IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA.

PC CRIMINAL APPEAL NO. 30 OF 2020

(C/F Babati District Court in Criminal Appeal No. 53 of 2017, Originating from Bashnet Primary Court in Criminal Case No. 138 of 2017)

SIRILI BAHA ..... APPELLANT

Versus

SALIONA AMNAAY ..... RESPONDENT

JUDGMENT

16th July & 6th August, 2021

Masara, J.

This is a second appeal originating from Bashnet Primary Court (the trial Court) where the Appellant stood charged with the offence of Brawling, contrary to section 89(1)(b) of the Penal Code, Cap. 16 [R.E 2002]. By the votes of the majority of the members of the trial Court, in terms of section 7(2) of the Magistrates' Courts Act (MCA), Cap. 11 [R.E 2002], the Appellant was found not guilty and thereby acquitted. The trial Court Magistrate did not agree with the findings of the Assessors. In his view, the case against the Appellant was proved to the required standards.

That decision did not please the Respondent. She appealed to the District Court of Babati (the first Appellate Court), vide Criminal Appeal No. 53 of 2017. In its judgment delivered on 25/1/2018, the first Appellate Court reversed the majority judgment of the trial Court and in lieu thereof found the Appellant guilty of the offence he stood charged with. The Appellant was therefore convicted and sentenced to serve a six months custodial sentence. The Appellant was aggrieved by both the conviction and sentence, he intended to appeal to this Court but he found himself out of time. He filed Misc. Criminal Application No. 36 of 2018, seeking for extension of time to file his appeal out of time. This Court (Mwenempazi, J.), in a ruling delivered on 3/12/2019, granted him 30 days to file his appeal to this Court. On 27/12/2019, he filed

this appeal with an intention to have the decision of the first Appellate Court overturned. This appeal is brought in a petition of appeal containing seven grounds of appeal as reproduced hereunder:

a) *That, the Honourable firstAppellate Court erred in law by improperly setting aside the correct decision of majority in Criminal Case No. 138 of 2017 of Primary Court-Bashnet, Babati District-Manyara Region on the basis of the Primary Court Magistrates' reasoning which could not have been done by the Primary Court himself by virtue of section 7(2) of MCA Cap 11 [R.E 2002];*
b) *That, the Honourable firstAppellate Court erred in law by mechanically validating the reasons given by the Primary Court Magistrate and then, on the basis of allegation made during submissions by the Respondent that the appellant was still threatening and irrelevant element of identification wrongly convicted the Appellant;*
c) *That, the Honourable firstAppellate Court failed to make a proper and deeper evaluation of the entire evidence taken by the Primary court in order to satisfy itself on whether or not the conviction of the appellant was justified or right as required by law laid down in D. R. Pandya vs. R [1957] E.A 336;*
d) *The order of the Primary Court Magistrate that the file be taken to the District Court for making possible corrections in the trial court's record shows that the entire appeal process is sham and a nullity;*
e) *The Honourable firstAppellate Court erred in not holding the Respondent's story was mere concoction and tainted with revenge against the accused/appellant and not substantiated by credible evidence;*
f) *That, the Honourable firstAppellate Court erred in law by rejecting the unshaken evidence of alibi of the Appellant; and*
g) *That the said error/s of the firstAppellate Court have resulted in a great miscarriage of justice to the Appellant and they need to be rectified by the High Court.*

Basing on the above grounds of appeal, the Appellant prays that the appeal be allowed. The record shows that the Respondent defaulted appearance since the appeal was lodged in this Court. To prove that service was made to her, the Appellant returned the summons signed and stamped by the hamlet chairman who endorsed on the summons as follows: *"Saliona Amnaay Hayupo Nyumbani tangu 2017".* Which can be translated to mean that Saliona Amnaay is not at her home since 2017. After being satisfied that service was duly made to the

Respondent who could not be traced, this Court directed that the appeal proceeds ex-parte. At the hearing of the appeal the Appellant was represented by Mr. Bharat B. Chadha, learned advocate who prayed for and the Court granted that the appeal be heard through filing of written submissions.

Submitting on the first ground of appeal, Mr. Chadha averred that section 7(2) of the MCA enables the presiding Magistrate to give casting vote to break a tie. In the case at hand, there was no tie. Mr. Chadha insisted that the trial Magistrate had no power to give his casting vote. He maintained that although the first Appellate Court took into consideration that factor in reversing the majority decision of the Court, yet the error which was committed invalidates its entire decision.

Mr. Chadha submitted on 2nd, 3rd and 4th grounds of appeal jointly. He contended that the procedure adopted by the trial Court Magistrate is unknown in law, since he became the appellant/complainant contrary to law. He asserted that the order made by the trial Court Magistrate that the file be taken to the District Court for making possible corrections in the trial Court's record, implies that the entire appeal process was rendered a mock and a nullity. In his view, the first Appellate Court ought to have remedied that irregularity and address it instead of reversing the majority decision and wrongly convicting the Appellant. Mr. Chadha summed up by stating that the first Appellate Court failed to evaluate the evidence in order to satisfy itself on the propriety of the Appellant's conviction.

Expounding the 5th ground of appeal, the advocate for the Appellant submitted that the first Appellate Court did not consider that the complaint was inimical to the Appellant and falsely framed against him.

Regarding the 6th ground of appeal, Mr. Chadha submitted that the first Appellate Court rejected the defence of *alibi* merely on the ground that it was weak without examining it in terms of settled law that if the defence of *alibi* is reasonably true, it must succeed. To support his assertion, he cited the Court of Appeal decision in ***Hamisi Saidi Butwe Vs. Republic***, Criminal Appeal No. 489 of 2007 (unreported).

Submitting on the last ground of appeal, Mr. Chadha contended that the Appellant is an old man of 81 years and the errors he pointed out caused him injustice resulting to great anguish and pain. He therefore urged this Court to allow the appeal by upholding the majority decision of the trial Court.

I have considered the grounds of appeal and the submissions made by Mr. Chadha, the Appellant's advocate. The main issue for consideration is whether the Appellant's conviction and sentence by the first Appellate Court was properly imposed.

In tackling the above issue, I find it imperative to briefly expound on the procedure of arriving at decisions in Primary courts as envisaged by section 7 of the MCA. Before digging deep in the procedure, it is instructive I reproduce the relevant provision for easy of reference. Section 7(1) and (2) of the MCA provide:

> *"7. -(1) In every proceeding in the primary court, including a finding, the court shall sit with not less than two assessors;*
> *(2) 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."*

From the above provision of the law, since magistrates in Primary Courts sit with the aid of assessors, their decisions are that of the majority. Assessors in Primary Courts are members of the Court who must participate actively in the decision together with the magistrate. According to subsection 2 above, assessors and the magistrate make the quorum of the Court. The decision of the primary Court must be that of the majority; that is, it depends on the votes between the magistrate and the assessors. The majority votes is what constitutes the decision of the Primary Court.

That procedure was further elaborated by the Court of Appeal in ***Neli Manase Foya Vs. Damian Mlinga*** [2005] TLR 167 where it held:

> *"... it is evident from sub rule 2 above that all the members of the court are required to participate in the decision process of the court. Assessors are members of the court, co-equal with the magistrate. After they have completed the hearing of the evidence from the parties, the stage is then set for the magistrate to consult with them in order to reach the decision of the court. This presupposes that before the court reaches a decision, there will be a conference of the members of the court to deliberate on the issues before them and reach a decision. In such a case, the magistrate will write down the decision, which will be signed by all members of the court."*

In the appeal under consideration, the two assessors who sat with the trial Magistrate were of the view that the Appellant was not guilty as charged. On the other hand, the trial Magistrate after scrutinizing the evidence, was sufficiently satisfied that the offence against the Appellant was proved on the required standard. Since the law regulating trials in Primary Court requires the decision to be that of the majority, the trial Magistrate gave his dissenting opinion thereon acquitting the Appellant basing on the majority votes of the assessors.

After writing the judgment of the majority, the trial Magistrate forwarded the file to the District Court in order for the District Court to give its directives

regarding the culpability of the Appellant. In practice, the procedure adopted by the trial magistrate is correct. The procedure of forwarding the case file to the District Court is not provided by law, but that has been the practice. The rationale behind is that assessors in Primary Court are not conversant with matters of law, they are therefore expected to give their opinion on matters of facts.

Forwarding the file to the District Court by the trial Court enables the District Magistrate in charge to examine whether there are legal points involved and whether the majority decision so reached conforms to the law, and that it does not contain any material irregularity. After being satisfied that the majority decision of the Primary Court was in conformity with the law, it is thereby confirmed. If the District Magistrate in charge finds that the majority decision was in contravention of the law or if it is discovered that it is tainted with any material irregularity, the District Magistrate in Charge draws the proper decision replacing that of the trial Court.

In the case at hand, the trial Court Magistrate forwarded the file to the District Court for the District Magistrate in charge to examine the propriety of the decision reached. However, there is no record showing that the District Magistrate in charge acted upon the recommendations of the trial Magistrate and ascertained whether the decision reached was properly procured. In the absence of such record, rightly as the learned advocate for the Appellant contended, the appeal was made and decided prematurely, because the decision of the trial Court had not been completed.

The decision of the trial Court would be considered complete as soon as the District Magistrate in charge acted upon the recommendations of the trial court; and in effect thereof, made his finding whether the decision of the trial Court

was proper or otherwise. In the event, the appeal cannot stand because the decision of the trial Court was not complete. This issue covers the 2nd, 3rd and 4th grounds of appeal. These grounds sufficiently dispose of the whole appeal. Having found that the appeal was taken prematurely, I find no compelling reasons to dwell on discussing the rest of the grounds of appeal, as the appeal itself lacks legs to stand.

For the above reasons, guided by section 29(b) of the MCA, I hereby quash and set aside the decision and proceedings of the first Appellate Court for stemming from a nullity. The conviction of the Appellant by the first Appellate Court is hereby quashed and sentence set aside. In the alternative, I order the file to be remitted back to the District Court Magistrate in Charge, in order for him to consider the request made by the trial Court Magistrate regarding the plausibility and propriety of the majority decision of the Primary Court.

Order accordingly.

Y. B. Masara
JUDGE
6th August, 2021