

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

PC CRIMINAL APPEAL NO. 30 OF 2022

(Arising from the decision of the District Court of Tarime at Tarime in Criminal Appeal No. 72 of 2022)

BETWEEN

ANARUA MWANGA APPELLANT

VERSUS

PETRO MNANKA RESPONDENT

JUDGMENT

22nd & 28th March, 2023

M. L. KOMBA, J.:

This is an appeal against the decision of District Court of Tarime (the first appellate court) in Criminal Appeal No. 72 of 2022 where the first appellate court quash the proceedings, set aside the sentence and orders of Tarime Urban Primary Court (the trial court) in Criminal Case No. 798 of 2021 which its judgment was delivered on 20th June, 2022. The first appellate court proceeded and acquit the appellant thereto.

Briefly, on 17th September, 2021 the respondent herein was convicted and sentenced to community services by the trial court for an offence of criminal trespass contrary to section 299 of the Penal Code [CAP 16 R.E 2019 now 2022]. He appealed before the first appellate court in Criminal

Appeal No. 65 of 2021 and the court ordered ***trial denovo***. Upon retrial, the trial court delivered the judgment on 20th June, 2022 and the respondent was again found guilty and sentenced to one year and two months in prison.

Once again, the respondent appealed to the first appellate court against the decision of the trial court and the first appellate court apart from quashing the proceedings, set aside the sentence and orders of the trial court, it proceeded to acquit the respondent. That decision of the first appellate court dissatisfied the appellant hence the present appeal. The appellant advanced three grounds of appeal to challenge the said decision of the first appellate court. The grounds read as follows;

- 1. That, the appellate Magistrate erred in law and fact for determining the case relying on nullified case on which judgment was delivered on 17th September, 2021 rather than relying on fresh case on which judgment was delivered on 20th June, 2022.*
- 2. That, the appellate Magistrate erred in law and fact as in a fresh case after nullification on which judgment was dated 20th June, 2022 there is no order for demolition of the wall contrary to what the appellate Magistrate tends to base his decision.*
- 3. That, the appellate Magistrate misdirected himself by deciding that there was serious irregularity in a fresh case as the trial Magistrate had found accused guilty and proceeded to sentence him without first convicting him, in actual fact that did not occasion any failure*

of justice as once one is found guilty automatically, he ought to be convicted and not otherwise. Thus, that did not deprive the respondent from getting substantial justice.

When the matter was placed before me for hearing, the appellant appeared solo, fended for himself while on the other hand the respondent had the services of Mr. Emmanuel Werema, the learned advocate.

Submitting in support of appeal, the appellant argued that the first appellate court's Magistrate erred in deciding the appeal basing on nullified case which was decided on 17th September, 2021 instead of basing on the new case which was decided on 20th June, 2022. He proceeded that in the new case decided on 20th June, 2022 by the trial court there was no demolition order which was discussed by the first appellate court's Magistrate in his decision.

On the 3rd ground the appellant submitted that there was irregularity but that irregularity does not cause injustice to any party. He added further that, failure to convict but sentence the accused does not harm any party. The appellant was of the views that the sentence passed by the trial court was correct. The appellant prayed the decision of the first appellate court in Criminal Appeal No. 72 of 2022 be nullified and restore the trial court decision delivered on 20th June, 2022.

Responding, the respondent counsel argued the 1st and 3rd ground jointly. He submitted that the appellant misdirected himself assuming that the first appellate court's Magistrate decision based on nullified decision of the trial court because in trial court's decision of 17th September, 2021 the respondent was sentenced to community service without limit. The decision was nullified by appeal No. 65 of 2021 before the first appellate court and ***trial denovo*** was ordered.

The counsel proceeded that on the second decision of the trial court which was delivered on 20th June, 2022 the respondent was sentenced to 14 months in prison. They appealed in Criminal Appeal No. 72 of 2022 where the first appellate court raised the issue ***suo moto*** that the respondent was not convicted.

Mr. Werema proceeded further that both parties was agreed that the trial court passed the sentence without convicting the respondent and that the omission is fatal as contravene paragraph 37 (i) and 39 of the third schedule to the Magistrate Court Act [CAP 11 R.E 2019] (the MCA). Mr. Werema added that the issue that the first appellate court's Magistrate relied on nullified decision is not correct though in his discussion his analysis based on the history. The counsel was of the opinion that if the appellant's prayer to nullify the decision of the first appellate court in

Criminal Appeal No. 72 of 2022 is granted, the decision of the trial court delivered on 20th June, 2022 cannot stand as the sentence imposed was beyond the threshold of the Primary Court.

With regard to the 2nd ground of appeal, the respondent's counsel submitted that in appeal No. 72 of 2022 there is no demolition, the issue which was in controversy is the sentence without conviction. The counsel was of the view that this appeal has no merit and if it will proceed the respondent will continue to suffer unnecessarily as the root of the case is land disputes.

In rejoinder the appellant insisted that the issue of demolition was featured in nullified judgment of the trial court delivered on 17th September, 2021 and not in the existing judgement of 20th June, 2022.

Having read the record of the appeal and heard the submissions of both parties the issue on the table is whether the appeal is meritorious.

Starting with the 1st and 2nd ground of appeal that the first appellate court decided on the issue of demolition which was not featured in the existing judgment of trial court delivered on 20th June, 2022, the answer here is affirmative. As the records speaks for itself, it is true that the first appellate court's Magistrate discussed and decided on the issue which was not featured in the existing trial court judgment but in nullified judgment

of trial court. At page 3, paragraph 4 of the first appellate court's judgment the Magistrate discussed that the trial court gave respondent the endless sentence. He quotes the trial court decision on that part, that is;

'Mshtakiwa atumikie kifungo cha kazi za jamii na aondoe ukuta huo aliojenga kwenye eneo la mlalamikaji ndani ya siku 90'.

That part was featured in the decision of trial court delivered in 17th September, 2021 which was nullified by the decision of the first appellate court in Criminal Appeal No. 65 of 2021 delivered on 29th November, 2021 and ordered retrial. After retrial the new decision by the trial court was delivered on 20th June, 2022, and in that decision the respondent was sentenced to serve 14 months in prison. No other order related to demolition was given. Thus, the grounds have merit and I allow it.

As to the 3rd ground of appeal that whether the trial court sentenced the respondent without convicting him and that the omission renders miscarriage of justice, without much ado, the trial court did not properly convict the respondent. The trial court did not mention the offence or the law of which the respondent was convicted. To put it clear the related paragraph in the trial court judgment of 20th June, 2022 reads;

'Hivyo mahakama hii imeridhika kuwa upande wa mashtaka umethibitisha kuwa mshtakiwa ameingia kwa jinai kwenye

eneo la mshtakiwa (sic) na kujenga ukuta bila uhalali wowote. Mshtakiwa ana hatia kama alivyoshtakiwa'.

SGD

CHANA MHEMBE CHANA – HAKIMU MKAZI

20/06/202 (sic)

From the above excerpt, in English it means that, *this court is satisfied that the prosecution has proved that the accused trespassed into claimant's land and erect the wall thereon. Accused is guilty as charged.*

In the case of **George Patrick Mawe & 4 Others vs. Republic**, Criminal Appeal No. 203 of 2011 (unreported) at page 4 the Court of Appeal observed:

"In the case of conviction, the judgment shall specify the offence of which and the section of the Penal Code or other law/the accused person is convicted and the punishment to which he is sentenced'.

The effects of the failure to observe the mandatory provisions of the laws and hence not properly convicting the accused are that the failure becomes fatal and an incurable irregularity, which renders the purported judgment and imposed sentence a nullity.

A case in point is that of **Hassan Mwambanga vs. R**, Criminal Appeal No. 410 of 2013 (unreported) where the Court of Appeal held that:

"It is now settled law that failure to enter a conviction by any trial court, is a fatal and incurable irregularity, which renders the purported judgment and imposed sentence a nullity, and the same are incapable of being upheld by the High Court in the exercise of its appellate jurisdiction".

From above observation, failure by trial court to enter proper conviction is good as no conviction at all. And the omission is fatal and incurable irregularity. But it is my opinion that the suitable remedy was to remit file back to the trial court in order to enter a proper conviction. But is this case worth to be remitted back to trial court for entering proper conviction?

The respondent counsel was of the opinion that if the appellant's prayer to nullify the decision of the first appellate court in Criminal Appeal No. 72 of 2022 is granted, the decision of the trial court delivered on 20th June, 2022 cannot stand as the sentence imposed was beyond the threshold of the Primary Court. In this case the trial court sentenced the respondent to serve 14 months in prison. In addition, the trial court ordered the file to be sent to the District Court for confirmation of the sentence as per paragraph 7 (1) of the third schedule to the MCA.

Paragraph 2 (1) (a) of the third schedule to the MCA provide that in exercising its criminal jurisdiction the primary courts have power to

impose the sentence of imprisonment for a term **not exceeding twelve months**. And paragraph 7 (1) (a) of the third schedule to the MCA provide that, if the primary court has passed the sentence exceeding six months imprisonment terms, such sentence should be confirmed by the District Court.

From above provisions of the law, it is my opinion that if the primary court passed the sentence above six months up to twelve months imprisonment terms, that sentence should be confirmed by the District Court. And that the primary court has no power to pass a sentence of more than twelve months imprisonment terms.

Although in this case the trial court sent the case file to the District Court for confirmation, but the sentence of 14 months passed by the trial court is beyond their power bestowed. The trial court's power to impose imprisonment sentence is limited to twelve months regardless of confirmation. If the trial court, with reasons was of the opinion that the respondent needed to be punished greater than the power of the court has, the trial court should have, instead of dealing with him in any other manner, commit the offender in custody to the district court for sentence. That is provided under paragraph 3 of the third schedule to the MCA.

Therefore, as rightly submitted by the respondent counsel if the appellant's prayer to nullify the decision of the first appellate court in Criminal Appeal No. 72 of 2022 is granted, the decision of the trial court delivered on 20th June, 2022 cannot stand as the sentence imposed was beyond the threshold of the Primary Court.

In upshot, I find the appeal is without merit and I dismiss it to the extent I analysed above.

It is so ordered.

DATED at MUSOMA this 24rd day of March, 2023.

M. L. KOMBA

Judge

Judgement delivered on 28th March, 2023 before A. V. Tarimo, Ag. Deputy Registrar in presence of both parties.

Sgd: A. V. Tarimo

Ag. Deputy Registrar

28/03/2023