

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

PC CRIMINAL APPEAL NO. 2 OF 2022

(Arising from Bukoba District Court in Criminal Appeal No. 70/2019 and Original Criminal Case No. 29/2019 of Katoma Primary Court)

REGINA SEBASTIAN APPELLANT

VERSUS

IMELDA SEBASTIAN RESPONDENT

JUDGMENT

Date of Ruling: 02.09.2022

A.Y. Mwenda J,

This appeal is against the decision of the District Court which upheld the decision meted by Katoma Primary Court.

Before Katoma Primary Court, the appellant was charged for house breaking C/S 294(1) of Penal Code. It was alleged that on 26/08/2019, the appellant broke and entered into the room belonging to the respondent and upon entering, she committed an offence therein. When a charge was read over against the appellant, she pleaded not guilty and as such the respondent was compelled to line up witnesses to prove her case. Having heard the prosecution's and the defense's evidence, the trial court found the appellant guilty as charged. She was then

convicted to 6 months jail imprisonment but discharged with a condition not to commit any criminal offence within a period of six months. She was also ordered to pay a fine to a tune of TZS. 150,000/=.

Aggrieved by both conviction and sentence, the appellant appealed before the District Court. After hearing the submissions from both sides, the District Court dismissed her appeal.

Still aggrieved by the decisions of the District Court she surfaced before this court with a memorandum of appeal with four grounds which read;

1. That, the trial court erred in law and fact to uphold the decision of the Primary Court without putting into consideration that the respondent's side failed to prove her case beyond reasonable doubt.
2. That, the learned Resident Magistrate of District Court erred in law and fact to uphold the sentence and conviction of the Primary Court without putting into consideration that the appellant was convicted unheard contrary to the laws including constitution of the United Republic of Tanzania of 1977 as amended from time to time which prohibited (sic) to convict any person without grant (sic) the right to be heard.
3. That, the learned Resident Magistrate both erred in law and fact to uphold (sic) the decision of the trial Primary Court based on mere allegations of the Respondent's side.

4. That, the learned Resident Magistrate of District Court erred in law and fact to convict the Appellant contrary to the law governing the alleged offence.

Having received the appellant's memorandum of appeal, the respondent opposed it by filing a reply with four points. Since the appellant's appeal stood opposed, the court was compelled to call the parties to appear before it for hearing.

On the hearing date, the appellant appeared in person without any legal representation whilst the respondent was legally represented by Mr. Lameck John Erasto, learned counsel.

When invited to submit in support to her case, the appellant submitted that she is challenging the District Court's decision which upheld the Primary Court's decision because she tendered her evidence before the Primary Court which was not considered. She said even a witness who was called by the respondent to prove that he was the administrator of the estate of her late husband did not tender Form No. IV. She said the room she is alleged to have broken into was hers as she acquired it from her late husband as they acquired it jointly. She added in that her late husband left a will which is not respected by her co-wife's children who are now harassing her. She concluded her submission with a prayer to have her appeal allowed.

Responding to the appellant's submission, the appellant submitted that the appellant was afforded opportunity to defend her case before the lower trial court

by tendering her evidence and calling witnesses and her evidence was considered by the trial court.

With regard to appellant's averment that the respondent's witness one Thomas S/O Jeremia never tendered any exhibit (Form No. IV), the learned counsel for the respondent submitted that at page 4 of the typed proceedings the said witness testified that the broken room belongs to the respondent. Who inherited it from her late father's estate.

The learned counsel added that the said witness tendered a will and an inventory which was prepared and filed before the court where the probate matter/case was closed. On top of that the learned counsel for that respondent said after the said witness (Thomas) had completed to testify, the appellant did not bother to ask him questions (cross examination) and to him it entail she was in agreement with what the witness testified. In support to this point, the learned counsel cited a case of PAUL ANTHONY V. REPUBLIC [2016] TLS – LR. 37.

Again, the learned counsel for the respondent submitted that, sometimes before the filing of the case which is the basis of this appeal, the appellant had at one time complained before the District Council's Office that her room is occupied by the respondent but upon investigation it was revealed that she was complaining in respect of a wrong property as hers (properties) were somewhere else (at Ishonga area).

The learned counsel also said that the trial court analyzed evidence properly and was capable to assess the witness's demeanor. In support to this point, he cited the case of ALL ABDALLAH RAJAB V. SAADA ABDALLAH RAJAB [1994] TLR 132. He then concluded his submission with a prayer to have the present appeal dismissed.

In a brief rejoinder, the appellant submitted that she believe the room in question was allocated to her.

Having summarized the rival submissions for and against the appeal, the issue is whether or not the present appeal is meritorious.

In a bid to discharge my duty of finding answers to the issue herein above, I went through the copy of the first appellate judgment to satisfy myself on the findings made. Looking at it, I noted that there was omission by the Magistrate to discharge his duty as the first Appellate Magistrate (Court), the duty which is a creature of the law. In the case of KAIMU SAID VS THE REPUBLIC, CRIMINAL APPEAL NO. 391 OF 2019, THE COURT OF APPEAL, while citing with approval the case of SIZA PATRIC VS REPUBLIC, CRIMINAL APPEAL NO. 19 OF 2010 (UNREPORTED) held inter alia that;

"We understand that it is settled law that a first appeal is in the form of a rehearing. As such the first appellate court has a duty to re evaluate the entire evidence in an

objective manner and arrive at its own finding of fact, if necessary."

In his judgment the Hon. Appellate Magistrate was expected to consider the evidence of both sides as presented so as to arrive at a finding of guilty or not. However, in the copy of judgment, the Hon. Magistrate did not examine the evidence of both sides before concluding the case. This is so because he dealt with extraneous matters in arriving to his conclusion. In reaching to such conclusion, the Hon. Appellate Magistrate said that having gone through the records with extreme eye of caution, starting from trial court, and submissions by the parties to the court, he found no any justifying reason to fault the proceedings, findings, judgment and order of the trial Court. As I have stated earlier, he did not state how did he arrive into such conclusion basing on the evidence especially in the circumstances where even the trial court (Primary Court) did not bother to analyze both the prosecution's and defense's evidence in arriving to its conclusion. The importance of analyzing evidence from both sides has been stated in many authorities of our superior court. In the case of KAIMU SAID (SUPRA) the court held inter alia that;

"The analysis and evaluation of the evidence as well as the findings should be apparent in the record."

From the forgoing observations I quash and set aside the judgment by the Hon. Appellate Magistrate. I also order Hon. Appellate Magistrate (D.P. Nyamkera) to compose a proper judgment in line to the authorities cited herein above bearing in mind that even the trial court's judgment fall short of the said guidance.

Otherwise, the records of the trial court and the proceedings of the first appellate court remain un disturbed.

It is so ordered.




A.Y. Mwenda

Judge

02.09.2022

Judgment delivered in chamber under the seal of this court in the presence of Ms. Regina Sebastian the appellant and in the absence of the respondent Ms. Imelda Sebastian with notice.




A.Y. Mwenda

Judge

02.09.2022