

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

CRIMINAL APPEAL NO. 24 OF 2020

**(C/F District Court of Arumeru at Arumeru in Misc. Criminal Application
No. 9 of 2020, Originated from Enaboishu Primary Court in Criminal Case
No. 58 of 2020)**

SANGITO KAYA..... APPELLANT

VERSUS

VICTOR KISAMO..... RESPONDENT

JUDGMENT

17.03.2022 & 29.03.2022

N.R MWASEBA, J.

The appellant, Sangito Kaaya, was charged at the Primary Court of Enaboishu at Arumeru for one count of obtaining money by false pretence contrary to section 304 of the Penal Code Cap 16 R.E 2019.

Prior to the hearing of the case, the appellant filed an application at Arumeru District Court praying for a case to be transferred from Enaboishu Primary Court to Arumeru District court for the sole reason that he wants to engage an advocate for representation.

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After a full trial, the district court declined his prayer for the reason that the wish to engage an advocate alone does not amount to good and sufficient cause to grant an application for transfer of a case from Primary court to any other court. Aggrieved, he filed this appeal armed with five grounds of appeal as they can be depicted from the petition of appeal.

At the hearing of this appeal, the appellant enjoyed the legal representation of Mr. Simon Mbwambo, learned counsel whereas the matter proceeded *ex-parte* after the efforts of tracing the respondent went in vain. The appeal was disposed of by way of written submission and the counsel for the appellant complied with the scheduled order.


Amplifying on the first ground of appeal, the appellant submitted that, the appellant wanted to exercise his right to be heard by transferring his case from primary court to the district court in order to engage an advocate as enshrined under **Article 13 (6) (a) and 5 (2) of the Constitution of the United Republic of Tanzania, 1977**. It was his further submission that the case contained legal technicalities that's why the appellant wanted to engage an advocate so as to see justice is being done (See **Section 310 of the Criminal procedure Act, Cap 20 R.E 2019**). Therefore, he prays for the court to allow the

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case to be transferred from Enaboishu Primary Court to the district court so that the appellant could enjoy his right of being represented by an advocate.

Coming to the second ground of appeal, the appellant complained that the district court determined the matter on merit then it held that the appellant admitted the offence while the matter before the court was only for transfer of the case. It was his further submission that the admission of the offence at the trial court was an equivocal which needs to be discussed at the merit of the case not at the level where they want to transfer a case. So, it was irregular for the magistrate to discuss the merit of the case.

On the third ground, the appellant complained that the plea of guilty at the primary court was procured by force and coercion that's why the appellant wished to transfer the case from primary court to the district court. The said allegation is a technical one which needs the presence of an advocate to see the justice is being done. He buttresses his argument by citing the case of **Alams kalumbeta vs Republic**, (1982) TLR 329 at pg. 330 and 332 ad **Dorcas Luzuga @ Salma Mussa vs Omary Ramadhani**, (PC) Matrimonial Appeal No. 6 of 2018 (Unreported).



Coming to the fourth ground of appeal, the appellant alleged that he is a lay person who knows nothing about the court process and its technicalities, that's why he wants to engage an advocate to represent him. So, denying his right to engage an advocate will be injustice to him taking into consideration that this is a criminal case in which once the person is found guilty, he will be imprisoned or ordered to pay fine and create a criminal record which will affect his life in future for lacking some opportunities.

Moreover, the appellant's counsel elaborated on how a criminal charge needs to be proved and cited some cases regarding the said issue. And went on submitting that the appellant was threatened by the respondent and justice of peace therefore his confession was not procured freely.

Further to that, he added that he is aware of the amendment made by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2021 which amended section 33 of the Magistrates' Court Act, [Cap 11 R.E 2019] by adding subsection (4) and (5) which allow the appearance of an advocate at the primary court. However, the laws put a condition that in order for an advocate to appear to the primary court, the presiding magistrate ought to be a resident magistrate. So, they prayed

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for the appeal to be allowed so as the appellant could have a legal representation by an advocate.

Having considered the arguments by the appellant and the records of this matter, the main issue for determination in light of the grounds of appeal is whether the appeal is competent before this court.

I have gone through the records and found that the appellant prayed for transfer of his case, Criminal Case No 58 of 2020, from Enaboishu Primary Court to Arumeru District Court. His application was made under **Section 47 (1) (b) of the Magistrates Courts Act**, CAP 11 R.E 2019.

However, the applications made under this provision are not appealable. This is well provided under **Section 49 (3) of Magistrates Courts Act** which provides that:

"No appeal shall lie against the making of, or any refusal to make, an order under the provisions of section 47 or 48"

That being the legal position, it goes without saying that this appeal is misconceived as it contravenes the above provision. Thus, it is incompetent before this court.



In the upshot, the appeal lacks merit for being incompetent before this court for contravening **Section 49 (3) of the Magistrates Courts Act** and therefore it is dismissed with no order as to costs.

It is so ordered.

DATED at **ARUSHA** this 29th day of March, 2022.



N.R. Mwaseba
N.R. MWASEBA

JUDGE

28.03.2022