IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

PC CRIMINAL APPEAL NO. 5 OF 2022

MUHAMEDI RASHIDI MLONGOLA ..... APPELLANT

VERSUS

KIPOI JAGU PALORI ..... RESPONDENT

(Appeal from the decision of the District Court of Kibaha at Kibaha in Criminal Appeal No. 20 of 2021)

JUDGMENT

22nd August & 10th October, 2022

KISANYA, J.:

This is a second appeal. It arises from the decision of the District Court of Kibaha sitting at Kibaha which upheld the decision of the Primary Court of Magindu Primary Court where the respondent was found not guilty on a charge of malicious damage to property preferred under section 326 of the Penal Code, Cap. 16, R.E. 2019 (now R.E. 2022).

Pursuant to the record, it was alleged that on 7th July, 2020 at around 1400 hours, the respondent's cattle destroyed the crops planted in the appellant's farm thereby causing damages of Tshs. 7,555,627.53. The appellant adduced evidence as PW1 and called Alfan Rashid Miso (PW2), Abdallah S. Kilavi (PW3) and Hamidu Salum (PW4) to prove his case. He also tendered an Evaluation Report prepared by

the agricultural officer. On the other side, the respondent defended himself as DW1 and denied having committed the offence. He also summoned two witnesses (DW2 and DW3) to support his case. At the height of the trial, the trial court was satisfied that the charge laid against the respondent was not proved on the required standard. Thus, the respondent was acquitted of the charged offence.

Aggrieved, the appellant preferred an appeal to the District Court of Kibaha in Criminal Appeal No. 7 of 2020. In its decision dated 28th February 2021, the first appellate court expunged the appeal on the account that the petition of appeal was filed by unauthorized person. That decision was quashed and set aside by this Court (Kakolaki J.) in PC Criminal Appeal No. 4 of 2021. It was further ordered that the appeal be reheard before another magistrate. Subsequent to that decision, the appellant filed a petition of appeal which was registered as Criminal Appeal No. 20 of 2021. After hearing both parties, the first appellate court confirmed the decision of the trial court. Thus, it dismissed the appellant's appeal for want of merit.

Still aggrieved, the appellant has preferred an appeal to this Court raising four grounds of complaints to the following effect: -

1. That the first appellate court erred in law and in fact for blessing the serious illegalities made by the trial court particularly the issue of failure to solicit and consult the opinions of assessors, read their opinion in the presence of the parties and incorporating the same in its judgment and change of

assessors and failure to insert the full names of assessors and append their respective signature in the proceedings and judgment of the court.

2. That, the first appellate court erred in law and facts by holding that there was no change of assessors and that the assessors were consulted and their opinion recorded.
3. That, the first appellate court erred in law and fact by determining an appeal with actual bias in evaluating and analyzing the submission of the parties.
4. That the first appellate court erred in law and fact by issuing an order over another order issued by his fellow magistrate and thus, *fanctus officio*.

During the hearing of this appeal, Mr. Loishiye Kisota, learned advocate stood for the appellant, whereas Mr. Dominicus Nkwera, also learned advocate appeared for the respondent.

I propose to start with the first and second grounds of appeal. They were tackled altogether by the parties. It was Mr. Kisota's submission that the proceedings are tainted with illegalities. He pointed out the said illegalities include failure to record opinion of assessors, failure to incorporate the opinion of assessors in its decision and failure by the assessors to sign the judgment. The learned counsel further submitted that the said omissions contravened rule 3 (1) and (2) of the Magistrate's Courts (Primary Courts) (Judgment of Court) Rules, 1987 GN No. 2 of 1988 (henceforth "the Rules".

Mr. Nkwera disagreed with the appellant's counsel. He submitted that the assessors were duly involved in accordance with the law. Referring this Court to section 7 of the MCA and rule (1) and (2) of the Rules, the learned counsel argued the role of assessors included to vote on the party who won the case. He further contended that the judgment of the trial court was duly signed by the assessors. It was his further submission that the assessors were consulted as required by the law. To bolster his submission, he cited the case of **Kare Kamilimi Steti vs Mohamed Salum and Others**, Consolidated PC Appeal No. 97 and 98 of 2018, HCT at DSM (unreported).

Rejoining, Mr. Kisota submitted that the record does not show whether the assessors voted. It was his further argument that the fact that the assessors signed the judgment does imply that they were consulted.

I have examined the record and considered the rival submissions and the cited authorities. For a start, I agree with Mr. Nkwera that in terms of rule 3(1) and (2) of the Rules, assessors are not required to give or write their opinions on the matter. The Rules require them to sign the judgment of the court to certify that they agree with it. The said rule stipulates:–

> *"3. (1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate shall proceed to consult with the*

assessors present, with the view of reaching a decision of the court.

(2) If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court which shall be signed by all the members.

(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in sub-rule (1) of this Rule, be entitled to sum up to the other members of the court."

The above cited provision was considered and discussed by the Court of Appeal in the case of **Neli Manase Foya vs Damian Mlinga**, Civil Appeal No. 25 of 2002 (unreported) in the following terms:-

"***We do not read anything in Rule 3 (1), (2) and (3) above which demands the assessors to give their opinions on an issue before the court.*** *Under Rule2 assessors are members of the court which include the magistrate. It is evident from sub rule (2) above that all members of the court are required to participate in the decision making process of the court. Assessors are members of the court, co – equal with the magistrate. After they have completed hearing the evidence from the parties, the stage is then set for the magistrate to consult with them in order to reach a decision of the court.* ***This presupposes that before the court reaches a decision, there will be a conference of the members of the court to deliberate on the issues***

> ***before them and reach a decision***. *In such a case, the magistrate will write down the decision, which will then be signed by all members of the court."* (Emphasize supplied)

I should hasten to say that the above position of law is clear that assessors are not required to give opinion. Therefore, Mr. Kisota's arguments that the assessors did not give their opinion and that their opinion was not read in the presence of the parties lack legal basis. As members of the court, the assessors were required to participate in making the court's decision. Upon completion of the hearing, the trial magistrate was required to consult with the assessors who heard the matter in order to arrive at the decision of the court. After consultation, the trial magistrate was duty bound to compose the judgment or decision and require all members to sign the same. That procedure was duly complied with.

I now move on to the third ground of appeal in which the appellant grieves that the first appellate court was bias in the course of evaluating and analyzing the submissions. The thrust of this ground as per submissions made by the appellant's counsel is that the first appellate court held the view that there was no change of assessors contrary to the record. It was Mr. Kisota's contention that some of the assessors made the decision while they did not hear the matter. He named the said assessor as Mr. Kibendera. Citing the case of **Erica Christom vs Christom Fabian and Another,** Civil Appeal No. 137 of 2020 (unreported) he argued that the said defect rendered the proceedings of the trial court a nullity.

Responding to this ground, Mr. Nkwera submitted that there was no change of assessors. Making reference to the typed proceedings, he argued that the assessors who heard the matter on 12th October, 2020 were Sauda and Ramadhan. He further contended that the judgment was signed by the said Sauda and Ramadhan. That said, the learned counsel moved this Court to find no merit in this ground.

Rejoining, Mr. Kisota contended that Mr. Kibendera was present at on the date of judgment while he did not participate during the hearing of the case.

Certainly, it settled law that the decision of the trial court must be made by the assessors who heard the case unless there are cogent reasons to the contrary.

Reading from the original proceedings of the trial, I find no changes of set of assessors. It is on record that Sauda and Kibendera were present when the charge was read over to the respondent on 5th October, 2020. On that day, the case was fixed for hearing on 12th October, 2020 during which Sauda and R. Kidendera were in attendance. Both parties were heard on that date (12th October, 2020) and the judgment delivered ten days later, on 22nd October, 2020. Pursuant to the coram, the assessors who were present on the date of judgment are Sauda and Kibendera. In the light of the foregoing, I hold the view that there was no change of set of assessors.

Both counsel contended that the judgment was signed by Ramadhan instead of Kibendera. Indeed, that fact is reflected in the typed judgment. However, the typed judgment referred to by the learned counsel was not signed by the assessors. I was then inclined to go through the original (handwritten judgment). It bears the assessors' signature and not their names. Looking at the assessors' signatures on the judgment, I am convinced that the same are similar to the signatures featuring in the proceedings whereby one of the assessors' wrote the words "Ramadhani KB" as his signature. The signature to that effect appears in the proceedings and judgment. Considering that the first assessor signed by writing "Sauda", I am of the view that the signature in the style of "Ramadhani KB" was made by Kibendera whose names appear throughout the coram. On that account, the third ground lacks merit as well.

Finally dealing with the fourth ground of appeal whose common thread is whether the first appellate court's proceedings is flawed with illegalities or irregularities. In his submission, Mr. Kisota faulted Hon. Mwingira-RM for overruling her predecessor order that the appeal would be argued by way of written submissions. He further contended that the successor magistrate did not assign the reasons for taking over the matter as underlined in the case of **Herca Marumba vs Daskari Daniel Temba**, Land Appeal No. 18 of 2019 (unreported).

In rebuttal, Mr. Nkwera submitted that the first appellate court was required to read the record of the trial court and dispose of the appeal. He went on to contend

that the reasons for change in hand of the case file were given. He was of the further view that the case of **Herca Marumba** (supra) is distinguishable from the circumstance of this case on the account that the duty to assign reasons for taking over does not apply to appeals.

Mr. Kisota rejoined by submitting the requirement to assign reasons for taking over the matter applies to appeals.

It is common ground that the appeal was initially assigned to Hon. Kangwa, learned resident magistrate. Pursuant to the record, Hon. Kangwa heard and determined the preliminary objection raised by the respondent. Thereafter, the appeal moved to Hon. Mwingira who ordered the hearing to be disposed of by way of written submission. Nothing to suggest that the predecessor magistrate (Hon. Kangwa) had ordered that the appeal would be heard orally. Therefore, Mr. Kisota's contention that the successor magistrate overturned the order made by her predecessor is not supported by the record.

The complaint that the successor magistrate assigned no reason of taking over the matter was not raised in the petition of appeal. It is trite law that parties are bound by their own pleadings that court is enjoined not to consider an additional ground of appeal which is argued without leave of the court. Even if I was to consider the said issue, I agree with the appellant's counsel that the successor magistrate was duty bound to assign reasons for taking over the matter from his predecessor.

However, I have considered that the appeal was not partly heard by the predecessor magistrate. It was heard by the successor magistrate who went on composing the judgment. In the circumstances, I am of the view that the omission is curable is under 37(2) of the MCA. This is when it is taken into account that the appellant did not demonstrate how the omission occasioned a failure of justice.

All said and done, I am satisfied that the first appeal was determined in accordance with the law. Consequently, the appeal is hereby dismissed in its entirety. This being a criminal case, I make no order as to costs.

S.E. KISANYA
JUDGE

Court: Judgment delivered 10th day of October, 2022 in the presence of the Mr. Augistino Mwayingu holding brief of Mr. Loishiye Kisota learned advocate for the appellant and the appellant in person.

Right of appeal explained

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY

S.E. KISANYA
JUDGE
10/10/2022