

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

(CORAM: MWARIJA, J.A., KITUSI, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 587 OF 2020

RICHARD MALIMI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the Resident Magistrate's Court of Shinyanga
at Shinyanga)**

(Mbuya, PRM - Ext. Jur.)

Dated the 22nd day of September, 2020

in

Criminal Appeal No. 35 of 2020

JUDGMENT OF THE COURT

12th & 17th July, 2023

MGEYEKWA, J.A.

The appellant, Richard Malimi was charged with attempted rape contrary to section 132 (1) and (2) (e) of the Penal Code, Cap. 16 [R.E 2002]. The prosecution alleged that on 26th December, 2016 at about 20:00 hrs at Mulungu Village within Kahama District in Shinyanga Region, he attempted to rape "V.K" (name withheld for the purpose of protecting her dignity). Subsequently, on the same day, the incident was reported to the police station leading to the appellant's arrest. The appellant refuted the accusation

and as a result, the case had to proceed to a full trial. To establish the guilt of the appellant, the prosecution relied on the evidence of four witnesses whose testimony was supplemented by three exhibits while on his part, the appellant was the only witness of defence.

The key witness for the prosecution, V.K, recounted the episode to the effect that on that fateful date, she was on her way back home and met the culprit being suspicious of him, she raised an alarm, unexpectedly, the ravisher gagged her mouth with a piece of cloth, pulled her to a bush, and started to undress her. When she was to surrender herself to the appellant, a samaritan arrived at the scene of the crime. She said the culprit attempted to run away. However they managed to get hold of him.

The evidence of PW1 was supported by that of Jumanne Bundala (PW2). He testified to the effect that on the fateful day, he heard an alarm, and thereafter dashed to the scene where he found the appellant lying on top of the victim. The accused person released the victim and tried to run away but they managed to arrest him. WP 7059 D/C Mary (PW3), is a police officer who dealt with the matter interrogated the appellant who according to her, confessed to have attempted to rape the victim. Dr. Peter Dalali

(PW4) examined the victim's body and noted that the victim was injured on her thigh and shoulder.

In answer to the charge, the appellant denied the allegations contained in the charge and in turn alleged that, on the material night, he was drinking at a liquor shop. On his way home from the liquor shop, he met some people who arrested him. He went on to narrate the story that they asked him if he is aware of the incident of attempted rape and he denied it. He added that, despite denying the allegation, they brought him before the ten-cell leader and later on to the police station. He was subsequently charged in Court.

The trial court was satisfied that the prosecution sufficiently proved that the appellant had committed the offence charged. At the conclusion of the trial, he was convicted of attempted rape and a sentence of thirty years in jail was meted against him.

Dissatisfied by the decision of the trial court, the appellant unsuccessfully appealed to the High Court where, in terms of section 45 (2) of the Magistrates' Court Act, Cap.11 [R.E 2002] (the MCA), the appeal was transferred to the Court of the Resident Magistrate of Shinyanga at Shinyanga to be heard by Rujwahuka, SRM (Ext. Jur.). According to the record, Rujwahuka, SRM (Ext. Jur.) scheduled hearing on 22nd July, 2020,

however, for reasons that are not apparent on the record of appeal, the appeal was heard and determined by Mbuya, PRM (Ext. Jur.).

Unamused, the appellant has come before this Court with three grounds which for reasons to be apparent herein, are not relevant for the disposal of the appeal.

When the appeal was placed for hearing before us on 12th July, 2023, the appellant appeared in person, unrepresented. The respondent Republic appeared through Ms. Caroline Mushi, learned State Attorney.

Before the commencement of the hearing, the learned State Attorney sought the leave of the Court to address us on a legal point. Ms. Mushi referred us to page 40 of the Court record showing that, by its order dated 15th June, 2020 the High Court transferred the appeal to the Resident Magistrate's Court of Shinyanga at Shinyanga to be heard by Rujwahuka, SRM (Ext. Jur.) not Mbuya, PRM (Ext. Jur.) who proceeded with the hearing of the appeal contrary to section 45 (2) (a) of the MCA. She stressed that, Mbuya PRM (Ext. Jur.) had no jurisdiction to preside over the matter without an order of transfer in his name. To fortify her submission, the learned State Attorney referred this Court to the case of **Emmanuel Daudi v The Republic**, Criminal Appeal No. 295 of 2019.

In the premises, she implored the Court to invoke its revisional powers bestowed upon it by the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 [R.E 2019] (the AJA) to revise the proceedings of the first appellate court, nullify the proceedings, set aside the judgment and remit the file to the High Court to be heard in accordance with the law.

On his part, the appellant blamed the first appellate court and contended that he should not be made to suffer from the mistakes which were caused by the court. Therefore, he urged this Court to set him free.

Having heard the legal point raised by the learned State Attorney, we have no hesitation in holding that, there is no gainsaying Mbuya, PRM (Ext. Jur.) presided over the case without a formal order which transferred Criminal Appeal No. 35 of 2020 to be heard by him. The provision of the law under section 45 (2) of MCA empowers the High Court to transfer an appeal to the Resident Magistrate's Court to be heard by a Resident Magistrate who has been vested with extended jurisdiction. For ease of reference, section 45 (2) of the MCA is reproduced below:

"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)".

In its numerous previous decisions, the Court has dealt with this issue. See amongst others, **Frank Lukas Ntende v Republic**, Criminal Appeal No. 266 of 2019 (unreported), **Nasra Hamis Hassan v Republic**, Criminal Appeal No. 545 of 2017 (unreported) and **Emmanuel Daudi** (supra) cited by the learned State Attorney. In the latter case, the Resident Magistrate with extended jurisdiction (Mwaiseje, SRM) heard an appeal in the absence of a formal order from the High Court transferring the appeal to her name. Having so found, the Court proceeded to declare the proceedings conducted by her a nullity.

Applying the above legal proposition to this case, we are settled in our mind that, in the matter at hand, the hearing of the appeal and judgment thereto before Mbuya, PRM (Ext. Jur.), lacked legality because there were no orders of transfer from the High Court to him. Therefore, we hold that the proceedings before Mbuya, PRM (Ext. Jur.), including its consequent judgment and orders were a nullity for having been conducted contrary to the transfer order.

Given the foregoing discussion, we exercise the powers of revision under section 4 (2) of the AJA and hereby nullify those proceedings, quash and set aside the judgment and consequent orders. The record is remitted to the High Court for an expeditious process for the hearing of the appeal in accordance with the law.

It is so ordered.

DATED at **SHINYANGA** this 15th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 17th day of July, 2023 in the presence of the Appellant in person and Mr. Alouis Boniface, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

R. W. Chaungu

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL

