

THE PEOPLE v BASIL MASAUSO AND PATSON MUSENGE SAKAMBA
(1980) Z.R. 243 (H.C.)

HIGH COURT, NDOLA
MOODLEY, J.
8TH APRIL, 1980
HNR/252/80

Flynote

Courts - Transfer of cases - Transfer between magistrates of same class in same district - Whether formal order of transfer required.

Procedure - Transfer of cases - Transfer between magistrates of same class in same district - Whether formal order of transfer required .

Headnote

Two accused persons had appeared before a class one magistrate at Kalulushi who had recorded their pleas. The Senior Resident Magistrate at Kitwe who administratively has supervisory jurisdiction over the subordinate court at Kalulushi directed a magistrate class one from Kitwe to go and try that case. The main contentions were that the Senior Resident Magistrate exceeded his jurisdiction in delegating a magistrate class one from Kitwe to try a case at Kalulushi and secondly that a formal order of transfer was necessary.

Held:

Between magistrates of the first class within the local limits of the same district, no formal order of transfer is required from one magistrate of the first class to another provided that the case to be determined is not a part-heard one. It is only when the case is remitted for hearing to a magistrate of the second or third class would a formal order of transfer be required on the part of the magistrate of the first class.

Legislation referred to:

Criminal Procedure Code, Cap. 160, ss. 75, 77 (1), 78, 80 (a).

Subordinate Court's Act, Cap. 45, ss. 4, 27. 30

Constitution of Zambia, Cap. 1, s. 98 (5).

Cases referred to:

(1) The People v Chaponda (1973) S.J.Z. 26.

Judgment

MOODLEY, J.:

This case was forwarded to the High Court by a magistrate of the first class at Kalulushi for purposes of review. On 5th February, 1980, two accused persons, both police officers, appeared before the magistrate of the first class at Kalulushi, charged with illegal possession of emeralds, contrary to s. 321 (1) of the Penal Code, Cap. 146 and on the second count they were charged with mining minerals without a licence contrary to ss. 44 and 125 of the Mines and Minerals, Act No. 32

of

1980 ZR p244

MOODLEY

J

1976. Both accused persons pleaded not guilty to the two courts in the charge. Subsequently the Senior Resident Magistrate at Kitwe who administratively has supervisory jurisdiction of the subordinate court at Kalulushi deputed a magistrate class one from Kitwe to proceed to Kalulushi in order to preside over the trial of this case. Communication to this effect was scan to the magistrate of the first class at Kalulushi on the 25th February, 1980. The magistrate at Kalulushi did not comply with the directive of the Senior Resident Magistrate, Kitwe. Instead he delivered a ruling to the enact that the learned Senior Resident Magistrate, Kitwe, had no jurisdiction to depute another magistrate of the first class to take over the case which was already properly within his own jurisdiction. Accordingly he ordered that both accused persons should be discharged and directed that the record of the case be sent to the High Court for review.

This court has read the ruling in question. It would appear that the learned magistrate at Kalulushi objected to the conduct of the Senior Resident Magistrate at Kitwe in deputing another magistrate from Kitwe to come and try the case since the offences were committed within the district of Kalulushi and not Kitwe. The magistrate at Kalulushi took the view that the conduct of the Senior Resident Magistrate, Kitwe in delegating another magistrate to preside over the case rendered the proceedings a nullity. He relied on the judgment of Mr Justice, W. B. Scott, in the case of *The People v George Chaponda* (1). He contends that the magistrate class one from Kitwe had no jurisdiction to preside over the matter because it had not been transferred to him and that the learned Senior Resident Magistrate had not informed him as to why the case should be tried by another magistrate. I reproduce below the final paragraph of that ruling: "While I recognise the fact that the Senior Resident Magistrate, under our administrative system, is my superior officer and has supervisory jurisdiction over this court, I must confess my inability to appreciate his actions in this case. Not only that his approach has not been conducive to smooth running of our department but also it has not reflected credit on us in the eyes of the public. I need hardly say that I am innocent. I have refused to be used as a sacrificial lamb for injustice."

Quite clearly the above paragraph in the ruling is not only impertinent but an act of serious indiscipline on the part of the magistrate class one at Kalulushi In order to justify his view that the learned Senior Resident Magistrate had exceeded his jurisdiction in delegating a magistrate class one from Kitwe to try the case at Kalulushi, he relies on ss.77 (1) and 75 of the Criminal Procedure Code, Cap. 160, ss. 4 and 27 of the Subordinate Court's Act, Cap. 45, and s. 98 (1) of the Republican Constitution. The short answer to the reliance placed on these statutory provisions is that they are irrelevant to the real issue in this case. The issue here is whether the Senior Resident Magistrate acted within his jurisdiction to depute a magistrate class one from Kitwe to proceed to Kalulushi to preside over the case involving these two accused persons.

It should be remembered that the magistrate class one at Kalulushi had merely recorded the pleas from the accused persons and thereafter

1980 ZR p245

adjourned the matter to a later date for trial. Chaponda's case (supra) is distinguishable from this case. In Chaponda's case the learned magistrate after taking the plea had proceeded to trial and had recorded the evidence of five witnesses. Through an administrative error the case went before another magistrate who failed to appreciate that this was a part-heard case and erroneously dismissed the charge and acquitted the accused. Now in the instant case the trial had not commenced and consequently it would have been perfectly proper for the magistrate class one from Kitwe to have conducted the trial in the circumstances. When the magistrate class one from Kitwe proceeded to Kalulushi to determine the case, was a formal order of transfer from the magistrate class one at Kalulushi necessary? It should be remembered that when the magistrate class one from Kitwe proceeded to Kalulushi he was to all intents and purposes a magistrate who was holding a subordinate court of the first class at Kalulushi and accordingly he was entitled to exercise his jurisdiction within the local limits of the district of Kalulushi. Section 78 of the Criminal Procedure Code, Cap. 160, reads:

" Any Magistrate holding a Subordinate Court of the first class (a) may transfer any case of which he has taken cognizance for inquiry or trial to any subordinate court empowered to inquire into or try such case within the local limits of such first class subordinate Court's jurisdiction "

It would hold that between magistrates of the first class within the local limits of the same district, no formal order of transfer is required from one magistrate of the first class to another provided that the case to be deterred is not a part-heard one. It is only when the case is remitted for hearing to a magistrate of the second or third class would formal order of transfer be required on the part of the magistrate of the first class.

It is quite clear therefore that the magistrate of the first class at Kalulushi took an erroneous view of the law when he held that the magistrate of the first class from Kitwe on arriving at Kalulushi, was not entitled to exercise jurisdiction in Kalulushi simply because he took the view that he was still a magistrate class one at Kitwe. However, even if the magistrate class one at Kalulushi had formed a mistaken notion of the law when he held that the Senior Resident Magistrate, Kitwe, had no jurisdiction to depute a magistrate class one to go to Kalulushi to preside over a case which he, the magistrate class one at Kalulushi was already seized with, there was no reason why he did not proceed to hear and determine the case involving these two accused persons according to the law. There was absolutely no justification for him to discharge these two accused persons without going through the merits of the case. It is worth noting that neither the public prosecutor nor the defence counsel were heard in the matter before the accused persons were discharged. Reading the ruling, it appears patently clear that the magistrate at Kalulushi took offence at the learned Senior Resident Magistrate's conduct and accordingly discharged the accused persons without giving any reasons for this action. In my view the magistrate class one at Kalulushi has behaved in a most irresponsible

fashion and his conduct could only be described as an abuse of judicial process. The maxim that "justice must not only be done but must be manifestly seen to be done" is often quoted. This maxim not only applies to an accused person but should also apply to the complainant who in this case is the State. Since the magistrate at Kalulushi had no legal basis for discharging the accused persons, I declare that his order is a nullity and is of no effect. The discharge of these accused persons in these circumstances does not have the effect of an acquittal and is not a bar to fresh proceedings on the same facts. I recognise that the accused persons may have been inconvenienced but they have not been jeopardised in any way. In view of the fact that I have already declared that the order discharging these accused persons is a nullity, I would direct that in terms of s. 80 (1) (a), this case is transferred to the subordinate court of the first class at Kitwe to be tried by the Senior Resident Magistrate. I further direct that a copy of these proceedings be forwarded to the Registrar of the High Court for such action as he may consider necessary.

Order accordingly

1980 ZR p246