

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

MISC. CRIMINAL APPEAL NO. 3 OF 2020

(Arising from Misc. Criminal Application No. 16 of 2019 of Korogwe District Court originating from Criminal Case No. 160 of Mombo Primary Court in Korogwe)

MGAYA DAUDI MBURA.....APPELLANT

-VERSUS-

SALUM CHAUREMBO.....RESPONDENT

JUDGMENT

Date of Last Order:- 14/09/2021

Date of Judgment:- 24/02/2022

AGATHO, J.:

This appeal emanates from the Ruling of the District Court of Korogwe at Korogwe in Misc. Criminal Application No. 3 of 2020. In that matter, the Appellant preferred an application under Section 47(1) of the Magistrates Court Act Cap 11 RE 2002 seeking before the Court for an order to transfer Criminal Case No. 160 of 2019 from Mombo Primary Court to Korogwe District Court. The Application was determined and upon the delivery of the Ruling, the District Court observed that there were no sufficient grounds for the transfer of the case since the case involved the offence of

threatening violence contrary to Section 89(1) of the Penal Code Cap 16 R.E 2002 which was/is within the jurisdiction of the Primary Court as per the First Schedule of the Magistrates Court Act [Cap 11 R.E 2002] now R.E 2019 and further, the fact that the Appellant wanted to engage an advocate was also not considered as good cause to warrant the transfer of the case as prayed. The Appellant/the then Applicant was dissatisfied with the decision hence appealed to this Court on the following grounds;

- (1) That the trial Magistrate erred both in law and facts when failed to consider that at the Primary Court of Mombo the Appellant was brutally tried and there is no chance of fair trial to the extent his case was to be transferred to Korogwe District.
- (2) That the trial Magistrate erred both in law and facts when ruled that right to legal representation is not mandatory in sheer regard that it is a personal constitutional right the fact which was not contested by the Respondent.
- (3) That the trial court grossly erred in law and fact when ruled that there are no sufficient reasons advanced to

warrant prayers sought to be granted in sheer regard of concrete evidence in records and those tendered by the Appellant in his affidavit that was been forcefully compelled to defend his case despite of being entitled to attend the hospital for medication on the material date and time.

The appellant prayed that the Court quashes and set aside the trial Court's order by allowing the appeal and make such orders deem fit in the interest of fair trial to the Appellant. The Respondent did not file his Counter Affidavit to reply.

On the 14th day of September 2021, the Court ordered both parties to file their written submissions and a schedule for filing the same was fixed. The Appellant filed his written submission unlike the Respondent who did not file his submission in reply. Both parties were not under legal representation.

In his submission with respect to the first ground of appeal, the Appellant submitted that he was brutally tried at the Primary Court since the Respondent was working as a Police Officer at Mombo and that any act done in the Primary Court favoured the Respondent.

That the Appellant was not accorded with the right to audience. He was forced to do as directed and that attracted him to lodge an application for transfer of the case to the District Court. The Appellant stated that that was a reasonable cause warranting the District Court to transfer the case from the Primary Court and it is lawful to do so at any time before the judgment as provided under Section 47(1) (c) of the Magistrates Court Act [Cap 11 RE 2019] since there is a reasonable cause to believe that there would be failure of justice if the matter will be heard at the Primary Court and also considering the fact that at the Primary Court of Mombo there is a single Magistrate.

Regarding the second ground of appeal, the Appellant submitted that he had already engaged an advocate to assist him to handle the matter because he is incapable of handling the same in his own personal capacity and that since advocates are restrained to appear before the Primary Court then he was not accorded with the right to legal representation and that leads to miscarriage of justice.

With respect to the third ground of appeal, the Appellant submitted that at the Primary Court, he was forced to defend himself while he was seriously sick and he had a medical report on the fateful date

and time when the Court compelled him to defend his case and that suffice this Court to consider it as a sufficient reason advanced to enable the Court to grant the prayer and quash the decision of the District Court.

Determining this appeal, this Court has initially considered as to whether the Application was proper before the Court. The Application was brought under Section 47(1) of The Magistrates' Courts Act [Cap 11 R.E 2002]. The instant Application was filed prior to the amendment of the laws brought about by the Government Notice No. 40 of 2020 published on 28/02/2020 containing a list of revised laws as revised in the year 2019 which also included the Magistrates' Courts Act. A thorough reading of the cited provision of the law, the Court has observed that the Applicant did not cite a paragraph of the relevant provision of the law. Section 47(1) (b) of the Magistrates' Courts Act Cap 11 R.E 2002 provided that,

47.-(1) Where any proceeding has been instituted in a primary Court, it shall be lawful, at any time before judgment, for-

(b) the district Court or a Court of resident magistrate within any part of the local jurisdiction of which the primary Court is established, to order the transfer of the proceedings to itself or to another magistrates' Court;

The above cited provision was incorporated in the Magistrates' Courts Act [Cap 11 R.E 2019] as per Section 47(1)(b). From the non-citation of the respective paragraph of Section 47(1) of the Magistrates' Courts Act, this Court finds it pertinent raising an issue *suo moto* as to whether non citation of the paragraph of the provision of the law was fatal. It is worth noting that where there is improper citation of the law, the application before the Court becomes incompetent since the Court is considered not to be properly moved warranting it to proceed determining the application before it. This was a position in the case of **Edward Bachwa and 3 others vs the Attorney General and another, Civil Application No. 128 of 2006 CAT at Dar es Salaam (unreported)** where it was held that wrong citation of the law, section, subsection and or paragraph of law is liable to render the application incompetent, see also the case of **China Henan International Co. Operation Group vs Salvand K.ARwegasira**

[2006] TLR 220. However, considering the fact that the defect in the application was minor since the cited Section (Section 47(1)) generally provides for transfer of cases and not otherwise then it was not fatal and it was also proper for the District Court to proceed with the application on merits since it had jurisdiction to determine the same. In the case of **Samwel Munsiro vs Chacha Mwikabe, Civil Application No. 539 /08 of 2019 CAT at Mwanza (unreported)** it was inter alia held that;

"Where an application omits to cite any specific provision of the law or cites wrong provision, but the jurisdiction to grant the order sought exists, the irregularity or omission can be ignored and the Court may order that the correct law be inserted."

See also the case of **Alliance One Tobacco and one another vs Mwajuma Hamisi (as the administratrix of the estate of Philemoni R. Kilenyi and another, Misc. Civil Application No. 803 of 2018, HCTZ Dar es Salaam District Registry.**

Also, Article 107 A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 as amended also requires Courts to dispense justice without being tied up with technicalities. From the above

cases and the law, this Court finds it just to proceed determining the Appeal on merits. Now considering the grounds of appeal, I prefer to determine the first and the third grounds altogether since they are interrelated.

With respect to the grounds of Appeal, the Appellant submitted that the reasons for the application to transfer the case was due to the fact that he was brutally tried at the Primary Court, he was denied the right to audience and that he was forced to defend himself while he was sick as he was entitled to attend at the hospital for medical checkup.

It is an established principle under the law of evidence that he who alleges must prove. This is according to Section 110 of the Evidence Act, [Cap 6 RE 2019] which provides that;

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

The Court has gone through the proceedings of the Primary Court and has not found any facts indicating brutality in the proceedings

that he was denied the right to audience and that he was forced to defend himself while he was sick. As per the proceedings of the Primary Court of Mombo on the 05th day of September 2019, the Appellant prayed the matter to be determined by the Court and he personally stated that he will defend himself. Therefore, the 1st ground of appeal lacks merit. And it is dismissed.

With respect to the second ground of appeal, the Appellant submitted that he was denied the right to legal representation since he had engaged an advocate to represent him and that was a sufficient cause for the Court to grant an order of transfer of case. The District Court referring the case of **Abubakar Mohamed Mlenda vs Juma Mfaume [1989] TLR 145, High Court of Tanzania at Dar es Salaam** the District Court was of the view that a wish and ability to engage an advocate alone does not amount to a good and sufficient cause to grant an application to transfer a case from the Primary Court to the District Court and since the offence that the Appellant was charged with which was threatening violence c/s 89(1) of the Penal Code [Cap 16 R.E 2002] now Cap 16 R.E 2019 was within the jurisdiction of the Primary Court, then that was considered not a sufficient cause to warrant

the transfer of the case as prayed. From the above this Court also considers that since the allegations regarding brutality in the course of proceedings were not established and the fact that the Primary Court had jurisdiction to determine the matter before it, again the fact that the Appellant had engaged an advocate, then that is not a sufficient cause to warrant the Court to transfer the case as prayed. This was also held in the case of **Lulu Richard Msofe vs John Christopher Mnzava, PC. Civil Appeal No. 11 of 2019 HCTZ Dar es Salaam District Registry at Dar es Salaam.**

In the case of **Abeid Ibrahim vs Pius Abiud, PC Criminal Appeal No. 04 of 2019, HCTZ Moshi District Registry at Moshi at page 5**, it was held that transfer of a case from one Court to another can only be granted upon sufficient cause and what amounts to sufficient cause can differ from one case to another depending on the particulars and circumstances of each case. By the way, the claim for transfer of case due to engaging an Advocate it is now been overtaken by events, Advocates can now appear before Primary Courts. The fact that the Appellant submitted that he was denied the right to legal representation which is the right to be heard as provided under Article 13(6) (a) of the

Constitution as cited earlier can now be available even at the Primary Court and this is according to Section 54 of the of the Written Laws (Miscellaneous Amendments) (No. 3) Act of 2021 which amends Section 33 of the Magistrates' Courts Act R.E 2019 allowing advocates to appear and represent parties at the Primary Court. Moreover, if the Appellant was sick then the Primary Court would certainly adjourn the matter to another date where the Appellant (accused) would have recovered. Therefore, being sick is not a sufficient cause to grant transfer of the case. From the above reasons this Court finds the Appeal to have no merits. As such it is dismissed. The case at Mombo Primary should proceed to be heard by another Magistrate.

DATED at TANGA this 24th day of February, 2022.




U. J. AGATHO
JUDGE
24/02/2022

Date: 24/02/2022

Coram: Hon. Dr. U. J. Agatho, Judge

Appellant: Present

Respondent: Absent

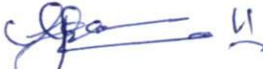
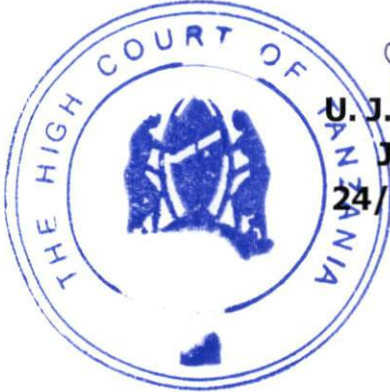
Court Clerk: Zayumba

Court: Judgment delivered this 24th day of February, 2022 in the presence of the Appellant and in the absence of the Respondent.



U. J. AGATHO
JUDGE
24/02/2022

Court: Right of Appeal explained.



U. J. AGATHO
JUDGE
24/02/2022