IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LUANDA, J.A., MJASIRI, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 50 OF 2013

1. RICHARD SIPRIANO
2. STEVEN KAULULE @ MWANALUGOLOLA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Sumbawanga)

(Dyansobera - PRM, (EJ))

dated the 5th day of August, 2010
in
Criminal Session No. 47 of 2006

JUDGMENT OF THE COURT

7th & 11th June, 2013

JUMA, J. A.:

This appeal by Richard Sipriano and Steven Kaulule @ Mwanalugolola is against the decision of W.P. Dyansobera-**PRM** who sat in the Resident Magistrate's Court of Rukwa at Sumbawanga. Exercising extended jurisdiction, the learned trial magistrate convicted the two appellants for the offence of murder contrary to section 196 of the **Penal Code, Cap. 16 RE 2002** and imposed a mandatory death sentence on

the appellants. It was alleged that on or about 28th October, 2004 at Sakalilo Village in Sumbawanga District, the two appellants murdered one Emmanuel Kaputa. Aggrieved appellants have preferred this second appeal to this Court.

When this appeal came on for hearing before this Court, Richard Sipriano, the first appellant appeared by an advocate, Mr. Justinian Mushokorwa. The second appellant took charge of his own appeal, while Ms. Scolastica Lugongo, learned Senior State Attorney appeared for the respondent Republic.

Before we could allow the parties to address us on the three grounds of appeal which Mr. Mushokorwa had filed on 5th June 2013, we *suo motu* invited the parties to this appeal, to address us first on the apparent defect we had observed on the face of the record of this appeal. This apparent defect brings to the fore the question whether this appeal is in the first place tenable before us. We specifically pointed out to the learned counsel that on its face, the record shows that the plea of the appellants was taken at the High Court. Similarly subsequent Preliminary

Hearing was also conducted before a High Court Judge. But, the trial that followed after the preliminary hearing was conducted by W.P. Dyansobera; the learned Principal Resident Magistrate vested with extended jurisdiction. This procedure, we pointed out, flies in the face of mandatory procedure under section 256A of the Criminal Procedure Act, CAP. 20 RE 2002 (hereinafter referred to as CPA).

Ms Lugongo, learned counsel for the respondent/Republic, conceded that the procedure adopted by the High Court to transfer the trial to a Resident Magistrate's Court after taking the pleas and conduct of preliminary hearing, contravened section 256A of the CPA. The learned State Attorney referred us to pages 2 to 11 of the record of this appeal which shows that it was Mmilla, J. (as he then was) who took the appellants' pleas on 9th February 2007 and conducted the Preliminary Hearing on 4th June 2007. Ms Lugongo similarly referred us to page 62 of the record showing that on 7th June 2010 Kihio, J. made an order under sections 173 and 256A of the CPA to transfer the trial of the appellants by a magistrate with extended jurisdiction.

Ms Lugongo referred us to our earlier decision in CRIMINAL APPEAL NO. 205 OF 2006, HAMIS MCHACHALI VS THE REPUBLIC (unreported) wherein we interpreted section 256A and categorically guided the High Court not to transfer cases for trial at Resident Magistrates' Courts after the taking accused person's plea and conducting preliminary hearing. The learned State Attorney rounded up her submissions by inviting us to quash and declare as a nullity, all the proceedings that were conducted before the Principal Resident Magistrate with Extended Jurisdiction. And after that, she urged us to order the High Court to hear the matter.

While expressing his agreement with Ms Lugongo's submissions and conclusion that this appeal is not properly before us, Mr. Mushokorwa expressed his regret that he had come well prepared to argue the appeal and suggested that this appeal presents this Court with an opportunity to reinterpret section 256A to allow the appeal to proceed despite the mistakes made on transfer. The second appellant who was unrepresented, had nothing to say, understandably because the issue we raised is purely legal in essence.

For purposes of our determination, we reproduce Section 256A which specifically governs transfers of cases from the High Court, for trial by magistrates with extended jurisdiction:

> ***256A.-****(1) 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.*

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. Condition precedent for a magistrate to exercise jurisdiction which ordinarily belongs to the High Court must be satisfied before that subordinate court assumes jurisdiction. The words "*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"* were couched in mandatory terms to imply when High Court orders a transfer, that transfer must be made before a plea and by extension before a preliminary hearing is conducted. Once the High Court has taken a plea and conducted a preliminary hearing, a magistrate enjoying extended jurisdiction cannot seize up requisite jurisdiction to try the matter concerned.

On this point, Ms Lugongo is with due respect correct to submit that the learned Principal Resident Magistrate lacked jurisdiction albeit under extended jurisdiction because the High Court had taken the plea of the appellants and had conducted preliminary hearing over the same matter. In HAMIS MCHACHALI *(supra)* we stated that "transfer" under section 256A of CPA means transfer of every aspect of the case i.e. taking of plea, preliminary hearing and the trial:

> "*.....**any transfer of a case for trial from the High Court to a Resident Magistrate with Extended Jurisdiction should be effected before the plea is taken and preliminary***

hearing is conducted. ..... *This is so because and as has been stated by this Court in its various decisions,* ***'preliminary hearing proceedings are part and parcel of the trial of case'***.. *The rationale behind this is that in a preliminary hearing important issues of fact may be agreed upon which later form the basis of the decision of the case...." [Emphasis added]*

We have on previous occasions dealt with the scope of powers of resident magistrates upon whom extended jurisdiction has been granted under section 256A of the CPA. For instance we discussed this scope in CRIMINAL APPEAL NO. 132 OF 2012, **JOHN MADUTULE @ NGOSHA VS THE REPUBLIC** (unreported), where we said:

"...The language used in Section 256A (1) above is clear and straight forward. It needs no interpretation. It simply says that a ***transfer*** *of a case pending in the High Court to a Resident Magistrate's Court ought to be done* ***before a plea of the accused is taken***. *As it has been observed, this case was transferred from the High Court at Dodoma to the Court of the Resident Magistrate, Dodoma, after* ***a Plea*** *was taken and a* ***Preliminary***

> ***Hearing*** *was conducted, on 12/03/2010 before the learned Judge, M.A. Kwariko. It was actually transferred to the Court of the Resident Magistrate when the case was ready for trial. As correctly submitted by counsel, in effecting the transfer of the case, the provisions of section 256A (1) were not complied with. Therefore the subsequent trial in the Court of the Resident Magistrate by R.I. Rutatinisibwa, PRM, with Extended Jurisdiction (EJ), was a serious irregularity which rendered the proceedings, decisions and orders of the trial court a nullity – see the cases of* ***Ndaso Yohana @ Kibyala,*** *(supra),* ***Juma Lyamwiwe v R,*** *Criminal Appeal No. 42 of 2001 and* ***The Republic vs. Banyanyirubusu s/o Gaspary and Others,*** *Criminal Revision No. 18 of 2006 (all unreported)."*

The facts in this appeal before us are similar to those in **JOHN MADUTULE @ NGOSHA**'s case (cited above) where the plea and preliminary hearing was heard by the High Court before being transferred to a subordinate court for trial. In **JOHN MADUTULE**, we concluded that transferring the trial after the High Court had taken a plea contravened the very clear direction under section 256A and as a result there was no

valid appeal before us. The first question which the learned Judge in Charge (Kihio, J.) should have asked himself before ordering a transfer is whether conditions for transfer as embodied under section 256A and as expounded by several of our decisions, had been satisfied.

There is another matter apparent on the record which also attracted our concern. The record of appeal which the District Registrar of the High Court at Sumbawanga certified on 22nd October 2012 suggests that B.M. Mmilla, a Judge of the High Court (as he then was), sat in the Resident Magistrate's Court of Rukwa at Sumbawanga when he took the appellants' plea and conducted preliminary hearing. This was an irregularity. To appreciate our concern, we reproduce the following excerpts recorded on 9th February 2007 appearing on page 2 of the record of this appeal:

IN THE RESIDENT MAGISTRATE'S COURT OF RUKWA
AT SUMBAWANGA
ORIGINAL EXTENDED JURISDICTION
RM CRIMINAL SESSIONS CASE NO. 47 OF 2006

REPUBLIC

VERSUS

1. RICHARD S/O SIPIRIANO
2. STEVEN S/O KAULULE @ MWANALUGOLOLA

Date: 09.02.2007
Coram: *Hon. B.M. Mmilla, J.*
For Republic: *Mr. Rwabuhanga & Mr. Mkizungo, S/As*
For Accused: *Mr. Kampakasa counsel for accused*

Accused Persons: *1st Accused..* } *Present under custody*
2nd Accused.. }

Interpreter: B.E. Ngogo-English into Kiswahili and vice versa

Notice of information of murder contrary to section 196 of the Penal Code was duly served to the accused persons.

Information read over and explained to the accused persons in the language known to them who plead:

Accused's plea:
1st accused: It is not true
2nd accused: It is not true

Court: Entered as a plea of not guilty in respect of both accused persons.

Sgd: B.M. Mmilla,
Judge
09/02/2007

The record further suggests that Preliminary hearing that was conducted on 4th June 2007 took place at the Resident Magistrate's Court

though presided over by Mmilla, J. (as he then was). There are indications that the commencement of trial was scheduled to take place on 8th February 2008 before Mmilla, J. It could not because Mr. Mwangamila, the learned State Attorney prayed for adjournment on account of what he described as "technical legal problem" which he had to resolve first. Come 11th February 2008, the date when the trial was adjourned to, the technical problem had not been solved. Mmilla, J. adjourned the trial to the "next convenient High Court Criminal Sessions." Almost two years later after this adjournment of the trial, Kihio, J. ordered a transfer of the trial to the court of the Resident Magistrate at Sumbawanga for trial before W.P. Dyansobera, PRM.

To discern what transpired at the trial phase, this Court relies on the record which the Registrar certified to be true and correct of the original proceedings. It is an established rule of practice that the certified record of a trial as taken down by the trial court, represents what actually transpired in the trial concerned (**See**-CRIMINAL APPEAL NO 205 OF 2011, **MOHAMED PAULO MLALE VS THE REPUBLIC** (unreported). For purposes of the present appeal, the record of the trial court suggests that a Judge of the High Court of Tanzania sat in the Resident Magistrate's

Court of Rukwa at Sumbawanga on 9th February 2007 and took the accused persons' plea and conducted a Preliminary Hearing before the matter was transferred to a Principal Resident Magistrate for a trial that led to a conviction and sentence.

We have on many occasions stated that a resident magistrate with extended jurisdiction shall sit in the Resident Magistrate's Court but not in the High Court (**See for example**- CRIMINAL APPEAL NO. 238 OF 2007, **ERNEY GASPAR ASENGA VS THE REPUBLIC** (unreported). Conversely and for the purposes of the present appeal, we dare say that a Judge of the High Court sitting in the Resident Magistrate's Court is an irregularity calling for revision.

To remedy the aforementioned illegality of the proceedings before the subordinate court with extended jurisdiction and the irregularity of the record of Preliminary Hearing suggesting that a Judge of the High Court sat in the Resident Magistrate's Court, we invoke our power of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002. We accordingly quash the entire proceedings before Mr. Dyansobera-

PRM, the judgment which he delivered on 5th August 2010 and also the sentence he imposed that same day. Since Mmilla, J. took plea and conducted the preliminary hearing in the Resident Magistrate's Court, we order the High Court of Tanzania at Sumbawanga to open a murder charge, if not done, at the High Court. We so order.

DATED at **MBEYA** this 10th day of June, 2013.

B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL