

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

CRIMINAL APPEAL CASE No. 14 OF 2022

*(Arising from the Resident Magistrates' Court of Musoma at
Musoma in Criminal Case No. 71 of 2021)*

NZOBARINDA SALIVATORY NIYONKULU DESIRE NIYOGUSENGA ADRONISS CHIZA FABIAN & NIBIMENYA ELIYAKIM	}	APPELLANTS
<i>Versus</i>		
REPUBLIC	RESPONDENT

RULING

12.09.2022 & 14.09.2022

Mtulya, J.:

In the present appeal, the appellants, namely, Nzobarinda Salivatory, Niyonkulu Desire, Niyogusenga Adroniss, Chiza Fabian and Nibimenya Eliyakim, were disputing the decision of the **Resident Magistrates' Court of Musoma at Musoma** (the resident magistrates' court) in **Criminal Case No. 71 of 2021** (the case). The appeal was scheduled for hearing through teleconference attached in this court on 12th September 2022. However, before hearing proceedings could take its course, Mr. Tawabu Yahya Issa, learned State Attorney for the respondent had raised up and registered an

objection in the appeal contending that the appellants are distinct persons from those prosecuted in the case at the resident magistrates' court. According to Mr. Tawabu, in the resident magistrates' court the respondent had prosecuted Adronis Niyogusenga, Eliachim Nibimenya, Salvator Nzobarinda, Niyonkuru Desire and Ciza Fabiyano. In order to substantiate his submission, Mr. Tawabu cited the Charge Sheet registered in the case on 24th December 2021.

In Mr. Tawabu's thinking, the confusion of names brings doubts in the appeal as to whether the appellants are the same people who were prosecuted in the case at the resident magistrates' court or their parents. With the available remedies, Mr. Tawabu submitted that the appeal be dismissed for want of proper names as the discrepancies in names is fatal and cannot be cured. In order to bolster his argument, Mr. Tawabu cited the provision in section 359 (1) and 313 (1) & (2) of the **Criminal Procedure Act [Cap. 20 R.E. 2019]** (the Act) and precedent of **Venance Kabwewe v. Republic**, Criminal Appeal No. 228 of 2014, which held that section 359 (1) of the Act does not give right of appeal to a third party.

Replying submission of Mr. Tawabu and his protest to the appeal hearing, the appellants, save for the fourth appellant,

submitted that the names belongs to them, but it was spelling faults which have caused all the fracas on the record of appeal. Finally, they prayed the appeal hearing to proceed as the resident magistrates' court committed errors in the case.

I perused the record of appeal and found that the cited discrepancies are vivid at the first glance of the record and this appeal cannot proceed with the faults for the sake of proper record of the court. If there are vivid irregularity, this court is duty bound to address them. It cannot justifiably close its eyes (see: **Diamond Trust Bank Tanzania Ltd v. Idrisa Shehe Mohamed**, Civil Appeal No. 262 of 2017). With the available remedies, Mr. Tawabu prayed the appeal be dismissed for want of the application of section 359 (1) of the Act and precedent in **Venance Kabwewe v. Republic** (supra). Section 359 (1) of the Act provides, in brief, any person aggrieved by any finding, sentence or order made or passed by a subordinate court may appeal to the High Court. The precedent in **Venance Kabwewe v. Republic** (supra), at page 12, stated that:

...section 359 (1) does not give the right to appeal to a third party. Only parties who are directly involved in the proceedings have a right to file an appeal under section 359 (1) of the CPA. If such right so

existed, it would have been categorically stated. In the result, we hereby dismiss the appeal.

However, in the cited precedent, the appellant, Mr. Venance Kabwebwe, was not a party in the case and did not appear in the proceedings of **Ngara District Court at Ngara** during the hearing of the case and was claiming ownership of 719 heads of cattle who were found at **Kimisi Game Reserve in Ngara District of Kagera Region**. In the present appeal, the appellants submitted that they were parties in the case at the resident magistrates' court, save for spelling faults in the appeal. In my considered opinion, the precedent in **Venance Kabwewe v. Republic** (supra) is distinguishable and cannot be invited and applied in the present appeal. Similarly, the cited provision in section 359 (1) of the Act is not applicable in the present appeal.

I am quietly aware of the new thinking of our superior court, the Court of Appeal, in a multiple of precedents, favoring substance of disputes rather than minor errors and lapses (see: **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017; **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017; **Mandorosi Village Council & Others v. Tuzama Breweries Limited & Others**, Civil


Appeal No. 66 of 2017; and **Njoka Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017).

Having said so and noting interest of justice to the parties who are approaching this court praying for intervention in the decision of the magistrates' court in the case, I have decided to struck out the appeal with thirty (30) days leave, from the date of this ruling, for the appellants to file fresh and proper appeal in this court without any delay, to enjoy the constitutional right of appeal and be heard enshrined under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002].

It is so ordered.

Right of appeal explained to the parties.




F. H. Mtulya

Judge

14.09.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Mr. Yesse Temba and in the presence of the appellants, through teleconference placed at this court in Bweri area within Musoma, Musoma Prison and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.


F. H. Mtulya

Judge

14.09.2022