

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

PC CRIMINAL APPEAL NO. 4 OF 2022

JOHN KALAMJI.....APPLICANT

VERSUS

1. MABULA NGELANIJA	}	RESPONDENTS
2. MAGINA DOFFU			
3. MASANA MANYANDODI			
4. MANONI MAREKA			
5. HAMIS CHAI			

[Appeal from the Decision of District Court of Shinyanga at Shinyanga.]

(Hon. C.S. Langau, RM)

dated the 10th day of September, 2021
in
Criminal Appeal No. 14 of 2021

JUDGMENT

7th Sept, 2022 & 5th May, 2023.

S.M. KULITA, J.

The appellant herein had instituted a Criminal Case No. 14 of 2021
at Nindo Primary Court against the respondents herein for offences of

Malicious Damage to Property contrary to section 326 and *Unlawful Confinement* contrary to section 253, both of the Penal Code [Cap 16 RE 2019]. The allegations in nut shell were to the effect that, the respondents herein engaged in destroying the appellant's properties and made a public announcement to isolate him from the society. In the final analysis, the 1st, 2nd and 3rd respondents were found guilty of "malicious damage to property" while the 4th and 5th respondents were found guilty of "unlawful confinement". Consequently, all respondents were punished to a conditional discharge for 3 (three) months each. They were also ordered to compensate the appellant at the tune of Tshs 1,000,000/= in totality.

Aggrieved with the decision, the respondents herein appealed to the District Court through Criminal Appeal No. 10 of 2021. In it, the District Court observed that, the respondents were convicted under a defective charge sheet. This is because the names of the respondents were not mentioned in the particulars of the offence. consequently, the respondents' punishment and order for compensation were declared null and void.

That decision also aggrieved the appellant herein, hence this appeal with two grounds; **one**, the first appellate court wrongly declared the Primary Court judgment and its orders null and void without ordering re-

trial, **two**, the first appellate court failed to observe that the respondents should pay compensation as at the trial court they admitted to have committed the offences.

The Appeal was orally heard on the 29th day of June, 2022. On that date, the Appellant appeared in person whereas Mr. Pharles Malengo, Advocate appeared for the respondents.

Submitting in support of the appeal the appellant stated nothing in connection with his grounds of appeal. The only best thing that he did was to pray for his grounds of appeal to be adopted and form part of his submissions.

On his part Mr. Malengo firstly prayed for his reply to the petition of appeal to be adopted as part of his submissions. Concerning the first ground of appeal, Mr. Malengo submitted that, it is the position of the law that, when charge is found to be defective, the remedy is not re-trial, as in doing so it will be a venue for the prosecution to fill in the gaps. To bolster his argument, the Counsel cited the case of **Simon Kitalika and 2 Others vs. Republic, Criminal Appeal No. 468 of 2016, CAT at Iringa.**

As for the second count, *Unlawful Confinement*, Mr. Malengo was of the views that, the same is tort by nature. He said that the appellant ought to have instituted a civil case, not criminal case as he did.

As for the second ground of appeal Mr. Malengo stated that, it is not true that the respondents had admitted the charge. He added that, had it been so, hearing of the case would have not been done. As for the fine, it was Mr. Malengo's views that, the fact that the charge has been found defective, penalties including the payment of fine should no longer stand. The Counsel added that the Primary Court has no powers to order the payment of fine that exceeds the tune of Tshs. 100,000/=. He averred that the trial court was wrong to impose fine which exceeds that said sum to each Appellant.

In rejoinder the appellant stated that, the publication that insisted his isolation is a criminal offence not a civil matter. Otherwise, he reiterated his submissions in chief.

This was marked the end of both parties' submissions.

I start my analysis with the 2nd ground of appeal which involves the allegation that the Respondents herein admitted before the trial court that they actually committed the charged offences. From the face of the

records, this second ground of appeal is unmeritorious. It is manifestly seen from the typed proceedings of the trial court, specifically at pages No. 30, 32, 34, 37, 40 and 44 all respondents disputed the offences charged. The proceedings of the trial court also show that, the said case was tried/heard, meaning thereby the Accuseds (Appellants herein) had pleaded not guilty to the charge. These facts prove that, the respondents did not admit to have committed the charged offences at the trial court.

Back to the 1st ground of appeal, in which this court has to determine whether re-trial should be ordered when the judgment that has emanated from a defective charge falls. In my perusal over the impugned charge sheet, I have noted it mentioning only one Accused person (1st Appellant) leaving the other three (2nd, 3rd and 4th Accuseds) unmentioned in the "Particulars of the Offence" in each of the two charged counts, which is wrong. In dealing with the alike issue, the Court of Appeal had this to say in **Mayala Njigailele vs. Republic, Criminal Appeal No. 490 of 2015** (unreported);

"Normally an order for retrial is granted in criminal cases when the basis of the case namely, the charge sheet is proper and is in existence. Since in this case

the charge sheet is incurably defective, meaning it is not in existence, the question of retrial does not arise"

In the same case the said court went on to hold that; -

"a retrial is normally ordered on assumption that the charge is properly before the court"

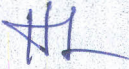
As the above excerpt speaks by itself, this is the position of the law as per the Court of Appeal, the most superior court in the country, this court is bound to follow. On that account, it was proper for the first appellate court not to order re-trial after it had found that the respondents were convicted under the defective charge.

For that matter, I don't see the point to fault the decision of the District Court. Consequently, its judgment and orders thereof are hereby confirmed. Appeal dismissed.


S.M. KULITA
JUDGE
05/05/2023

DATED at SHINYANGA this 5th day of May, 2023.




S.M. KULITA
JUDGE
05/05/2023