IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: OTHMAN, C.J., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 293 OF 2016

THE REPUBLIC ..... APPELLANT

VERSUS

1. **PETER JOCKTAN @ ISINIKA @ CHINGA**
2. **JOHN PETER @ MIKIKA SPENCER .....RESPONDENTS**

(Appeal from the decision of the High Court of Tanzania

at Dar es salaam)

(Mchauru, PRM EXJ)

Dated 6th day of June, 2016

In

Criminal Sessions Case No. 92/2013

JUDGMENT OF THE COURT

31st August, & 13th Sept.2016

JUMA, J.A.:

This appeal which was brought by the Republic is based on the complaint that a Principal Resident Magistrate exercising the powers of the High Court on extended jurisdiction nullified and quashed the proceedings of the preliminary hearing conducted earlier by a fellow Principal Resident Magistrate of equal standing under extended jurisdiction.

The background to this complaint was that the two respondents, PETER JOKTAN @ ISINIKA @ CHINGA and JOHN PETER @ MIKIKA SPENCER, were charged with the offence of murder contrary to section 196 of the Penal Code, Cap 196 R.E. 2002. The particulars of offence were that on 16th August, 2011 at MVIWATA Offices within the town of Morogoro the two respondents murdered Cuthbert Bahatisha who was one of the two night watchmen guarding the offices.

The Information containing the Charge Sheet dated 1st October, 2013 was filed in the High Court of Tanzania on 22nd November, 2013 at Dar es Salaam High Court Registry and was registered as Criminal Session Case No. 92 of 2013. Because the jurisdiction to try the offence of murder is vested in the High Court presided by a Judge, the original record of this appeal shows that an order was issued by the High Court under section 256A of the Criminal Procedure Act, Cap. 20 (CPA) specifying the transfer of the case to the Resident Magistrate's Court of Morogoro to be heard by Rusema-PRM on extended jurisdiction. On 12th August, 2014 Hon. Rusema, PRM (EJ) presided over a Preliminary Hearing in Criminal Session Case No. 13 of 2014 at the Resident Magistrate's Court of Morogoro. At the

conclusion, he adjourned the trial to await a later date to be fixed by the Registrar of the High Court.

At the hearing of the trial on 15th June, 2016 Mr. Edger Bantulaki the learned State Attorney drew the attention of Hon. E.F. Mchauru, the learned Principal Resident Magistrate who was presiding over the trial of Criminal Sessions Case No. 13 of 2014 on extended jurisdiction to some defects which suggested that the concluded preliminary hearing was not conducted in accordance with the procedure outlined under section 192 of the CPA and the Rules made under it under GN 192 of 1988. The learned State Attorney identified as the first error, where the record shows that it was the learned counsel appearing for the accused persons, instead of the accused persons, who signed under memorandum of undisputed facts and also disputed facts. The second error appearing on the face of the record of preliminary hearing is that the record suggests that memorandum of matters which are not in dispute were not read over and explained to the accused persons. The third apparent defect which Mr. Bantulaki outlined is the fact that the Report on Post-Mortem Examination which was admitted as exhibit P1 during the Preliminary Hearing was neither shown to the accused persons nor was its contents read over.

The learned State Attorney urged Hon. Mchauru-PRM (EJ) to adjourn the trial and refer the defects to the Court of Appeal so that the Court may revise the defective preliminary hearing proceedings. On her part, Ms. Patricia Mbosa, learned counsel who was defending the respondents, agreed with the proposal made by Mr. Bantulaki. In his Ruling, Mchauru-PRM (EJ) declined the invitation to refer the matter to the Court of Appeal, and instead took upon himself the task of ordering a new Preliminary Hearing:

> *"...I have stated earlier that there was an omission on the part of the Learned Principal Magistrate who conducted preliminary hearing of this case. He omitted to have the accused persons sign the memorandum; he omitted having the memorandum and ExhP1, read to the accused person and he also omitted having that ExhP1 shown to the 2 accused persons.*
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> *These omissions if un-rectified, and the matter proceeds for hearing to the finality they become an error which render the proceedings defective. This case has not proceeded for hearing. Apparently I have succeeded these proceedings from another Principal Resident Magistrate. Now will making good those omissions at this stage of the case where hearing of the case has not yet commenced, amount to this court doing which*

this court does not have power to? I do not think that an answer to that question can be in affirmative. ...

....So I do hold that this court has powers in the circumstances of this case, to make good the omission on the reasons I have advanced above. As a succeeding Magistrate I order that the Preliminary Hearing be redone so as to complement that which was omitted by the predecessor so as to ensure that Justice is done to both parties and also that the same is not delayed. It is so ordered.

Sgd. Hon. E.F. Mchauru-PRM

EXT JURISDICTION

16/06/2016"

At the hearing of the appeal on 31st August, 2016, learned Principal State Attorney, Mr. Tumaini Kweka assisted by Ms. Mkabatunzi Derrick, learned State Attorney appeared for the appellant Republic. Mr. Aloyce Sekule, learned advocate, appeared for the two respondents.

At the very outset, Mr. Kweka conceded that the defects which he highlighted through this Criminal Appeal No. 293 of 2016 should ideally have been brought to the attention of the Court by way of a revision instead of the appellate avenue as it has. Mr. Kweka urged us to invoke

our power of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (AJA) to quash and set aside the entire proceedings and decisions of both Rusema-PRM EJ and Mchauru-PRM (EJ) on grounds of the three errors which were outlined and acknowledged to by Mchauru-PRM (EJ).

To reiterate his position, Mr. Kweka submitted that the accused persons should also have signed the memorandum of undisputed facts. Page 3 of the supplementary record shows that only their defence counsel, and the learned State Attorney (Prosecuting Attorney) who appended their signature. The learned Principal State Attorney similarly referred us to irregularity apparent on the face of the proceedings of the preliminary hearing where, after the admission of the post-mortem report (exhibit P1); its contents were not read out to the accused persons.

When asked by the Court to clarify the source of the jurisdiction of the two Principal Resident Magistrates to try the offence of murder which is by law triable in the High Court, Mr. Kweka referred us to section 256A (1) of the Criminal Procedure Act, Cap 20 (CPA) which allows the transfer of such cases from the High Court to a specified Resident Magistrate on an extended jurisdiction. The relevant provision states:

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.*

(2) *For avoidance of doubt, any proceedings or decision conducted or made by a resident magistrate with extended jurisdiction, prior to the coming into, effect of the provisions of this subsection, shall be deemed to have been conducted or made in accordance with the provisions of subsection (1) of this section.*

(3) *The provisions of this Act which governs the exercise by the High Court of its original jurisdiction shall mutatis mutandis, and to the extent that they are relevant, govern proceedings before a resident magistrate under this section in the same manner as they govern like proceedings before the High Court.*

The learned Principal State Attorney also submitted that the Principal Resident Magistrate can only be seized with jurisdiction under section 256A (1) of the CPA upon an order of transfer specifying the name of the Magistrate to conduct the trial on extended jurisdiction. He pointed out

that while there is in the original record of the case an order of the transfer specifying Rusema-PRM, there is no such an order specifying that Mchauru-PRM shall take over the trial upon the completion of the preliminary hearing conducted earlier by Rusema-PRM. In the absence of such an order of transfer, he submitted, it is not clear in what circumstances Hon. Mchauru-PRM was seized with requisite jurisdiction to try the offence of murder. He submitted that this irregularity occasioned by absence of an order of transfer, calls for revision of the proceedings and decision of Mchauru-PRM.

Mr. Sekule the learned counsel for the respondents agreed with the submissions of the learned Principal State Attorney, to the effect that the record of the proceedings of Preliminary Hearing before Rusema-PRM are riddled with fundamental irregularities calling for revision of the proceedings. He too called upon the Court to invoke its power under section 4 (2) of AJA.

To support his line submissions to the effect that Mchauru-PRM should not have assumed jurisdiction on extended jurisdiction without being mentioned in a transfer order, Mr. Sekule referred us to the decision of this Court in **Said Sosthenes and Athuman Omary vs. Republic**

MZA Criminal Revision No. 1 of 2012 (unreported). In that case, the Court dealt with the scenario of a case where by an Order for transfer made under section 173 (1) of the CPA by the High Court in Mwanza transferred for trial before B.D. Safari a Resident Magistrate. Consequent to that transfer, another Magistrate, J.E. Mtotela, conducted a Preliminary Hearing albeit on extended jurisdiction. But the same case came up for trial before Rweyemamu, J. at the High Court. When the matter came up for revision, the Court stated that the proper provision that should have been invoked for purposes of transfer is section 256A (1) of the CPA. The Court gave the following restatement of the law which Mr. Sekule urged us to seek guidance:

> *"...Even if the proper provision of the CPA would be invoked (section 256 A (1) above), yet there is another hurdle to be overcome.* ***The order was directed to Mr. Safari. But as stated above, the Preliminary Hearing was conducted by Mr. Mtotela, who had not been invested with the power to conduct the hearing in that particular case****. It is worth noting that* ***orders made under section 256A (1) of the CPA, are directed to a particular, individual magistrate with extended jurisdiction, not to the court where there could be more than one such magistrate***

and then anyone of them conducts the hearing. *Were it to happen that the magistrate assigned to conduct such hearing is incapable of proceeding with the hearing, then a subsequent magistrate has to be specifically assigned by an order issued by the relevant judge of the High Court. In the instant case we are not certain why the case ended up in the hands of Mr. Mtotela. What is certain however, is that the proceedings conducted by Mr. Mtotela were an irregularity, therefore null and void for want of competence."* [Emphasis added].

From pointed submissions made by Mr. Kweka and supported by Mr. Sekule, the irregularities in the proceedings of the preliminary hearing before Rusema-PRM go to the root of the proceedings and we need not belabour the point any further. We shall go along with what this Court stated in **Hamimu Hamisi Totoro Zungu Pablo and Two Others vs. R.,** Criminal Appeal No. 170 of 2004 (unreported) a defective preliminary hearing was at issue:

"....We have studied the proceedings of this day and we are satisfied that they were not conducted properly. ***In terms of section 192 of the Criminal Procedure Act, (CPA) both***

the accused and the prosecutor have to agree to the memorandum of undisputed facts before such facts are recorded as being undisputed. *Section 192 of the CPA provides as follows:*

> *"192. Preliminary hearing to determine matters not in dispute.*
>
> *(1) Notwithstanding the provisions of section 229, if an accused 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 not in dispute between the parties and which will promote a fair and expeditious trial.*
>
> *(2) In ascertaining such matters that are not in dispute the court shall explain to the accused who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as it thinks fit; and the answers to the questions may be given without oath or affirmation.*
>
> *(3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the*

memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.

Looking at the way the Preliminary Hearing was conducted; one gets the impression that ***the facts, which were recorded as undisputed, were merely the facts as read by the public prosecutor. It is nowhere indicated that the magistrate explained to the accused persons before him about the nature of a preliminary hearing in terms of section 192 (2) of the CPA. The trial magistrate only indicated that he complied with section 192 (3) of the CPA. He did not indicate whether he complied with sub-section (2) of section 192 as well.****"*[Emphasis added].

From settled case law on the scope of section 256A of the CPA as expounded in several decisions of the Court [like **Said Sosthenes and Athuman Omary (supra)** and **Theophili Kamili vs. R.**, Criminal Appeal No.100 of 2012 (unreported)], an order of transfer of criminal case to a magistrate on extended jurisdiction must first be made to a specified

magistrate before that specified Resident Magistrate takes up the case on extended jurisdiction. A specific order of transfer is not so open-ended as to allow a successor magistrate to take over the hearing without a specific order of transfer in his name. With due respect, Mchauru-PRM erred in law to suggest as he did, that once an order of transfer of a trial has been made to a specified magistrate under section 256A (1) of the CPA, another magistrate can take over the trial as a successor magistrate without a fresh order of transfer. Mchauru-PRM had stated:—

> *"...Apparently I have succeeded these proceedings from another Principal Resident Magistrate..."* ...
>
> *"...As a succeeding Magistrate I order that the Preliminary Hearing be redone so as to complement that which was omitted by the predecessor..."*

We think, Mchauru-PRM having been published in the official Gazette under section 173 of the CPA as a magistrate invested with extended jurisdiction to try any category of offences ordinarily tried by a Judge in the High Court, it does not automatically mean that he could take over as a successor magistrate for the hearing of the trial for murder which had

earlier been specifically assigned in the name of Rusema-PRM. We can hasten to add that even if there was any order of transfer specifying Mchauru-PRM to conduct the trial after Rusema-PRM had completed the preliminary hearing, his jurisdiction could not extend to reversing the decision of a fellow Principal Resident Magistrate.

In our reckoning, section 173 of the CPA merely creates a pool of magistrates with equal standing in so far as extended jurisdiction is concerned, and any one of whom may be assigned in his or her specific name, with the jurisdiction to hear a specific case ordinarily triable by a Judge in the High Court. The relevant section 173 of CPA states:

> ***173.-(1)*** *The Minister may after consultation with the Chief Justice and the Attorney General, by order published in the Gazette–*
>
> > *(a) invest any resident magistrate with power to try any category of offences which, but for the provisions of this section, would ordinarily be tried by the High Court and may specify the, area within which he may exercise such extended powers; or*
> >
> > *(b) invest any such magistrate with power to try any, specified case or cases of such offences and such*

magistrate shall, by virtue of the order, have the power, in respect of the offences specified in the order to impose any sentence which could lawfully be imposed by the High Court.

(2) Nothing in this section shall affect the power of the High Court to order the transfer of cases.

In light of the foregoing fundamental irregularities this matter which came before us by way of an appeal, calls for the exercise of the Court's power of revision under section 4 (2) of the AJA.

We hereby invoke our revision jurisdiction and we nullify, quash and set aside the entire Preliminary Hearing proceedings before Rusema-PRM (EJ) in Criminal Session Case No. 13 of 2014 which was conducted in the Resident Magistrate's Court of Morogoro at Morogoro together with the Order of adjournment pending the trial. We similarly nullify, quash and set aside the proceedings of the trial that was conducted on 15th June, 2016 by Mchauru-PRM (EJ) together with the resulting Ruling which the Principal Resident Magistrate (Mchauru-PRM, EJ) delivered on 16th June, 2016.

We finally direct that the Criminal Session Case No. 92 of 2013 Information of which was filed in the District Registry of the High Court at Dar es Salaam, should as soon as practicable, begin afresh at the stage of Preliminary Hearing. It is so ordered.

DATED at **DAR ES SALAAM** this 5th day of September, 2016.

M.C. OTHMAN
CHIEF JUSTICE

I.H. JUMA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL