity because the respondent was not properly arraigned. He thus urged us to nullify the entire trial proceedings and order a fresh trial.

After a careful consideration of the record before us and the submission of the learned Senior State Attorney, the crucial issues here are

whether the learned High Court Judge was correct in sparing the proceedings before A.O Nzowa, RM and the propriety or otherwise of the trial proceedings.

At the outset, we agree with the decision of the learned High Court Judge to have revised the proceedings before F. Lukosi, RM on account that he was not vested with jurisdiction to sit and preside over in the District Court. We say so because jurisdiction is the creature of statute and this is the initial aspect to begin with for a judge or magistrate before embarking on adjudication of a case. In that regard, section 6 (2) and (2) of the Magistrates' Courts Act which regulates constitution of Magistrates' Courts stipulates as follows:

*"(1) Subject to the provisions of section 7, a magistrates' court shall be duly constituted when held by a single magistrate, being –*

- (a) in the case of a primary court, a primary court magistrate;*
- (b) in the case of a district court, a district magistrate resident or a magistrate;*
- (c) in the case of a court of a resident magistrate, a resident magistrate.*

*(2) Notwithstanding the provisions of subsection (1), where jurisdiction is conferred on a district court only when held by a magistrate of a particular description, such court shall not be duly constituted for the exercise of such jurisdiction unless held by a magistrate of that description."*

In the case of **WILLIAM RAJABU MALLYA AND TWO OTHERS VS REPUBLIC** [1991] T.L.R. 83 the Court had the occasion to deal with section 6 (i) (c ) of the MCA which is similar to the current section 6 (1) and (2) of that Legislation. The appellant was charged in the Resident Magistrates' Court for the offences of obtaining money by false pretences and conspiracy to defraud. When the accused appeared in court for the first time, the court was duly presided over by a Resident Magistrate. Subsequently, the court was presided over by a Principal District Magistrate who tried and eventually disposed of the case. On appeal before the Court, the trial was nullified as the Court held:

*"(i) If a case is designated for a particular court, then it should be heard only by a member of that court notwithstanding that a member of*

*some other court has substantive jurisdiction over the offence and could hear it.*

*(ii) because the Principal District Magistrate presided over the court of Resident Magistrate when he was trying this case, the court was not duly constituted within the meaning of section 6 (i) (c) of the Magistrates' Courts Act 1984."*

In the matter under scrutiny, as correctly submitted by the learned Senior State Attorney Lukosi, RM who was designated to preside over in the Primary Court had no jurisdiction to preside over and try Criminal Case No 4 of 2012 which was before the District Court. As earlier stated, this was properly addressed by the High Court having revised and nullified the proceedings before F. Lukosi, RM. Following the nullification of the proceedings the question to be answered is the propriety of the remaining proceedings before A.O. Nzowa.

It is evident at page 37 of this record that on 17/1/2013, before A.L. Chuwa DRM the prosecution prayed and were granted leave to have the charge sheet substituted and on 17/1/2013 it was read over to the respondent who pleaded not guilty and then, preliminary hearing was

conducted. However, on 12/3/2013 the prosecution sought and were granted leave to amend the charge by 17/4/2013. On 7/5/2013 the matter was placed before F. Lukosi, RM who took the plea, the respondent pleaded not guilty and preliminary hearing was conducted. Subsequently, the trial continued before A.O. Nzowa, RM who recorded the evidence of the remaining prosecution witnesses and the defence witnesses. However, throughout, the respondent was not reminded of the charge and or called upon to plead. It is a mandatory requirement under section 228 (1) of the CPA, to take an accused's person to plea before his trial commences on the offence charged. The provision stipulates:

*" 228 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."*

After that requirement has been complied with, the plea of the accused person must be recorded. In this regard, in the case at hand, the question to be answered is whether the arraignment of the respondent was complete. The Court considered the omission to take the accused person's plea in the case of **THUWAY AKONAAY VS REPUBLIC** [1987] TLR 92 and

cited with approval the observation from the old case of **AKBARALI DEWJI** 2 TLR 137 as follows:

*"The arraignment of an accused is not complete until he has pleaded. Where no plea is taken the trial is a nullity. The omission is not an irregularity which can be cured by section 346 of the Criminal Procedure Code."*

(See also– **ROJELI KALEGEZI AND TWO OTHERS VS REPUBLIC**, Criminal Appeal No. 141, 142 and 143 of 2009, **JOSEPH MASANGANYA VS REPUBLIC**, Criminal Appeal No. 77 of 2009 and **JOHN LEIYA MASAWA VS REPUBLIC**, Criminal Appeal No. 80 of 2016 (all unreported)).

In view of the settled position of the law, in the absence of the respondent's plea the trial which subsequently ensued before A.O. Nzowa, RM, is a nullity. As such, the learned High Court Judge ought to have as well, revised the entire trial proceedings including those before A.O. Nzowa, RM which were not preceded by the proper arraignment of the respondent. For this reason, we are therefore justifiably constrained to invoke our revisional powers under section 4(3) of the Appellate Jurisdiction Act [CAP 141 RE.2002] and hereby nullify the entire trial

proceedings before F. Lukosi, RM and A.O Nzowa, RM. We further direct the case file to be remitted to the trial court for expedited trial after the proper arraignment of the respondent before another magistrate with competent jurisdiction.

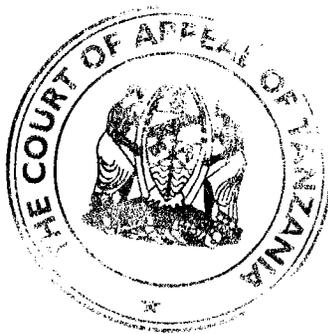
**DATED at DAR ES SALAAM** this 28<sup>th</sup> day of February, 2020.

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

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

The Ruling delivered this 6<sup>th</sup> day of March, 2020 in the presence of Ms. Anunciata Leopold for the Applicant, Senior State Attorney, 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**