

**IN THE HIGH COURT OF TANZANIA
AT MWANZA**

MWANZA DISTRICT REGISTRY

PC CIVIL APPEAL NO.40 OF 2019

(Arising from the decision of the District Court of Magu civil appeal No.01 of 2019, originating
from the Magu urban Primary court civil case No.122 of 2018)

SHITEBO MALONJA.....APPELLANT

VERSUS

JAMES MAPUBU.....RESPONDENT

JUDGEMENT

23.11.2019 & 18.2.2020

U. E. Madeha. J

At hand, this is the second appeal from the District Court of major civil appeal No.01, from Magu Urban Primary court civil case No. 122 of 2018. Having gone through the records of both trial court and the first appellate court without exploring much into the merits of the appeal, I noticed some irregularities which cannot be left unturned, since they have some impacts on the root of this case.

Both lower courts based their decision on the constitution of the group which was referred as an exhibit in the trial court, particularly section 13 of that constitution which provides for the grounds of cessation of membership.

The constitution of the group is considered to be a documentary evidence, such evidence before admission ought to undergo any procedures or requirements of admissibility. In the case of **Walii Abdallah Kibutwa and two others v Republic**, criminal Appeal No.181 of 2006 and **Robinson Mwanjisi and Three others v Republic**, Criminal appeal No. 154 of 1994 and **Omari Iddi Mbezi v Republic**, criminal appeal No. 227 of 2009 (all unreported) the court held that:

"Documentary evidence whenever it is intended to be introduced in evidence it must be initially cleared for admission and then actually admitted before it can be read out".

From the records of the trial court there is no single paragraph showing whether the document was read to the parties before it is admitted, and even whether the court admitted the said documentary evidence as an exhibit, since it was not marked anyhow by the trial court. In the case of **Lack Kilingani versus Republic**, criminal appeal No.404 of 2015, the court held that failure to read the contents of the documentary evidence after it is admitted in the evidence is a fatal irregularity.

From the above decision, the trial court failed to show anywhere in the proceedings as to whether the purported constitution was admitted in evidence, even if this court has to believe that it was admitted without being marked as an exhibit its contents were not read out to the parties since it lacks any evidence from the court record to support that.

Considering that the constitution of the group happened to be the centre of the decisions of both trial court and the District Court, and having satisfied myself that there were procedural irregularities in admitting the constitution in evidence. I hereby dismiss the appeal and order trial *denovo* by another competent magistrate who should adhere to procedural requirements of the law. Each part should bear its own costs. Ordered accordingly.

DATED and DELIVERED at MWANZA this 18th day of February 2020.




.....
U. E. Madeha
Judge
18/2/2020