

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

(CORAM: JUMA, C.J., GALEBA, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 02 OF 2019

BONIFACE s/o KISINZA..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the Resident Magistrates' Court of Mbeya at Mbeya)

(Mutaki SRM Ext. Juris.)

Dated the 14th day of November, 2018

in

Criminal Appeal No. 37 of 2018

.....

JUDGMENT OF THE COURT

23rd & 25th February 2022

GALEBA, J.A.:

Boniface Kisinza, the appellant, was charged before the District Court of Chunya for the offence of rape contrary to sections 130(1), (2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019] (the Penal Code). According to the prosecution at the trial, on 10th May 2017, at Chokaa Village in Chunya District within Mbeya Region, the appellant had carnal knowledge of a young girl aged 14 years. The appellant pleaded not guilty to the charge, therefore the prosecution called six witnesses to prove the charge against him. The appellant also adduced evidence to defend himself. However, at the end of the trial, the District Court found the appellant guilty, convicted him and consequently, it sentenced him to a

mandatory term of thirty years in prison. Being aggrieved, he lodged his appeal which was admitted in the High Court, but was transferred for hearing and determination by Mutaki SRM with Extended Jurisdiction (the SRM with Extended Jurisdiction) at the Resident Magistrates' Court of Mbeya at Mbeya. The appeal was subsequently dismissed on 14th November 2018 by the said SRM with Extended Jurisdiction, which outcome aggrieved the appellant. He has lodged this second appeal to contest the dismissal of his first appeal.

The appeal before us, is predicated on seven grounds of appeal, but for reasons which will become obvious as we proceed, we will consider only the fifth ground of appeal and declined to deal with any others. The substance of that ground relevant for this judgment, is to the effect that, the SRM with Extended Jurisdiction had no requisite jurisdiction to hear and determine the appeal because there was no formal transfer order of the appeal from the High Court to him.

At the hearing of this appeal, the appellant appeared in person without legal representation, whereas Ms. Nancy Mushumbusi, learned State Attorney appeared for the respondent Republic. When asked to elaborate on his grounds of appeal, the appellant requested that we adopt his grounds of

appeal and permit the learned State Attorney to respond to them so that, if necessary, he would rejoin.

As indicated above, Ms. Mushumbusi submitted that, as determination of the fifth ground, was capable of disposing of the whole appeal, she preferred to argue in support of that sole ground. In that respect, she submitted that, as far as that ground was concerned, she was in agreement with the appellant's complaint, because the order transferring the appeal from the High Court to the SRM with Extended Jurisdiction for his determination of the appeal, was neither signed by an appropriate judicial officer nor was it stamped or sealed with the seal of the High Court. She strongly argued that, such a transfer order of the appeal was unlawful and ineffectual, in which case, she added, the said SRM with Extended Jurisdiction had no jurisdiction to preside over the allegedly transferred appeal. The learned State Attorney implored us to nullify all the proceedings of the SRM with Extended Jurisdiction, to quash his judgment and remit the original record of the matter to the High Court with directions that the appeal be set down for hearing and be determined by a competent judicial officer, according to law.

When we inquired from the appellant, as to whether he had any rejoinder, being a layman, he had nothing useful to put across.

We have carefully examined the disputed order which is dated 28th March 2018 and included in the record of appeal at page 44. Briefly, the document is neither signed by a judge in charge or a judge, in the former's absence, and the same is also not stamped with the stamp of the High Court or its seal.

The issue is whether the order with the above defects is unlawful and if so, what are the appropriate orders that we should make. We will start with the law under which magistrates with extended jurisdiction may be assigned appeals preferred to the High Court. The relevant law is section 45(2) of the Magistrates' Courts Act [Cap 11 R.E. 2019] (the MCA). That section, provides as follows:

"(2) The High Court may direct that an appeal instituted in the High Court be transferred to and be heard by a resident magistrate upon whom extended jurisdiction has been conferred by section 45(1)."

The interpretation of the above provision is straight forward. It is that, the High Court may direct that an appeal filed before it be transferred to and be heard by a resident magistrate with extended jurisdiction in terms of section 45(1) of the MCA. It also means, by extension, that a resident magistrate with extended jurisdiction has no jurisdiction to entertain an

appeal filed in the High Court unless section 45(2) of the MCA has first been strictly complied with.

This is not the first time that this Court is facing the scenario. In the case of **Evance Joseph v. R**, Criminal Appeal No. 22 of 2017 (unreported), a resident magistrate with extended jurisdiction presided over a criminal appeal and determined it, without there being in place an order of the High Court issued under section 45(2) of the MCA transferring the appeal to him. On a further appeal, this Court observed:

"It is imperative therefore, that a resident magistrate with extended jurisdiction cannot entertain an appeal filed in the High Court unless the appeal is formally transferred for that purpose. Where, like in the present case, there is no formal order transferring an appeal to a resident magistrates' court, the proceedings are rendered a nullity."

The above is the position of the Court and there has been an unbroken chain of authorities including **Robert Mneney v. R**, Criminal Appeal No. 341 of 2015, **Fidelis Mlelwa and Another v. R**, Criminal Appeal No. 248 of 2015 and **Erney Gaspar Asenga v. R**, Criminal Appeal No. 238 of 2007 (all unreported).

With the above position, we are now certain that a resident magistrate to whom an appeal has not been legally and formally transferred under section 45(2) of the MCA has no jurisdiction to entertain that matter. We also know the consequences if he does.

There is however one more issue in the matter before us. Unlike in **Evance Joseph** (supra), **Fidelis Mlelwa** (supra) and **Erney Gaspar Asenga** (supra), where the orders were missing completely from the record, in this case the "order" is there but the argument of the learned State Attorney was that because of the above irregularities, the same is as good as if it was not on record. That leads us to a more or less detailed discussion and analysis of the order that transferred the appeal to the SRM with Extended Jurisdiction in this case. We will examine the extent of the invalidity of the contested document for us to be able to determine whether, the transfer order was lawful and therefore effectual or it was illegal and inconsequential.

First, whereas the petition of appeal which initiated the appeal in the High Court shows at page 42 of the record of appeal, that the appeal emanated from Criminal Case No. 82 of 2017, the order of transfer shows that the appeal that was being transferred to the SRM with Extended Jurisdiction, was an appeal contesting the decision of the District Court of

Chunya in original Criminal Case No. 8 of 2017. The other way of putting it plain and in clearer terms, is this; the instrument or order issued, even if it was to be signed and stamped, the order related to a matter that the appellant was not challenging in the High Court. To us, that is critical.

Second, as contended by Ms. Mushumbusi, the document was neither signed nor stamped. However, the document, subject of this discussion is an order of the High Court, a connotation found in the title of the transfer document itself. The document is titled as follows:

"ORDER OF TRANSFER UNDER SECTION 45(2) OF THE MAGISTRATES' COURT ACT CAP 11 R.E. 2002."

[Emphasis added]

Section 2 of the MCA defines the word "order", as follows:

"order" includes a writ, warrant, summons or other process, and a decree revisional or confirmatory order and any other formal expression of the decision of a court;

Court practice has it that all documents mentioned in the above definition of "order" can only be valid and have the force of law only if they are issued or given under the hand of a particular judicial officer. For instance, an unsigned court summons, warrant, decision, decree or any court order that is not signed is like any other worthless piece of paper. Such

an order cannot be a valid court order for all intents and purposes. It is ineffectual for it lacks the necessary force of law. In our view, the order transferring an appeal for determination to a resident magistrate with extended jurisdiction is a very serious order which cannot be acted upon if it is not signed by an appropriate judicial officer and for that purpose, a judge of the High Court.

It is our considered position that, the order or instrument upon which the SRM with Extended Jurisdiction relied to hear and determine the appeal in this matter, was no better than an order which was not issued at all. That is to say, that order or instrument allegedly transferring the appeal for determination by the SRM with Extended Jurisdiction, is as if it was not on record. There is no gainsaying therefore that, the SRM with Extended Jurisdiction heard and determined the appeal of the appellant without jurisdiction.

Consequently, the fifth ground of appeal is allowed. The proceedings of the SRM with Extended Jurisdiction are nullified and the judgement challenged before this Court arising from the same criminal appeal proceedings is quashed and set aside. We further make the following orders:

1. The original record be remitted to the attention of the Deputy Registrar, Mbeya Registry of the High Court.

2. The appeal that was lodged by the appellant by presenting a petition of appeal on 23rd June 2018 be assigned to a fit judicial officer for its hearing and determination according to law.
3. For avoidance of doubt, the appellant shall continue serving his sentence as passed by the District Court of Chunya, unless the High Court orders otherwise after hearing his appeal.

Finally, as consideration of the fifth ground of appeal has conclusively determined the whole appeal, we find it futile to deal with any other grounds raised by the appellant in this appeal.

DATED at **MBEYA**, this 25th day of February, 2022

I. H. JUMA
CHIEF JUSTICE

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2022 in presence of the appellant in person, and Ms. Nancy Mushumbusi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



C. M. Magesa
C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL