IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC CRIMINAL APPEAL NO. 2 OF 2021

MATINDE MAGABE ..... APPELLANT

VERSUS

JAMES FRANCIS ..... RESPONDENT

(Appeal from the decision of the District Court of Tarime at Tarime in Criminal Appeal No. 48 of 2020)

JUDGMENT

20th July and 20th August, 2021

KISANYA, J.:

The respondent, James Francis was arraigned before the Tarime Urban Primary Court with the offence of malicious injuries to the properties contrary to section 326 (1) of the Penal Code [Cap 16 R.E 2002]. In terms of the charge, it was alleged that on, 15th April 2020 at 0800hrs at Nyamitembe hamlet, Nyamerambaro village within Tarime District, the respondent destroyed the appellant's sisal (105 stem) worth TZS 491,505/= by uprooting and cutting them.

Upon hearing of two witnesses for prosecution and one defence witness, the trial court found the respondent guilty of the offence as charged. He was then convicted and sentenced to six months conditional discharge.

The trial court went on to order compensation to the tune of TZS 491, 331, 500/= in favour of the appellant.

Dissatisfied, the respondent appealed to the District Court of Tarime which nullified the proceedings of the trial court and quashed and set aside the conviction, judgment and orders made thereon. The said decision of the first appellate court was based on four reasons. ***One,*** that the valuation report on the damaged properties was not tendered by an expert person and he did not testified before the trial court. ***Two,*** the respondent was convicted on non-existing provision of law. ***Three,*** the trial court judgment was silent on whether the parties were explained their right to appeal. ***Four,*** the trial court proceedings were recorded in the reported speech contrary to section 210 (1) (b) of the Criminal Procedure Act [Cap 20 R.E 2019].

Not amused with the decision of the first appellate court, the appellant lodged the present appeal in which he raised six grounds of appeal as follows:-

1. *That, the appellate court erred in law and facts for failure to give necessary orders upon quashing the decision of the trial primary court basing on the irregularities.*
2. *That, the appellate court erred in law and facts for relaying (sic) on the Criminal Procedure Act (Cap 20 R.E 2019) which is inapplicable in the matter originates from primary court.*

3. *That, the appellate court erred in law and facts for failure to determine that the respondent had never objected the evaluation (sic) report tendered by the appellant herein at the trial primary court which proved the damage made by the respondent.*
4. *That, the appellate court erred in law and facts for quashing the decision of the trial primary court as the evidence tendered by the appellant herein proved the respondent committed the offence beyond reasonable doubts as the same never objected by the respondent.*
5. *That, the appellate court erred in law and facts for quashing the decision of the trial court and at the same time setting aside the decision of the trial court.*
6. *That, the appellate court erred in law and facts for failure to consider that technicalities are not applicable at the primary court as the provision of 326 (1) of the Penal Code Cap 16 had identified the offence the respondent had committed.*

When this appeal was placed before me for hearing, Mr. Evance Njau, learned advocate, appeared for the appellant. On the other side the respondent appeared in person unrepresented. Having gone through the record, I also directed the parties to address the Court, inter alia, on the following two issues namely, whether the Exhibit P1 was tendered in accordance with the law; and whether the evidence adduced by the witnesses called by both parties was read over to them as required by the law.

Submitting in supporting of appeal, Mr. Njau conceded that there are irregularities in the proceedings of the trial court. He went on to submit that the proper recourse is to nullify the proceedings of the trial court, quash the conviction, set aside the sentence and make an order for retrial. He was of the view that the evidence before the trial court was watertight. In response, the respondent was at one with the appellant's counsel in view of the irregularities pointed out by the Court. He also implored me to remit back the case file to the trial court for retrial.

It is now the duty of this Court to decide on the fate of this appeal. In my view, this matter can be disposed of by considering the irregularities in the proceedings of the trial court.

As rightly held by the first appellate court, the evidence of witnesses before the trial court were recorded in reported speech. It was the decision of the first appellate court, the evidence was recorded contrary to section 210 (1) (b) of the Criminal Procedure Act [Cap 20 R.E 2019]. I agree with the learned counsel for the appellant that the law cited by the learned resident magistrate of the first appellate court does not apply to primary court. The relevant provision is paragraph 35 (6) of the Primary Courts Criminal Procedure Code under the third Schedule to the Magistrate Courts Act [Cap. 11, R.E. 2019] which provides:-

*"**The magistrate shall record the substance of the evidence** of the complainant, the accused person and the witness and after each of them has given evidence shall read his evidence over to him and record any amendment or corrections and thereafter the magistrate shall certify at the foot of such evidence, that he has complied with this requirement."*

Reading from the above cited provision, it is clear that the trial magistrate of the primary court is required to record the evidence and not to report what the witness stated. The provision is coached in mandatory terms. Thus, it must be complied with by the trial magistrate. Failure to comply with the said provision vitiates the proceedings. This position was stated in the case of **Dennis Deogratius vs the Republic**, Criminal Appeal No. 362 of 2016, CAT Tabora when the Court of Appeal held:-

"We have thus seen that the trial magistrate recorded the prosecution evidence in a reported speech of the interpreter. This means the evidence was not of the witnesses but the statements of the interpreter. This means that there was no evidence from the prosecution upon which conviction could have been grounded. This was fatal irregularity. The first ground of appeal has merit."

In the instant appeal, it is not disputed that the evidence of witnesses for both parties were recorded in reported speech. For instance, PW1 evidence in chief went as follows:

"9/2/2020 alimkuta mshtakiwa akiwa anakata katani kwenye shamba lake. Mshtakiwa alikimbia mlalamikaji alimtafuta mwenyekiti wa kitongoji aliyefika eneo la tukio. Mwenyekiti wa kitongoji alimtaarifu mwenyekiti wa kijiji ambaye naye aliandika taarifa kwenda kwa mtendaji wa kata aliyemwita mshtakiwa aliyefika na walisuluhishwa tarehe 15/4/2020....."

Therefore, guided by the position of law stated in the case of **Dennis Deogratius** (supra), the proceedings of the trial court were vitiated. For that reason, I find no reasons to fault the first appellate court's decision on that matter.

In addition, I have found other two defects in the proceedings of the trial court, which were not considered by the first appellate court. Since the defects relates to points of law and goes to the root of the case, I found it appropriate to address them.

The first defect failure by the trial magistrate to read the evidence adduced by the witnesses for both sides with a view to satisfy himself on whether they intended to amend or correct the evidence recorded. The said omission contravened paragraph 35 (6) of the Primary Courts Criminal Procedure Code (supra) quoted hereinabove. I understand that neither party demonstrated how he was affected by the said omission. However, this Court reminds the learned trial magistrates to comply with the requirement of the law.

The second defect is failure by the trial magistrate to read over the valuation report (Exhibit P1) which was tendered to prove the damages caused by the respondent. It follows that the respondent was denied the right to know its contents. In that regard, he was not in a good position to cross-examine PW1 who tendered the same and prepare his defence. It is trite law as held **Issa Hassan Uki vs the Republic,** Criminal Appeal No. 129 of 2017 that the omission to read over the document admitted in evidence is incurably defective. Therefore, Exhibit P1 is hereby expunged from the record.

In view thereof, I find that the first appellate Court was justified in nullifying the proceedings, quash the conviction and set aside the conviction and orders of the trial court.

Reverting to the first ground of appeal in which the Court is called upon to direct on the way forward, both parties asked me to make an order for retrial. It is trite law that an order for retrial is made when the proceedings are nullified as in the case at hand where the interests of justice so require. It is an established principle that the order for retrial cannot be made if the evidence was not sufficient because that would enable the prosecution to fill in the gaps in its case. [See **Shaban Said vs. the Republic**, Criminal Appeal No. 267 of 2009, CAT at Mwanza (unreported) and **Fatehali Manji vs. R.** (1966) E.A. 343.]

That being the case, I have considered the parties submissions and the circumstances of the case. It is on record that the appellant's evidence including Exhibit P1 (damage of properties valuation report) was not challenged by the respondent.

In the event, guided by the recourse taken in **Dennis Deogratius** (supra), I find it appropriate to leave it to the appellant to decide whether he would wish to charge the respondent afresh. Thus, the appellant may, if still interested to pursue the matter, institute a fresh charge against the respondent.

DATED at MUSOMA this 20th day of August, 2021.

E.S. Kisanya
JUDGE

Court: Judgment delivered this 20th day of August, 2021 in presence of the respondent and in the absence of the appellant. B/C Kelvin present.

Right of further appeal explained.

E. S. Kisanya
JUDGE
20/08/2021