

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[IN THE DISTRICT REGISTRY OF ARUSHA]**

**AT ARUSHA**

**PC CRIMINAL APPEAL NO. 17 OF 2022**

*(C/F Babati District Court Criminal Appeal No. 11 of 2022, Originating  
from Babati Urban Primary Court Criminal Case No. 20 of 2022)*

**MARKO DWANGAI..... APPELLANT**

**VERSUS**

**MATHAYO DWANGAI.....RESPONDENT**

**JUDGMENT**

**BADE, J.**

Upon being aggrieved by the decision of the first appellate court (Babati District Court), the Appellant one Marko Dwangai preferred this second appeal to be determined by this Court. In his petition of appeal, seven grounds were fronted styled in the following words:

1. That, the appellate court erred in law by jeopardizing the Appellant's rights to be heard during the hearing of an appeal and



the appellate court directs itself in determining the matter hence reached into wrong verdict. (sic)

2. That the appellate court erred in law and fact by delivering decision(sic) by(sic) believing and based (sic) on the unfounded allegations adduced by the Respondent during the hearing of appeal hence reached into unfair decision(sic)
3. That the appellate court erred in law and fact by allowing an appeal for the reasons that the Appellant's witnesses testified in the trial court differs (sic) in their testimonies while the Appellant was absent on the material date rather the appellate court failed to conduct thorough findings to satisfy itself hence reached into improper decision. (sic)
4. That the appellate court erred in law and fact by delivering decision based on unfound(sic) ground which has never been raised by (sic) Respondent herein in (sic) his 4 grounds which was (sic) filed by himself to the appellate court.
5. That, the Hon. Learned magistrate of the appellate court erred in law and fact for failure to evaluate properly(sic) in satisfying itself rather than taking into account weak and cooked evidence in

relation to this matter henceforth reached into biased decision which is unmaintainable in the eyes of the law(sic)

6. That, the appellate court erred in law and fact by convicting the Appellant basing on the prosecution side(sic) while failed to prove the charge of stealing against the Appellant beyond reasonable doubt.

7. That, the learned magistrate of the appellate court erred in law and fact by disregarding the defence of alibi while on the material date as claimed was absent but the appellate court convict(sic) and ordered the Appellant to pay fine and refund the Respondent herein.

Before indulging to the merit of this appeal I consider it proper to albeit briefly, introduce the factual background of the matter.

According to the gleaned facts, the Appellant and the Respondent are relatives. They are in fact, blood brothers. It is alleged that on 16<sup>th</sup> September 2021 the Appellant, the Respondent, and one Qaresi went to Basutu. It is alleged further that the Respondent harvested about 53 bags of maize and among them, 50 bags were sold and the Respondent was paid the amount of Tanzanian shillings two million (Tsh.

2,000,000/=). Three bags were left for family consumption and subsistence. It is said, that money was kept in the bag and was given to the Appellant for safekeeping while the Respondent and one Qaresi, his (in-law) went to watch the television in the guest house they lodged. Meanwhile, the Appellant complained of being tired and went to rest in his room. After watching the TV, the Respondent and Qaresi decided to go to their rooms for night's rest and sleep.

To their dismay, they found the room in which the Appellant had boarded locked with a padlock. They knocked at the window but there was nobody in that room. They broke in only to find that the Appellant was not there. They thought the Appellant has decided to go home at Ufana and therefore, they went there but the Appellant was nowhere to be found as they were told by the wife that he had not shown up so far. The Appellant is alleged to have been found on 2<sup>nd</sup> October 2021 in the village of Bashnet camping there with a certain woman.

Upon being asked about the complaints that he took the money belonging to the Respondent, he denied any wrongdoing. Due to that denial, the matter was reported to the police station and the Appellant was arrested and arraigned in Court to answer the charge of theft.

In the Primary Court of the District of Babati at Babati, the Appellant was charged under sections 258 and 265 of the Penal Code, [Cap. 16 RE 2022]. Upon the matter being heard on merits, the Appellant was acquitted and set free for the charges against him. The acquittal aggrieved the Respondent who successfully appealed against the decision in the District Court of Babati at Babati. Upon conviction, the Appellant was sentenced to pay a fine of TZS 500,000/= or else, serve six months custodian sentence in default. He was also ordered to return the stolen money to the Respondent which is TZS 2,000,000/=.

In this appeal, the Appellant appeared in person, unrepresented but with translation services from his own relative since he does not speak Kiswahili; and so he orally made his case, whereas the Respondent did not appear despite the fact that he was duly served to the satisfaction of the Court.

As noted above, seven grounds were presented before this court challenging the decision of the first appellate court. However, for the reason to be known soon in this judgment, I will not be detained to analyze and determine all seven grounds of appeal because the 1<sup>st</sup> ground alone has the quality of disposing off the matter in its entirety. This ground is on the right to be heard which the Appellant complains of

being denied during the hearing of the appeal before the 1<sup>st</sup> appellate court.

Arguing this ground, the Appellant being a lay person had a few words to talk but was clear and well-understood through his translator. He maintains that he was not afforded a chance to be heard by the first appellate court. That the first appellate court decided the matter on its own without hearing any party at all. To him, it manifests the unfairness of the process and therefore makes it unfounded. He lastly prayed this Court to allow the appeal and uphold the decision of the trial court which acquitted him.

This complaint has taken me straight forward to the proceedings of the first appellate court in order to see the genuineness and or otherwise of it. Frankly speaking, I am shocked by the kind of procedure the learned senior Resident Magistrate blindly opted to adopt. It is a novel procedure in our legal practice.

Summarily, upon receiving the petition of appeal, the matter was severally adjourned for various reasons some of which being the indisposition of the parties and absence in court. For better understanding of what I mean, I deemed it appropriate to reproduce the

excerpts from the proceedings of the first appellate court. It is written like this;

*"Date: 29/3/2022*

*Coram: J. M. Mwambago- RM*

*Appellant* }  
*Respondent* } *Present*

*C/C Emilius*

*Court: for hearing the Respondent is absent.*

*Lucian German- The Accused is sick. He has gone to hospital.*

*Court: Order*

*1. Hearing on 12/04/2022*

*Sgd: J.M. Mwambago*

*21/03/2022*

*Date: 12/04/2022*

*Coram: J.M. Mwambago-RM*

*Appellant* }  
*Respondent* } *All present*

*C/C Anastazia*

*Appellant- I am sick*

*Court The matter is for hearing. the Appellant is sick.*

*Order: Hearing on 21/04/2022*

*Sgd: J.M. Mwambago-RM*

*12/04/2022*

*Date: 21/4/2022*

*Coram: J.M. Mwambago-RM*

*Appellant* }  
*Respondent* } *All present*

*C/C Emilus*

*Court: I failed to write the judgment since the record of trial court  
has not yet brought to this court.*

*Order:*

- 1. Judgment on 18/05/2022*
- 2. Call the record of the trial court*

*Sgd: J.M. Mwambago-RM*



21/04/2022

*Date: 18/5/2022*

*Coram: J.M. Mwambago-RM*

*Appellant* }  
*Respondent* } *All present*

*C/C Emilius*

*Court : Order*

*1. Judgment on 26/05/2022*

*Sgd: J.M. Mwambago-RM*

18/05/2022

*Date: 26/05/2022*

*Coram: J.M. Mwambago-RM*

*Appellant* }  
*Respondent* } *All present*

*C/C Emilius*

*Court: The judgment is yet finished to be written.*

*Order: Judgment on 31/05/2022*

*Sgd: J.M. Mwambago-RM*

*26/05/2022*

*Date: 31/5/2022*

*Coram: J.M. Mwambago-RM*

*Appellant- Absent*

*Respondent- Present*

*C/C Emilius*

*Court The Appellant is absent.*

*Order: Judgment on 29/06/2022*

*Sgd: J.M. Mwambago-RM*

*31/05/2022*

*Date: 29/6/2022*

*Coram: J.M. Mwambago-RM*

*Appellant- Absent*

*Respondent- Present*

*C/C Emilius*

*Order: The judgment is ready.*

*Order: The judgment to be read over and it has been read out.*

*Sgd: J.M. Mwambago-RM*

*29/06/2022”*

Reading from the quoted part of the procedure, it is vividly explanatory that the parties were not given a chance to argue the presented grounds of appeal. If I may assume that the Respondent who was the Appellant in the first appellate court adopted those grounds of appeal to be determined by the first appellate court without further substantiation due to him being a layperson, still something might be missing because the proceedings have not recorded this fact. That being so, still, the record is also silent on the part of the Appellant who was the Respondent in that court.

Suffice it to say, the learned Senior Resident Magistrate constructed the judgment based on his own submission and findings. Furthermore, the record is also silent as to whether the said submission, if at all was made, was it written or oral. However, if it was made orally or in written form the record should have so reflected. Be it as it may, it is apparent that the first appellate court miscomprehended the procedure and completely misguided itself. This miscomprehension has

no other name rather than being called denying the parties the right to be heard. Having been satisfied that the parties were denied their right to be heard what is next?

The above question takes its lead from the Constitution of the United Republic of Tanzania, 1977 as amended from time to time. Article 13(6)(a) of the said Constitution provides as hereunder:

*13(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*

*(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;*

However, the right to be heard being a cardinal principle of natural justice, it has been interpreted and emphasised by the Court of Appeal of Tanzania in a plethora of cases to make a good law. Some of which are; **Onesmo Nangole vs Dr. Steven Lemomo Kiruswa**, Civil Appeal No. 129 of 2016, **Margwe Erro and 2 Others vs Moshi Bahalulu**,

Civil Appeal No. 111 of 2014, **The Registered Trustees of Arusha Muslim Union vs The Registered Trustees of National Muslim Council of Tanzania alias Bakwata**, Civil Appeal No. 300 of 2017 and **Shaibu Salim Hoza vs Helena Mhacha as a legal representative of Amerina Mhacha (Deceased)**, Civil appeal No. 7 of 2012 (all unreported) justice to mention a few. **For instance, in Mbeya-Rukwa Auto Parts & Transport Limited vs Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000 (unreported), the Court emphasized that: -

*"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right Article 13(6)(a) includes the right to be heard amongst the attributes of equality before the law and declares in part:*

*(a) Wakati haki na wajibu wa mtu ye yote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamiiifu"*

Guided by the above legal authorities, it is apparent that, not affording the parties the right to be heard is tantamount to a violation of the

fundamental natural justice as enshrined in the Constitution as a bill of right.

Therefore, the matter being so settled as above, I find merit in the 1<sup>st</sup> ground of appeal which I accordingly allow. I find the judgment of the first appellate court to have been based on the proceedings which violated the right to be heard and occasioned a failure of justice to the parties who were condemned without being heard. In the event, I also find the proceedings of the first appellate court to be nullity. I thus nullify and quash the proceedings of the first appellate court and set aside the judgment emanated therefrom.

Having reached that analytical conclusion, what is the remedy and way forward to the situation culminating the matter? In my settled view, the answer is not far-fetched. It is again within the observations made by the Court of Appeal of Tanzania in the case of **Danny Shasha vs Samson Masoro and 11 Others**, Civil Appeal No. 298 of 2020 (unreported) where it was held as hereunder:


*"The first appellate court ought to have ordered a retrial after considering that the parties were denied the right to be heard. This being an infraction which violated the rules of natural justice*

*requiring the tribunal to adjudicate over a matter by according the parties full hearing before deciding the dispute.”*

In the circumstances and guidelines of the above case law, this appeal calls for a retrial before the Babati District Court and to accord parties the right to be heard. I, therefore, order that the appeal be heard de novo before the Babati District Court as the first appellate court before another Magistrate as soon as practicable.

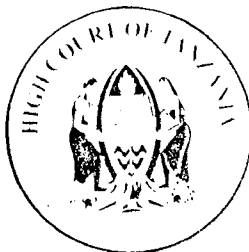
It is accordingly ordered.

**Dated at Arusha this 21st day of April 2023**



**A. Z. Bade**  
**Judge**  
**21/04/2023**

Judgment delivered in the presence of the representative for the Appellant, while the Respondent is absent, in chambers on the **21st** day of **April 2023**.



**A. Z. Bade**  
**Judge**  
**21/04/2023**