

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

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

CRIMINAL APPEAL NO. 406 OF 2021

JOSEPH CHARLES..... APPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Kato SRM with Ext - J.)

dated the 5th day of July, 2021

in

Criminal Appeal No. 13 of 2021

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JUDGMENT OF THE COURT

2nd October & 5th October, 2023

KITUSI, JA.:

The District Court of Nzega at Nzega District convicted the appellant and sentenced him to 30 years imprisonment having found him guilty of Trafficking in Narcotic Drugs contrary to section 15A (1) and (2) (c) of the Drugs Control and Enforcement Act No. 5 of 2015, hereafter the Act, as amended by section 9 of the Drug Control and Enforcement (Amendment) Act No. 15 of 2017. At the trial it was alleged that, on 24 June 2019 at Mambali Village within Nzega District, the appellant was found trafficking in

narcotic drugs known as Cannabis sativa, also commonly known as bhanghi weighing 32.6 kilograms.

The facts are interesting if we are going to have to determine the substantive justice of this case. But it seems that we may not have to go that far.

Told briefly, the story which the two courts below believed and grounded the conviction on is that; Assistant Inspector Shaaban (PW3) was the officer in charge (OCS) of Mambali Police Station. On 24 June 2020 he was in a public transport from Mambali towards Nzega township. The prosecution case is that the appellant unknowingly walked into the lion's den, so to speak, because when the bus in which PW3 was travelling reached Ngatu area, he (appellant) motioned it to stop, and he got in. Posing like a businessman, the appellant instructed the bus conductor (PW2) to load his luggage into the bus.

However, PW3's sixth sense made him smell foul, as he sensed that the appellant was not a businessman but masquerading as one. Curiosity got the better of him and he wanted to know what was in the appellant's luggage. The appellant was carrying clothes but within that bag there were other things. On PW3's insistence the contents of the bag were checked only to find contraband items, bhanghi, stuffed within it.

PW2 the bus conductor supported PW3's version in material particulars. As he was the one responsible for the passengers and their luggage, he assured the trial court that he knew which luggage belonged to who, and was positive that the contraband was part of the appellant's luggage.

In defence, the appellant stated that it was not surprising that PW2 and PW3 mistook him for the owner of the bag. This is because, he said, he was the only one left with the parcel when the bus stopped. However, according to him, the real owner of the parcel had ran away abandoning it.

The trial court accepted the prosecution case as true and rejected the defence version, and as earlier indicated, it proceeded to convict him as charged. So did the first appellate court, Hon. Kato, Resident Magistrate, with extended jurisdiction. It sustained the conviction and sentence.

The appellant is still unsatisfied, so he has presented this second appeal, and he appeared in person to argue it. Mr. Iddi Mgeni, learned Principal State Attorney represented the respondent in opposing the appeal. As we intimated earlier that we might not have to look into the substantive merits of the appeal, we are about to disclose the reason for that rather undesired course of things.

The first is about a remark the learned trial Resident Magistrate wrote on 10/7/2019 that: -

"Court: The proper charge under Economic Crimes Control Act to be filed."

Obviously, the above instruction shows that the learned Resident Magistrate, as she then was, was of the view that the charge that had been placed before her was not properly drawn under the relevant laws. We put this fact to Mr. Mgeni, learned Principal State Attorney at the hearing of this appeal.

Mr. Mgeni submitted that the charge ought to have been preferred under the Economic and Organized Crime Control Act, Cap 200, as amended arguing that the weight of the cannabis in this case made the matter fall under Cap 200. Since that was not complied with, argued Mr. Mgeni, the Court should nullify the proceedings before the trial District Court as well as those of the first appellate court. He pressed for an order of retrial even though the appellant has been in custody for a total of 4 years before and after his conviction. The appellant who was unrepresented, could hardly make sense out of the discussion on the propriety of the charge. Therefore, he did not address us on that.

In resolving this dilemma, we wish to reproduce section 15A (1) and (2) (c) of the Act, under which the appellant was charged. It provides: -

"15.A- (1) Any person who traffics in narcotic drugs psychotropic substance or illegally deals or diverts precursor chemicals or substances with drug related effects or substances used in the process of manufacturing drugs of the quantity specified under this section, commits an offence and upon conviction shall be liable to imprisonment for a term of thirty years.

(2) For purposes of this section, a person commits an offence under subsection (1) if such person traffics in -

- (a) narcotic drugs psychotropic substances weighing two hundred grams or below;*
- (b) precursor chemicals or substance with drug related effect weighing 100 litres or below in liquid form, or 100 kilogram or below in solid form;*
- (c) Cannabis or khat weighing not more than fifty kilograms."*

Since the cannabis sativa involved in this case weighed 32.6 kilograms therefore below fifty kilograms, it was proper to charge the appellant before the subordinate court. This is because under section 2 of the Act: -

"Court means -

*(a) in respect of an offence for contravention of section 7, 11, 15A, 17, 18, 19, 20, 21, 22, 25, 34, 39, 42, 47, 51A, 54, or 65 means **subordinate court.**"*

From the above exposition, the District Court of Nzega had the requisite jurisdiction to try the case and the charge was properly drawn. Since the learned Resident Magistrate later ignored her earlier remark and proceeded with the trial, we shall also treat it as innocuous too and proceed.

There is another procedural lapse, though. This is that the High Court transferred the appeal to be heard by Kato, Senior Resident Magistrate with extended jurisdiction. We are aware that the Minister responsible for legal affairs may invest certain magistrates with extended powers to hear and determine cases as if they were High Court judges. We are also aware of the powers of the High Court to transfer cases for them to be heard and determined by such Resident Magistrates with extended jurisdiction.

In this case the order of transfer at page 99 of the record reads: -

"PROCEEDINGS

Date: 31/12/2020

Coram: Hon. Amour S. Khamis, J.

Parties: Absent

B/C Jenifa Bilali, RMA

COURT:

This Criminal Appeal No. 73 of 2020 is hereby transferred to the RM's Court Tabora Extended Jurisdiction and is assigned to Hon. JOVITH ALPHONCE KATO, SRM with Extended Jurisdiction pursuant to Section 173 (1) of the CRIMINAL PROCEDURE ACT, CAP. 20 R.E. 2019 and THE CRIMINAL PROCEDURE (EXTENSION OF JURISDICTION) ORDER, G.N. NO. 219 OF 2018.

AMOUR S. KHAMIS

JUDGE

30/12/2020"

We drew the attention of Mr. Mgeni to that transfer order and wanted him to address us on its propriety. The learned Principal State Attorney submitted that the transfer was not proper for having been made under section 173 (1) of the Criminal Procedure Act (CPA) instead of section 173 (b) of the same. He repeated the prayer that we should nullify the proceedings and order a retrial.

With respect, the wording of section 173 of the CPA connotes that the High Court may transfer a case to be **tried** by a Resident Magistrate with extended jurisdiction It provides: -

"173.- (1) *The Minister may, after consultation with the Chief Justice and the Attorney General, by order published in the Gazette-*

- (a) *invest any resident magistrate with power to try any category of offences which, but for the provisions of this section, would ordinarily be tried by the High Court and may specify the area within which he may exercise such extended powers; or*
- (b) *invest any such magistrate with power to try any, specified case or cases of such offences and such magistrate shall, by virtue of the order, have the power, in respect of the offence specified in the order to impose any sentence which could lawfully be imposed by the High Court.*

(2) *Nothing in this section shall affect the power the High Court to order the transfer of cases.*

(3) *For the purposes of any appeal from or revision of his decision in the exercise of such jurisdiction, such resident magistrate shall be deemed to be a judge of the High Court, and the court presided over by him while exercising such jurisdiction shall be deemed to be the High Court."*

Section 174 is even clearer that what is envisaged in section 173 is a trial. It provides: -

"174. All offences tried under the provisions of section 173 shall be tried with the aid of two or more assessors and in the manner prescribed for the trial of offences by the High Court."

When the above provisions are read together with section 256A of the CPA the doubt as to what is actually envisaged under section 173 of the CPA gets resolved totally. Section 256A (1) of the CPA provides: -

"256A.-(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 gathered from the above is that the learned Judge had no powers under section 173 (1) of the CPA to transfer Criminal Appeal No.73 of 2020 to Hon. Kato Senior Resident Magistrate with extended jurisdiction because that provision comes into play only when the case being transferred is for trial.

These powers of transfer of cases referred to in the foregoing provisions need to be exercised within the dictates of the law because they

affect the jurisdiction of the Resident Magistrate with extended jurisdiction to whom a particular case may have been transferred. Appeals filed in the High Court are transferable to the court of Resident Magistrate to be heard by a Resident Magistrate with extended jurisdiction but that power is provided for under section 45 (2) of the Magistrates Courts Act, Cap 11 (MCA). It provides: -

"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)."

Even when the transfer is properly done under the above provision, the need to be more meticulous is still there. For instance, in the **Director of Public Prosecutions v. Peter Kalifumu & Another** [2003] TLR 32, proceedings before Wambura, Principal Resident Magistrate with extended jurisdiction were nullified despite having been properly transferred to her. The reason for the proceedings being declared a nullity was that the learned Principal Resident Magistrate purported to conduct the proceedings in the High Court. That is the seriousness with which wrong transfer of cases to Resident Magistrates with extended jurisdiction, is dealt with by the Court.

Similarly in this case, we invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 (AJA) and nullify the proceedings before Kato, Senior Resident Magistrate with extended jurisdiction, because the transfer of the case to him was done under a wrong provision.

Mr. Mgeni has prayed that we should order a rehearing of the appeal, but we must decline the invitation for two reasons, at least. The first reason is the possibility of the prosecution using this opportunity to mend the defects in their case. That is what the case of **Fatehali Manji v. Republic** [1966] E.A 343, warns us against. In this case there is an unexplained breakage of the chain of custody from PW3 who did not mention the person to whom he handed over the drugs at police station. Mr. Mgeni submitted that it is not always that when chain of custody is broken, it renders the prosecution case fatal. He cited to us the case of **Joseph Leonard Manyota v. Republic**, Criminal Appeal No.485 of 2015 (unreported), in support. That is true, but the learned Principal State Attorney has not explained to us how the drugs in this case being bhangi could not be tampered with in the absence of evidence that it was sealed during the seizure. This argument fails. The other reason is the length of the period the appellant has been in custody. We are satisfied that an order of rehearing of the appeal will prejudice the appellant.

So, in the end, having nullified the proceedings, we quash the judgment of Kato, Senior Resident Magistrate with extended jurisdiction, and set aside the sentence. The appellant should be released from prison if not held for some other lawful reasons.

DATED at TABORA this 4th day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 5th day of October, 2023 in the presence of the Appellant in person and Mr. Nurdin Mmari, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL