IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 23 OF 2021

(Arising from Misc. Civil Application No. 63 of 2020 Juvenile Court of Dar es Salaam at Kisutu)

FORTUNATUS SIMFUKWE ..... APPELLANT

VERSUS

NOELLA MOSHI ..... RESPONDENT

JUDGMENT

Date of Last Order; 06/4/2021

Date of Judgment; 21/7/2022

S.M. Kulita, J.

This is an appeal from the Juvenile Court of Dar es Salaam at Kisutu. The Appellant herein was convicted and sentenced to serve the imprisonment of 3 (three) months and paying a fine, Tsh. 800,000/= for contempt of court. The said penalty was made *suo mottu* upon the allegation by the trial Magistrate in the original case, Misc. Civil Application No. 63 of 2020 that the Respondent (Appellant herein) willingly denied to pay money for the DNA test, which was a contravention of section 36(5) of the Law of the Child Act [Cap 13 RE 2019].

Aggrieved with the said decision, the Appellant lodged this appeal relying on the following grounds;

1. That, the trial court convicted and sentenced the Appellant without investigation and lodging a charge to court.
2. That, the Appellant was not heard before he was convicted and sentenced.
3. That, upon conviction the Appellant was not given the option to pay a fine.
4. That, the trial Magistrate proceeded with determination of the original case (Misc. Civil Application No. 63 of 2020) while the Appellant had already lodged the Revision Application complaining on the irregularities and illegalities committed by the trial Magistrate.
5. That, the Appellant has been punished twice for the same offence.

The matter was disposed of by way of written submissions. The Appellant is represented by Mr. Ditrick Mwesigwa, Advocate from Curia Attorneys while the Respondent is represented by the legal aid institution namely TAWLA. However, the Respondent didn't file a reply submission, hence the matter was entertained *ex-parte* against her.

In his written submission Advocate for the Appellant, Mr. Ditrick Mwesigwa submitted in respect of Grounds 1 and 2 of the appeal that, it was essential for the trial court to frame and record substance of the charge and read it to the Respondent (Appellant herein). He added that the Appellant was then to be given a fair opportunity to reply. He further stated that that the Appellant had already made part payment for the DNA test but he was not given an opportunity to express it to the Magistrate. The counsel was of the view that, the fact that the said procedures were not followed, it means the Appellant's right to be heard was infringed. He alleged that what had been done collides with **article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977** which provides for the right to be heard.

Mr. Mwesigwa further averred that the said dispute on the contempt of court was supposed to be an independent case and be entertained by another Magistrate.

Submitting on the 3rd ground of appeal, the counsel stated that upon conviction the Appellant was not given the option to pay a fine. On this, the Counsel stated that the offence that the Appellant is alleged to have committed is minor as compared to the punishment that has been inflicted. He said that the said offence is punishable for the payment of fine at the minimum sum of Tsh.

500,000/= as an alternative to the 3 months term of imprisonment. He asserted that the said option of payment of fine was not given to the Appellant, instead he was punished for both, fine and imprisonment.

As for the 5th ground that, the Appellant has been punished twice for the same offence, the Counsel submitted that the trial Magistrate erred in law to punish the Appellant twice for the same offence. He said that the Appellant was initially punished on 11/11/2020 but the same trial Magistrate again punished the Appellant on the same case of similar facts on 14/01/2021**.** Mr. Mwesigwa said that it was the violation of the principle of double jeopardy which provides that no person should be punished twice for the same offence.

The 4th ground of appeal based on the fact that the trial court proceeded to entertain the original case while the Appellant had already lodged a Revision Case before this court. The Counsel submitted that the Appellant had filed a Notice of Revision at High Court against the ruling of the trial Magistrate upon her denial to recuse herself from entertaining the Misc. Civil Application No. 63 of 2020 in which the Appellant herein was the Respondent. He alleged that, from the date that the said notice for Revision was

filed at High Court, the trial Magistrate's hands were tied to proceed with the original case, Civil Application No. 63 of 2020.

That was the end of Appellants submissions. As stated earlier that there was no reply to the Appellant's submission, hence the matter proceeded *ex-parte.* The analysis is therefore going to be determined in the absence of the Respondent's submissions.

The above submissions by the Appellant led me to go through the original record and the following is my analysis;

The issue to be determined as per the 1st ground of appeal is whether it was wrong for the trial court to penalize the Appellant for Contempt of Court in the absence of the charge and without investigation of the allegations against him.

This court is of the view that, there are two scenarios in which the court can deal with the people committing the contempt of court. The **first mode** is that which involves the frame of charge against the wrong doer whereby such a person is charged in the ordinary ways that are used to institute a criminal case against the Accused in court. The charge in that offence is framed under section 114 of the Penal Code. For the sake of justice such kind of case of contempt of court should be entertained by another Magistrate

instead of the one before whom the contempt is alleged to have been made.

The **second mode** is that in which the court deals with the wrong doer suo mottu. This should be done if the person commits wrong before the court in the presence of the Judge or Magistrate, and upon being inquired by the said Judge or Magistrate provides no justifiable reason for what he/she has done. Under this scenario the presiding Judge or Magistrate has the right to penalize the wrong doer upon inquiring him. The trial Judge or Magistrate has to satisfy himself on his allegation against the said suspect of contempt by inquiring him, so as to avoid punishing him mistakenly. It means the person should not be condemned unheard.

In the case of **MASUMBUKO RASHID V. R [1986] TLR 212** cited by the Appellant's Counsel, the issue was that the Accused persons left the dock in protest, and without further ado, the Learned Magistrate peremptorily convicted them of contempt of court and sentenced each of them accordingly. The situation is distinguishable to this case. Unlike the facts that can be seen in that cited case, as it was for 11/11/2020, on 14/1/2021 the presiding Magistrate in this case gave the Appellant the right to show cause before she penalized him. She then penalised him upon

finding him with no justifiable reason for his act of not complying with the court order.

Therefore, the penalty for contempt of court can be imposed suo mottu by the Magistrate or Judge before whom the contempt has been committed. This does not necessarily be established by framing of the formal charge before the court. It depends on the nature of the case. I therefore find the 1st issue with no merit, hence dismissed.

As for the Second ground of appeal, whether the Appellant was condemned unheard, the record is vivid that, till 14/1/2021 the Appellant had not yet paid the money, Tsh. 300,000/= for the DNA test since he had been so ordered by that court on 5/3/2020, about 7 months back. The trial court's record further transpire that, before he was punished on the 14/1/2021 the Appellant was asked by the trial court as to why he had not complied with the court order which had been issued since a long time back. The reply was that he had filed an appeal at High Court against the trial Magistrate's ruling, dated 22/12/2020, upon her denial to recuse herself from entertaining his case (Misc. Civil Application No. 63 of 2020). However, the Appellant had not submitted any proof to that effect, the ground which the trial Magistrate found to be unjustifiable, rather it was a delay tactics by the Appellant, hence

proceeded to penalize him to serve the imprisonment of 3 months and to pay a fine of Tsh. 800,000/=.

Be it noted that on the 11/11/2020 the said Appellant's reply on that same issue was that the order for DNA test was not sought by him, hence he was not responsible to pay for it. The records also transpire that, having so heard the Appellant on that 11/11/2020, the trial Magistrate informed the Appellant that his allegations were false. She told him that according to the proceedings, on the 5/3/2020 he (Appellant) is the one who had sought for the DNA test regarding his allegation that he is not a biological father for the child. The Magistrate rightly clarified that the said prayer by the Appellant was granted by the predecessor Magistrate, Hon. Madame Missana. That led the trial Magistrate to punish the Appellant to pay a fine of Tsh. 500,000/= or to serve the imprisonment of 3 months in default. The Appellant paid the fine.

The record also transpire that, prior, on 10/9/2020 when the Appellant was asked for the first time as to why he doesn't affect the payment for the DNA test, he replied that he was still in progress to effect the payments at Muhimbili National Hospital. He alleged that he had already paid Tsh. 100,000/= out of Tsh. 300,000/= and the balance of Tsh. 200,000/= would be paid in 2 months later. However, the Magistrate found him not serious on

the orders of the court, as even the examination for the DNA is used to be done by the office of the Government Chemist, not Muhimbili Hospital as alleged by the Respondent. The said court declared him a liar. She just warned the Respondent and ordered him to effect the said DNA test. However, it was in vein up to 11/11/2020 when the Appellant appeared again in that court, and punished accordingly for the 1st time.

From the above historical background of the matter as narrated from the record, you can find that the Appellant's allegation that he was condemned unheard on that 14/1/2021 is not true. The truth is that he was heard in all occasions that led him to be penalized, including that of 14/1/2021 from which this appeal arises.

Having so said, I find the 2nd grounds of appeal with no merit, hence dismissed.

As for the 5th ground that, it is true that the Appellant was punished twice by the trial court. However, the scenario does not fall under the doctrine of double jeopardy as alleged by the Appellant's counsel. According to the historical background of the matter, there at the lower court the Appellant did commit the contempt twice as much in this same matter, that's why he was punished twice.

For the 1st time the Appellant was penalized on 11/11/2020 for the said allegation of contempt of court, which was neglecting to pay the money for the DNA test for a long time and lying the court that he had not sought for the DNA test, the statement which was found to be false. He was penalized to pay a fine of Tsh. 500,000/= or to serve the imprisonment of 3 months in default.

The 2nd time was 14/1/2021 in which he was penalized to serve the imprisonment of 3 months and to pay a fine of Tsh. 800,000/= for further not complying the court order to pay money for the DNA test. This time the reason being, that he had filed a notice of appeal at High Court against the trial court's Magistrate's ruling dated 22/12/2020 on his (Appellant's) prayer for her to recuse from entertaining his case, but she denied. The said Magistrate having found the said reasons not justifiable and there was no proof that the Appellant had actually lodged the said Notice at High Court continued to punish the Appellant as narrated above.

According to the record, the said order for DNA test was issued following the Respondent's allegation that the child in question is not his blood/biological issue. The trial court blessed the Respondent's prayer to undergo the DNA test as per **section 36(2) of the Law of the Child Act [Cap 13 RE 2019].** Under **sub-section (3)** the said court further ordered the Respondent to

bear the costs for that purpose**.** The said **section 36 (2)** and **(3)** provides;

> *"(2) Without prejudice to subsection (1), where the evidence of a mother or independent evidence cannot be corroborated by other evidence available to the satisfaction of the court, the court may, upon request or suo moto, order DNA test to be conducted for the purpose of proving the biological father of the child.*
>
> *(3) The court shall determine and make an order as to the party who shall bear the costs associated with the DNA test"*

The records further transpire that, after the issuance of that said order for the DNA test on 5/3/2020, the Respondent used not to turn up to court. On 10/9/2020 the Respondent appeared to court without having affected the payment for the said test**.** Upon inquiring the Appellant, the said court declared him a liar, but it warned him and extended the time for the said Appellant to effect the payment at the proper institution so that the DNA test could have been conducted. Still the Appellant never complied with the orders of the court for two times without any justifiable reason, that's why he was penalized two times which are the number of

times he did commit the contempt, after he had been warned on the 10/9/2020.

It is ample in the record that, under **section 36(5) of the Law of the Child Act [Cap 13 RE 2019]** the trial court, rightly ordered the Appellant to pay a fine of Tsh. 500,000/=, or to serve the imprisonment for a term of 3(three) months in default, for denial to obey the court order on 11/11/2020. The Appellant opted to pay the fine.

The record further transpire that inspite of imposition of the said penalty against the Appellant on that 11/11/2020, the order for executing the DNA test by the Respondent was still there. However, the Respondent never complied with it, instead, on the 14/1/2021 he appeared before the same court without having affected the said payment. This time the reason behind was that he has lodged the appeal at High Court against the trial court's ruling dated 22/12/2020, but he had no any proof to that extent. The trial Magistrate rightly regarded the said reason unjustifiable, penalized him a stiff penalty of fine (Tsh. 800,000/=) and imprisonment (3 months) collectively. As it was the 2nd time he commits contempt of court, the Appellant is regarded the 2nd offender, hence he deserved a penalty which was severe than the previous one.

Though the Appellant's wrongs arises from the same case, these two scenarios cannot be regarded as double jeopardy. Under the doctrine of Double Jeopardy a person should not be charged twice for the same crime originating from the same facts. As for the matter at hand contempt of court by the Appellant was committed on different days. It is like committing any other kind of crime of the same nature, against the same person on different days. Each of them will be regarded a separate count, punishable with different sentences for each of them.

Therefore, the trial court was right to penalize the Appellant twice as they are number of times that he did contempt the court in that same case. Actually, there is no law which provides that penalty for the contempt of court should not exceed one per case, but, whenever one commits it, he should be penalized accordingly, notwithstanding the number of times that he commits it in the same case. Therefore, the 5th ground of appeal also fails.

In his 3rd ground of appeal the Appellant alleged that upon conviction, he was not given the option to pay a fine. His Counsel submitted that in this 2nd accusation, the one that led to the institution of this appeal, the trial court ought to have given him an option to pay a fine or to serve the imprisonment as it was so done in the first allegation prior to it. Further the Appellant's Counsel

stated that the offence that the Appellant is alleged to have committed is minor as compared to the punishment that has been inflicted. It is my opine that, this being the second time the Appellant commits the same offence, and it is the continuity of the wrong that he had committed before and penalized accordingly, the trial court was right to impose the stiff penalty against him, for this wrong that the Appellant committed later.

I managed to go through the provision of **section 36(5) of the Law of the Child Act [Cap 13 RE 2019]** which provides for the penalty against the person who refuses to comply with the court order on the DNA test. The said section states;

> *"Any person who refuses to comply with the court order issued under this section commits an offence and shall on conviction be liable to a fine of not less than five hundred thousand shillings or to imprisonment for a term of three months or to both"*

Therefore, in sentencing the Appellant, the trial Magistrate did not act beyond her jurisdiction to penalize the Appellant to serve the imprisonment of 3 months and to pay a fine of Tsh. 800,000/=. The fact that the Appellant is not the first offender, but the second offender, it was right for him to face the stiff penalty, as compared

to the first time in which he was penalized with an option of either to pay a fine of Tsh. 500,000/= or to serve the imprisonment for a term of 3 months, whereby the Appellant opted to pay a fine.

I know that the civil contempt does not require immediate imprisonment, for it is also punishable by the imposition of a fine, but the above narrated facts attract me to declare that the imposed penalty is proper, as it regarded the fact that it was the 2nd time the Appellant commits the same crime and it was in continuity of the previous crime that he had committed in the same matter.

If the Appellant's behaviour was to be condoned, Court's orders would be violated and disobeyed with impunity, making the courts' duty impossible to be achieved, with disastrous consequences to the machinery of justice [see **Kwiga Masa v. Samweli Mtubwata (1989) TLR 103 (HC)** and **Lampit & Another v. Pook Borough Council (Taylor & Another, third Party (1990) ALL.ER 887.**

In the High Court case of **Olam Tanzania Limited v. Halawa Kwilabya, DC Civil Appeal No. 17 of 1999** it was held:

> *"Now what is the effect of a court order that carries instructions which are to be carried out within a predetermined period? Obviously, such an order is*

binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is conversant to them……..This should not be allowed to occur. Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."

As defined in both the **Black's Law Dictionary, 8th Edition, page 336** and the **Penal Code [Cap 16 RE 2019].** The former defines contempt as;

"……..a disregard of, or disobedience to, the rules or orders of the legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body",

While, the latter has the following words:

"……..any person who wilfully obstructs or knowingly prevents or in any way interferes with or resists the execution of any

summons, notice, order, warrant or other process issued by court, or any person lawfully charged with the execution thereof is guilty of an offence and shall be liable ……".

The Appellant's act fits in the four corners of those definitions. The fact that what he has done repetitively, it leads to unnecessary delay of justice by obstructing the quick disposal of the case. Thus, the Appellant deserved the said severe penalty.

As rightly held by my sister Hon. Mgonya, J, in the case of **Zein Mohamed Bahroon vs. Reli Assets Holdings Company Ltd RAHCO, Misc. Land Application No. 307 of 2017, High Court, Land Division** in which he quoted with approval the decision of this Court Hon. Luanda J, as he then was, in **TBL V. EDSON DHOBE & OTHERS, Misc. Civil Application No. 96 of 2000** that;

"Court orders should be respected and complied with, court should not condone such failure, to do so is to set a bad precedent and chaos. This should not be allowed to occur. Always courts should exercise firm control over proceedings"

Thus, the trial Magistrate's aim in not giving the Appellant an option to pay a fine or imprisonment, is that he was the 2nd offender. Hence, stiff penalty can be a lesson for the wrong doer to learn

that he should not further disturb the court's procedures. Be it noted that disturbing the court's procedures can lead to a bad precedent and chaos in dispense of justice.

Under the said circumstances the trial Magistrate was right to penalize the Appellant for both, fine and imprisonment. I therefore find the 3rd ground of appeal also fails.

The Appellant's Counsel alleged in the 4th ground of appeal that the trial Magistrate proceeded with determination of the original case (Misc. Civill Application No. 63 of 2020) while the Appellant had already lodged a notice for filing Revision/Appeal at High Court against the irregularities and illegalities committed by the trial Magistrate in her ruling dated 22/12/2020 whereby the said Magistrate refused to recuse herself from entertaining that case inspite of being so prayed by the Appellant.

This ground of appeal also looks to have no merit as the records transpire that the Appellant, after he had been penalized on that 14/01/2021 regarding the contempt of court, he lodged this appeal at High Court on 5/2/2021. By the time the said appeal was lodged at High Court on that 5/2/2021, the original case file was still in possession of the trial court, the thing which creates a doubt if there was such appeal/revision filed at this court before. There was

no proof to that extent. It is nowhere to be seen that there was appeal/revision or the notice lodged to court against the trial court's ruling dated 22/12/2020.

The only cases that the Appellant had lodged to this court, apart from this Civil Appeal No. 23 of 2021 filed on that 5/2/2021 is the Civil Revision No. 5 of 2021 filed on that same date, 5/2/2021 but abandoned by the Appellant himself. This Civil Appeal No. 23 of 2021 was filed against the decision of the trial court delivered on 14/1/2021, not 22/12/2020. This ground of appeal is meritless, hence dismissed as well.

From the aforesaid analysis, I uphold the decision of the trial court. I find the appeal with no merit, hence dismissed. Appellant to bear the costs.

S.M. KULITA
JUDGE
21/07/2022

ORDER; The original case file to be remitted back to the Juvenile Court of Dar es Salaam at Kisutu for further action(s) from where it had ended up.

S.M. KULITA
JUDGE
21/07/2022