IN THE HIGH COURT OF TANZANIA

**AT TABORA**

APPELLATE JURISDICTION

(Tabora Registry)

(PC) CRIMINAL APPEAL NO. 1 OF 2008

ORIGINAL CRIMINAL APPEAL CASE NO. 47 OF 2006

OF THE DISTRICT COURT OF SHINYANGA DISTRICT

USANDA PRIMARY COURT CC. NO. 38/2006

**AT SHINYANGA.**

BEFORE: E.B. LUVANDA,Esq; RESIDENT MAGISTRATE

**MBOJE S/O MPUNGATI.....APPELLANT**
**(Original Accused)**

**VERSUS**

**MVIGA S/O GASPAL.....RESPONDENT**
**(Original Prosecutor)**

**JUDGMENT**

*8th Feb.08 & 26th Oct. 09*

**WAMBALI, J.**

This is a second appeal preferred by the Appellant Mboje Mpungati after the District Court of Shinyanga at Shinyanga had dismissed his appeal against conviction and sentence imposed on him and another by the Primary Court of Usanda in Shinyanga District.

Briefly, the appellant together with two others, namely Shija Mpungati and Moshi Kulwa were charged by the complainant one Mviga Gaspal (the present respondent) of the offence of solicitation and incitement to commit offence contrary to section 390 of the Penal Code Cap.16 (R.E. 2002) of the Laws of Tanzania. The Primary Court of Usanda upon hearing the evidence by the prosecution and the defence of the appellant and others, acquitted the first accused Shija Mpungati and convicted Moshi Kulwa and the appellant of the offence as charged and sentenced both of them to one year in jail and to pay compasation of Shs. 500,000/= to the complainant. On appeal to the District Court of Shinyanga by both the appellant and Moshi Kulwa, the decision of the Primary Court was upheld and thus the appeal was dismissed. The appellant having been dissatisfied by that decision has appealed to this Court. It is important, in my view, to note that Moshi Kulwa who appealed to the District Court at Shinyanga unsuccessfully, has not appealed to this Court.

The appellant before this court lodged four grounds of appeal contesting the decision of the District Court which upheld the findings of the Primary Court. During the hearing of the appeal, Mr. M.K. Mtaki, advocate appeared for the appellant while the respondent appeared in person. Before urguing the appeal Mr. Mtaki informed the Court that the grounds of appeal were drawn by the appellant himself without any legal assistance. He stated further that after

going through the grounds he found that only one ground, that is, number (iii) was relevant to the appeal. He therefore prayed, which prayer was granted, to withdraw grounds (i),(ii) and (iv) of the petition of appeal. The respondent too had no objection to the prayer.

For the sake of record and consistence I reproduce ground (iii) hereunder;

> ***"(iii) <u>THAT</u>, the learned Resident Magistrate erred in law that the Primary Court Magistrate was correct in the decision in favour the respondent that the evidence introduced by the Respondent was with her witness.'***

In his submission in support of the ground of appeal, Mr. Mtaki learned advocate for the appellant stated that the learned Resident Magistrate erred in law in believing like the Primary Court the evidence of PW.2 that she was solicited and incited to commit the offence by the appellant. Mr. Mtaki stated that there is no dispute that on the material day PW.2 left her matrimonial home belonging to her and the respondent to Kahama where her parents live due to matrimonial misunderstanding. He stated that it is also on record that she left home with personal effects and bags of rice, the amount of which is not known. He also said that on the way to Kahama he

met the appellant, but insisted that there is no evidence which indicated that the appellant assisted her (PW.2) to carry the said bags of rice as claimed. He submitted that having regard to the circumstances of the matter, Pw.2 could not be regarded as reliable witness as she had her own interest to serve due to the misunderstanding between her and her husband (respondent). Mr. Mtaki was quick to argue however that even if it could have been accepted as a fact that PW.2 was assisted to carry her properties including rice there could never had been any offence committed as she was taking her properties. PW.2 could not in the circumstances have committed the offence under section 390 of Cap. 16 as she was taking her matrimonial properties. Mr. Mtaki therefore criticised the trial Primary Court Magistrate and the District Court for coming to the finding and conclusion that the offence under the said section was committed by the appellant. He insisted that even the number of bags of rice claimed to have been taken from the matrimonial home is not known despite the fact that the record indicates eight (8) bags. Mr. Mtaki finally prayed for the appeal to be allowed, conviction and sentence set aside and the order of compensation to be vacated accordingly. In reply to the submission by Mr. Mtaki learned advocate for the appellant, Mr. Mviga Gaspal, the respondent stated that he wished to repeat what he stated at the District Court that PW.2 was a credible witness since she is the one who saw the whole transaction. He further stated that PW.2 could not mistake the appellant as he is their neighbour. He stated that it was because of

her evidence that the trial Primary Court acquitted the first accused Shija Mpungati and convicted the second accused and the appellant. He thus wondered why PW.2 could not be taken as credible and trustworthy witness. The respondent in response to the submission by Mr. Mtaki learned advocate that PW.2 was taking her properties, stated that in normal circumstances she could not take properties without agreement or his consent and that she must have been assisted to carry the properties upon being convinced by the appellant. He insisted that the properties belonged to both of them and thus they could not be taken without agreement.

He insisted that Kahama is not her home, she just went there to her relative. He stated that he did not witness the appellant taking properties but he was told by PW.2 that she was assisted to take properties by the appellant and another. He stated that the second accused Moshi Kulwa found him on the alleged day at Ifumba Nzega but he did not know what had happened at home until when he returned with his wife (PW.2).

From the foregoing the major point for determination is whether the evidence adduced at the trial by the prosecution side was sufficient to convict the appellant. It is clear from the ground of appeal that appellant is of the opinion that the evidence of the prosecution did not prove the case beyond reasonable doubt.

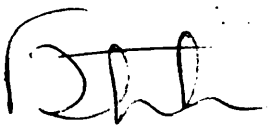
Going by the record of the trial Primary Court it is clear that Helena Deus gave her evidence which was believed by the trial magistrate and gentlemen assessors. It is noted that what the witness stated during examination in chief was firmily repeated during cross-examination by both the appellant and the second accused who has not appealed. The witness (Helena Deus) is the one who was involved in the whole transaction in which the appellant and another are said to have solicited and incited her to take the properties out of the matrimonial home and the same were stored by the second accused. Those properties have not been recovered to date. Mr. Mtaki learned advocate stated that the number of bags of rice allegedly taken is not known. However it is my opinion that throughout the recorded of the trial court, the number of bags of rice is stated as 8. Moreover Mr. Mtaki stated that even if it can be argued and accepted that the witness took the properties from the matrimonial home, the same could not be an offence as she was claiming her right. It is my view that the argument can not stand as the witness was not charged with stealing which could have raised the defence of claim of right. In the particular case the accused were charged with the offence of solicitation and incitement, the right of claim of right could not stand. As to the fact that the witness (Helena Deus) had her interest to save, it is my view that throughout the record there is no where it is indicated that the witness, complainant (PW.1) and the appellant though neighbours had any

conflict between them which could have lead to the framing of the charge.

Basing on what has been stated above it is clear that the prosecution proved its case beyond reasonable doubts and there is no way to interfere with the finding of the trial and appellant District Court. The appellant was rightly convicted. However, before coming to the end of this decision, I have noted that in imposing the sentence the trial court indicated clearly that the sentence had to be confirmed by the District Court as required under the Magistrate Court Act, Cap.11, Third Schedule Part II Rule 7(1)(a). The District Court did not indicate to have confirmed the same. Equally the trial Primary Court ordered compasation which was in excess of its jurisdiction as mandated under Rule 5(1)(b) of the Third schedule to the Act. Unfortunately the learned Resident Magistrate who presided over the appeal at the District Court only noted that the Primary Court had power to order composition but did no go beyond to see if the compasation was within the law.

In this regard, it is ordered that the matter of compasation and sentence of 12 months be remitted to the District Court for confirmation or otherwise as required by law. Apart from this fact the appeal as far as conviction is concerned is dismissed accordingly.

It is so ordered.

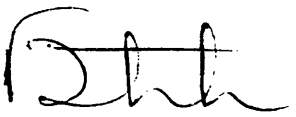


F.L.K. WAMBALI

**JUDGE**

26/10/2009

Judgment read in presence of Mr. Mtaki, Advocate for the appellant who is present in person and the respondent who is also present in person today 26th October, 2009.

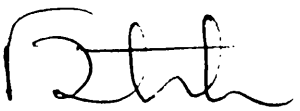


F.L.K. WAMBALI

**JUDGE**

26/10/2009

Right of Appeal explained.



F.L.K. WAMBALI

JUDGE

26/10/2009