IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) CRIMINAL APPEAL NO. 5 OF 2022

(Arising from Criminal Appeal No. 37 of 2022 at Muleba District Court and Original Criminal Case No. 88 of 2021 at Nyamilanda Primary Court)

MBERWA GERARD---------- APPELLANT

VERSUS

PALMON BYEMERE----------RESPONDENT

JUDGMENT

Date of last Order: 14.07.2022

Date of Judgment: 15.07.2022

A.E. Mwipopo, J.

It was on 21.08.2021 when Mberwa Gerard stopped and parked at Karambi Centre the motorcycle with registration No. T 101 APN he was riding from Kimeya Market. He entered inside the shop of Teacher Rasudi Bamele to buy his needs. When he came out of the shop the motorcycle was not there. The people who were around told him that Palmon Byemere, who is the respondent herein, took the motorcycle. The appellant reported the incident to the village chairman and they went together to the house of the respondent. The motorcycle was found inside the house of the respondent, but when the chairman asked the respondent

to handle the motorcycle to the appellant, the respondent rejected for the reason that he is the rightful owner of the motorcycle. The appellant also claimed that he is the rightful owner of motorcycle as he bought it for Tshs. 700,000/= from the respondent in 2019. Seeing the situation, the chairman left without solving the dispute. The appellant decided to institute criminal case No. 88 of 2021 in Nyamilanda Primary Court accusing the respondent for stealing the motorcycle. The Primary Court after hearing evidence from both parties convicted the respondent for the offence of theft contrary to section 265 of the Penal Code, Cap. 16, R.E. 2019, and sentenced him to serve 6 months imprisonment term on 30.09.2021.

The respondent was aggrieved by the decision of the trial Primary Court and filed Criminal Appeal No. 37 of 2021 in the Muleba District Court. The District Court heard the appeal in absence of the appellant where it allowed the appeal on 13.01.2022 and discharged the respondent. The appellant was not satisfied with the decision of the appellate District Court and he filed the present appeal. The appellant has four grounds of appeal which are found in his Petition of Appeal. The said grounds of appeal are as follows:-

1. *That the learned Resident Magistrate erred in law and fact to decide the appeal in exparte without summoning the appellant to appear and reply to the grounds of appeal.*

2. *That the learned Resident Magistrate in his judgment pointed out that the summons was issued to the appellant to appear in Court but the same was not served to the appellant by the appellate District Court.*
3. *That the learned Resident Magistrate erred in law and fact to believe fictitious story of the respondent that he hired the motorcycle to the appellant without any proof. There is no witness who testified or contract tendered to prove that the appellant hired the motorcycle in issue from the respondent and surprisingly ignored the evidence of the appellant which proved the case beyond reasonable doubt.*
4. *That it seems the learned Resident Magistrate did not go through the proceedings of the trial Court otherwise the trial Court judgment could not have been reversed and the idea of bonafide claim of right could not stand, instead the appellate Magistrate could have upheld the conviction of the trial Primary Court and extend the sentence from six month imprisonment to twelve months because the respondent is habitual offender of the same offence of theft.*

On the hearing date both parties appeared in person without legal representation. The appellant submitted on all four grounds of appeal together. He said that after the trial Primary Court have convicted and sentenced the respondent to serve 6 months imprisonment for the offence of theft, the respondent appealed to Muleba District Court. The said District Court heard the appeal in his absence and without serving him with the summons. In the said appeal, the District Court quashed the decision of the Primary Court and set aside

the sentence. For that reason, the appellate District Court denied his right to be heard in the said appeal.

The appellant submitted further that the District Court erred for failure to consider his evidence which proved the offence without leaving any doubt. He prayed for the appeal to be allowed, the decision of the District Court be quashed and the Court to enhance the sentence imposed to the respondent from 6 months to 12 months imprisonment.

In his response, the respondent said that the trial Primary Court erred to convict him as the dispute between him and the appellant was based on the ownership of the motorcycle in issue. He said that he hired the motorcycle to the appellant for daily payment of Tshs. 1,500/=, but the appellant claimed that he sold it to him for Tshs. 700,000/=. He said that the District Court rightly held that there was issue of ownership of the motorcycle which needed to be determined first before the trial Primary Court decided the criminal case.

On the issue that the appellant was not served with summons to appear in the appeal as result the District Court proceeded with hearing of the appeal in his absence, the respondent said that as he was in prison during hearing of the appeal it was the District Court which served the appellant with summons. He said that the District Court informed him that the appellant was served with summons through trial Primary Court, but the appellant decided not to appear to defend his

case. For that reason the District Court properly proceeded to determine the appeal in appellant's absence. The responded added that after he was convicted and sentenced to serve 6 months imprisonment term on 30.09.2021 he served almost all the sentence before he was discharged by District Court on 13.01.2022.

In his rejoinder, the appellant insisted that he is the owner of the motorcycle after he bought it from the respondent and there is sufficient proof of the same in his evidence adduced at the trial Primary Court.

In determination of the appeal before this Court, I decided to start with the first and second grounds of appeal that the hearing of the appeal proceeded in exparte while he was not served with summons to appear. The reason is that these grounds/issues are capable of disposing of the appeal as it is concerning the right of the appellant to be heard by the appellate District Court. In the course of determining the said two grounds of appeal, the remaining grounds of appeal will be considered.

The right to be heard is fundamental right provided by our Constitution in Article 13 (6) (a). In the case of **Ausdrill Tanzania Ltd vs. Mussa Joseph Kumili and Another,** Civil Appeal No. 78 of 2014, Court of Appeal of Tanzania at Mwanza, (Unreported), it was held that:-

> *"Right to be heard (audi alteram partem) is a fundamental principle which the courts of law jealously guard against. In this country natural justice is not*

merely a principle of common law; it has become a fundamental constitutional right. (Article 13 (6) (a)."

The said right to be heard should always be observed and be guaranteed as it was held in the case of **Hashi Energy (T) limited vs. Khamis Maganga**, Civil Application No. 200/16 of 2020, Court of Appeal of Tanzania at Dar Es Salaam, (unreported).

The importance of the right to be heard was emphasized in the case of **Abbas Sherally and Another vs. Abdul Fazalboy,** Civil Application No. 33 of 2002, Court of Appeal of Tanzania at Dar Es Salaam, (unreported), where the Court of Appeal held that :-

"The right of a party to be heard before adverse action or decision 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. "

In the present case, the appellant submitted that his right of hearing was denied as he was not served with summons to appear in the District Court. On his reply, the respondent said that when the appeal was held he was in prison serving the sentence imposed by the trial Primary Court. As a prisoner he was not in position to serve the summons to the appellant. But, the appellate District Court

informed him that the appellant was served with summons through trial Primary Court.

Upon perusal of record, I observed that the proceedings of the appellate District Court is silent if the appellant was served with summons. What is shown in the record is the order of the District Court for the appellant to appear and the order that appellant has to be notified. There is nothing in the proceedings of the appellate District Court which show that the appellant was served with summons to appear. Also there is no order in the proceedings showing that the District Court decided to proceed with hearing of the appeal in absence of the appellant for failure of the appellant to appear in Court after he was properly summoned. There is no copy of summons which was duly served to the appellant in the record of the appellate District Court. It was in the judgment where the appellate District Court stated that the appellant was served with summons to appear. However, it is not known how the same appeared in the judgment of the appellate District Court while there is nothing in record showing that appellant was served with summons. For that reason, I find that the appellant was not served with summons to appear in the appeal. As result, appellant was denied his right to be heard by the District Court in the appeal filed by the respondent.

The remedy where the party is denied right to be heard is to nullify the proceedings and judgment of the appellate District Court for breaching the

fundamental right and order the hearing of the appeal to start afresh. In normal circumstances retrial or fresh hearing of the case is ordered where the respective hearing was illegal or defective. But, where the interest of justice does not permit retrial or rehearing shall not be ordered. The position was stated in the case of **Fatehali Manji vs. Republic, [1966] EACA 343**, where the Court held that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will be not ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the gaps in its, evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

Similar position was stated by the Court of Appeal in the case of **Eliah John vs. Republic**, Criminal Appeal No. 306 of 2016, Court of Appeal of Tanzania at Arusha, (Unreported), where it was held that:-

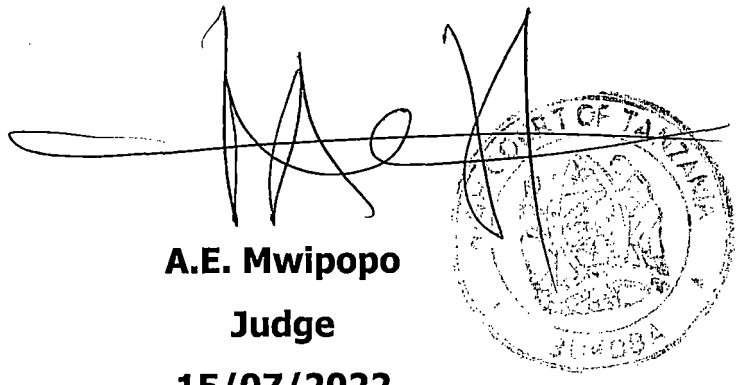
> *"In the end, like the learned Senior State Attorney, we don't think it is proper and in the interest of justice to order a re-trial on account of the prosecution evidence on record being very weak [see **Saidi Shabani vs. Republic,** Criminal appeal No. 206 of 2008 (unreported)]. An order of re-trial will definitely pave way for the prosecution to fill up the obtaining gaps which will therefore occasion an injustice to the appellant."*

After examining the evidence on record and considering the parties' submissions, I hesitate to order rehearing of the appeal in this case for two reasons. Firstly, as it was rightly heard by the appellate District Court, the evidence available in record reveals that there was dispute of ownership of the motorcycle in issue between the appellant and the respondent. The appellant testified that the said motorcycle which he bought from the respondent was stolen by the respondent. On the other hand, the respondent testified that the motorcycle belongs to him as he never sold it to the appellant. He said that he hired the said motorcycle to the appellant and that he never sold it to him. In such situation, the trial Primary Court was supposed to pause the hearing of the criminal case and advised parties to institute civil case for determination of the ownership of the motorcycle in issue before the matter is solved through criminal procedures.

Secondly, the respondent was sentence to serve 6 months imprisonment for theft offence by the trial Primary Court on 30.09.2021 and he commenced to serve the sentence on the same date. The appellant never appealed against the said sentenced imposed to the respondent for its enhancement. The proceedings, judgments and copy of commitment warranty of appellate District Court shows that the respondent was discharged on 13.01.2021, which means that the respondent has served almost two third (2/3) of the sentence imposed to him by the trial Primary Court by the time he was released from prison. In such

circumstances, quashing the decision of the appellate District Court and allowing the hearing of appeal to start afresh will not serve justice to the respondent.

For that reason, proceedings of the appellate District Court is quashed and its Judgment is set aside. As there is no sufficient evidence in record to prove the offence of theft against the respondent and for the interest of justice under the circumstances of this case, the respondent is discharged. It is so ordered accordingly.

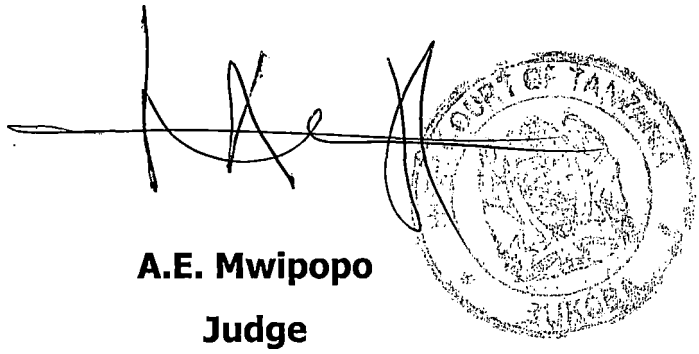


A.E. Mwipopo

Judge

15/07/2022

Court: The Judgment was delivered today in the presence of the appellant and the respondent.



A.E. Mwipopo

Judge

15/07/2022