

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC. CRIMINAL APPEAL NO. 15 OF 2022

(Arising from the decision of the District Court of Tarime at Tarime, original Criminal Case No. 139 of 2022 in the Tarime Urban Primary Court)

WITNESS JOHANES.....APPELLANT

VERSUS

FREDY TYENYI.....1ST RESPONDENT

SINDA SAMSON TYENYI.....2ND RESPONDENT

JUDGEMENT

24th Feb & 01th March, 2023

M. L. KOMBA, J.:

Before Tarime Urban Primary Court (the trial court), the appellant (complainant) successfully sued respondents herein (accused persons) in Criminal case No. 139 of 2022 for theft contrary to section 265 of Penal Code Cap 16 R. E. 2019. It was alleged that on 13/02/2022 at 21.42 hours at Starehe street within Tarime District accused persons jointly and together did steal luggage worth 1,665,000/ the property of appellant. At the conclusion of the hearing trial court found accused persons guilty and sentence them 14 months imprisonment and ordered to pay compensation of Tshs. 1.665, 000/= to the appellant. Unsatisfied, respondents appealed

to Tarime District court with nine grounds and for some reasons I will not reproduce them at them.

After deliberation and analysis, the learned appellate Magistrate in Criminal Appeal No. 13 of 2022 allowed the appeal and acquitted respondents. This decision dissatisfied the appellant as she did not recover her luggage neither was she compensated. She then knocked the door of this court folded at hand with three grounds that;

1. ***Kwamba***, Mahakama iliyosikiliza rufaa kwa mara ya kwanza ilikosea kisheria na kimantiki kwa kuamua kwamba muomba rufaa hakuthibitisha kesi yake kama inavyotakiwa kisheria wakati ni dhahiri katika mwenendo na hukumu ya mahakama ya mwanzo kwamba muomba rufaa alithibitisha kesi yake bila kuacha shaka lolote kama inavyotakiwa.
2. ***Kwamba***, Mahakama iliyosikiliza rufaa kwa mara ya kwanza ilikosea kimantiki na kisheria kuamua kwamba kesi hii inatokana na mgogoro wa familia bila kuwa na ushahidi wa kutosha kuthibitisha uwepo wa mgogoro huo.
3. ***Kwamba***, Mahakama iliyosikiliza rufaa kwa mara ya kwanza ilikosea kisheria na kimantiki kuamua kwamba wajibu rufaa waachiwe huru kutokana na hoja kama vile kutokua na shufaa ya washitakiwa, haki

ya rufaa kutokuelezwa kwa washitakiwa washitakiwa kupewa adhabu bila kuhukumiwa (convicted) hoja ambazo Hakimu mwenyewe aliibua katika rufaa bila kumpa muomba rufaa nafasi.

On the hearing date, both parties stand solo, unrepresented. When given right to make her case, the appellant adopted her petition of appeal, and further submitted that it was not right for the District Court to vary the decision of the trial court without her being compensated the value of the stolen luggage and pray this court to consider and allow her appeal with costs, to quashing decision of the first appellate court, to restore the decision of the trial court in criminal case No. 139 of 2022 and provide other relief deem fit to grant.

In reply, 1st respondent Fred Tyenyi adopted their reply to the petition and further submitted that he agree with the decision of District Court to nullify the decision of the Tarime Primary Court, the Urban court because appellant failed to prove her claims. 2nd respondent (Sinda Tyenyi) was of the same position that the appellant failed to prove she travelled to the place where she bought the items which were in the luggage and pray this court not to consider this appeal.

After hearing the submissions and read the record and judgment of the Tarime District Court seat at Tarime, I am in a position to determine whether this appeal is meritorious.

Reading from the 3rd ground of appeal the appellant complained of the new issues which was raised *suo motto* by the appellant Magistrate. This grumble made me to revisit and read the entire judgement of the Tarime District court arising from Criminal case No. 13 of 2022. I found that apart from the fact that Appellate Magistrate did not attend all issues as raised in the petition of appeal as it is now the position of the law, see for instance, the decisions in **Malmo Montage Konsult AB Tanzania Branch vs. Magreth Gama**, Civil Appeal No. 86 of 2001, **Nyakwama s/o Ondare @ Okware vs. The Republic**, Criminal Appeal No. 507 of 2019 and **Mwajuma Bakari (Administratrix of the Estate of the late Bakari Mohamed) vs. Julita Semgeni and Another**, Civil Appeal No. 71 of 2022 (all unreported), among others, I find further at page 6 of the judgement three new issues were raised, analyzed and concluded.

Just as raised by the appellant in her petition of appeal, when in the cause of composing judgement, the appellate Magistrate found irregularities, he was supposed to call both parties and request them to address the court

before he proceeded with analysis and arrive to the conclusion without affording parties to respond. This is the same as denying the parties right to be heard on the issue as was held by the Court of Appeal in the case of **Mbeya Rukwa Autoparts and Transport Ltd vs. Jestina George Mwakyoma** [2003] T.L.R. 251, where the Court held that, I quote:

'...natural justice is not merely a principle of the common law, it has become a fundamental constitutional right Article 13(6) (a) includes the right to be heard among the attributes of equality before the law'.

In the present appeal, the Magistrate raised *suo motto* the issue of conviction claiming that the trial Magistrate did not convict appellants and therefore the sentence was improper. He further faults the trial Magistrate for passing sentence above the statutory limit which is six months and that the 14 months which he sentenced appellants were not confirmed and therefore ineffective and proceeded to acquit respondents without avail the parties right to address the court on those issues. This is the same as denying the parties right to be heard on the raised issues.

In the case of **EXB.8356 S/SGT Sylvester S. Nyanda vs. The Inspector General of Police & The Attorney General**, Civil Appeal No. 64 of 2014 (unreported), the Court of Appeal held that: -

'There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed suo motto which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to fair hearing'.

The Court of Appeal in the above cited case went on to quash the proceedings of the High Court and order retrial. The Court took similar position in the case of **Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo**, Civil Appeal No 161 of 2016, Court of Appeal of Tanzania, at Mwanza, (Unreported), where it was held that: -

"In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters suo motu and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of the High Court a nullity, and we hereby declare so."

Thus, from above cited decisions of the Court of Appeal it is settled law that where the Court or Tribunal raises issue **suo motto** and determined it

without according the parties an opportunity to be heard, the entire proceedings and the decision of the court becomes a nullity.

In the present appeal the fact that District Court in Criminal case No. 13 of 2022 raised issues *suo motto* and proceed to determine it without accord the parties opportunity to be heard, this renders the proceedings nullity. I find this ground alone is sufficed to dispose off an appeal and I will not analyse other grounds of appeal.

For that reason, I allow the appeal; I quash the proceedings and decision of the District Court Tarime at Tarime over Criminal case No. 13 of 2022 and hereby restore decision of trial court in Criminal case No. 139 of 2022 of Tarime Urban Primary Court. Moreover, I reduce terms of imprisonment from one years and two months (14 months) to six (6) months and the order for compensation to the tune of 1,665,000/= remains undisturbed.

DATED at **MUSOMA** this 1st March, 2023.




M. L. KOMBA

Judge

Judgement Delivered on 01 March, 2023 in chamber in the presence of both parties.


M. L. KOMBA

JUDGE

1st March, 2023