

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

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

**CRIMINAL APPEAL NO. 266 OF 2019**

**FRANK LUKAS NTENDE ..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the Resident Magistrate's Court of Mbeya,  
exercising extended jurisdiction at Mbeya)**

**(Mutaki, SRM, Ext-Juris.)**

**dated the 2<sup>nd</sup> day of October, 2019**

**in**

**Criminal Sessions Case No. 07 of 2017**

**.....**

**JUDGMENT OF THE COURT**

20<sup>th</sup> September, & 13<sup>th</sup> October, 2022

**RUMANYIKA, J.A.:**

Before the Court of the Resident Magistrate of Songwe at Momba, Mr. Mutaki, a Senior Resident Magistrate with extended jurisdiction, vide a High Court's transfer order made under section 256A (1) of the Criminal Procedure Act Cap. 20 R.E. 2019 (Now R.E 2022), (the CPA), George Thadeo Kadule who is not a party to this appeal as had no case to answer and acquitted on 20/09/2019 in a ruling on no case to answer, Frank Lukas Ntende, the appellant was convicted as charged for murder contrary to

section 196 of the Penal Code Cap. 16 R.E. 2002 (Now R.E. 2022). He was sentenced to death by hanging.

It was alleged in the information filed on 17/01/2017 that the appellant murdered his step mother one Matilda Kaulule, the deceased on 17/05/2016 at about 21.00 hours at Mkoko Village within Momba District in Songwe Region. Aggrieved by the conviction and the only available mandatory sentence, the appellant is before us appealing.

To prove their case, the prosecution had six witnesses and three exhibits. The appellant was himself, the sole defence witness. He had no exhibits. PW1 is the deceased's daughter with whom, at the material time the deceased was at home brewing a drink locally called *komoni*. She alleged to have identified the appellant at the crime scene. PW2 is the brother of PW1 to whom the latter named the appellant at the earliest. PW3 is the local Village chairman to whom the latter named the appellant immediately after the incident. PW4 is the local District Medical Officer who conducted an autopsy on the dead body and issued the post mortem report on examination which established cause of the deceased's death to be severe bleeding due to a cut wound, exhibit P1. PW5, Justice of the

Peace is the one who recorded the appellant's extra judicial statement, exhibit P3. Last on the list is PW6, the Police Officer who drew the sketch map of the crime scene, exhibit P2.

On his part, as it was alluded to before, the appellant testified as the sole defence witness. He pleaded not guilty and denied involvement in the offence charged.

At the hearing of the appeal, the appellant had the services of Ms. Mary Paulo Gatuna, whereas Mr. Njoloyota Mwashubila, learned State Attorney appeared for the respondent Republic.

Initially, the appellant had seven grounds of appeal. However, for convenience of this appeal we will not reproduce them except the general ground number 6 which reads as follows:

*6. That the trial court erred in law points and facts in convicting the appellant while he failed to observe the criminal procedure for proper administration of criminal justice.*

To elaborate that ground of appeal, Ms. Gatuna submitted unusually briefly. She faulted the trial court that it was not properly constituted because it was aided by the assessors who were not properly selected,

guided and involved and that alone considered, this point was sufficient to dispose of the appeal.

Mr. Njoloyota Mwashubila, learned State Attorney who represented the Republic readily conceded to Ms. Gatuna's contention that the trial court sat with assessors who were not duly selected and guided as it is noted at pages 59 – 70 of the record of appeal.

Additionally, he pointed out to the Court the more serious stand-alone preliminary point of law. It is on the jurisdiction of the trial court which he thought was capable of disposing of the appeal. To expound that point, he contended that by the judges transfer order of 19/04/2017 under section 256A (1) of the CPA appearing at page 14 of the record of appeal, the trial learned Senior Resident Magistrate should have seated in the Court of Resident Magistrate of Mbeya at Mbeya as directed, but the latter sat and presided over the proceedings in Songwe Region at Momba, as appearing at pages 15 – 16 of the record of appeal. This, Mr. Mwashubila contended, it contravened the above law which restricted such trials to the respective courts' territorial jurisdictions, where the offences are alleged having been committed. In this case murder of Matilda Kaulule, the

deceased which ought to have been directed to be tried in Songwe Region at Momba and the transfer order should have read as such. But it was not and the remedy is to nullify those proceedings for being invalid and order a retrial.

To bolster his point, Mr. Mwashubila cited our unreported decision in **Nasra Hamis Hassan v. R**, Criminal Appeal No. 545 of 2017. Additionally, he urged us to declare the impugned proceedings as such and order a retrial by the High Court where they filed the information. To round up his point, he contended that for the reason of the Judge's transfer order being abrogated and misapplied by the trial magistrate, the resultant decision and orders are of no any legal effects.

In reply, Ms. Gatuna readily conceded to Mr. Mwashubila's contention, the effects of the omission spotted and on the way forward proposed.

On our part, we have read the record of appeal, heard the rival submissions by the learned attorneys sufficiently more so their concession, we also have given them the consideration that they deserve and accede.

Like the parties' learned counsel agreed each other, we choose to deal with the issue raised on jurisdiction of the trial court because it is

without any option basic as it has been consistently observed by the Court in a number of cases. See – **Fanuel Mantiri Ngúnda v. Herman Mantiri Ngunda & 2 Others** [1995] T.L.R. 155. Similarly, in **Richard Julius Rukambura v. Issack Ntwa Mwakajila and Another**, Civil Appeal No. 2 of 1998 (unreported) that:

***"The question of jurisdiction is paramount in any court proceedings. It is so fundamental that in any trial even if it is not raised by the parties at the initial stages, it can be raised and entertained at any other stage of the proceedings in order to ensure that the court is properly vested with jurisdiction to adjudicate the matter before it"***

(Emphasis added).

Applying the above quoted proposition to the present case, it is clear to us that neither the parties nor the trial court raised the issue of jurisdiction.

The issue for our consideration is whether, with reference to the Judge's transfer order dated 19/04/2017 the trial court had jurisdiction. The answer is not farfetched. That transfer order reads as follows:

**"IN THE HIGH COURT OF TANZANIA  
AT MBEYA  
CRIMINAL SESSION CASE NO. 2/2017  
REPUBLIC  
VERSUS  
FRANK LUKAS NTENDE & ANOTHER**

**ORDER OF TRANSFER UNDER SECTION 256 A (1) OF  
THE CRIMINAL PROCEDURE ACT; CAP. 20 RE. 2002**

It is **ORDERED** that the above mentioned  
*Criminal Session Case filed in the High Court be and  
is hereby transferred to the Court of the  
Resident Magistrate Court of Mbeya at Mbeya  
for taking plea before HON. WILLIAM  
MUTAKI Senior Resident Magistrates with  
Extended Jurisdiction.*

*Dated 19/04/2017*

.....  
*JUDGE "*  
(Emphasis added).

The above quoted text of the Judge's transfer order is, with all intents and purpose free of any ambiguities two – fold; **one**, Criminal Sessions Case No. 2 of 2017 was transferred from the High Court of

Tanzania Mbeya Registry to William Mutaki, Senior Resident Magistrate, Ext. Jurisdiction, in his name sitting in Mbeya Region at Mbeya for plea taking sessions. Nonetheless he sat in the Court of Resident Magistrate of Songwe Region at Momba, completely a different territorial jurisdiction where he decided the case to its finality. This was in contravention of the said transfer order. We shall come back to the effects, if any, of the trial magistrate having extended the scope and determine the case to its finality instead of only taking the appellant's plea as directed in the case transfer order.

For more clarity and understanding, the provisions of section 256A (1) of the CPA under which the extended jurisdiction is conferred to a Resident Magistrate read as follows:

***"256A (1)- The High Court may direct that the taking of a plea and the trial on 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. "***

(Emphasis added).



As noted above, the legal requirement, under section 256A (1) of the CPA confines and restricts the transfer order only to the assignor in his name for the designated region he is posted to serve. This has been consistently insisted by the Court for instance in **Nasra Hamisi Hassan** (supra) cited to us by Mr. Mwashubila, that:-

***“...we wish to urge the relevant authorities exercising the power to transfer cases under section 256A (1) of the CPA to specific resident magistrate with extended jurisdiction duly appointed in terms of section 173 of the CPA, to also indicate the name of the respective court of Resident Magistrate in which the preliminary hearing and trial is to be conducted.”***

With regard to above analogous strict adherence of the order made by the Judges In charge under section 256A (1) of the CPA to transfer the case to the specific territorial jurisdictions of courts, in a number of cases, including our unreported decision in **James Sendama v. Republic**, Criminal Appeal No. 279 “B” of 2013, we referred to the provisions of section 5 (1) of the Magistrates’ Court Act, Cap 11 R.E. 2019 (Now 2022), the MCA and observed that:-

*"...the territorial jurisdiction of courts of Resident Magistrates would be such area as the Chief Justice may designate from time to time in the Gazette..."*

With the above provision in mind, we confidently take a judicial notice to state that for an offence alleged to have been committed in Songwe Region as is the case, in order for the trial Senior Resident Magistrate, Extended jurisdiction to preside over those proceedings was one posted in Songwe Region and not Mr. William Mutaki who served in Mbeya Region as directed in the said transfer order. We also had that proposition in mind in **Nasra case** (supra). It therefore does not need any over emphasis for us to state that Mr. Mwashubila's complaint and contention that due to the said omission the purported trial court's proceedings are liable to be nullified, is founded and has merit. This point is sufficient to dispose of the entire appeal.

It is for the above reasons, as hinted before, that we neither reproduced all the grounds of appeal nor looked into the substantive evidence on record because, doing so could be illegal as the proceedings of the trial court from which this appeal arises are illegal.

Just before conclusion, we are equally indebted to state that the powers extended by the High Court to resident magistrates are exercisable within the confines of the law which do not give them a leeway to extend limbs beyond the intention of section 173(1) (a) and (e) of the CPA. They are only deemed judges of the High Court.

For the Court to avoid the possibilities of the judicial officers to assume jurisdiction which may result into such incurably flawed and invalid proceedings, we wish to remind them that courts' jurisdiction is a creature of statute. The provisions of section 5 (1) of the MCA and section 173 (1) (a) of the CPA confer ordinary and extended jurisdiction to Resident Magistrates respectively. In this appeal, the Senior Resident Magistrate was clothed with jurisdiction in accordance with the transfer order issued to him by the High Court under section 256A (1) of the CPA. We are similarly obliged to state that transferring of a case to a Resident Magistrate with extended jurisdiction is not a broad spectrum exercise which confers upon him uncontrolled powers beyond the intended scope and geographical boundaries of that court.

Without prejudice to the above discussion and findings, as intimated before, we are set to determine on the point whether by trying that Criminal Sessions Case to its finality, the learned Senior Resident Magistrate violated the judge's transfer order which directed him to conduct a plea taking. To answer that, the provisions of section 256A (1) of the CPA provide for a wide range of court business process and powers to take the accused's plea, conducting a preliminary hearing and determine the merit of the case to its finality. This Court has so observed on different occasions. See – **Thomas Gasper Mchamisi v. Republic**, Criminal Appeal No. 291 of 2013 and **Juma Lyamwiwe v. Republic**, Criminal Appeal No. 42 of 2001 (both unreported) that;

*"Section 256A (1) of the CPA envisages that **the Resident Magistrate with extended jurisdiction to whom the case, is transferred will take a plea and then conduct a trial. And a trial, no doubt, included a preliminary hearing.**"*  
(Emphasis added).

The above legal proposition applied to the present case, considering our proposition in **Lyamwiwe case** (supra), we wish to state that we also meant that a preliminary hearing includes a plea taking by

analogy. Without more words, the said trial Senior Resident Magistrate ousted the territorial jurisdiction.

Having discussed and observed as above, we hereby declare the proceedings of the purported trial court in Criminal Sessions Case No. 7 of 2017 a nullity. Ordinarily, we would have ordered a retrial of the case before Mutaki, SRM, Extended jurisdiction sitting in the Court of Resident Magistrate of Mbeya at Mbeya as it was previously transferred and ordered by the Judge. However, we decline to make that order because we take a judicial notice of him having vacated the office on retirement.

However, as alluded to before, from its inception that transfer order was improper and ineffectual, we hereby nullify those proceedings and, with immediate dispatch, remit the record to the High Court of Mbeya where the information was filed for appropriate orders and final determination of the case as soon as practicable according to law.

Consequently, in exercise of our revisional powers under section 4 (2) of the Appellate Jurisdiction Act Cap 141 R.E. 2022, we regrettably quash and set aside the entire purported proceedings, decision and consequent orders. We also set aside the sentence of death by hanging

meted out to the appellant. For avoidance of the doubt, we further direct that until such time when the case shall be lawfully handled to its finality by the High Court, the appellant shall remain in custody. Order accordingly.

**DATED** at **MBEYA** this 4<sup>th</sup> day of October, 2022.

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

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

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

The Judgment delivered this 13<sup>th</sup> day of October, 2022 in the presence of appellant linked via video conference from High Court Mbeya and Ms. Anastasia Elias, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



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