

TANZANIA / JUDGMENT

# CRIMINAL APPEAL NO 444 OF 2020 GERADI JOHN MAMKWE VS THE REPUBLIC

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IN THE COURT OF APPEAL OF TANZANIA AT MOSHI (CORAM: MWARI3A. 3.A., KENTE. 3.A And MGONYA. 3.A.1 CRIMINAL APPEAL NO. 444 OF 2020 GERADI 30HN MAMKWE ..... APPELLANT VERSUS THE REPUBLIC .....RESPONDENT (Appeal from the Decision of the Resident Magistrate's Court of Moshi at Moshi) fMazenao, PRM- Ext. 3ur.1i dated the 7th day of September, 2020 in Criminal Session Case No. 20 of 2019 JUDGMENT OF THE COURT 19\* & 22nd March, 2024 MWARIJA. J.A.: This appeal lodged by the appellant, Geradi John Marnkwe is against the decision of the Resident Magistrate's Court of Moshi (Mazengo, PRM - ExtJur.) arising from Criminal Session Case No. 20 of 2019. In that case, the appellant was charged in the High Court of Tanzania at Moshi with the offence of murder contrary to s. 196 of the Penal Code, Chapter 16 of the Revised Laws. It was alleged that on 5/2/2014 at Longuo 'A' Ushirika wa Neema area within the District of Moshi in Kilimanjaro Region, the appellant murdered one Sekunda Onesmo Mushi. The case was transferred to the Resident Magistrate's Court of Moshi in terms of s. 256 A (I) of the Criminal Procedure Act, Chapter 20 and s. 45 (2) of the Magistrate's Courts Act, Chapter 11 both of the Revised Laws, to be heard by a Resident Magistrate with extended jurisdiction. When he was arraigned before the Resident Magistrate's Court of Moshi (the trial Court), the appellant denied the charge, As a result of the appellant's plea of not guilty, the prosecution called four witnesses to testify; Dr. Honest Herman Massawe (PW1), Maliseli Bernad Mushi (PW2), G.7280 D/C Msangarufu (PW3) and E 8063 D/Sgt. Waziri (PW4). On his part, apart from giving his evidence in defence as DW1, the appellant called one witness Joyce Samwel Sabaya (DW2) to testify in support his defence. The background facts giving rise to the appeal may be briefly stated as follows: PW2 was until the material time the Village Executive Officer, Luguo 'A' Village in Uru Kusini Ward. On 6/2/2014, while he was about to go to his office, he received a phone call from the Chairperson of Karume Hamlet in the Village, one Hilda Shoo. She informed him that a certain woman had been seen at a place not far from the appellant's place of residence having been dumped in a pit. He immediately went to the scene and saw the woman in an unconscious state bleeding from a wound on her head. On further observation, he recognized her. He remembered to have seen her with the appellant drinking liquor at Gerald Mamkwe's bar,

which was being operated by the appellant at the place where he was also residing. The woman was still alive but breathed with difficulty. He noticed that there were dragging marks leading to the appellant's residence. PW1 acted by calling the Officer Commanding District (OCD) of the Central Police Station and within a short time, police officers arrived at the scene but at the time when they arrived, the woman had passed away. They traced the dragging marks, which ended in the appellant's room. PW1 witnessed the search of the room in which, several items were found with blood stains. They were inter alia, the bed cover, mattress and the fork hoe (ratoj which was found in the room. The other two witnesses were police officers at the material time, stationed at Moshi District Police Station. PW4 was one of officers who went to the scene of crime. Together with one Cpi Butiku, they accompanied one Inspector Kapusi who led the team of investigators. According to his evidence, PW4 saw the body in the pit having a fresh wound on her head. He also saw the dragging marks which ended up at the appellant's room as stated by PW2. He searched the room and found that the floor and other items mentioned by PW2 had blood stains. They included a fork hoe and adult's trousers. According to the witness, the search was conducted in the presence of the area's Chairman and one Vincent Jacob Puka, the appellant's bar attendant. They all signed the search warrant (exhibit P4). He also drew a sketch map of the scene of crime (exhibit P3). After the search, the body of the deceased was taken to KCMC Hospital for postmortem examination which was conducted by PW1. He stated in his evidence that, the deceased had wounds on her body, including the head where the wounds indicated that she was inflicted with an object having three sharp points or that one sharp object was inflicted three times. He concluded that the cause of death was due to trauma caused on her by use of the described object. He tendered the postmortem report which was admitted in evidence as exhibit P1. On his part, PW3 who recorded the statement of Vincent Jacob Puka tendered it in court under s. 34 B of the Evidence Act, Chapter 6 of the Revised Laws, on account that, that the said person could not be found so as to be summoned to appear in court to testify. The statement was admitted in evidence as exhibit P2. The appellant, who was not around on the date when his room was searched, was later arrested on 6/2/2014 and charged as shown above. In his defence, the appellant (DW1) testified that on 6/2/2014 at about 10:45 hrs, he received a call from PW2 who informed him that a certain person who had been injured, was found near his premises and that there was an arrangement to take that person to hospital. Having been so informed by PW2, he promised to meet him in the evening. The appellant went on to state that, shortly after that call, he received another phone call from his neighbour, one Mama Assenga who told him that, unknown persons had thrown a dead body at His (DW1's) compound and that he should disappear for the purpose of his safety. DW1 called PW2 and asked him as to why he was hiding that information and the reply by PW2 was that, he did not want to disclose that information fearing that the appellant would not return home. He however, decided to go back home and when he was asked about the incident, he replied that he knew nothing about it. He went on with his business until the closure time of 21:00 hrs and went to his residence. On the next day, he was questioned by PW2 and other village leaders about the suspicion that he was involved in the murder of the deceased but denied the allegation. He testified further that, later on, he went to police station in the company of PW3, one Alex Matei, the ten cell leader of Longuo 'A' street. It was the appellant's further testimony that the information he had is that, the deceased was killed

by the members of the peoples' militia (sungusungu). He testified further that, he had grudges with PW2 because of the allegation that the appellant had been enticing the former's wife to have sexual relationship with Mwenge University Students. He denied knowing the deceased, contending that he had never seen her. DW2, the appellant's wife stated that she operated a restaurant business at Ushirika wa Neema where her husband, the appellant operated a bar and a shop. It was her evidence that on 5/2/2014 she was with the appellant at their business area and on 6/2/2014 the appellant travelled to Marangu to attend a burial ceremony of their relative. He refuted the allegation that the appellant stayed in a room in the house in which they operated their businesses. Having considered the evidence, which was mostly circumstantial, the trial court was satisfied that the case against the appellant had been proved beyond reasonable doubt. As a consequence, he was convicted and sentenced to suffer death by hanging. He was aggrieved hence this appeal. In his memorandum of appeal filed on 9/7/2021, the appellant raised a total of 10 grounds of appeal and later on 28/2/2022 and 19/2/2024 he filed two supplementary memoranda of appeal consisting of 5 and 8 grounds (the 1st and 2nd Supplementary Memorandum of appeal respectively). For reasons to be apparent herein, we need not state the substance of each ground of appeal. At the hearing of the appeal on 19/3/2024, the appellant, who was present in Court, was represented by Mr. Elia Johnson Kiwia, learned counsel while the respondent Republic was represented by Ms. Jenipher Massue, learned Principal State Attorney assisted by Ms. Veronica Moshi, learned State Attorney. In ground 4 of the first supplementary memorandum of appeal, the appellant raised a point of law to the effect that, the learned trial Principal Resident Magistrate did not have jurisdiction to try the case. Ms. Massue readily conceded to that ground of appeal. She agreed that the learned trial Principal Resident Magistrate did not have jurisdiction because, the case was transferred to the Resident Magistrate's Court to be heard by Mahimbali, SRM-Ext.Jur as he then was. For that reason, the learned Principal State Attorney submitted that, Mazengo, PRM-ExtJur. lacked jurisdiction because the case was not assigned to her in terms of s. 256 A

- (1) of the CPA. She cited the case of Frank Lucas Ntende v. Republic, Criminal Appeal No 266 of 2019. In the circumstances, Ms. Massue prayed that the proceedings of the trial court be nullified, the appellant's conviction be quashed, the sentence be set aside and a retrial be ordered. Mr. Kiwia supported the position taken by the learned Principal State Attorney. He did not have anything substantial to add. The 4th ground of appeal in the first supplementary memorandum of appeal in which the appellant raised a point of law on the jurisdiction of the learned trial Principal Resident Magistrate is, as conceded by Ms. Massue, meritorious. The transfer order of the High Court which is at page 71 of the record is clear. The case was assigned to F.H. Mahimbali, SRM-Ext. Jur. It was however, heard by Mazengo, PRM-Ext. Jur. In the absence of another order of the High Court transferring the case to her, the learned trial Principal Resident Magistrate lacked jurisdiction to preside over and decide the case. The transfer of the case was made pursuant to s. 256 A (1) of the CPA which provides as follows: "255 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 subsection (1) of section 173." It is clear from the provision of the CPA reproduced above that, in a transfer order, the Resident Magistrate with extended jurisdiction who is to take the plea and conduct the trial of an accused person must be specified. See for instance, the case of Nasra Hatnis Hassan v. Republic, Criminal Appeal No. 545 of 2017 (unreported). In that case, a transfer order was issued by the High Court for the trial to be conducted in the Resident Magistrate Court by Shaidi, Principal Resident Magistrate with extended jurisdiction. The trial was however, conducted by Kalli, Principal Resident Magistrate with extended jurisdiction. On that anomaly, the Court nullified the proceedings on the ground that the learned trial Principal Resident Magistrate did not have jurisdiction. The position is not different from the situation in the present case. We thus agree with the learned Principal State Attorney and since the determination of the point raised in the argued ground of appeal suffices to dispose of the appeal, the need for considering other grounds of appeal does not arise. In the event, we allow the ground of appeal and consequently, nullify the proceedings of the trial court, quash the appellant's conviction and set aside the sentence. We direct that the record be remitted to the High Court for retrial of the appellant according to the law. Meanwhile the appellant shall remain in custody awaiting his retrial which should be expedited. DATED at MOSHI this 22nd day of March, 2024. A. G. MWARIJA JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL L. E. MGONYA JUSTICE OF APPEAL The Judgment delivered this 22nd day of March, 2024 in the presence of Mr. Elia Johnson Kiwia, learned Counsel for the Appellant and Ms Bertina Tarimo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original. y —tu R. W. CHAUNGU DEPUTY REGISTRAR COURT OF APPEAL 10

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