IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 590 OF 2020

BARAKA LEONARD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Shinyanga)

(Mkwizu, J.)

dated the 30th day of October, 2020

in

Criminal Appeal No. 27 of 2020

JUDGMENT OF THE COURT

14th & 20th July, 2023

KITUSI, J.A.:

Baraka Leonard the appellant was charged at Kahama District Court, with rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code, Cap 16, allegedly for having had carnal knowledge of a girl child aged one year, to whom we shall simply refer as the alleged victim. The trial court convicted the appellant and sentenced him to life imprisonment, which was upheld by the High Court on first appeal.

The appellant is still at it. He has preferred this second appeal in which he raises a total of eight grounds, four in the original

memorandum and another four in the supplementary memorandum of appeal.

The appellant's conviction was mainly found on the evidence of four witnesses. Veronica Mbaga (PW1) and Jumanne Emmanuel (PW5) are husband and wife and parents of the alleged victim. They have a house helper known as Esther Gadafi (PW2) who performs the house chores as well as taking care of the infant alleged victim. It is common ground that PW1 and PW5 mostly preoccupied with business ventures, are normally not home until after sunset, with PW5 coming home much later into the night. The appellant was their night security guard.

On the fateful day, that is on 10th August, 2017, PW1 arrived home at 20.00 hours to find the alleged victim asleep. According to PW1, it was unusual for the alleged victim to be asleep at that hour so she became inquisitive. PW2 informed PW1 that the little girl had not been quite herself on that day.

PW2 recalled that on that day while attending to routine duties such as washing dishes, she asked the appellant to hold the alleged victim for a while, and he obliged. According to PW2, the appellant stayed with the child outside while she proceeded with work in the house. One Amos Mwamzalima (PW4) a gardener at the house of PW5's

father was sent by PW5 in an errand to his house. PW5 had sent PW4 to deliver some money to PW2. On arrival at the house, PW4 found the allege victim in the appellant's hands outside the house. He delivered the money to PW2 and left.

Back to PW1. When she was curious about her daughter's unusual behaviour on that day, she took her to her bedroom with the view of bathing the child. In the process of doing so she noticed signs in the infant's private parts that made her suspect that she had been ravished. We are intentionally avoiding the fine details of the alleged intercourse because they are not going to be relevant to our determination of this appeal. The appellant became the immediate suspect.

The matter was subsequently reported to the police who arrested the appellant and charged him. The appellant's defence was denial. He admitted the fact that he was a security guard working for PW5's family and that on 11th August, 2017 he started his day's work in the morning as usual, only to find himself arrested shortly later. He was sent to police station where he made a statement denying commission of the alleged rape. Both the trial court and the first appellate court took the view that only the appellant, and none else, could have abused the alleged victim, because no one else apart from PW2 was at the house during the

material time. Hence the conviction, sentence by the trial court and dismissal of the first appeal, by the High Court.

As shown earlier, the appeal is predicated on 8 grounds. At the hearing Mr. Jukael Jairo, learned State Attorney represented the respondent Republic assisted by Ms. Caroline John Mushi and Ms. Happy Zabron Chacha, also learned State Attorneys. The appellant appeared in person, without the benefit of legal representation.

In our considered view, the first ground of appeal in the original memorandum of appeal raises a jurisdictional issue and it is incumbent on us to address it first. It says:-

> 1. *That, my Lord Justices, the case re-assignment made in court during trial from Hon. E. N. Kyaruzi (SRM) to Hon. R. S. Mushi (RM) was not according to the law.*

We made it quite clear to the learned State Attorney, and he understood, that this is not a complaint of non-compliance with section 214 of the Criminal Procedure Act, Cap 20 (CPA) which is commonly raised. There was, in this case, no violation of section 214 of the CPA as submitted by Mr. Jairo, because the record bears out that at page 9 Kyaruzi (SRM) explained the reason for re-assigning the case to Mushi

(RM). In any event, Kyaruzi (SRM) had not recorded any evidence at the time of re- assigning the case to Mushi (RM).

The complaint in the first ground of appeal relates to the power of Kyaruzi (SRM) to re-assign the case to Mushi (RM). The question that calls for our painstaking consideration is whether a Resident Magistrate of whatever rank sitting at Kahama District Court has powers to assign or re-assign a case registered in the District Court of Kahama to a Resident Magistrate of whatever rank who sits in the District Court of Shinyanga.

Mr. Jairo conceded that the procedure adopted by the learned Senior Resident Magistrate was out of the ordinary because Kyaruzi (SRM) had no such powers of re-assignment. We agree with the learned State Attorney.

Our starting point is the Magistrates' Court Act, Cap 6 (MCA). Section 4 (1) and (2) of the MCA provides:-

> *"4– (1) There is hereby established in every district a district court which shall, subject to the provisions of any law for the time being in force, exercise jurisdiction within the district in which it is established.*

(2) Subject to sub section (3), the designation of a district court shall be the district court of the district in which it is established".

Obvious from the above provisions is that the jurisdiction of the district court is territorial, that is, limited to the geographical location within which the district is designated unless it has been given contiguous or concurrent jurisdiction, over another district. Before answering the issue that we have posed above, we wish to allude to case scenarios of lack of territorial jurisdiction, some of which may give guidance to the instant situation.

We begin with the case of **Nasra Hamisi Hasssan v. Republic,** Criminal Appeal No 545 of 2017 (unreported), where the High Court transferred Criminal Sessions Case No. 59 of 2015 registered at Bagamoyo District in Coast Region, to Shaidi, PRM EJ, sitting at Kisutu in Da es Salaam region. The case was later wrongly tried by Kalli PRM EJ, to whom it had not been transferred. Before the court concluded the matter, it considered an issue which is of relevancy to us:-

"Having declared that the proceedings in Criminal Sessions case No. 59 of 2015 before Kalli PRM EJ were a nullity, we would have ended here and ordered a retrial before another magistrate with Extended Jurisdiction since the

trial of the case was initially properly transferred by the High Court to Shaidi PRM EJ. However, in the light of the second issue concerning the jurisdiction of the trial court, we feel constrained to deliberate and determine the propriety of the Court of Resident Magistrates of Dar es Salaam at Kisutu to entertain a trial of the case which originated from Bagamoyo District Court within Coast Region".

The Court proceeded to hold that the jurisdiction of the court of Resident Magistrates is limited to the territorial area of designation, unlike the High Court which enjoys unlimited territorial jurisdiction. The proceedings were nullified.

A somewhat similar scenario is in the case of **James Sendama v. Republic,** Criminal Appeal No. 279 "B" of 2013 (unreported) in which the Court, citing the case of **Thomas Elias v. Republic** [1993] TLR 263 held :-

" ...if a case is filed in a designated court, no other court has jurisdiction to try it, except a designated magistrate sitting in the said designated court".

On the other hand, in the case of **Makoye Masanja & 3 Others v. Republic**, Criminal Appeal No. 29 of 2014 (unreported), trial was

conducted in Bariadi District Court although the offence had been committed within Meatu District, and the suspects were arrested there. When the issue of territorial jurisdiction was raised, the Court took the view that the irregularity was curable under section 387 of the CPA. The said section provides :-

> *"No finding, sentence or order of any criminal court shall be set aside merely on the ground that the inquiry, trial, or other proceeding in the course of which it was arrived at or passed, took place in a wrong region, district, or other local area, unless it appears that such error has in fact occasioned a failure of justice."*

Similarly in the case of **Samson Buruna @ Sibore Buruna v. Republic**, Criminal Appeal No. 138 of 2002 (unreported), Mtotela PRM EJ stationed at Mwanza and to whom transfer of the case had been made in terms of section 256 (1) of the CPA, conducted trial of that case while sitting at Tarime District Court within Musoma, Mara. Referring to Mr. Mtotela's powers, the Court observed:-

> *"When he sat at Tarime he was trying the same case which had been duly transferred to him, albeit in the wrong place. We think that situation is curable under section 387 of the Criminal Procedure Act 1985".*

We have deliberately set out the foregoing instances so as to be clear of which irregularities are curable and which ones are not. We must underline the fact that in **Makoye Masanya** (supra) and **Samson Buruna @ Sibore Buruna** (supra), the irregularities were held to be curable because the assignment of the cases was proper, in the first place, only that the magistrates conducted proceedings at wrong venues. However, in **Nasra Hamisi Hassan** and **Thomas Elias** (supra) the irregularity could not be cured because the assignment or transfer was improper, therefore right from the assignment of the case the presiding magistrate lacked jurisdiction to try it. The difference is hair thin and tricky to appreciate, in our view, but very significant.

We come closer to the issue at hand. Was the assignment by Kyaruzi (SRM) to Mushi (RM) proper and if not, whether it can be cured. After considering the cases we have cited and the provisions of section 4 (1) and (2) of the MCA, we hold without hesitation, that the purported re-assignment of the case to Hon. Mushi (RM) by Kyaruzi (SRM) was not in keeping with both his legal mandate and established practice. This is because since the alleged offence was committed within Kahama District and the case was registered in a register of the District Court of Kahama, a Resident Magistrate from another district had no jurisdiction

to try it and a fellow Resident Magistrate confer him with that jurisdiction by way of re- assignment.

Jurisdiction as it is well known, is a creature of the law and we have held in a number of cases, it is our duty to ensure proper application of laws. See the cases of **Joshua Mgaya v. Republic**, Criminal Appeal No. 205 of 2018 and **Julius Joseph v. Republic**, Criminal Appeal No. 03 of 2017 (both unreported).

There is therefore, merit in the first ground of appeal in that Mushi, (RM) from the District Court of Shinyanga had no jurisdiction to try Criminal Appeal No. 403 of 2017 from which these proceedings have originated, because the purported re-assignment to him by Kyaruzi (SRM) was erroneous. That irregularity cannot be cured by section 387 of the CPA.

Consequently, we nullify the proceedings before Mushi (RM), quash the judgment and set aside the sentence on the ground that he had no jurisdiction. The proceedings before the High Court were also a nullity for emanating from null proceedings, and we declare so and quash the judgment. We allow the first ground of appeal and as that determination is sufficient to dispose of the appeal, we are not going to consider the other grounds of appeal.

The appellant has prayed for his outright release. We have given this prayer sufficient consideration balancing between the appellant's argument that he has served enough period in prison and on the other hand the vulnerable age of the alleged victim. It is our considered view that the justice of the case requires us to order a retrial according to law, and we so order.

DATED at **SHINYANGA** this 19th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of July, 2023 in the presence of the Appellant in person and Louis Boniface, 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