

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And RUMANYIKA, J.A.)**

**CRIMINAL APPEAL NO. 451 OF 2019**

**GIDION MUSAJEGE MWAKIFAMBA ..... 1<sup>ST</sup> APPELLANT**

**ANDREA ANGETILE MWASIJINGA ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the Resident Magistrate's Court  
of Mbeya Region at Mbeya)**

**(Chaungu, SRM Ext. J.)**

**dated the 22<sup>nd</sup> day of October, 2019**

**in**

**Criminal Sessions Case No. 18 of 2018**

**.....**

**RULING OF THE COURT**

23<sup>rd</sup> & 29<sup>th</sup> September, 2022

**KOROSSO, J.A.:**

Gidion Musajege Mwakifamba and Andrea Angetile Mwasijinga, the 1<sup>st</sup> and 2<sup>nd</sup> appellants were charged with Murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E 2002, now R.E 2022 (the Penal Code). In particular, it was alleged that on 20/4/2017 at Ndamba Village, within the District of Rungwe, Mbeya Region the appellants jointly and together did murder one Janeth Steven. The appellants were convicted and sentenced to death by hanging by the Court of Resident Magistrate before a Senior Resident Magistrate with extended Jurisdiction.

Aggrieved by the conviction and sentence, the appellants filed a memorandum of appeal filed a joint memorandum of appeal before this Court comprising two grounds. For reasons which will shortly become apparent, the grounds of appeal will not be reproduced.

On 23/9/2022 when the appeal was called for hearing, the appellants who were also present in person were represented by Mr. Victor Mkumbe, learned advocate, while the respondent Republic was represented by Mr. Davice Msanga, learned State Attorney.

At the inception of the appeal hearing, Mr. Msanga sought to pursue and was granted leave of the Court to raise a point of law regarding whether the Senior Resident Magistrate with extended jurisdiction was clothed with jurisdiction to entertain Criminal Sessions Case No. 18 of 2018 which is subject to the instant appeal. In consequence, we invited the counsel for the parties to address the Court on the point raised.

However, before exploring their responses, we think, albeit briefly, it is pertinent to preface it with the background facts of the matter at stake. Suffice it to say, the record of appeal shows that after the requisite information for murder against the appellants (then, the 1<sup>st</sup> and 2<sup>nd</sup> accused persons) was filed in the High Court of Tanzania at Mbeya on 22/8/2017, Hon. Herbert Senior Resident Magistrate with Extended Jurisdiction was the one who conducted the Plea taking and Preliminary

Hearing proceedings in the Resident Magistrates Court of Mbeya at Mbeya on 13/08/2018. Thereafter, on 18/9/2019, Hon. Chaungu, Senior Resident Magistrate with Extended Jurisdiction steered the trial up to the delivery of Judgment on 22/10/2019 culminating in the conviction and sentencing of both appellants.

In expounding his point of contention, the learned State Attorney submitted that the record of appeal does not show that the Senior Resident Magistrate Extended Jurisdiction who conducted the trial and convicted the appellants had the requisite transfer order in terms of section 256A of the Criminal Procedure Act, Cap 20 R.E 2002, now R.E 2022 (the CPA). He implored us to find that, the lack of the transfer order means that the trial court did not have the requisite jurisdiction. He urged us to invoke our revisional powers to nullify the proceedings and judgment, quash the conviction and set aside the sentence imposed against the appellants and order a retrial. Mr. Msanga further urged us to order that the appellants remain in custody pending their retrial.

On the other part, Mr. Mkumbe adamantly resisted the prayer by the learned State Attorney and urged the Court to invoke the overriding objective principle thus do away with the procedural errors and proceed and allow him to address the merits of the appeal, the substantive matters. In the alternative, he argued that if the Court was to find that

there was no order for transfer for the Senior Resident Magistrates with extended Jurisdiction who steered the plea taking, preliminary hearing, and conduct of the trial against the appellants to be a fatal error, then the order for a retrial should direct that it be conducted in the High Court where the information was filed. He conceded that in that scenario the appellants be ordered to stay in custody to await their retrial.

We have carefully considered the submissions of counsel for the contending sides and find it pertinent to commence by reproducing the section 256A (1) of the CPA, which states:

*"(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."*

What is certain is that various decisions of this Court have stated that the word "transfer" under section 256(1) of the CPA envisages transfer of the conduct of the case from the stage of plea taking, preliminary hearing to the Trial. In the case of **Hamisi Mchachali v. Republic**, Criminal Appeal No. 205 of 2006 (unreported), the Court had this to say:

*"It is our view that 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. The same should be conducted by the PRM - Extended Jurisdiction. 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 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" See Majaliwa Guzuye v. Republic Criminal Appeal No. 213 of 2004; Juma Nyamwimwe v. Republic, Criminal Appeal No. 42 of 2001). A Resident Magistrate with Extended Jurisdiction to whom a case has been transferred should therefore take the plea and conduct the preliminary hearing. In our view, a trial includes a preliminary hearing. As was stated in the Lyamwimwe case, 'it is not intended that the High Court will take a plea, conduct a preliminary hearing and then transfer the case to Resident magistrate with Extended Jurisdiction.' Rather, the transfer should be effected before."*

(See also, **Nasra Hamisi Hassan v, Republic**, Criminal Appeal No. 545 of 2017 and **Thomas Gasper Mchamisi v. Republic**, Criminal Appeal No.291 of 2013 (both unreported)).

In the present case, undoubtedly, the conduct of plea taking and preliminary hearing was before Herbert, SRM Extended Jurisdiction and the trial was conducted by Chaungu, SRM Extended Jurisdiction and thus contravening the essence of the requirement of section 256 (1) of the CPA as provided above. To cap it all, there was no “transfer” to either of the two Senior Resident Magistrates with Extended jurisdiction mandating them to undertake the plea, preliminary hearing, or trial. It follows that, in the present case, the proceedings conducted by both SRMs with extended jurisdiction were a nullity as there is no record to show that the High Court validly issued a transfer to the SRMs with extended jurisdiction to try the case in terms of section 256A (1) of the CPA.

Before we conclude on the way forward, we have considered the invitation by the learned counsel of the appellant for us to invoke the overriding objective principle under the circumstances. The contention by Mr. Mkumbe is grounded on the introduced provisions to the Appellate Jurisdiction Act, Cap 261 RE 2002, now 2019, sections 3A and 3B, by the Written Laws (Miscellaneous Amendments) (No. 3) Act, No. 8 of 2018. Indeed, since the said provisions came into force, the Court has in a number of decisions tested their applicability and import. In **Mondorosi Village Council and 2 Others v. Tanzania Breweries Limited and 4 Others**, Civil Appeal No. 66 of 2017 (unreported) it was held:

*"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the foundation of the case."*

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(See also, **Njake Enterprises Ltd v. Blue Rock Ltd**, Civil Application No. 69 of 2017 (unreported)).

In the case of **Martin D. Kumaliya and 117 Others v. Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (unreported), the Court underscored the need to apply the overriding objective with the good sense to avoid contravening clear provisions of the law. Furthermore, in **Martin D. Kumaliya** (supra), the Court when discussing the overriding objective principles provisions stated that the provisions were introduced:

*"to give effect to the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of disputes. While this principle is a vehicle for attainment of substantive justices, it will not help a party to circumvent the mandatory rules of the Court"*

We are in tandem with the above statement. As shown above, the transfer under section 256A of the CPA is very specific. It also embeds jurisdiction on the Resident Magistrate with extended Jurisdiction granted the transfer to conduct a trial within the jurisdiction of the Court of

Resident Magistrate as specified in the transfer. Therefore, lack of the transfer as was the case in the instant appeal is not a matter to be taken lightly or where the overriding objective principle can be easily invoked to do away with the requirements of section 256A of the CPA. The transfer must be issued to a specific Magistrate with extended jurisdiction in terms of Section 173 (1)(a) and (2) of the CPA. For the foregoing, we decline to accept the invitation to invoke the overriding principle in the circumstances of this case.

In the end, based on our finding above, we hold that, in the instant case, the proceedings conducted by Herbert, SRM with Extended Jurisdiction, and Chaungu, SRM with Extended Jurisdiction are a nullity for lack of a transfer order in terms of section 256A of the CPA.

Consequently, in terms of section 4(2) of the AJA, we invoke our revisional jurisdiction to quash the entire trial court's proceedings on the plea taking and preliminary hearing conducted by Herbert, SRM, Extended Jurisdiction, and the subsequent trial proceedings by Chaungu, SRM Extended Jurisdiction in Criminal Sessions Case No. 18 of 2018, and all the orders subsequent to the filing of the information in the High Court. We also quash the conviction and set aside the sentence meted to the appellant.



In the end, we order that the information lodged in the High Court with respect to Criminal Sessions Case No. 18 of 2018 be remitted back to it to start afresh from the time of filing the requisite information, with the direction that the trial proceeds in accordance with the law.

We further order that while awaiting the action to be taken by the High Court which we direct should be as soon as practicable, the appellant remains in custody.

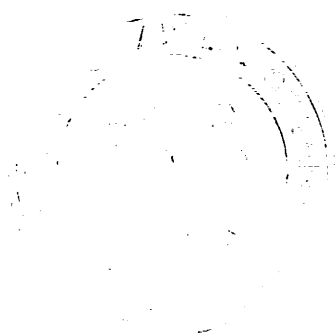
**DATED** at **MBEYA** this 28<sup>th</sup> day of September, 2022.

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

W. B. KOROSSO  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

This ruling delivered this 29<sup>th</sup> day of September, 2022 in the presence of Ms. Irene Msaki, learned advocate who holds brief for Mr. Victor Mkumbe, learned advocate for the appellants and Ms. Hannarose Kasambala, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**