death of the deceased as a whole and not in phases, no doubt he would well have come to the same conclusion.

For these reasons, we set aside the conviction for murder and sentence of death. In substitution thereof, we enter a conviction for manslaughter. Taking into account that relevant factors and circumstances of the case we sentence the appellant to five (5) years imprisonment effective from the date of his conviction before the High Court.

FANUEL MANTIRI NG'UNDA v. HERMAN MANTIRI NG'UNDA AND TWO OTHERS

COURT OF APPEAL OF TANZANIA

(Kisanga, Ramadhani and Lubuva, JJA)

CIVIL APPEAL NO 8 OF 1995

May 24, 1995 – ARUSHA

(From the decision of the High Court of Tanzania at Moshi, Mushi, J)

Magistrates' Courts – Jurisdiction – Jurisdiction over land held under customary law – Magistrates' Courts Act 1984.

Civil Practice and Procedure – Pleadings – Order of the High Court granting leave for case to proceed before the Resident Magistrate not pleaded – consequences thereof.

The High Court had given leave for a dispute involving land held under customary law to be heard by the Court of Resident Magistrate. However, the order of the High Court granting leave was not pleaded in the plaint and the trial court came to know about the order when it was produced as an exhibit during trial. It was evident that the order was granted before proceedings commenced. The trial court heard and determined the suit. On appeal the High Court ruled that the Magistrates' Court had no jurisidiction to entertain the dispute because the order granting leave to the court to hear and determine the dispute was not pleaded in the plaint. On further appeal to the Court of Appeal of Tanzania:

Held:

(i) Although the proceedings were commenced without the order of leave of the High Court being produced and pleaded in the plaint that the trial court had jurisdiction, the matter was saved when in the course of evidence the order of the High Court was availed to the trial court;

(ii) As the order was in existence at the time the proceedings were commenced, as a matter of equity and justice, the proceedings before the Magistrates' Court were not vitiated and the Court was properly vested with jurisdiction over the case.

Appeal allowed.

No case referred to.

Jonathan, for the appellant

Lubuva, JA, delivered the following considered judgment of the court:

This is a second appeal. It arises from the decision of the High Court of Tanzania (Mushi, J) setting aside the judgment and decree of the Magistrates' Court in RM civil case no 1 of 1992.

Briefly, the facts that gave rise to the case were as follows. The suit involved a dispute between the Ng'unda clan members over a piece of land in Losaa Village, Hai District, Kilimanjaro Region. In the Magistrates' Court Moshi, the appellant successfully sued the respondents for trespass. He was declared the lawful owner of the land in dispute and the respondents were further ordered to pay compensation of Shs 300,000/= for loss of use and damages to the appellant.

An order of injunction was also issued to restrain the respondents from entering the disputed land. From that decision of the Resident Magistrate, the respondents appealed to the High Court. Dealing with the appeal, the learned judge without going into the merits of the appeal disposed of the matter on the ground that the Magistrates' Court had no jurisdiction to adjudicate on this case. In allowing the appeal, the learned judge held that although the Magistrates' Court Moshi had been granted leave of the High Court to entertain the suit, the Court's jurisdiction was not properly invoked because it was not pleaded in the plaint. The learned judge thus ordered the plaint to be struck out as it was bad in law. Dissatisfied with the decision of the High Court, the appellant has appealed to this Court.

Mr *Jonathan* learned Counsel who had represented the appellant before the Courts below also appeared for the appellant before us.

Although he had filed seven grounds of appeal, he preferred to argue only grounds one and two together in which in his view, the points raised in the rest of the grounds were sufficiently canvassed. In these two grounds the appellant complained that:

1. The learned Judge erred in allowing the appeal on a point not raised in the memorandum of appeal and not otherwise urged at its hearing.
2. The learned Judge erred in condemning the appellant unheard on the particular point determining the appeal.

Arguing on these grounds, Mr *Jonathan*, learned Counsel assailed the learned judge in allowing the appeal on a point which had not been raised on appeal on which the appellant had not been given a chance to be heard. He further submitted that it was erroneous on the part of the learned judge to allow the appeal on the ground that the Court (Magistrates' Court Moshi) had no jurisdiction over the case because leave of the High Court had been granted and the order was tendered in Court as exhibit P1 in the course of the proceedings in court. Mr *Jonathan* however, conceded that it was not proper for the court to proceed with the hearing of the case on the assumption that the Court had jurisdiction to deal with the case. Mr *Jonathan* however, firmly maintained that in this case, though initially the proceedings were commenced when the order granting leave of the High Court due to oversight had not been availed to the Court, the situation was saved when the order was produced in court as a matter of evidence. He finally submitted that as the court order granting leave was issued on 29 November 1991, at the time of the commencement of the proceedings (9 January 1992) the court was properly vested with jurisdiction to adjudicate upon the case. He prayed the Court to allow the appeal and order the case to be remitted to the High Court to be heard on merit.

On behalf of the other respondents, Ibrahim Athumani Ng'unda, the second respondent briefly addressed the Court. He stated that the respondents were not aware that leave of the High Court had been granted vesting jurisdiction in the Magistrates' Court Moshi to hear this case. However, at the Court's prompting that the High Court order granting leave was tendered in Court as exhibit P1, he (Ibrahim Athumani Ng'unda)did not pursue this point any further. As for the arguments raised in support of the appeal, Ibraham Athumani Ng'unda, was of the view that since the issues involved were of a legal nature, they (respondents) had

A left the matter the Court to decide according to the law and merit of the case.

The determination of this appeal turns around the issue whether the Magistrates; Court Moshi had jurisdiction to hear the case. This is an issue which is governed by the provisions of s 63(1) of the
B Magistrate's Courts Act, 1984 which provides:

> '63 (1) Subject to the provisions of any law for the time being in force where jurisdiction in respect of the same proceedings is conferred on different courts, each court shall have a concurrent jurisdiction
> C therein:
>
> Provided no civil proceedings in respect of marriage, guardianship or inheritance under customary law, or the incidents thereof, *and no civil proceedings in respect of immovable property, other than proceedings relating to land held on a Government lease or a right of occupancy granted under the Land Ordinance or proceedings under*
> D *Section 22 or 23 of the Land Ordinance shall be commenced in any Court other than a primary court unless the Republic is a party thereto or unless the High Court gives leave for such proceedings to be commenced in some other Court*; (emphasis supplied)

E From the wording of this provision, it is unambiguously clear that suits involving land held under customary law are to be instituted before the primary court unless leave of the High Court is obtained for other courts to entertain such cases of this nature. In this case, the fact is that the Magistrates' Court Moshi had by order
F of the High Court been granted leave to have the proceedings of the case commenced in that Court. However, in the plaint, it was not indicated that leave had been granted or that the Court had jurisdiction to deal with the case. As a result, the learned judge on appeal held that such omission in the pleadings was fatal. Further-
G more, from the record, it is apparent that the order of the High Court granting leave was produced in court as exhibit (P1) in the course of evidence by the appellant (original plaintiff). That to us clearly shows that the proceedings before the Magistrates' Court Moshi were commenced before the order of the High Court was
H availed to the court. For that reason, the learned judge held that the Court had assumed jurisdiction which it did not have. The plaint was thus ordered to be struck out. In this connection, with respect, we do not accept Mr *Jonathan's* complaint that the learned judge decided the appeal on the question of jurisdiction which was
I not raised or on which the appellant was not heard. This we think is baseless because the record clearly shows that the matter was raised

in the written statement of defence at the trial and the learned Counsel is also on record addressing himself on this point on appeal before the learned judge. We reject that ground.

The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature. In our considered view, the question of jurisdiction is so fundamental that the courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. This should be done from the pleadings. The reason for this is that it is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case. For the court to proceed to try a case on the basis of assuming jurisdiction has the obvious disadvantage that the trial may well end up in futility as null and void on grounds of lack of jurisdiction when it is proved later as matter of evidence that the court was not properly vested with jurisdiction.

Addressing himself on this point, with respect, we are in agreement with the learned judge's reasoning behind the logic of requiring leave of the High Court when he said:

> 'The purpose of obtaining leave is to show that the RM's Court or District Court has been given special jurisdiction to determine cases of land held under customary law. This leave is the key to the opening or instituting the suit in the RM's or District Court. Jurisdiction of the Court must be evident on the fact of the plaint and not a matter of evidence to be gathered at the trial. In fact not only that the plaint should state that such leave had been granted, but the High Court order granting such leave should form part of the plaint as an annexure....'

This, we are satisfied, was a correct restatement of the principle involved in the Court's ascertainment of its jurisdiction at the commencement of cases. In the circumstances of this case, where as already indicated, the jurisdiction of the court was not included in the plaint and the Court's order granting leave to the Magistrates' Court Moshi was availed at a later stage of the trial, was the court's jurisdiction ousted? Mr *Jonathan*, learned Counsel for the appellant has contended that as the High Court order granting leave was already issued since 29 November 1991 and the court proceedings before the Magistrates' Court were commenced on 9 January 1992, the court was vested with juridiction to try the case.

Indeed it is a gainsay that the court order exhibit P1 granting

leave was issued by the High Court on 29 November 1991. For some reason however the order was not availed to the Magistrates' Court Moshi by 9 January 1992 when the proceedings were commenced. It was on 5 June 1992 when, in the course of the proceedings that the order was tendered in court as exhibit P1. In these circumstances, we think the situation is different. That is, at the commencement of the proceedings, the order granting leave was already in existence in which case the court of the Resident Magistrate Moshi was vested with jurisdiction over the case. To our minds, the situation would be different if there was no order at all in existence at the time of the commencement of the proceedings as there would be no legal basis upon which the court could adjudicate upon the case. On the other hand if the order of the High Court was issued after the commencement of the proceedings, such order would not operate retrospectively so as to validate the proceedings which had commenced previously. Here, as already explained the order granting leave in terms of s 63(1) of the Magistrates' Courts Act, 1984 was already in existence when the proceedings commenced but had not then been communicated to the court. It was communicated later in the course of evidence. In our view, the order granting leave having been tendered in court as exhibit in the course of the evidence, it formed part of the record.

In the result, having regard to all the circumstances of the case, we are with respect, in agreement with Mr *Jonathan*, learned Counsel for the appellant that although the proceedings were commenced without the order of leave of the High Court being produced and the fact that it was not pleaded in the plaint that the court had jurisdiction, the matter was saved when in the course of evidence, the order of the High Court of 29 November 1991 was availed to the court. As the order was in existence at the time when the proceedings were commenced we are of the settled view that as a matter of equity and justice, the proceedings before the Magistrates' Court were not vitiated and that the court was properly vested with jurisdiction over the case.

In concluding this matter, we wish to re-emphasize one point. That is, that even though we have found in the particular circumstances of this case that the non-availability of the order of the High Court granting leave at the commencement of the proceedings did not vitiate the trial by the Magistrates' Court, as a matter of practice, it is essential for the courts at all times in the first instance to ascertain from the pleadings stage if they are properly vested with jurisdiction and not to let the matter to chance. Furthermore, it is

also our view that in order to control and avoid unscrupulous litigants from taking advantage of obtaining leave of the High Court after the commencement of the proceedings, the courts should be very strict and meticulous in scrutinizing the orders for such leave when produced in court at the appropriate time of pleadings.

For these reasons, we allow the appeal and set aside the judgment and decree of the High Court. We also order that the matter be remitted to the High Court for hearing the appeal on its merit before another judge. It is accordingly ordered. Each party to bear its own costs of this appeal.

TRANSPORT EQUIPMENT LTD v. DEVRAM P VALAMBHIA

COURT OF APPEAL OF TANZANIA

(Kisanga, Ramadhani and Mfalila, JJA)

CIVIL APPLICATION NO 46 OF 1994

May 24, 1995 – DAR ES SALAAM

(For the revision of the judgment, decree and order of the High Court of Tanzania at Dar es Salaam, Rubama, J)

Court of Appeal – Revisional jurisdiction – Revision by the Court of Appeal of Tanzania – When such revision is available – Section 4(3) of the Appellate Jurisdiction Act, 1979.

In this application the applicant sought to move the Court of Appeal of Tanzania to revise the judgment, decree and order of the High Court. The application was brought under powers of revision given to the Court of Appeal by the Appellate Jurisdiction Act 1979 as amended by Act No 17 of 1993. The Court of Appeal considered, *inter alia*, when such powers of revision can be exercised.

Held:

(i) The appellate jurisdiction and the revisional jurisdiction of the Court of Appeal of Tanzania are, in most cases, mutually exclusive; if there