

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., FIKIRINI, J.A., And KENTE, J.A.)

CRIMINA APPEAL NO. 396 OF 2020

PETRO PASCHAL APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the Resident Magistrates' Court
of Bukoba at Bukoba)**

(Minde, SRM-Ext. Jur.)

**dated the 27th day of May, 2020
in**

Criminal Session Case No. 07 of 2018

.....

JUDGMENT OF THE COURT

28th & 1st December, 2022

KENTE, J.A.:

Before the Resident Magistrates' Court of Bukoba, (presided over by Ms. Minde a Senior Resident Magistrate with Extended Jurisdiction), the appellant Petro Paschal was charged with and subsequently convicted of murder contrary to section 196 of the Penal Code – Chapter 16 of the Laws. The particulars of the offence alleged that, on 28th January 2017 at Mgorogoro Village within the District of Kyerwa in Kagera Region, the appellant murdered one Dayana d/o Daud (hereinafter the deceased).

During the trial, the facts that emerged were briefly to the following effect. The appellant and deceased were respectively a husband and wife. They were living together at Nyakatunda village in Kyerwa District. Their marriage was blessed with one child Pieta Paschal. As manifest of marital discord of which the appellant allegedly deserved most of the blame, the deceased left the matrimonial home and went to live with her parents. It is further alleged that, as threats and acts of intimidation on the deceased went unavailing, on 28th January 2017 the appellant pounced on her as she was then working in the field alongside her friend one Zawadi Benedicto (PW1), attacked and killed her on the spot.

Before the trial court, the appellant completely denied the allegations of murder. While admitting to have met the deceased and her friend Zawadi on the fateful day, he told the trial court that, as he passed by, after seeing him the then rowdy deceased went ballistic. She allegedly attacked him with a hoe. The appellant recounted that, in the course of defending himself, he hit the deceased using a stick causing her to fell down. He went on recounting how he left behind the deceased who he claimed, was not injured. He went to Kitwechenkura Health Center to seek medical treatment following the wounds which he suffered on the right eye where the deceased had allegedly hit him.

In a nutshell, after considering the evidence before her, the trial Senior Resident Magistrate rejected the appellant's defence version that it was the deceased who had attacked him. She noted that, the appellant had started hunting for the deceased on 27th January 2017 by chasing her and uttering threat remarks and that, on the fateful day, he was spotted while taking cover under a coffee tree apparently as he lay in wait for the deceased. The trial Senior Resident Magistrate also found, based on the evidence of PW1 that, as opposed to his defence version, the appellant was the one who struck the deceased twice on the head thereby causing her death. It was her finding that, given the nature of the weapon used and the part of the body on which the appellant had hit the deceased, the only inference defeating the possible defence of killing in the course of self-defence was that, the appellant had intended to kill the deceased. She thus found him guilty and convicted him as earlier alluded to.

On behalf of the appellant, Mr. Peter Matete learned counsel preferred three grounds of appeal couched in the following terms:

1. That the learned trial Senior Resident Magistrate with Extended Jurisdiction erred in law and in fact in convicting the appellant on the basis of a Post Mortem Examination Report which was tendered by a person who was not competent to do so.

2. That the learned Senior Resident Magistrate erred in law when she failed to draw an adverse inference against the prosecution side for their omission to call eye witnesses to the murder incident and relying on circumstantial evidence; and
3. That the learned Senior Resident Magistrate erred both in law and infact to base the appellant's conviction of the weak and suspicious evidence.

However, before the hearing of this appeal could begin in earnest, we asked Mr. Matete learned counsel for the appellant and Mr. Nestory Nchimani learned Senior State Attorney who appeared along with Mr. Robert Kidando also learned Senior State Attorney to represent the respondent Republic to comment on the question as to whether or not, Hon. Minde, (SRM - Ext Jur.) had the requisite jurisdiction to try the matter which was specifically transferred from the High Court to the Court of the Resident Magistrate of Bukoba to be heard by Hon. J. Kahyoza (PRM – Ext. Jur) as he then was. It is worthwhile to note that the above-posed question has been the subject matter of comments by this Court in a good number of cases. We shall later on refer to only three of those cases.

Submitting in response to our question, Mr. Matete readily conceded that, indeed Minde SRM (Ext. Jur.) had no jurisdiction to hear and determine the case as the transfer order appearing on page 26 of the

record of appeal was very specific, that the matter was transferred to the Resident Magistrates' Court of Bukoba to be heard by Hon. Kahyoza (PRM-Ext Jur.) and not any other Resident Magistrate. Mr. Matete went on submitting, correctly so in our view that, if for any reason, Hon. Kahyoza to whom the matter was assigned could not try and finally determine it after having conducted a preliminary hearing as it were, then the case file ought to have been remitted back to the High Court for re-assignment to another Resident Magistrate with Ext. Jur in terms of sections 173 and 256 A (1) of the Criminal Procedure Act, Chapter 20 of the Laws (the CPA). Given the circumstances, the learned counsel submitted that the proceedings before the trial court were a nullity. He thus invited us to invoke our revisional jurisdiction in terms of section 4(2) of the Appellate Jurisdiction Act Chapter 141 of the Laws (the AJA) to nullify the proceedings before the Resident Magistrates' Court, quash the appellant's conviction and set aside the capital sentence imposed on him. Regarding the way forward, the learned counsel implored us to order for a retrial before a properly constituted court.

On behalf of the respondent Republic, Mr. Nchimani was in total agreement with Mr. Matete. He pointed out that, while the matter was specifically transferred from the High Court to the Resident Magistrates' Court to be heard by Hon. Kahyoza PRM (Ext. Jur.), it was not open for

Hon. Minde SRM (Ext. Jur.) to proceed to try and determine it relying on the transfer order to Hon. Kahyoza. Regarding the way forward, the learned Senior State Attorney was of the same view as Mr. Matete that the proceedings before the trial court be nullified, the appellant's conviction be quashed and the capital sentence imposed on him be set aside to pave the way for a retrial.

We have gone through the record before the trial court and taken into account the submissions made by both Mr. Matete and Mr. Nchiman. As correctly submitted by Mr. Matete and gracefully conceded by Mr. Nchiman, there is no doubt that the case before the High Court was transferred to the Resident Magistrates' Court of Bukoba to be heard by Kahyoza (PRM-Ext. Jur) and not Minde (SRM-Ext. Jur). That was in perfect alignment with various decisions of this court which require the case transferred by the High Court to the Resident Magistrates' Court to be heard by a Resident Magistrate with extended jurisdiction to be heard and finally determined by the specified Magistrate. Accordingly, faced with a similar situation in the nearest equivalent case of **Emmanuel Daud v. Republic**, Criminal Appeal No. 295 of 2019, while following our earlier decisions in the cases of **Ally Athumani & Another v. Republic** [2009] T.L.R 26 and **Fidelis Mlelwa & Another v. Republic**, Criminal Appeal No. 248 of 2015 (unreported), we held that:

".....when a transferred appeal is heard by the Magistrate who is not named in the transfer order, then notwithstanding that he is vested with extended jurisdiction, the proceedings become a nullity for heaving been conducted contrary to the transfer order."

Since, the case of Emmanuel Daud (supra), is one of the cases to which we may frequently return as a source of case law on this subject, it is appropriate to state very briefly that likewise in that case, the appeal was transferred from the High Court at Shinyanga to the Resident Magistrates' Court of Shinyanga to be heard by Rujwahuka a Senior Resident Magistrate with extended jurisdiction. However, eventually, but for no apparent reason and without another transfer order, it was heard and determined by Mwaiseje also a Senior Resident Magistrate with extended jurisdiction.

Needless to say, the position in the case now under scrutiny is analogous to the three cases cited above. In the instant case, the transfer order appearing on page 26 of the record of appeal was very particular that the case was going to be heard individually by Kahyoza (PRM – Ext. Jur. as he then was). In the circumstances, we find with respect that the proceedings subsequently conducted before Minde (SRM-Ext. Jur.) in the

absence of another transfer order in between, specifically assigning the case to her, were a nullity for want of jurisdiction.

Pursuant to section 4 (2) of the Appellate Jurisdiction Act, we nullify the said proceedings and set aside the judgment of the trial court and the sentence imposed on the appellant. We direct for the matter to be remitted to the High Court for trial in accordance with the law. The obvious requirement to expedite the hearing and determination of this old criminal session case need not detain us here. It is on this context that we so direct.

DATED at BUKOBA this 1st day of December, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 1st day of December, 2022 in presence of Mr. James Kabakama holding brief for Mr. Peter Matete, learned counsel for the Appellant and the Appellant present in person. Ms. Evaresta Kimaro, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.


A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL