

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

(PC) CRIMINAL APPEAL NO. 3 OF 2021

(C/F Criminal Appeal No. 25 of 2020 at Karatu District Court, Originating from Karatu
Primary Court in Criminal Case No. 402 of 2020)

BURA TAHHANI..... APPLICANT

VERSUS

CATHERINE LOLO..... RESPONDENT

JUDGMENT

1/10/2021 & 3/12/2021

ROBERT, J:-

The respondent, Catherine Lolo, was acquitted by the primary Court of Karatu from the charge of an offence of Destruction of property filed by the appellant herein contrary to section 326 (1) of the Penal Code, Cap. 16 (R.E 2002). Aggrieved, the appellant unsuccessfully filed an appeal to the District Court of Karatu vide Criminal Appeal No. 25 of 2020. Still aggrieved, he preferred the present appeal based on the following grounds:-

- 1. The first appellate court grossly erred in law in failing to consider the grounds of appeal before thereby arrived at erroneous decision.*

- 2. That on the available facts appearing on the trial Court's record, the first appellate court grossly erred in law and in fact by holding that the respondent in committing the offence had been administratively doing the official duties while in fact she committed an offence as charged.*
- 3. That the first appellate Court was biased in failing to give the appellant his Constitutional rights to argue the appeal as presented.*
- 4. That the decision of first appellate Court has carried a miscarriage of justice on the case at hand.*

Briefly stated, facts giving rise to this appeal reveals that, at the time of these allegations the respondent, Catherine Lolo, was appointed by the District Executive Director as acting Village Executive Officer. In the course of her duties, she ordered and administered clearing of all public outlets (street roads) around the village. She also called the appellant and asked him unsuccessfully to clear the public way around his house. The operation was then conducted in the entire village whereby all public ways were cleared. The appellant's trees were allegedly cut in the course of that process. Aggrieved, the appellant instituted this matter at the Primary Court of Karatu.

When this matter came up for hearing both parties appeared in person without representation. At the request of parties, the Court ordered the appeal to be argued by filing written submissions.

Supporting her appeal, on the first ground the appellant argued that, the first appellate court magistrate fixed the date of judgment without hearing the appellant's witness who was at Mang'ola on that day which is contrary to Rule 35 and 36 of the Primary Court Criminal Procedure Code, 3rd schedule to the Magistrates' Court Act, Cap. 11 (R.E 2019). He disputed the holding of the first appellate court that the appellant was called and ordered to clear the way by herself.

On the second ground of appeal, the appellant submitted that, the respondent committed the offence charged in her personal capacity not in official duties. He argued that, there is no proof of the existence of the Government Gazette as the court is by law enjoined to take judicial notice of its existence under section 58 and 59 (1) (a) of the Evidence Act, Cap. 6 (R.E 2002).

On the third ground of appeal, the appellant argued that, the first appellate court was biased in failing to give him his constitutional right to argue the appeal as presented. He maintained that the first appellate Court did not decide the first ground of appeal through which the appellant stated that he was not given an opportunity of calling his witness and tendering exhibits by the trial Court. He cited Article 13 (6) of the Constitution of the United Republic of Tanzania to support his

argument. He also cited the case of **Romadi Mkini vs Republic**, [1980], 148 where the Court held that every person charged before a court of law has the right to right defend himself including giving evidence on his own behalf. The first appellate court failed to analyse the allegation that the trial court denied the appellant the right to be heard by its failure to decide on the raised grounds.

Lastly, it was the appellant's submission that, the trial magistrate wrote a judgment without taking the evidence of the appellant. He faulted the trial magistrate for what he termed being in a hurry to write judgment before hearing evidence of the respondent's side.

He maintained that, the respondent had an obligation of notifying him and agreeing with him about the resultant damage prior to causing damage to his property. He made reference to the case of *Berabera Ujamaa Village vs. Abubakari* (1983) TLR 219 (HC) where the Court held that, no man shall be deprived of his property without adequate compensation.

Opposing this appeal, the respondent first of all submitted that, the appellant introduces new grounds, second and fourth which were not raised at the first appellate court; therefore, this court has no jurisdiction to entertain the said grounds. The issue of whether the

respondent was a public servant or not was not raised at the first appellate court. He referred this court to the case of **Hotel Travertine Limited and 2 Others vs national bank of Commerce Limited**, Civil Appeal No. 82 TLR 133 of 2012.

On the first and the third ground of appeal, the respondent submitted that, the appellant was given a right to be heard together with her witnesses, however, she failed to enjoy the said right by her failure to bring his witnesses. She maintained that, it is in the interest of justice that litigation needs to come to an end. To support her argument, she made reference to the case of **Yazidi Kassim t/a Yazidi Auto Electric Repairs vs The Hon. Attorney General**, Civil Application No. 354/04 of 2019 referred to the case of **Emmanuel Conrad Yosipati vs Republi**, Criminal Application No. 90/07 of 2019.

She submitted further that, the first appellate court dismissed the grounds of appeal due to the fact that the appellant failed to adduce any reasonable grounds to support her appeal.

Responding to the second ground, the respondent argued that, at the trial court when the appellant was given a chance to cross examine the respondent, he never asked her whether she was a public servant or not and he referred to her as a Village executive officer. Therefore, his

criticism towards the trial court and the 1st appellate court is unjustifiable. He made reference to the case of **Linus Chengula vs Frank Nyika 9 Administrator of the Estate of the late Asheri Nyika**), Civil Appeal No. 131 of 2018 (Unreported). Thus, she prayed for the appeal to be dismissed with costs.

In a brief rejoinder, the appellant insisted that the trial court denied him the right to be heard which is contrary to Rule 35 of the Primary Court Criminal Procedure Code, 3rd schedule to the magistrate Court Act, Cap 11 R.E 2019.

Having heard the submissions of parties in this appeal, I will now pose here and make a determination on the merit of this appeal. As a matter of principle, this Court is expected to find the answer to the issues raised by parties at the first appellate court with regards to the conduct of the case at the trial Court through the judgment and proceedings of the lower courts. Looking at the impugned judgment of the first appellate Court, it is obvious that most of the issues raised by parties are not addressed by the first appellate Court. The entire judgment is composed in one paragraph which calls for a question whether the impugned judgment of the District Court of Karatu meets the threshold of a judgment.

In the case of **Hamisi Rajabu Dibagula vs The Republic**, Criminal Appeal No. 53 of 2001, CAT (unreported) the Court of Appeal cited with approval the case of **Luther Symphorian Nelson v. The Attorney General and Another**, Civil Appeal No. 24 of 1999 (unreported) on what a judgment should contain and observed at Page 21 that: -

*"...A Judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on record. Though it may be reduced to minimum, it must show that no material portion of the evidence laid before the court has been ignored. In **Amirafi Ismail v. Regina**, 1 T.L.R. 370, Aberney, J., made some observation on the requirements of judgment He said;*

"A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how. "

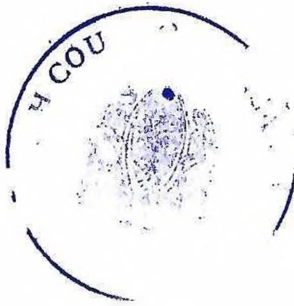
Guided by the cited provision and case law, it is apparent that the impugned judgment of the 1st appellate court is lacking in terms of the requirements of the law. It lacks a concise statement of the case or brief facts, issues for determination, discussion in relation to the said issues and analysis of evidence adduced. It is difficult to ascertain where the 1st appellate court magistrate's reasons originate from. That said, it is

difficult to comprehend how the first appellate court handled the issues raised by parties in this case in order to dispose of the present appeal.

That being said, I set aside the proceedings and judgment of the District Court of Karatu in Criminal Appeal No. 25/2020 and order for immediate rehearing of the appeal before another competent magistrate.

Appeal is allowed with no order as to costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read 'K.N. Robert'.

K.N. ROBERT
JUDGE
3/12/2021