IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 477 OF 2019

SEFU SNAYO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Court of the Resident Magistrate of Mbeya, at Mbeya)

(Chaungu, SRM Ext. Juris.)

dated the 11th day of September, 2019
in
Ext. Juris. Criminal Sessions Case No. 3 of 2018
(Formerly High Court Criminal Sessions Case No. 12 of 2018)

.....

RULING OF THE COURT

30th September & 18th October, 2022

MWAMBEGELE, J.A.:

An information for murder contrary to section196 of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now Revised Edition, 2022) was preferred on 16.01.2017 against the appellant Sefu Snayo in the High Court of Tanzania at Mbeya. It was alleged that on 13.08.2016 he murdered one Dorine Mgonzo at Muungano Village in Mbarali District, Mbeya Region. On 26.06.2018, the High Court transferred the case to the Court of the Resident

Magistrate of Mbeya at Mbeya for hearing before W. M. Mutaki, a Senior Resident Magistrate with Extended Jurisdiction. The order of transfer was made under section 256A (1) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (now Revised Edition, 2022); henceforth the CPA.

After the order, the matter was accordingly transferred to the Court of the Resident Magistrate of Mbeya at Mbeya for hearing before W. M. Mutaki, SRM (Ext. Juris.) who conducted a Preliminary Hearing on 02.09.2019. However, for reasons that are not apparent on the record of appeal, the matter landed into the hands of R. W. Chaungu, also a Senior Resident Magistrate with Extended Jurisdiction in the Court of the Resident Magistrate of Mbeya at Mbeya who took over and proceeded with the trial of the appellant on 02.09.2019 up to and including the pronouncement of judgment. Chaungu, SRM (Ext. Juris.) found the appellant guilty as charged, convicted and sentenced him to the mandatory sentence of death by hanging. Aggrieved, the appellant lodged this first and final appeal.

When the appeal was placed for hearing before us on 30.09.2022, the appellant appeared and was represented by Mr. Issa Ndamungu, learned advocate. The respondent Republic had the services of Ms. Rosemary

Mgenyi, learned State Attorney. However, before we could go into the hearing of the appeal in earnest, the learned State Attorney sought leave of the Court to address us on what she called a preliminary point of law. Mr. Ndamungu did not have any objection to the preliminary point of law being raised and addressed first before going into the nitty gritty of the appeal. We thus granted leave to the learned State Attorney to address us on the point.

Ms. Mgenyi, in addressing us on the point, submitted that the Preliminary Hearing of the matter was conducted by W. M. Mutaki, a Senior Resident Magistrate with Extended Jurisdiction after being assigned to do so by a High Court order of transfer of the case from the High Court to the Court of the Resident Magistrate of Mbeya at Mbeya. She submitted further that Mutaki, SRM (Ext. Juris.) conducted a Preliminary Hearing but the trial was conducted by R. W. Chaungu, SRM (Ext. Juris.) who later composed the judgment and found the appellant guilty, convicted and sentenced him. She contended that Chaungu, SRM (Ext. Juris.) had no jurisdiction to entertain and preside over the matter because he lacked, and could not have legally done that without, an order of transfer in his name. She argued that the

transfer order which appears at p. 16 of the record of appeal was in respect of Mutaki, SRM (Ext. Juris.) and, in terms of section 256A (1) of the CPA, that order was nontransferable to anybody including Chaungu, SRM (Ext. Juris.). In the premises, she argued, the proceedings before Chaungu, SRM (Ext. Juris.) including its attendant judgment and consequent conviction and sentence are a nullity. She thus implored us to invoke our revisional powers bestowed upon us by the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 (the AJA), to nullify the proceedings before Chaungu, SRM (Ext. Juris.). Ms. Mgenyi, promised to avail to us a copy of our previous decision on the point. Indeed, the learned State Attorney, as a true officer of the court, walked the talk. She later supplied to us our unreported decision in **Robert Mkabe v. Republic**, Criminal Appeal No. 332 of 2017 on the point.

On his part, Mr. Ndamungu, conceded to all what was submitted by Ms. Mgenyi. He thus had no qualms if the proceedings before Chaungu, SRM (Ext. Juris.) would be nullified.

We prodded the trained minds for the parties on the way forward. They parted ways on the response to this question. While Ms. Mgenyi argued

that the matter should be remitted to the High Court for necessary orders, Mr. Ndamungu thought it would be in the interest of justice to gloss over the ailment in view of section 388 of the CPA and the overriding objective principle now entrenched in our laws. He thus urged the Court to proceed with the hearing of the appeal on its merits.

Given that this is a serious point of law that needed our determination for the way forward of the appeal, we thought it appropriate to retreat and deliberate on it and give a ruling for the way forward, which we are now set to give.

We think the starting point should be the provisions of section 256A (1) of the CPA. They read:

> *"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."*

For completeness, we also wish to reproduce hereunder the provisions of subsection (1) of section 173 of the CPA mentioned in section 256A (1).

The marginal note to the section reads; "Extended Jurisdiction" and subsection (1) thereof reads:

> *"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 offences specified in the order to impose any sentence which could lawfully be imposed by the High Court."*

It is no gainsaying that Chaungu, SRM (Ext. Juris.) presided over the case without a transfer order in his name. The question that needs to be answered is whether the proceedings and the flanking judgment and orders thereof were a nullity as Ms. Mgenyi would have us hold. Luckily, we have

had occasions to deal with this issue in a number of our previous decisions. One of them being **Robert Mkabe** (supra) cited and supplied to us by Ms. Mgenyi. Others are: **Frank Lukas Ntende v. Republic**, Criminal Appeal No. 266 of 2019, **Nasra Hamis Hassan v. Republic**, Criminal Appeal No. 545 of 2017 and **Thomas Gasper Mchamisi v. Republic**, Criminal Appeal No. 291 of 2013 (all unreported)

The facts of the matter before us fall in all four with those in **Thomas Gasper Mchamisi** (supra). There, like here, an order was made by the High Court transferring Criminal Sessions Case No. 23 of 2006 from the High Court of Tanzania, Moshi Registry, to Moshi Resident Magistrates' Court where it was filed as Criminal Sessions Case No. 18 of 2006 and the designated magistrate being A.C. Nyerere, Principal Resident Magistrate with Extended Jurisdiction. The designated magistrate took the plea of the accused person before her and thereafter, on application by the State, adjourned the hearing of the case to another date. About seven months later, another Principal Resident Magistrate with Extended Jurisdiction, F.W. Mgaya, took over the trial of the case and conducted a preliminary hearing without a transfer order of the High Court under Section 256A (1) CPA. Four

years from the date of transfer, trial commenced before R.I. Rutatinisibwa, SRM (Ext. Juris.), again without an order of transfer from the High Court. The Court found and held that proceedings of the preliminary hearing before F.W. Mgaya, PRM (Ext. Juris.), and the trial proceedings before R.I. Rutatinisibwa, SRM (Ext. Juris.), lacked legality because there were no orders of transfer of proceedings from the High Court to each one of them.

Also, in **Thomas Gasper Mchamisi** (supra), the Court referred to its previous decision in **Abrahaman Ramadhani @ Chino v. Republic,** Criminal Appeal No. 130 of 2013 (unreported) in which this Court had occasion to remark thus:

> *"From the reading of Sections 256A (1) and 173(1) (a) and (b) of the Criminal Procedure Ace it is clear that the transfer of the case from the High Court to the Court of Resident Magistrate must be directed to a specific magistrate conferred with extended jurisdiction to hear such a case"*

In that case; **Thomas Gasper Mchamisi** (supra), the court also held:

> *"... even if there is a transfer order, it must be directed at a particular magistrate for it to be valid. Where there is no transfer order at all, as has*

happened in the preliminary hearing and the trial, the illegality is compounded. We would go further. Section 256A (1) envisages that the magistrate exercising extended powers to whom a case is transferred must take the plea ***as well as conduct the trial****. The use of the word* ***and*** *in the section means it is used in the injunctive sense, not the disjunctive sense. Even if, therefore, there was a valid transfer order, section 256A (1) did not allow three magistrates to participate in the case, with one taking the plea, another one conducting the preliminary hearing and the third one conducting the trial".*

As pointed out earlier, the facts in **Thomas Gasper Mchamisi** (supra) are in all fours with the facts of case before us. Here, like there, Criminal Sessions Case No. 12 of 2018 was transferred to the Court of the Resident Magistrate of Mbeya at Mbeya for hearing before Mutaki, SRM (Ext. Juris.) where it was registered as Ext. Juris. Criminal Sessions Case No. 3 of 2018 and Mutaki, SRM (Ext. Juris) conducted the Preliminary Hearing only. Chaungu, SRM (Ext. Juris.) took over and finalized the case up to and including the judgment. The taking over of Chaungu, SRM (Ext. Juris.) without a transfer order was against the letter of section 256A (1) of the

CPA. As we held in **Richard Sipriano & 2 Others v. Republic** [2013] T.L.R. 457:

> *"The mandatory language employed in above cited section 256A, clearly recognizes that there are situations where jurisdiction conferred on High Court may be conditionally transferred. For the purposes of this appeal, jurisdiction over the offence of murder belongs to the High Court. This jurisdiction of the High Court to try offences of murder can only be transferred to a resident magistrate who has extended jurisdiction conferred to him under subsection (1) of section 173 of CPA. In other words, jurisdiction of a resident magistrate with extended jurisdiction is a conditional or contingent jurisdiction. Conditions precedent for a magistrate to exercise jurisdiction which ordinarily belongs to the High Court must be satisfied before that subordinate court assumes jurisdiction".*

In addition to **Richard Sipriano** (supra), the Court confronted an akin scenario in **Nasra Hamis** (supra) in which Criminal Sessions Case No. 30 of 2014, was transferred by the High Court, in terms of section 256A (1) of the CPA, to be heard by Shaidi, Principal Resident Magistrate with Extended

Jurisdiction. However, later, the matter was placed before Kalli, also Principal Resident Magistrate with Extended Jurisdiction, for trial. There was no transfer order to Kalli, PRM (Ext. Juris.). The Court held that the proceedings before Kalli, PRM (Ext. Juris.) were a nullity for want of an order of transfer. The Court relied on its previous decisions in the unreported **Msana Mwita @ Marwa v. Republic**, Criminal Appeal No. 194 of 2012 and **Juma Lyamwiwe v. Republic**, Criminal Appeal No.42 of 2001 to nullify the proceedings before Kalli, PRM (Ext. Juris.) for want of a transfer order and remitted the matter to the High Court to deal with it according to law.

Guided by our decisions in **Thomas Gasper Mchamisi** (supra), **Richard Sipriano** (supra) and **Nasra Hamis Hassan** (supra), we should now be certain to find and hold, as we hereby do, that the proceedings before Chaungu, SRM (Ext. Juris.), including its consequent judgment and orders were but a nullity.

Having concluded as above, we now turn to determine the way forward to this appeal. Mr. Ndamungu, argued with tenacity that the ailment is curable under section 388 of the CPA and the principle of overriding objective

now in our midst. With profound respect to the learned advocate, we find difficulties in agreeing with him. We find such difficulties because the ailment is one on jurisdiction to which the principle of overriding objective does not apply. We wish to remind Mr. Ndamungu that the overriding objective is not a panacea for every ailment in court proceedings. Put differently, the overriding objective principle was not meant to be a magic wand for every ailment in court proceedings. As far as we are aware, the principle of overriding objective or sometimes referred to as the oxygen principle, does not apply on matters of jurisdiction – see: **Jacob Bushiri v. Mwanza City Council and 2 Others**, Civil Appeal No. 36 of 2019, **Mathew T. Kitambala v. Rabson Grayson and Another**, Criminal Appeal No. 330 of 2018 and **Gidion Musajege Mwakifamba and Another v. Republic**, Criminal Appeal No. 451 of 2019 (all unreported). In **Jacob Bushiri** (supra), for instance, we relied on our unreported previous decision in **SGS Societe Generale De Surveillance SA and Another v. VIP Engineering and Marketing Limited and Another,** Civil Appeal No. 124 of 2017 to hold:

> ***"The institution of an appeal within sixty days is a jurisdictional issue and a mandatory***

requirement which cannot be salvaged by the overriding objective principle *which was not meant to allow parties to circumvent the mandatory rules of the Court or turn blind to the mandatory provisions of the procedural law which go or have the effect of going to the foundation of the case."*

[Emphasis supplied]

As an extension to the above discussion, we wish to associate ourselves with the warning sounded by the Court of Appeal of Kenya in the case of **Hunt Trading Company Ltd v. Elf Oil Kenya Ltd**, Civil Appeal No. 6 of 2010 and subscribed by the Court as the correct position of the law in our jurisdiction in our decisions in **Union of Tanzania Press Clubs and Halihalisi Publishers Ltd v. The Attorney General of the United Republic of Tanzania,** Civil Appeal No. 89 of 2018 and **Kellen Rose Rwakatare Kuntu and Four Others v. Zithay Kabuga**, Civil Appeal No. 406 of 2020 (both unreported) that if improperly invoked, the overriding objective could easily become an unruly horse. With equal profound respect, we agree with Ms. Mgenyi that we should invoke our revisional jurisdiction under section 4 (2) of the AJA to nullify the proceedings before Chaungu,

SRM (Ext. Juris.) and remit the matter to the High Court for compliance with the law.

For the avoidance of doubt, we are aware that the transfer order which appears at p. 16 of the record of appeal complied with the letter of the law. We are also aware that the proceedings before Mutaki, SRM (Ext. Juris.) were quite in order before the eyes of the law. However, as Mutaki, SRM (Ext. Juris.) is no longer in the service of the Judiciary of Tanzania, a matter which we have taken judicial notice of, it is no longer practical to remit the record to the Court of the Resident Magistrate of Mbeya at Mbeya where it was transferred for trial.

Given the foregoing discussion, we invoke our powers of revision under section 4 (2) of the AJA to nullify the proceedings before Chaungu, SRM (Ext. Juris.) up to and including the judgment and the consequent orders. We quash the judgment and conviction of the appellant and set aside the sentence of death by hanging imposed on him. We order that the record of Criminal Sessions Case No. 12 of 2018 later christened as Ext. Juris. Criminal Sessions Case No. 3 of 2018, be remitted to the High Court of Tanzania at Mbeya for necessary orders according to law. In the interim, the appellant

Sefu Snayo shall remain under custody to await the necessary orders of the High Court which we direct shall be made with necessary speed.

Order Accordingly.

DATED at **DAR ES SALAAM** this 17th day of October, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered on this 18th day of October, 2022 in the presence of appellant in person vide video link from Ruanda Prison and Steven Rusibamaila, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL