

**IN THE HIGH COURT OF TANZANIA**  
**MUSOMA DISTRICT REGISTRY**  
**AT MUSOMA**  
**CRIMINAL APPEAL NO 14 OF 2019**

**BETWEEN**

**AYUB KHAN ODERO** \_\_\_\_\_ **APPELLANT**

**VERSUS**

**SELEMANI LANYA RIWA** \_\_\_\_\_ **RESPONDENT**

*(Arising from the Decision and Orders of District Court of Tarime, Hon. Mugendi RM, in Criminal Appeal no. 6 of 2018 dated 30/05/2019)*

**JUDGEMENT**

Date of last order; 20.03.2020  
Date of Judgment; 27.03.2020

**GALEBA, J.**

The complaint of the appellant in this appeal was originally filed as criminal case No. 10 of 2017 in Nyaburongo primary court in Rorya district in which the respondent who was at the time the chairman of the local community council (mwenyekiti wa baraza la jadi) was being charged for robbery contrary to the provisions of **sections 285 (sic) and 286 of the Penal Code [Cap 16 RE 2002]** (the Penal Code). Although he denied involvement in the robbery (if any), but the primary court convicted him of the offence and sentenced him to pay a fine of Tshs 30,000/= or serve a term of 3 months in prison. He was also ordered to pay the appellant compensation of Tshs 450,000/= for the seized 8 sheep and 1 he goat attached on his

instructions. The respondent appealed to the district court at Rorya and the latter court set aside the decision of the primary court which had convicted the respondent. The appellant was dissatisfied with the decision of the district court hence the present appeal.

The prelude to this appeal is that on 21.04.2017 there was a robbery at **Ms. JANE YUSTO'S** tea shop at a place called Komoro in Tarime district and the stolen items were found at the appellant's house. The allegations being that the thief was the son of the appellant, whose name was not disclosed. On 24.04.2017 two militia men (also called **sungusungu** in Kiswahili), **OMEME RIWA** and **ORENDO OREMO** went to the house of the appellant and seized 8 sheep and 1 male goat and took them away. At the time of seizing the livestock the appellant was not there and he did not see them. **PW2 ZABRON ONYANGO** saw the militiamen with the livestock, and they told him that it was the respondent who had instructed them to attach the livestock. According to this witness, they showed him a letter from the local community council (baraza la jadi) which authorized them to seize the sheep and the goat. This letter however was not tendered in the primary court. **PW2 MICHAEL ODERO** stated that he met the said militiamen with the livestock and they told him that they had been sent by the respondent in his capacity as the chairman of the local community council to seize them. Whereas the livestock were seized on 24.04.2017, the respondent stated that on 24.07.2017 he was attending to a funeral in Kiroleli Bunda which is far away from Rorya where the attachment of the livestock took place. However the

primary court evaluated the above evidence and came up with a finding of fact that the appellant proved the criminal case for robbery of the sheep and the goat against the respondent and it convicted and sentenced him as stated above. The respondent appealed to the district court by filing criminal appeal no 6 of 2018 which appeal was upheld based on the following grounds;

**First**, the said **OMEME RIWA** and **ORENDO OREMO** were not called as witnesses in the primary court to testify as to who sent them to seize the sheep and the goat, **second** the said **OMEME RIWA** and **ORENDO OREMO** were not sued in the Primary Court as they are the ones who were seen with the livestock and **third**, all witnesses who came to testify against the respondent were not in attendance in the local community council meeting in which it is alleged that the respondent instructed the militia men to go and seize the livestock of the appellant.

It is that judgment which is being contested by the appellant before me, predicated the same on the following four grounds of appeal;

***"1. THAT a fair and impartial trial was not done to the appellant by the appellate district magistrate who erroneously hold (sic) at page 3 of the judgment second paragraph that it was the appellant who ordered attachment of his livestock in dispute while in fact the order was made by the respondent as chairman of the militiamen of the area.***

***2. THAT the appellate district magistrate erred in law in deciding the case in favour of the respondent on ground that the militiamen ordered by the respondent to use force to take the appellant's livestock in dispute were not called to testify while in fact the respondent's own witnesses DW2 Doris Yusto proved that fact.***

**3. THAT the appellate district magistrate erred both in law and fact in deciding the case in favour of the respondent on ground that no witness testified to have seen the militiamen ordered by the respondent to use force to take the appellant's livestock to be in possession of livestock in dispute while in fact both PW2 Zabron Onyango and PW3 Michael Odera proved that fact.**

**4. THAT the appellate district magistrate erred in law for failing to heed that the respondent had mens rea in ordering the militiamen to use force to take the appellant's livestock in dispute as no neither (sic) criminal offence nor civil case had been committed by the appellant against the respondent to warrant unlawful seizure."**

At the hearing of this appeal, the appellant submitted that he had one complaint cutting across all grounds; his complaint was that the district court was wrong to hold that before the primary court the offence of robbery was not proved to the required standard in criminal cases. He impressed on me that, although he did not himself see the respondent ordering the militiamen to seize his livestock, but the evidence of **PW2 Zabron Onyango** and **PW3 Michael Odera** proved that the respondent committed the offence and also in the primary court after conviction the respondent admitted to have committed the offence because during mitigation he pleaded that he would never repeat to commit the same offence.

As to who was supposed to call the militiamen to tell the court who ordered them to go and seize the livestock of the appellant, the appellant stated that it was the respondent who was supposed to call them, which, the respondent did not do. The appellant finally prayed that if the district court was right that it was necessary to call the militiamen in order to testify, then this Court be pleased to remit

the original record to the primary court for retrial in order that the militiamen can be called and testify.

On his part the respondent stated briefly that all allegations leveled against him were untrue as he was not in the vicinity of where the crime was committed because he had gone to Kiroleli in Bunda on 17.04.2017 and he came back on 27.04.2017.

I have passionately considered the above arguments in this appeal, and as the grounds were argued together by the appellant, I will resolve the appeal in like manner. The issue for determination being whether the district court was wrong to hold that the offence of robbery with violence was not proved against the respondent in the primary court.

First, the offence in the primary court was robbery with violence **(kosa la unyang'anyi kwa kutumia nguvu k/f 285 & 286 K.A. SURA 16)**. In the primary court facts were that on 24.04.2017 the respondent being the chairman of the local community council sent two militiamen, **OMEME RIWA** and **ORENDO OREMO** to the house of the appellant to attach his livestock. Whereas there was no dispute that the said militiamen seized the livestock, the hotly contested point of contention was who instructed the militiamen to go to the appellant's home and seize his livestock, if at all they were instructed by any authority. The appellant's position was that they were ordered by the respondent; but the respondent's account was that he did not instruct them as he was not even in Rorya at that time.

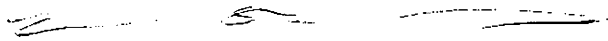
The appellant submitted that it was upon the respondent to prove that he did not order them, but that is not the law, the law is that he who alleges must prove, so it was upon the appellant to prove that it was indeed the respondent who ordered the militiamen to go and attach the appellant's 8 sheep and 1 goat. The issue is did the appellant prove that fact? The respondent relied on the evidence of **PW2 Zabron Onyango** and **PW3 Michael Odera** which evidence was hearsay because these witnesses received the information from the militiamen. Such evidence in law could not have grounded any conviction. Legally, there was needed evidence of the person who heard the respondent ordering the militiamen to attach the appellant's livestock. If that was impossible then the evidence of the militiamen themselves was needed for them to tell the primary court as to who ordered them to seize the appellant's livestock. Unfortunately, neither of such evidence was tendered in the primary court.

I have also noted that the respondent did not admit the offence in the primary court during mitigation. He did not say that he will never repeat to commit the offence rather he said ***"Ninao watoto 10 wanaonitegemea sina mke naomba mahakama inipunguzie adhabu."***

The appellant's prayer to remit the case to the trial primary court so that the proper witnesses can be called, is not meritorious because remitting a matter for trial **de novo** can only be made in cases where there was a technical error in the trial but not for purposes of

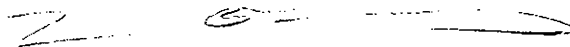
facilitating a party to go and fill in the gaps and lapses by getting better evidence to boost his case.

In the circumstances, I agree with the district court's findings that there was no sufficient evidence in the primary court upon which to base a sound conviction of the respondent for the offence of robbery with violence. It is therefore the holding of this court that this appeal has no merit and the same is dismissed. It is so ordered.



Z. N. Galeba  
**JUDGE**  
**27.03.2020**

**Court;** This Judgment has been delivered this this 27<sup>th</sup> March 2020 in the presence of the applicant and the respondent, both in person.



Z. N. Galeba  
**JUDGE**  
**27.03.2020**