

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: SAMATTA, C.J., MSOFFE, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 42 OF 2001

**JUMA LYAMWIWE APPELLANT
VERSUS
THE REPUBLIC RESPONDENT**

**(Appeal from the conviction of the Resident
Magistrate's Court of Mwanza at Geita)**

(Lyamuva-PRM/Extended Jurisdiction)

**dated the 8th day of June, 2001
in**

RM Criminal Sessions Case No. 14 of 2001

16/2/2005 & 28/4/2006

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JUDGMENT OF THE COURT**

MSOFFE, J.A.:

In the High Court of Tanzania at Mwanza the appellant and two others were charged with murder c/s 196 of the Penal Code. It was alleged that on or about the 25th day of November, 1990 at Ileanilo village within the district of Sengerema in Mwanza Region they murdered one Lucas Kalangalilo. On 4/8/1993 the High Court (Chipeta, J.) took their pleas and accordingly proceeded to conduct a preliminary hearing in line with the provisions of S. 192 of the Criminal Procedure Act, 1985, read together with the Accelerated

Trial and Disposal of Cases Rules, 1988 (G.N. 192/1888). On 24/5/1999 the case came up for hearing before Nchalla, J. On this date it transpired that one of the accused persons known as Alphonse Msafiri Kazimili had died and a burial permit dated 29/10/1995 was produced to that effect. The case against him was accordingly marked abated, and the case against the appellant and the other accused person was adjourned for hearing on another date. Instead of the hearing proceeding before the same court on a later date, on 20/4/2001 the High Court (Nchalla, J.) made an order for the transfer of the case to the Resident Magistrate's Court at Mwanza for trial before A.N. Lyamuya, Principal Resident Magistrate with Extended Jurisdiction. Mrs. Lyamuya heard the case, and in the end she acquitted the other accused person and convicted the appellant and sentenced him to death. The appellant is dissatisfied, hence this appeal against the conviction and sentence.

Before us Mr. Magongo, learned advocate, appeared for the appellant. On the other hand, Mr. Rwabuhanga, learned State Attorney, represented the respondent Republic.

Mr. Magongo filed a memorandum of appeal containing three grounds. However, for purposes of our determination of the appeal we will deal with only the second ground which reads as follows:-

2. That as the preliminary hearing was conducted by the High Court, then the order of transfer to the Resident Magistrate Court was illegal.

In arguing the above ground Mr. Magongo submitted that in law the High Court is vested with power to transfer a case to a Resident Magistrate with Extended Jurisdiction. However, the transfer should be made before and not after a preliminary hearing is conducted. He went on to say that that is the spirit behind the provisions of S. 256 A (1) of the Criminal procedure Act, 1985 as amended by the relevant provisions of the Written Laws (Miscellaneous Amendments) Act No. 17/1996. Since the transfer was made after the preliminary hearing, the trial of the case before Lyamuya, Principal Resident Magistrate with Extended Jurisdiction, was a nullity, he concluded.

On his part, Mr. Rwabuhanga agreed with Mr. Magongo on his submission on ground two. He added that in law no transfer was actually made in the instant case. He also went on to say that under normal circumstances a transfer should be made under S. 256 A (1) of the Criminal Procedure Act, 1985, as amended, and not under S. 173 (2) of the above Act as was done in this case.

At this juncture, we think, it is important to quote S. 256 A (1).

It reads:-

"256 A (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 sub section (1) of section 173."

(Emphasis supplied)

With respect, we agree with Messrs. Magongo and Rwabuhanga in their respective and concurrent views on the correct

interpretation of S. 256 A (1). In our view, the starting point is S. 192 (1) of the same Act which reads as follows:-

“192 (1) Notwithstanding the provisions of section 229, if an accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in open court in the presence of the accused or his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are in dispute between the parties and which will promote a fair and expeditious trial.”
(Emphasis supplied).

It occurs to us that the purpose of conducting a preliminary hearing as soon as is convenient after an accused person pleads not guilty is to ensure, among other things, an expeditious trial. If so, we do not think that it was ever intended that the High Court would conduct a preliminary hearing and then transfer the case to a Resident Magistrate with Extended Jurisdiction. In our view, to transfer a case after a preliminary hearing would not be keeping in line with the intention and spirit of S. 192 (1). In similar vein, the transfer

envisaged under S. 256 A (1) can only be done before a preliminary hearing is conducted.

We also wish to point out that under S. 256 A (1) it is envisaged that a Resident Magistrate with Extended Jurisdiction to whom a case has been transferred will take a plea and then conduct a trial. And a trial, no doubt, includes a preliminary hearing. Surely, it is not intended that the High Court will take a plea, conduct a preliminary hearing and then transfer the case to a Resident Magistrate with Extended Jurisdiction.

At this stage we also wish to reiterate that it is correct, as urged by Mr. Rwabuhanga, that where the High Court desires to direct a transfer then an order for such transfer should be made under S. 256 A (1) of the Criminal procedure Act, 1985, as amended. Certainly, it is not correct to make an order under S. 173 of the said Act. And for the avoidance of doubt, the order of transfer should be made, in line with the spirit of Sections 192 (1) and 256 A (1) of the above Act, before plea taking.

For the above single reason we allow the appeal solely on the basis of the complaint under ground two. We accordingly declare a nullity the trial which proceeded before Lyamuya, Principal Resident Magistrate with Extended Jurisdiction. The High Court at Mwanza is directed to proceed with the trial of the case from the stage it had reached after conducting the preliminary hearing.

DATED at DAR ES SALAAM this 10th day of April, 2006.



B.A. SAMATTA
CHIEF JUSTICE

J.H. MSOFFE
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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


(S.M. RUMANYIKA)
DEPUTY REGISTRAR