IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

PC. CRIMINAL APPEAL NO. 09 OF 2021

(Originating from Karatu District Court in Criminal Appeal No. 27 of 2020 and Karatu Primary Court in Criminal Case No. 308)

FAUSTINE MCHUNO..... APPELLANT

VERSUS

MELKIORY HURBERT ASSEY..... RESPONDENT

JUDGMENT

1/4/2022 & 30/8/2022

ROBERT, J:-

The appellant herein was the Complainant in Criminal Case No. 308 of 2020 against the Respondent at the Primary Court of Karatu. Having been aggrieved by the decision of the Primary Court, he appealed to the District Court of Karatu vide Criminal Appeal No. 27 of 2020. The District Court having gone through the records of the said appeal made a finding and ordered as follows:-

> *"I went through the record and I find that this appeal is the replica of Case No. 353/2020 and Appeal No. 22/2020 as the issues are directly and substantially the same hence bad for res-judicata"*

With that finding, the court went ahead and dismissed the appeal. Dissatisfied with the order by the first appellate court, the appellant has appealed before this court against the said order on the following grounds:-

1. *That the first appellate court erred in law to misdirect and non-direct on the evidence on record hence reached into erroneous orders.*
2. *That the first appellate court misdirected itself in law for ordering that this appeal is a replica of the case no. 353 of 2020 and appeal no. 22 of 2020 the trial Magistrate orders breached the principle of fair trial and led to miscarriage of justice on part of the appellant.*

At hearing of this appeal, both parties appeared in person without representation. The appellant prayed successfully to argue the appeal by way of written submissions.

Highlighting on the first ground of appeal, the appellant submitted that, the first appellate court ought to have determined each ground of appeal in order for the parties to know the basis of the decision reached. He maintained that it was important for the decision of the District Court to contain reasons. To support his argument, he cited the case of **Tanzania Air Services Ltd vs Minister for Labour, Attorney General and the Commissioner for Labour** [1996] TLR 217. He submitted further that, it was not right for the Magistrate to give an omnibus determination of all the grounds of appeal raised.

Coming to the second ground of appeal, he contended that it is a fundamental principle of natural justice that parties should be heard and that the same is embodied in the constitution of the United Republic of Tanzania under Article 13(6)(a). He argued further that, application of the said principle is part and parcel of a fair trial.

With regards to the finding of the District Court that the appeal was the exact replica of the already decided cases, he argued that in the two cited cases the accused person (respondent herein), was accused of committing crimes on two different dates and time as one was committed in 2019 and the other one in 2020. It was thus wrong for the first appellate Magistrate to deny the appellant the right to be heard on merit when he filed his appeal.

He insisted that the order given by the first appellate Magistrate was against the principle of *audi alteram partem* thus causing miscarriage of justice. He finally prayed for nullification of the impugned order.

In response, the respondent submitted that the claims put forward by the appellant were unfounded and distinguished the cited case of **Tanzania Airt Services** (supra) from the present case claiming that it was cited out of context.

On the issue that the first appellate Court gave an omnibus determination of the grounds of appeal, he claimed that the assumption was totally wrong as the Magistrate reached at the conclusion based on the reasons that the appeal was a typical replica to the aforementioned cases.

In response to the second ground of appeal, he argued that the appellant's contention that he was denied the right to be heard is misconceived as the court did its best to avoid multiplicity of cases. He stated further that he is currently serving his conditional discharge sentence as per the decision in Criminal Appeal No. 27 of 2020 thus it was right to mark the appellant's case as a replica of the cited Criminal Appeal. Moreover, the respondent was declared the rightful owner of the suit land thus it was improper to hold that he breached the court's order. He concluded his submissions by urging this court to dismiss this appeal for lack of substance.

The appellant opted not to file rejoinder submissions which marked the end of the parties' submissions both for and against the appeal.

This appeal intends to challenge the impugned order of the first appellate Court given on the 12th day of December, 2020 and this Court is called upon to rule on whether there is merit in the appeal.

In doing so, I find it convenient to start by deliberating on the second ground of appeal which claims that the first appellate court breached the appellant's right to be heard thus causing miscarriage of justice.

From the outset it is important to note that, courts and other decision-making bodies are guided by principles, the principle of natural justice being one of them. The principle of natural justice embodies the right to be heard *(audi alteram partem),* the rule that parties have to be given a right to be heard before any decision touching on their rights is made.

The duty to hear parties before the court issues an order is so fundamental that failure to hear parties will have the effect of vitiating the proceedings and the resultant decision or order. Courts have often been reminded of observing this fundamental right of parties before passing any decision against any party. In the case of **Abbas Sherally and Another v. Abdul Fazalboy**, Civil Application No. 33 of 2002 (unreported) it emphasized the importance as it held;

> *"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"

It is not disputed that, the first appellate court, *suo mottu,* and without inviting the parties considered the issue that the appeal before it was *res judicata* and consequently made an order dismissing the appeal without hearing the parties. As already stated above, it is the trite law that courts should not raise issues *suo motu* and decide them without inviting parties to address the said issues such a practice is tantamount to denying parties the right to be heard.

In the circumstances, I find an order of the District Court dated 10th December, 2020 to be a nullity for failure to accord parties an opportunity to be heard. As a consequence, I allow this appeal, quash and set aside an order of the District Court. I remit the case back to the District Court and direct the court to invite parties to address it on the issue of res judicata which was raised and decided by the District Court without giving parties the right to be heard.

It is so ordered.

K.N.ROBERT
JUDGE
30/8/2022