

**IN THE HIGH COURT OF TANZANIA
(MUSOMA DISTRICT REGISTRY)**

AT MUSOMA

PC. CRIMINAL APPEAL NO. 25 OF 2019

*(Arising from Criminal Appeal No. 13 of 2019 in the District Court of
Bunda at Bunda, originating from the Criminal Case No. 195 of 2019
of Bunda Urban Primary Court)*

1. MUGETA MALAGO 1ST APPELLANT

2. EDWARD MALAGO 2ND APPELLANT

VERSUS

AMOSI PAMBARESPONDENT

JUDGEMENT

24th February, 2020

KISANYA, J.

The appellants herein were prosecuted before the Primary Court of Bunda Urban at Bunda, with offence of malicious damage to property contrary to section 326 of the Penal Code [Cap. 16, RE. 2002]. They were found not guilty, and hence discharged of the charged offence. The Respondent was aggrieved by the said decision. He appealed to the District Court of Bunda at Bunda. Upon examining the evidence on record, the first appellate court was satisfied that the case against the appellants was proved beyond all reasonable doubts. Therefore,

both appellants were convicted of the charged offence. They were ordered to compensate the Respondent by paying him Tanzania Shillings (TZS) 490,000 each, within three months from 15/11/2019.

Aggrieved by the first appellate court's decision, the appellants have appealed before this Court on the following grounds:

- 1. That the appellate court convicted the appellants without evidence to prove the offence of malicious damage.*
- 2. That the Respondent failed to adduce evidence to prove the offence, as it was clearly stated in the trial court's judgement that damaged properties were not produced in court as exhibits.*
- 3. That the appellate court grossly misdirected for believing that the said order was damaged without other evidence to support the allegations.*
- 4. That the appellate court wrongly awarded compensation of properties damaged without proof.*

When this appeal was called on for hearing today, both parties appeared in person, legally unrepresented. From the very outset, the Court, *suo motu*, asked the parties to address the issue whether the trial court proceedings were properly conducted. This was after noticing that opinion of assessors was not solicited and their opinion (if any) was not reflected in the judgement of the trial court.

Before proceeding further, let me highlight what driven this appeal. According to the charge, the appellants committed the charged

offence on 06/05/2019 at Kisorya Village within Bunda District in Mara Region by unlawfully breaking "one cup board, two doors, one clothes bag luggage and one thermos," all valued at TZS 980,000, the properties of the Respondent.

The Prosecution marshaled two witnesses to prove the case. The respondent testified as PW1. In his evidence, the respondent testified that, on 06/05/2019 at 1000 hours, he saw the appellant assaulting members of the Ward Tribunal who had visited the *locus in quo*, to resolve land dispute. One of the members (PW2) entered inside his house to hide himself. The appellants broke the entrance door to his house to find him. They continued to assault the said member (PW2). PW1 testified further that in the course of breaking the door, the appellant damaged one cup board, two doors, one clothes bag luggage and one thermos, all valued at TZS 980,000. Another witness was Makulile Masumi (PW2). He testified to be member of the Ward Tribunal who entered inside the respondent's house to hide himself and that the entrance door to PW1 house was stoned by the Appellants who were assaulting him.

On their part, the Appellants denied the charges. Their evidence was to the effect that on 6/4/2019, members of the ward tribunal went to the disputed land. When he asked what they were doing on the on the disputed land, the First Appellant (DW1) was assaulted by PW2 by using a hoe. Thereafter, PW2 ran inside PW1's house.

Being lay person, the both parties had nothing to say on the issue whether the trial court proceedings were properly conducted. However, it was submitted by the appellants that opinion of assessors was given. On the other hand, the Respondent submitted that the opinion of assessors was not given. As stated herein, this issue was raised by the Court, *suo motu*, after detecting that the record does not show whether assessors were consulted to give opinion and that their opinion was not reflected in the trial court's judgement.

This being a second appeal, I can only interfere with findings of the lower courts if there is a misapprehension of evidence, violation principles of law or practice or miscarriage of justice as held in **Wankuru Mwita vs Republic**, Criminal Appeal No.219 of 2012 (unreported) where the Court of Appeal held that:

"... on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

The issue whether the trial proceedings were properly conducted is of point of law. The provisions of sections 6(a) and 7 of the

Magistrates' Courts Act [Cap. 11, R.E. 2002] provide that primary court is correctly constituted by the magistrate and not less than two assessors. I hereby quote section 7 (1) of the said Act for easy of reference:

"In every proceeding in the primary court, including a finding, the court shall sit with not less than two assessors."

Apart from sitting in the primary court, assessors take part in decision making, including deciding whether the accused person is guilt or not. Further, the primary court's decision is reached decided by votes of the magistrate and assessors present. However, the magistrate has a casting vote if there is equality of votes. This is provided under section 7(2) of the Magistrate Courts Act that:

"All matters in the primary court including a finding in any issue, the question of adjourning the hearing, an application for bail, a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award and all questions and issues whatsoever shall, in the event of difference between a magistrate and the assessors or any of them, be decided by the votes of the majority of the magistrates and assessors present and, in the event of an equality of votes the magistrate shall have the casting vote in addition to his deliberative vote.

In order to ensure compliance with the above provisions of law, the primary court's proceedings must show that opinion of assessors was solicited and read over or given in the presence of the parties. Further, the judgement should reflect opinion given by the assessors. The appellate court cannot assume that the law was complied with, if the proceedings and the judgement do not show that fact.

In the present case, the proceedings show that the defence case was closed on 13/6/2019. On the said day, the trial court ordered that judgement would be delivered on 21/06/2019. It is on record that the judgement was written on 21/06/2019 and delivered on 2/7/2019 in the presence of assessors. Also, the judgement does show opinion of assessors and whether the appellant's were found guilty or not guilty by the assessors.

Therefore, I find that failure to solicit opinion of assessors, read their opinion in the presence of the parties and incorporating the decision in the judgement and proceedings vitiated the proceedings of the trial. The first appellate court proceeding was also vitiated because it originated from improper proceedings, as the Court was not properly constituted. This position is based on decision of the Court of Appeal of Tanzania in **Agnes Severini vs Mussa Mdoe** [1989] TLR 164, where it held as follows after recognizing that opinion of one assessor was not given.

'We think that it was mandatory for the second assessor to give his opinion on the final issue in the suit i.e. which party was successful and to what extent. The omission to do so was necessarily fatal, and it rendered the purported decision null and void. That is to say there was no decision by a competent or properly constituted court.'

Therefore, using the powers conferred on me by sections 30 and 31 of the Magistrates' Court Act [Cap. 11, R.E. 2002], I quash the proceedings before the trial court. Likewise, I quash the proceedings before the first appellate court, its judgement and order. For the

aforesaid reasons, there is no need of inviting the parties to address the Court on the grounds of appeal.

I would have ordered for retrial, but, having considered that the appellants were acquitted by the trial due to insufficient evidence, I find that retrial order will benefit the prosecution to fill the gaps in its case. It is settled that retrial order should not be issued where the conviction is set aside for want sufficiency of evidence or if it will enable the prosecution to fill gaps in its evidence at the first trial **(See Ferehali Manji vs Republic [1966] EA 344)**. Therefore, I find that, the circumstances of this case are inappropriate to order re-trial.

It is so ordered.

DATED at MUSOMA this 24th day of February, 2020.


E.S. Kisanya

JUDGE

24/2/2020

Court: Judgement is delivered this **24th day of February, 2020** in the presence of both Appellants and the Respondent.


E. S. Kisanya

JUDGE

24/2/2020

Court: Right of further appeal to the Court of Appeal is well explained to the parties.


E. S. Kisanya

JUDGE

24/2/2020

