THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL REVISION NO. 25 OF 2023

(Arising from Criminal Revision No. 09/2023 Kilombero District Court, Originating from Criminal Case No. 242 of 2022 in Mang'ula Primary Court)

METHOD MLALWE ..... APPLICANT

VERSUS

ISAYA UTAMBULE ..... RESPONDENT

RULING

Ruling date on: 13/07/2023

NGWEMBE, J.

The applicant Method Mlalwe was convicted by Mang'ula Primary Court for the offence of common assault contrary to section 240 of **The Penal Code, Cap 16 R.E 2019** and sentenced him to serve 12 months imprisonment. The charge sheet stated that, he assaulted the respondent using a machete and a club, thence caused bodily harm.

The district Court exercised its revisional powers under section 22 of **The Magistrate Courts Act (the MCA)**, but it found no serious error warranting intervention on the trial court's judgment. However, it considered the provision of section 7 (1) of The Third Schedule to the MCA, under which a sentence above 6 months imprisonment must be confirmed by the district court before the convict can start serving his imprisonment. The district court observed that, the trial court did not seek any confirmation for the sentence of twelve (12) months

imprisonment. For that reason, the resident magistrate in charge of Kilombero District Court substituted the imprisonment term with that of Community Service. The Community Service order was yet to commence as the Probation Officers were in the preliminary process including identifying their sureties.

However, this court called for the records in order to examine them for the purpose of satisfying itself on propriety of the proceeding and orders made therein. Considering that the applicant is among the inmates at Kiberege prison who complained of their respective trials.

Also noted that, the applicant was sentenced by the trial court on 27/10/2022, thus it is highly probable that at the time of delivering this ruling, he may have or about to complete his prison sentence meted by the trial court. Notwithstanding that fact, this revision is of essence not only to the subordinate courts, but also to the applicant. It matters in this case to highlight some insights of revisions. I am persuaded by the Supreme Court of India in the case of **Amit Kapoor Vs. Ramesh Chander, (2012) 9 SCC 460** where object of criminal revision was extensively explained in the following observation: -

> *"If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner... The Court has to keep in mind that the*

exercise of revisional jurisdiction itself should not lead to injustice ex facie."

Considering the complaint by the applicant, the main issue is whether the primary court proceedings, judgment and sentence had any other irregularity or illegality than that observed by the district court.

From the evidence, it was adduced that the applicant did actually assault the respondent. The applicant in his defence admitted all other facts as narrated by the two prosecution witnesses, but then interjected that, the respondent was the one who assaulted him in company of others with an intent to shave his hair for an undisclosed purpose. In weighing, common assault was established although the motive remained unknown.

The sentence of one year imprisonment, in my opinion was relatively on the high side, considering that it is the maximum of which Primary Court can give, while common assault is not among the serious offences. On the other side, the fact that, the applicant had previous conviction of assault was not disputed.

This court therefore, finds no concrete ground upon which, to fault the conviction and sentence, save the failure by the magistrate to seek confirmation of the sentence. In this case, the court follows the general rule that, an appellate court cannot interfere with the lower court's sentence except under the compelling circumstances. Among those compelling circumstances, is where the trial court acted in excess of its powers or where it applied the wrong principle in sentencing the accused. See **Livinus Uzo Chime Ajana Vs. R, (Criminal Appeal No. 13 of 2018) [2020] TZCA 383, R Vs. Mohamedal All Jamal (1948) 15 EACA 126, Mohamed Ratibu @ Saidi Vs. R, Criminal Appeal No. 11 of 2004** and **Samweli Jackson Saabai @ Mng'awi**

& Others Vs. R, (Criminal Appeal No. 138 of 2020) [2022] TZCA 338, where it was observed *inter alia: -*

> *"Our starting point is restating the settled law that sentencing is the domain of the trial court and that the appellate court can alter or interfere with the imposed sentence by the trial court on rare occasions where there are good grounds or circumstances to warrant doing so as emphasized in various decisions of this Court"*

The rule above applies equally in cases of revision as in appeal. Taking that rule to the case at hand, this court will not be justified to interfere with the district court's finding and orders made as they were all correct regarding the sentence. Even the failure to seek confirmation was cured by the district court, though not much reasoned.

However, in this case it seems criminal justice has never been comfortable with the trial court's proceeding. Be it noted, this court does not tend to demand for human perfection in court proceedings. Instead, it calls for at least a minimal adherence to the mandatory requirements of the procedural laws, precedents and good practice. One of those procedural laws in respect of this case is the Third Schedule to the MCA also known as *The Primary Court Criminal Procedure Code*, which governs criminal trials in primary courts.

The prescription of the Schedule and illustration of the manner through which evidence will be adduced in criminal trials at primary court is sufficiently given. Specifically, section 35 (6) of the Schedule provides on recording of the evidence that: -

> *"The magistrate shall record the substance of the evidence of the complainant, the accused person and the witness and after each of them has given evidence shall read his evidence over to him and record any amendment or corrections and*

thereafter the magistrate shall certify at the foot of such evidence, that he has complied with this requirement."

What the trial magistrate is required to do under the subsection, is to read the evidence to the witness and then effect the amendments if any, according to what the witness will say having heard his or her testimony. But in all cases, the magistrate must certify at the foot of the testimony that he complied with the requirement. The provision is clear, I understand it to be an indispensable requirement. In a higher tone, this court has insisted on the compliance of legal procedures in several revisions originating from primary courts. These rulings are legitimately expected to encourage magistrates to be abreast of the procedures governing proceedings before their courts, which seemed not to be part of their custom and now they should make it their custom.

The record of the trial court reflects that, the trial magistrate endeavoured and he managed to append his signature at the foot of all the testimonies. This was part of the good compliance by him. But he failed to fulfil the law as required of him by section 35 (6) of the Schedule. The magistrate did not state that the section was complied with in respect of every witness. This was a procedural irregularity which I have noted to be consistently committed in most of the files attended by magistrates in Kilombero district.

Lastly, the trial court committed another irregularity in admitting exhibits. It suits to name here that, this is not the first case where primary courts in Kilombero district have admitted exhibits in an irregular manner. I have observed in some other files a primary court adopted a reckless procedure of admitting exhibits. In the Revision between **Godfrey John Mela and Robert Makinduka** the Primary Court of Mlimba admitted a mobile phone with a seizure certificate, but did not

label the exhibit, yet the trial magistrate kept referring to that exhibit which so to say was nameless.

In this case, the court proceeded with hearing when the case came on for the first day, while the complainant was absent. I have considered the provision of section 26 of the Third Schedule to the MCA and formed a position that, the magistrate ought to have adjourned the case on that day. But the trial magistrate proceeded to read the charge to the accused and took his plea to the charge in the absence of the complainant. The trial magistrate went even farther purporting to admit exhibits from a stranger to the case, who was not a witness, but a militia man who seems to have been in custody of those items. It is unknown who this person was in the proceedings, yet what he brought before the court were received and secured a place in the case file as exhibits. I prefer to demonstrate what transpired on that day as quoted here: -

"Tarehe 17/10/2022

Mbele ya: A. MAJARIBU RM

Washauri: (1) ..... (2) .....

Mlalamikaji: Hayupo amelazwa.

Mshtakiwa: .....

SHTAKA: Shambulio k/f 240 Sura 16 K.A

Sgd

17/10/2022

MAHAKAMA: Mshtakiwa amesomewa shtaka naye kwa kinywa chake mwenyewe amejibu kuwa:

MSHTAKIWA: Siyo kweli

MAHAKAMA: Mshtakiwa amekana shtaka amesema sio kweli c/f 33 Ny 3 MCA Cap 11 RE 2019.

Sgd

17/10/2022

MG. 157950: Naomba kuwasilisha vielelezo PF3 na Panga.

MAHAKAMA: PF3 inapokelewa kama kielelezo M1 na panga linapokelewa kama kielelezo M2.

Sgd

17/10/2022"

What followed thereafter, was a prayer by a police officer G6390 one Cpl Mohamed, that the accused bail should be withheld due to the bad condition of the complainant. The prayer was granted, again without availing the accused person a right to be heard. A case was adjourned to the next week for hearing with an order that, the complainant should appear. Actually, the bail right was restored on that day after the police officer addressed the court that the complainant was relieved also being present in court.

Apart from a strange admission process of the purported exhibits, a PF3 suggests that the respondent reported to the Clinical Officer that he was assaulted by a mad man, while nothing about insanity was testified in the whole trial before the court. While the charge of common assault is what the prosecution preferred, a police officer prayed that the bail be withheld owing to the bad health condition of the victim. I have noted also that the machete and the PF3 were brought to court in effort to prove common assault. In this court's reasoning, the above is a set of incompatibilities which confronted the trial right from the beginning.

As the record reflects, the proceeding was irregular, the exhibits were improperly admitted and unfit for court use. At least, in the circumstance of this case, without the PF3 and a machete which were not properly before the trial court, common assault was proved by eye witnesses and the victim.

Otherwise, all other presumptions being constant, these irregularities were for the resident magistrate in charge of Kilombero

District Court to deal with, not necessarily in revision only, but even in her routine inspection over the primary courts in the district.

Magistrates are called to follow the law in conducting trials. Failure of the trial court to comply with the dictates of the law, is causing injustice to both the complainant and the accused person. It prejudices the accused because he will have been punished illegally, but it will as well be injustice to the complainant because the proceedings he trusted and for which he devoted his resources to attend and testify in court will be nullified. In case of retrial, it will again cost the complainant unnecessarily.

In this case, the trial court proceeding was much flouted to the extent that if this court spares them will have committed another illegality by blessing the condemned proceedings. It is on this ground that this court proceed to nullify the whole trial courts' proceeding. Sentence and orders as well are quashed and set aside. This takes the district court ruling and orders to the same fate, which are as well quashed and set aside. The applicant should be released immediately. Considering that the applicant must have served about ¾ of the sentence, no criminal proceeding should be preferred on those same facts.

Order accordingly.

Dated at Morogoro this 13th July, 2023.

P. J. NGWEMBE

JUDGE

13/07/2023

Court: Ruling delivered this 13th July, 2023 in the absence of both parties.

A.W. Mmbando

DEPUTY REGISTRAR

13/07/2023

Court: Right to appeal fully explained.

A.W. Mmbando

DEPUTY REGISTRAR

13/07/2023