

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

PC. CRIMINAL APPEAL NO. 4 OF 2021

KUMALIJA SEBA.....APPLICANT

VERSUS

MASEMBA BULUGU.....1ST RESPONDENT

DUTTU MASEMBA.....2ND RESPONDENT

SOPHIA LUKUMBA.....3RD RESPONDENT

[Appeal from the Decision of District Court of Maswa at Maswa]

(Hon. F.R. Lukuna RM)

dated the 30th day of April, 2021

in

Criminal Appeal No. 01 of 2021

JUDGMENT

29th March & 13th May, 2022.

S.M. KULITA, J.

This is a second appeal by the Appellant herein one **KUMALIJA SEBA**. In a nut shell, at the Primary Court the Appellant, while with Power of Attorney, on behalf of one, Holo Nangwa complained for Criminal Trespass, contrary to section 299(a) of the Penal Code, over her 12 acres

of land. He lost the said case at the Primary Court. Aggrieved with the decision, the Appellant appealed at the District Court of Maswa. For the second time, the Appellant lost the matter, hence this appeal in which he relied on the following two grounds; **One**, the 1st appellate court erred for abandoning grounds of appeal raised without assigning reasons for so doing, **two**, the 1st appellate court erred for denying parties with right to address on the grounds raised *suo motto* by the court.

The Appeal was heard on 29th of March, 2022. Both parties appeared in person.

Submitting in support of appeal in general, the Appellant stated that, his grounds of appeal at the first appellate court were not considered. He added that, it was wrong for the lower courts to decide in favor of the Respondents while the District Land and Housing Tribunal had already granted the disputed land to him (Appellant).

The Appellant further stated that, the court did not give parties chances to address on the grounds it framed by itself *suo motto* which includes the issue of Power of Attorney. Concerning the said issue of Power of Attorney, the Appellant stated that, he sees no fault as at all the times, from Primary Court, the Appellant has been representing seven people without any complaint. As for the said document, Power of

Attorney being a photocopy, the Appellant stated that had he been asked by the court, he would have submitted the original one.

In reply, the 2nd Respondent, for and on behalf of all Respondents stated that, there is an ample evidence that the disputed land is owned by his father, not the Appellant who wants to trespass it. He added that, the Appellant had just married their sister and later on divorced. He insisted that, the land that they have constructed a house is not the one that the Appellant had won at the District Land and Housing Tribunal.

In rejoinder, the Appellant submitted that, the land that the Respondents have built in, is the very one he has won at the land tribunal. He added that, his wife has given to him Power of Attorney as she is sick of epilepsy for 6 (six) years way back.

I have taken into consideration both parties' submissions, the available records as well as the rival issues. In determining the grounds of appeal I hereby start with the second one which states that the appellate court erred for denying parties with the right to address on the grounds raised *suo motto* by the 1st appellate court.

The records show that, the Appellant had presented four grounds of appeal at the District Court of Maswa as follows; **one**, that the trial

Primary Court decided the matter against the weight of evidence, **two**, that the defense evidence had proved on land matters and that it had incriminated the Respondents, **three**, that the trial Primary Court did not take into consideration that the Appellant had won a land case against the Respondents before, **four**, that the trial Primary Court misdirected itself for not taking into consideration that the trespassed land belongs to Holo Nangwa.

The District Court record also shows that, in its five pages judgment, resolved the appeal basing on the following; **one**, the charge referred to the trial court was defective, **two**, the Appellant tendered to the court a photocopy of the Power of Attorney purporting to represent Holo Nangwa, **three**, Power of Attorney is not acceptable in criminal cases and while the complainant is still alive.

It is however not in dispute that, those issues were raised by the 1st appellate court *suo motto* and the parties were not given chances to address on them in determination of the said appeal.

The Court of Appeal has been severally holding that, a denial of the right to be heard in any proceeding vitiates the proceedings. See, **ECO-TECH (Zanzibar) Limited V. Government of Zanzibar, Civil Application No. 1 of 2007** (unreported), **Mbeya-Rukwa Auto Parts**

& Transport Limited V. Jestina George Mwakyoma- Civil Appeal No. 45 of 2000 (unreported), **DPP V. Sabina Tesha & Others [1992] TLR 237, Dishon John Mtaita V. DPP, Criminal Appeal No. 132 of 2004** (unreported) to mention just a few.

Referring the right to be heard as enshrined in the Constitution the said Court held in the **Mbeya- Rukwa** case (supra) that;

"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and declares in part"

In another case, namely **Abbas Sherally & Another V. Abdul S. H. M. Fazalboy, Civil Application No. 33 of 2002** (unreported) the Court of Appeal held;

"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision

*would have been reached had the party been heard,
because the violation is considered to be a breach of
natural justice."*

As indicated earlier, in the course of composing his judgment, the learned appellate Magistrate in the 1st appeal, posed some grounds *suo motto* on the competence of a charge and the Appellant's Power of Attorney. In doing so, he did not invite the parties, as he ought to have done, to address him on those grounds of which he found them necessary in determination of the appeal before him. Instead, he went ahead and *suo motto* ruled them out.

As the parties were denied of the right to be heard on those grounds of competence of the charge and the Power of Attorney raised *suo motto* by the learned appellate Magistrate, I am satisfied that, the said act vitiates the whole judgment of the District Court.

Without much ado, I find this appeal meritorious, hence allowed. I find the judgment of the District Court a nullity for violation of the right to be heard. In the event the judgment of the District Court is declared null and void. I accordingly, quash and set it aside. On furtherance I hereby order that, the Criminal Appeal No. 01 of 2021 be remitted back to Maswa District Court and the same be re-assigned to another

Magistrate who will proceed from the proceedings dated 15/04/2021, when the matter was set down for judgment. The Magistrate to be re-assigned should consider that there is a need to invite the parties to address the court on those issues of Competence of the Charge and the Appellant's Power of Attorney.

Order accordingly.


S.M. KULITA
JUDGE
13/05/2022

DATED at SHINYANGA this 13th day of May, 2022.




S. M KULITA
JUDGE
13/05/2022

