IN THE HIGH COURT OF TANZANIA

AT SONGEA

CRIMINAL APPEAL NO.2 OF 2007
(Original Criminal Case No. 435 of 2006 of the District Court of Songea District at Songea)
THE D.P.P.....APPELLANT
Versus
DANIEL GASPARY HAULE.....RESPONDENT

Hearing Concluded: 4/7/2007
Judgment Delivered: 6/8/2007

JUDGMENT

UZIA, J

In the District of Songea, Z.A. Maruma, Resident Magistrate acquitted the accused person, one Daniel Gaspary Haule who was charged with the offence of Criminal trespass c/s 299 (a) of the Penal Code. As a matter of clarity, the learned Resident Magistrate couched her order in the following words:

Court: "It seems the same case was withdrawn under section 222 of C.P.A of 1985 and accused was acquitted."
Order: "Accused shall be free unless otherwise charged".

Following this order, the appellant, Director of public prosecutions represented by the State Attorney filed an appeal against the order. Only one ground was filed in this court that the trial court erred in law and fact on not finding that there was no proof of the plea of antrefois acquit to the Respondent.

The State Attorney, prayed to this court to allow the appeal and quash the dismissal order and order a trial de novo.

When hearing the appeal, Mr. Ismail Manjoti, learned State Attorney, attacked that order, that the learned magistrate erred in law in acquitting the said accused person as there was no proof of the defence of antrefois acquit. He submitted, that since there was nothing to suggest that the appellant was charged and acquitted on the same offence, the learned magistrate strayed into a serious error in making the impugned order. He further contended that it was unfortunate that magistrate made the order without making reference to any charge which accused person faced and acquitted. I agree with a State Attorney that, the principle laid down in the case of **Maduhu Versus Republic** (1991) TLR 143 was not followed. In that case, Katiti, J as he then was held;

> "(i) *It is the duty of the accused to plead antrefois acquit in order to derive the advantage or benefit thereof;*
>
> *(ii) an accused person can raise the plea at any time, either as plea in the bar to the second prosecution, or, at any stage in t he proceedings, before the closure of the defence case;*
>
> *(iii) It is the general rule that in pleas of autrefois acquit or convict, the burden of proof, (onus probandi) lies on the party who asserts the affirmative of the issue, or question in dispute".*

In the instant case, the learned trial magistrate stepped into the accused's shoes, when she stated "It seems the same case was withdrawn under section 222 of C.P.A of 1985 and accused was

acquitted". That being the case, the irregularity is, in my opinion, a ground for faulting the learned trial magistrate order.

I therefore quash the said ruling and set aside the order. In the event, and for the reasons stated, I allow the appeal and order trial de-novo, the case be heard by another competent magistrate.

L. M. K. UZIA

JUDGE

6/8/2007

I certify that this is a true copy of original.

DISTRICT REGISTRAR

HIGH COURT

SONGEA