

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
[IN THE DISTRICT REGISTRY]  
AT ARUSHA**

**PC- CRIMINAL APPEAL NO. 5 OF 2018**

*(Originating from Criminal Appeal No. 29/2017, Original from Criminal Case No.  
60/2017 from Dareda Primary Court)*

**EDWARD GERVANCE.....APPELLANT**

**VERSUS**

**1. JOHN MARTIN.....1<sup>ST</sup> RESPONDENT**

**2. ANTON BOAY.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

*Date of Last Order: 27/08/2018*

*Date of Judgment: 03/08/2018*

**BEFORE: S.C.MOSHI**

This is a second appeal. The appellant has preferred an appeal on the following grounds:-

*(i) That, the trial Magistrate erred in law by presiding the appeal case in the Resident Magistrate Court of Manyara at Babati without being assigned that appeal case by the District Resident Magistrate In charge of Babati who is the one has appellate Jurisdiction to hear and disposal appeal case from Primary Court.*

*"(ii) That the trial Magistrate (appellate court) erred in law by disregarding evidence of handwriting of the writer who*

*write and witnessed the documents of admission which was done before justice of peace of it is area".*

*(iii) That the trial Magistrate erred in law by faulting the evidence adduced in Primary Court while the evidence of the respondents were not credible to exempt them from liability.*

During the hearing of this appeal the appellant appeared in person whereas the respondent was represented by Qamara.A. Peter, advocate. The appeal was disposed of by way of written submissions.

In respect of the first ground of appeal the appellant argued among other things that, the District Court of Babati quashed the conviction and set aside the sentence delivered by the Primary Court of Dareda at Dareda which was entered in favor of the respondents. Any appeal from Primary Court goes to District Court within the District in which it is established; in case of District Court, a District Magistrate or a Resident Magistrate and in case of a Court of a Resident Magistrate, a Resident Magistrate. It is only a member of that particular Court who has jurisdiction to hear the appeal cases from Primary Courts. A magistrate of other Courts has no jurisdiction unless she was assigned by magistrate of a District Court who is an INCHARGE of that District Court. But that was not done. Surprisingly a magistrate of another Court heard his appeal case without being assigned by the INCHARGE of that District Court. Appellate powers are given to a District Magistrate or Resident Magistrate of a District Court per Section 21 of the Magistrates Court Act Cap. 11 R.E. 2002. What was done was against the provisions of Section 6 (1) (b) and per Section 21 of the Magistrates Court Act Cap. 11 R.E. 2002. The record of the proceedings of

appellate Court doesn't show if the Resident Magistrate of Resident Magistrate court was assigned to handle Criminal Appeal case Number 29/2017. Section 6(1) (b) of the Magistrate Court Act Cap 11 R.E. 2002 states that:

*"6(1) (b) in the case of a District Court, a District Magistrate or a Resident Magistrate."*

*6(1) (c) "in the case of a Court of a Resident Magistrate, a resident Magistrate"*

*6(2) notwithstanding the provision of subsection (1), where jurisdiction is conferred on a District Court only when held by a Magistrate of a particular description, such court shall not be duly constituted for the exercise of such jurisdiction unless held by a Magistrate of that description".*

To support his submission he cited the case of **WILLIAM RAJABU MALLYA AND TWO OTHERS Vs REPUBLIC [1991] TLR 83**, where Court of Appeal of Tanzania held *inter alia* that:-

*"(i) If a case is designated for particular court, then it should be heard only by a member of that Court notwithstanding that a member of some other court has substantive jurisdiction over the offence and could hear it.*

*(ii) Because the Principal District Magistrate presided over the Court of Resident Magistrate when he was trying this case, the Court was not duly constituted within the meaning of*

*Section 6(1) (c) of the Magistrate's Court Act Cap 11 R.E.  
2002".*

He contended that, the Senior Resident Magistrate in Charge of a Court of a Resident Magistrate of Manyara lacked jurisdiction. Therefore, the proceedings and its judgment was a nullity and they should be set aside.

Responding to the submission in respect of the first ground of appeal Mr. Qamara stated among others that, assignment of Magistrate or Judge to preside over a case is an administrative issue which does not need to be in the proceeding of the Court as purported by the Appellant.

He said that, the appeal from the primary Court was heard and determined in the District court of Babati at Babati and not in the Resident Magistrate Court of Babati. The particulars of Judgment read as follows:-

*"IN THE DISTRICT COURT OF BABATI*

*AT BABATI*

*CRIMINAL APPEAL NO 29 OF 2017*

*( Original Criminal case no 60/2017 in the Primary Court of Babati District  
at Dareda)*

*JOHN MARTIN AND ANTON BOA .....APPELANTS*

*VERSUS*

*EDWARD GERVANCE.....RESPONDENT*

*JUDGMENT*

*DATE OF LAST ORDER: 13/09/2017*

*DATE OF JUDGMENT: 09/11/2017*

*BEFORE: D.C.KAMUZORA-SRM*

*Before the...." End of quote.*

He said that, this proves that the appeal was entertained and heard in the District Court of Babati at Babati and not in the Resident Magistrate's court of Babati.

He argued that the Appellant claims violation of Section 6 (b) of the Magistrates' Courts Act provides that, "*6 (1) Subject to the provision of section 7 a magistrates' courts shall be duly constituted when held by a single magistrate being; in case of district Court, a district magistrate resident or a magistrate;* but the fact and position of the law is clear that the district magistrate includes a Resident Magistrate. This is clearly explained in Section 2 of Magistrate Courts Act (supra) it explained who is a district Magistrate. He said that, the part reads that; -"*district magistrate" includes a resident magistrate*"

He said that in that perspective the resident magistrate can sit in a district Court.

He contended that, the cited case of **WILLIAM RAJABU MALLYA AND TWO OTHERS VS REPUBLIC** [1991] TLR 83 quoted by the appellant is distinguishable and of no relevance because; first this case was filed in the Resident Magistrate Court, secondly the case was heard by a *Senior District* Magistrate sitting in the Resident Magistrate court. In this particular case the position is different, the appeal was filed in the district Court and the appeal was heard in the same District Court and the hearing was done by

Senior Resident Magistrate sitting in a District Magistrate Court. As quoted "district magistrate" includes a "Resident magistrate".

I have considered both sides' submissions. I will start to discuss the first ground of appeal. First of all, it is true that assignment of a case to a particular Magistrate or Judge to preside over it; is an administrative issue, which does not need to be in the record of the proceeding.

It is evident that the appeal was presided over by a Senior Resident Magistrate who sat in a District Court. This is evidenced by the court record as indicated by Mr. Qamara. It is my view that the case of **WILLIAM RAJABU MALLYA AND TWO OTHERS Vs REPUBLIC** [supra] is distinguishable from this case at hand.

That said, I find that the first appeal lacks merits.

I will discuss the second point of appeal together with the third point of appeal. The second ground reads thus "That the trial Magistrate (appellate court) erred in law by disregarding evidence of handwriting of the writer who write and witnessed the documents of admission which was done before justice of peace of it is area" and the third ground of appeal that reads, "That the trial Magistrate erred in law by faulting the evidence adduced in Primary Court while the evidence of the respondents were not credible to exempt them from liability."


It was argument of the appellant that Exhibit "A" and "B" tendered before the Primary Court( that is the document of seizure with list items found in respondents shop dated 23 /10/2016..) is confession by the respondents. I have considered both side's arguments it is my view as it was found by the

District Court (at appeal) that the document does not qualify to be termed a confession document but rather a list of seized documents. As it was correctly reasoned by the District court that:-" The document itself could not be regarded as confession for each accused as it contained a general clause that could not bind the accused individually. In law you could not say that the accused confessed jointly. In that regard therefore this court finds that such exhibit is unreliable and cannot be taken to prove that the accused confessed".

The rest of the evidence is oral evidence of the witnesses who stated that the appellants were found in possession of the stolen properties but the complainant (pw1) did not give any special prescriptions of the stolen goods. See the case of ***Joseph Mkubwa and Samson Mwakagenda Versus Republic***, criminal App. No.94/2007 Court of Appeal (unreported). In this case the court of Appeal held among other things that for doctrine of recent possession to be invoked it must be proved that the properties were positively identified and the suspect was recently found in possession of the property.

I therefore for the aforesaid reasons, find that this appeal has no merit. I dismiss it in its entirety.

Right of Appeal is explained.

  
**S.C. MOSHI**  
**JUDGE**  
**03/08/2018**

