

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

AT TANGA

CRIMINAL APPEAL NO.9 OF 2020

(Arising from Criminal Revision No. 04 of 2019 of Handeni District Court)

BETWEEN

NASIBU ALLY MAGWIZA APPELLANT

VERSUS

ASP. LWAMBANO..... RESPONDENT

JUDGMENT

MKASIMONGWA, J.

The Appellant, Nasibu Ally Magwiza who is a school teacher, first stood before the Primary Court of Handeni District at Kabuku charged with Idle and Disorderly Contrary to Section 176 (i) of the Penal Code. It was alleged that:

"Wewe Nasibu Ally @ Magwiza unashitakiwa kwamba mnamo tarehe 19/02/2019 saa 2 asubuhi huko Kijiji cha Komkoga Wilaya ya Handeni na Mkoa wa Tanga ulikamatwa na Kassim S/O Ahmad ukiwa unakunywa pombe muda wa kazi na kuacha kufundisha wanafunzi, Kitendo ambacho ni kinyume na Sheria"

The Appellant pleaded guilty to the charges and he was accordingly convicted of the offence as charged and sentenced to pay Tshs. 10,000/=

fine or serve two months in jail. The Appellant paid the fine and that was on 20/02/2019. On the basis of that conviction the Appellant was later on 30/04/2019 summarily dismissed from employment which fact prompted him sometime on 03/07/2019 to file an Application before Handeni District Court for extension of time in which to appeal against the conviction entered against him by the Primary Court. The Application was not successful as the same was later on 20/11/2019 dismissed for want of prosecution. That decision was never challenged by the Applicant. Thinking that the proceedings before the trial Primary Court contain some legal irregularities and impropriety in that there was a defective charge, an equivocal plea of guilty and irregularities in the proceedings, the Applicant, again knocked the doors of Handeni District Court armed by a Chamber Summons seeking for an order revising proceedings in Criminal Case No. 77 of 2019 of Kabuku Primary Court. After hearing the Application the District court is recorded to have stated as follows in determining it:

"... According to paragraph five of the affidavit, the Applicant after being convicted and sentenced by Kabuku Primary Court the Applicant failed to file appeal on time in this court hence he filed application for extension of time so that to be allowed

to file appeal out of time. However the said Application was dismissed for want of prosecution. This means that the applicant filed revision in this court after the Application for extension of time to file appeal out of time to have been dismissed.

It should be noted that the revision is not substitute of appeal ... the application is shopping forum of revision of which it is not correct ... if he failed to file appeal out of time and he decided to ask for leave of the court in order to allow to file appeal out of time if the application was dismissed, the only remedy applicant had was to file application for restoration of the application that was dismissed or to ask dismissal order to be set aside and not to file revision."

The Appellant was dissatisfied by that decision of the District Court hence this appeal was preferred to challenge it. In the petition of Appeal filed, the Appellant listed three grounds of Appeal and they are as follows.

- "1. That the trial court Magistrate error in law dismissing the Application while there was irregularities and impropriety in a trial Primary Court which resulted Miscarriage of Justice.*

2. *That the learned trial court Magistrate error in law by dismissing the Application while in Primary Court the Applicant was convicted under equivocal plea of guilty hence defective charge and facts of the case was not established.*
3. *That the learned trial court Magistrate error in law holding that, the Applicant by filing application was shopping forum of revision while the Appellant has the right under the law”.*

From the grounds of Appeal above the appellant prayed the court that the appeal be allowed, the proceedings in the lower courts be quashed and the contested decision be set aside. He further prayed the court that it declares that there were irregularities in the trial Primary Court Proceedings and accordingly the Appellant be acquitted.

The Appeal was contested by the Respondent. On the date the Appeal came for hearing before me. Mr. Josephat Ally Mambea and Mr. Sunday Ahmed, learned Advocates, appeared before the court representing the Appellant and Respondent, respectively. On being invited by the court to argue his case Mr. Mambea stated that as the Appellant was aggrieved by the conviction and sentence imposed against him by Kabuku Primary Court in Criminal Case No. 77 of 2019, the Appellant thought of appealing, against them, to the District Court of Handeni. As he was caught by time

limitation, he went to the District Court seeking for extension of time in which to appeal. It is when Criminal Application No. 4 of 2019 was instituted. The Application was however dismissed for want of prosecution. Mr. Mambea stated further that, on the date the Application was so dismissed the Applicant's advocate could not appear as he was sick. Following dismissal of the Application, the applicant could not seek for restoration of the same as the law is silent to that effect. In the circumstances the Applicant invoked the provisions of Section 22 (1) and (2) of the Magistrates Courts Act [Cap 11 R.E 2019) which confers power on the District Court to call for and examine the record of the case from the Primary Court and where it is satisfied that there are irregularities in the proceeding, revise it. The Appellant in instituting this matter, acted in accordance with the law. As such the court below erred when it held the Applicant was shopping forum of revision. In the event the appeal be allowed and the Ruling of the court below be set aside.

On the other hand Mr. Sunday submitted that; Appeal and Revision are alternative remedies available to a party to the judicial proceedings aggrieved by the decision therein. Since Appeal and Revision are alternative remedies where one has a right of appeal and exercises such a

right he is deceased with the right of revision. In the case at hand, the Appellant was convicted of an offence charged with before a Primary Court on his own plea of guilty. As he was aggrieved by the conviction the Appellant determined to appeal against it and since he was time barred the Appellant applied for extension of time in which to appeal which application was dismissed for want of prosecution. In the premises, Appellant ought to have applied for an order setting aside the dismissal order and restoration of the dismissed application. Mr. Sunday added that an allegation that there were irregularities in the proceedings before the Primary Court; that could have constituted a ground of appeal. Secondly Mr. Sunday stated that the fact that, the counsel for the Applicant was sick on the date his application was dismissed did not constitute a ground for revision of the Primary Court proceedings. In event Mr. Sunday subscribed to the findings and holding of the District Court in the matter for the court was justified to do so. He prayed the court therefore that the appeal be dismissed for want of merit.

In a brief rejoinder, Mr. Mambela submitted that, his learned friend counsel for the Respondent has not cited any authority supporting his contention that a revision is not a substituted of A appeal. As such the

submission to that effect should be dismissed by the court. The Revision filed intended to deal with irregularities in the proceedings which were so conspicuous in the matter before the Primary Court. Mr. Mambea reiterated his prayer to have the appeal been allowed.

I have considered the submission along with the records in the matter. It is evident that the Appellant was convicted of an offence of Idle and Disorderly Person Contrary Section 176 (i) of the Penal Code [Cap 16 R.E 2002]. Under the law the decision or order passed by a Primary Court in any proceedings can be vacated by that of the District Court made in Appeal or Revision when the later court exercises its Appellate or Revisional Jurisdictions in terms of Sections 20 and 22 respectively, of the Magistrates Court Act [Cap 11 RE 2019]. Section 20 (1) of the Act reads as follows:

"20.-(1) Save as hereinafter provided-

- (a) in proceedings of a criminal nature, any person convicted of an offence by a primary court, or where any person has been acquitted by a primary court, the complainant or the Director of Public Prosecutions; or*
- (b) in any other proceedings, any party,*

if aggrieved by an order or decision of the primary court, may appeal there from to the district court of the district for which the primary court is established."

Similarly Section 22 (1) of the Act is cased in the following words:

22.-(1) A district court may call for and examine the record of any proceedings in the primary court established for the district for which it is itself established, and may examine the records and registers thereof, for the purposes of satisfying itself as to the correctness, legality or propriety of any decision or order of the primary court, and as to the regularity of any proceedings therein, and may revise any such proceedings.

Going by the provisions of the law above it is evident an Appeal is right a party has if he is aggrieved by an order or decision of the Primary Court. In our jurisdiction the right of appeal is provided not only by the statute but also by the Constitution of the United Republic of Tanzania 1977 (As amended from time to time). Article 13 (6) (a) of the Constitution provided as follows:-

"13 (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles namely:

(a) *When the right and duties of any person are being determined by the court, or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or other agency concerned"*

It is again clear from the provisions of Section 22 of the Act that it is in the discretion of the court to exercise its revisional powers. In the exercise of its revisional jurisdiction a district court has all the powers conferred upon it in the exercise of its appellate jurisdiction (section 22 (2) of the Act). In the same scenario where one challenges a decision or order of the Primary Court by Appeal to the District Court, and where the District, finds no merit in the appeal, with a view to putting the record right, it is not denied of its discretion to invoke its revisional powers if it is satisfied that the decision or order of the decision or order was not correct, legal or proper.

In the case at hand, the Appellant sought to exercise his right of appeal against the decision of the Primary Court. As he was out of time he first lodged an application for extension of time in which to appeal. The Application was dismissed for want of prosecution. Mr. Mambela (Adv)

stated that the law is silent if the Applicant could have applied for restoration of the dismissed application. He therefore came with this Application. Whether the applicant is entitled to what he seeks from the court in this matter? I think the answer is no. It is my view that where the law provides for several remedies one must exhaust the way in pursuing of the remedies he has resorted to. As the Appellant resorted to appeal, he had to exhaust the appeal process. The fact that the Application for extension of time in which to appeal was dismissed for want of prosecution did not entitle the Appellant to make this Application. Mr. Mambela stated that he made this Application for the law is silent as to the remedy where in the circumstances the Application for extension of time is dismissed for want of prosecution. If that is the case it means therefore that is the end of the road. The Applicant had no right to apply for revision. The trial court was therefore justified in its holding.

That part, although, the Appellant had no right to apply for Revision, that in my view did not deny the District Court of its discretionary powers under section 22 (1) of the Magistrates Courts Act [Cap 11 R.E 2019] that is, the power to call and examine the record of any proceedings in the Primary Court for the District for which it is itself established for purposes

of satisfying itself as to the correctness, legality or propriety of any decision or order of the Primary Court, and as to the regularity of any proceedings thereon. This could be done where the appeal previously lodged was not determined on merits, as the case was here in this matter.

In event whereas this appeal is devoid of merit hence it is dismissed the District Court of Handeni District is directed to call for and examine the record of Criminal case No. 77 of 2019 to satisfy itself as to the correctness, legality or propriety of the decision under context, and if it so requires; revise the proceedings. The matter shall be dealt with a Resident Magistrate other than the one who dealt with the Criminal Revision No. 4 of 2019 of Handeni District Court.

DATED at **TANGA** this 6th of April, 2021.




E. J. Mkasimongwa

JUDGE

06/04/2021