

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(IN MWANZA DISTRICT REGISTRY)**

AT MWANZA

MISC. CRIMINAL APPLICATION NO.34 OF 2021

(Arising from Extended Jurisdiction RM Criminal Appeal No 02 Of 2021 and in Criminal Appeal No 39 of 2021 in the HC of Mwanza originated from Criminal Case No 180 of 2020)

GODFREY S/O MASUMBUKO-----APPLICANT

VERSUS

THE REPUBLIC----- RESPONDENT

RULING

Last order: 18.02.2022

Ruling date: 23.02.2022

M. MNYUKWA, J.

This application is made by way of chamber summons accompanied by the affidavit of the applicant's counsel, one Julius Mushobozi. The application is made under section 361(1) (a) and (b) and 361(2) of the Criminal Procedure Act, Cap 20 R.E 2019. The applicant applied for extension of time to file the notice of intention to appeal against the decision of Chato District Court in Criminal Appeal No 180/2020 time and extension of time to lodge an appeal against the decision of Chato District Court in Criminal Case No 180/2020. The applicant's application and



affidavit were opposed by the counter affidavit sworn in by the respondent, Republic who was represented by the learned state attorney, Ms. Magreth Mwaseba. The respondent, also filed a notice of preliminary objection to the effect that the application is bad in law for want of jurisdiction.

As a matter of practice, when the preliminary objection is raised, the Court will have to dispose it before the hearing of the main application. Thus, by the consent of the parties and with the leave of this court, the application was argued orally.

In her brief submission, Ms. Mwaseba submitted that the appeal against the decision of Chato District Court in Criminal Case No 180 of 2020 was heard before Hon. Moshi, SRM, (Extended Jurisdiction) through Criminal Appeal No 39 of 2021. She added that, when the matter was heard before Hon. Moshi, SRM who sat as a SRM with extended jurisdiction, he dismissed the appeal as the notice of appeal was defective. For that case the appellant was supposed to appeal against the decision of Hon. Moshi SRM (extended jurisdiction).

She went further submitting that, the position of the case law in the case of **Cyprian Mamboleo Hiza vs Eva Kioso & Another**, Civil Application No 3 of 2010 is clear that, once the case is dismissed is like it



was decided on merit even if the case was not decided on merit and any person aggrieved by the decision may appeal. She further contended that in the circumstances prevailing in the present case, the applicant was supposed to file an appeal to the Court of Appeal.

The learned state attorney further submitted that, even if the appeal was erroneously dismissed, the applicant was supposed to appeal against that decision and she was surprised why the applicant has withdrawn his intention to appeal to the Court of Appeal.

She concluded her submission prayed the Court to struck out the application because it had no jurisdiction to entertain it.

Responding to the preliminary objection raised by the learned state attorney, Mr. Sekundi B. Sekundi submitted that he believes this Court had jurisdiction to hear the present application. He added that at the time of conviction the applicant was 16 years of age and being a layman he was trying to obtain his right. He referred this Court to the case of **Ian Pattie Associate Ltd vs Well Worth Hotels and Lodge**. Misc. Commercial Application no 300 of 2017 in which the Court argued not to use technicalities in the dispensation of justice.

The counsel for the applicant further submitted that the applicant used all means to get his right and when the matter was before Hon.



Moshi. SRM with extended jurisdiction, the appeal was dismissed instead of being struck out and that the applicant had advanced sufficient reason.

He retires his submission insisting that, this Court had the jurisdiction to determine the application according to Rule 89 of the Court of Appeal Rules.

Re-joining, Ms. Mwaseba submitted that even though the applicant had sufficient reasons, this court had no jurisdiction to entertain the matter. She insisted that the Court is always guided by the law and not the mercy. Thus, the court hierarchy should be followed as the presiding magistrate who determined the appeal sat as a High Court and since the appeal was dismissed instead of being struck out, the applicant was supposed to file appeal against the decision of Hon. Mushi, SRM (extended jurisdiction). She retires her submission prayed the applicant to follow proper procedure.

I have given careful consideration to the arguments for and against the preliminary objection raised by the learned state attorney on behalf of the Republic and the applicant's reply respectively, the central issue for determination is *whether this Court had the jurisdiction to entertain the present application or not.*



Before I embark to determine the preliminary objection on whether this Court had jurisdiction or not, it is sufficed to briefly explain the question of jurisdiction. It is a settled law that the question of jurisdiction lies at the root of judicial function as it defines the power and limit within which each court can exercise its function. See the case of **Fanuel Mantiri Ng'unda v Herman M Ngunda**, Civil Appeal No 8 of 1995, CAT (Unreported). When it happens that the Court decides any case which does not have jurisdiction to do so, the effect of such decision is nullity. See the case of **Sindiko v Kaaya**, (1977) LRT No 18. Also, the case of **Sospeter Kahindi Vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017, CAT(Unreported)the court had this to say regarding jurisdiction of the court;

"any trial of a proceeding by a court lacking requisite jurisdiction to seize and try the matter will be adjudged a nullity on appeal or revision. We would also stress that parties cannot confer jurisdiction to a court or tribunal that lacks that jurisdiction."

In the present application the available record speaks for themselves. It is clear on record that, the applicant filed the notice of appeal and the petition of appeal to this Court against the decision of Chato District Court in Criminal Case No 180 of 2020. The said appeal was dismissed by Hon. Moshi, SRM (Extended jurisdiction) on the reason that the notice of appeal



was defective since it was not properly titled as the applicant's notice of appeal was titled in the District Court of Chato instead of being titled in the High Court of the United Republic of Tanzania at Mwanza District Registry. As a result the appeal was dismissed.

Ms. Mwaseba strongly contended that this Court had no jurisdiction to entertain the matter because Hon. Moshi, SRM (Extended jurisdiction) dismissed the matter. She added that, even if that was done erroneously as he was supposed to strike out instead of dismissing, the applicant was required to file appeal against the said decision to the Court of Appeal instead of filing the present application.

On his part the counsel for the applicant averred that this Court had the power to entertain the present application as the court is required to ensure the substantive justice is attained taking into consideration that the applicant is a layperson.

After the rival submissions of the parties, I feel compelled to reproduce section 45 (2) of the Magistrate Court Act, Cap 11 R.E 2019 which reads as follows:

"S. 45(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.”

From the wording of the above section, it is clear that the High Court may direct the appeal to be transferred and heard with the resident magistrate upon whom extended jurisdiction has been conferred. Then, what is the position of the said magistrate and its decision when he has been conferred extended jurisdiction. The answer is not far to fetch as it is clearly provided for under section 45 (1) of the Magistrate’s Courts Act, Cap 11 R.E 2019 which provides that:

S. 45(1) for the purpose of any appeal from 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 by him while exercising such jurisdiction shall be deemed to be the High Court.”

It is on record that when Hon. Moshi, SRM (Extended jurisdiction) determined the appeal which was dismissed, by virtue of section 45(1) of the Magistrate’s Courts Act, Cap 11 R.E 2019, was deemed to be a judge of the High Court and the Court of resident magistrate of Geita in which he sits was deemed to be the High Court. As it was rightly submitted by the learned state attorney, the applicant cannot bring the present application in the same court in which its end result if his application will



be granted, will be like rehearing of the petition of appeal which was dismissed by this Court before Hon. Moshi, SRM (Extended jurisdiction).

The decision of the Court of Appeal in the case of **Shiminimana Hisaya and Sabimana Fokas vs Republic**, Criminal Appeal No 6 of 2004 is clear on the resident magistrate who decided an appeal when conferred with the power of extended jurisdiction as it is provided for under section 45 of the Magistrate's Courts Act, Cap 11 R.E 2019. The Court of Appeal pointed out that:

"... The rationale therefore, is that a resident magistrate with extended jurisdiction to whom a High Court appeal is transferred to hear would sit in their court the court of resident magistrate. When he does so, then the Court would be deemed to be the High Court in the event an appeal is preferred from his decision. The appeal would go, not to the High Court, but to the Court of Appeal as if it had been a decision of the High Court."

Guided by the above case law and the cited provision of law, it is quite clear that the applicant cannot bring the present application which had the effect of determining what was determined by Hon. Moshi, SRM with extended jurisdiction.



On the argument that the court should allow the present application in order to attain the substantive justice as the appeal was erroneously dismissed, and therefore this court will have power to entertain the present application, my answer in this argument is very simple. As it was rightly stated by the learned state attorney that the court hierarchy should be followed and as per the decision of the Court of Appeal in the case of **Eva Kioso and Another vs Mrs, Semwaiko**, Civil Appeal No 3 of 2010 where the Court among other thing stated that:

"Presumably, if the application had not been dismissed the applicant could have gone back to the High Court and start the process afresh..."

The above statement connotes that since the appeal was dismissed, the applicant cannot go back to the High Court to start a fresh, rather he may file appeal against the decision of Hon. Moshi, SRM (Extended jurisdiction) to the Court of Appeal if he so wishes to pursue the appeal. Thus, the cited case of **Ian Pattie Associates Ltd vs Well Worth Hotels and Lodges** (supra) cited by the applicant's counsel is distinguishable with our present case because the same was struck out and not dismissed like the circumstances in our present case. Likewise, the argument that this Court had jurisdiction as per section 89 of the Court



of Appeal Rules, 2019, it is my findings that the same does not give this court power to have the jurisdiction to entertain the present application.

For the reasons stated above, I find the application lacks merit and the same is hereby struck out. Consequently, the preliminary objection is upheld.




M. MNYUKWA
JUDGE
23/02/2022

Ruling delivered on 23rd day of February, 2022 whereby all parties were present.


M. MNYUKWA
JUDGE
23/02/2022