

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MWANZA SUB REGISTRY)**

**AT MWANZA**

**CRIMINAL REVISION NO. 02 POF 2021**

*(Arising from the ruling and decision of the District Court of Nyamagana in Criminal Appeal No. 28 of 2021. Original Criminal Case No. 145 2020, Nyamagana Urban Primary Court.)*

**JULIUS RUKUBINGWA.....APPLICANT**

**VERSUS**

**PILI MWIZARUBI.....RESPONDENT**

**RULING**

**2<sup>nd</sup> Aug. & 27<sup>th</sup> Sept., 2022**

**DYANSOBERA, J.:**

The applicant Julius Rukubingwa is moving the Court to call for the records, revise, set aside and nullify the proceedings and Honourable Court's ruling of District Court of Nyamagana in Criminal Appeal No. 28 of 2021 before Hon. C.A. Mushi, SRM of 22<sup>nd</sup> November, 2021. The application has been preferred under Section 30 (1) (a) and Section 31 (1) of the Magistrate's Courts Act [Cap. 11 R.E.2019], rule 4 (2) of the Judicature and Application of Laws Act [Criminal Appeal and Revisions in Proceedings Originating from Primary Courts), Rules, GN No. 390 of 2021.

Briefly, the background of the matter is the following. Christina Mwita was in need of money. She approached the respondent so that she stood as her surety. Christina Mwita managed to secure a loan of Tshs. 200, 000 with

an interest of 90, 000/=. When the date of payment was due, Christina Mwita repaid the loan plus interest but through the respondent, her surety. It is in evidence that the respondent failed to remit the money to the lender, the applicant.

Seeing this, the applicant reported to the Police Outpost at Milongo whereby the respondent was arrested and charged before the Primary Court at Nyamagana Urban in Criminal Case No. 1415 of 2020. The trial court heard the case but was satisfied that no criminal offence was proved to have been committed. It found that the matter was civilly and not criminal. The trial court, in consequence, found the respondent not guilty and acquitted her. The applicant was aggrieved by the trial court's decision and instituted Criminal Appeal No. 28 of 2020. In his judgment dated 26<sup>th</sup> day of February, 2021, the learned Resident Magistrate, G.K. Sumaye, reversed the trial court's decision and convicted the respondent of the offence of obtaining money by false pretenses. The conviction was entered against the respondent in her absence relying on the case of **Marwa Mahende v. R.** [1998] TLR 249 and the provisions of section 226 of the Criminal Procedure Act. The sentence was reserved pending the respondent's apprehension.

It appears, the record was re-assigned to another Magistrate, this time Hon. C.A Mushi, RM who, on 22<sup>nd</sup> day of November, 2021 found that the respondent had failed to account for her non-appearance at the time she was convicted and ordered the former judgment to stand. The judgment which convicted the respondent was read over to her. During the sentencing, the respondent was given opportunity to mitigate and she said that she had already paid TZS 150,000/= after the appellant had refused to accept a sum of TZS 200, 000/=. The respondent was sentenced to a fine of TZS 100, 000/= or in default of payment of the fine to custodial sentence of three months.

The issue calling for determination in the propriety or otherwise of the first appellate District Court.

Having considered the lower court record, I have no flicker of doubt that there was only one decision pronounced in one file records, that is Criminal Appeal No. 28 of 2020. The indication of Criminal Appeal No. 28 of 2021 was a typographical error which was minor and which neither prejudiced the appellant nor occasioned any miscarriage of justice. That error was inconsequential.

However, after going through the records of the lower courts, I am of the view that the decision of the first appellate court cannot be allowed to stand. It suffers from two serious legal flaws.

In the first place, the respondent was, at the trial, charged with stealing c/ss 158 and 168 of the Penal Code and she was acquitted of the said offence. The first appellate court, without any legal justification, entered conviction against the appellant on obtaining money by false pretences, the offence with which the respondent was charged with. That was clearly wrong.

Second, the conviction was substituted for the acquittal in the absence of the respondent, the then accused at the trial court. This was a blatant violation of section 21 (1) (b) of the Magistrate's Courts Act [Cap 11 R.E. 2019] which required the district court when substituting conviction for acquittal to give the respondent opportunity of being heard. In other words, the conviction against the respondent in her absence was violative of section 21 (1) (b) of the Act.

This court is has a duty to intervene by way of revision so that the requirements of law are observed.

Consequently, for the reasons different from those advanced by the appellant, the proceedings of the district court are revised by nullifying them and quashing ~~aside~~ the conviction entered against the respondent. The sentence of a fine of TZS 100, 000/= is set aside. The decision of the trial primary court is restored.

The application for revision is allowed to the extent explained, otherwise, it is dismissed.



**W. P. Dyansobera**  
**Judge**  
**27.9.2022**

This ruling is delivered under my hand and the seal of this Court on this 27<sup>th</sup> day of September, 2022 in the presence of the appellant but in the absence of the respondent.



**W.P. Dyansobera**  
**Judge**