IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

PC CRIMINAL APPEAL NO. 13 OF 2022

(Appeal from the judgment in Criminal Appeal No. 7 of 2022 before the District Court of Hanang' at Katesh)

RAMADHANI RAJABU..... APPELLANT

VERSUS

YONA GIDASAYDA.....RESPONDENT

RULING

29/5/2023 & 13/6/2023

BARTHY, J.

This is the second appeal by Ramadhani Rajabu (the appellant) who at first was arraigned before the Bassotu Primary Court (hereinafter referred as the trial court) charged with one count of Malicious damage to property contrary to Section 326 (1) of the Penal Code [CAP 16 R.E 2022].

It was alleged before the trial court that, the appellant destroyed sunflower plants the property of the respondent valued at Tsh. 9,393,600/=. The appellant pleaded not guilty to the said charge; hence, full trial ensued.

The trial court having hearing the parties, it was convinced that the case against the appellant was proved beyond reasonable doubt. The appellant was convicted and sentenced to pay a fine of Tsh 100,000/= or three months imprisonment in default of the fine.

Aggrieved with the conviction and sentence meted against him, the appellant preferred an appeal before Hanang' District Court vide criminal appeal No. 7 of 2022 (the first appellate court). Upon hearing the said appeal, the first appellate court dismissed it for lack of merits. Unamused with such decision, the appellant preferred the instant appeal with two grounds of appeal which I will not reproduce them here.

At the hearing of this appeal, Mr. Abdallah Kilobwa learned advocate represented the appellant while the respondent appeared in person. The appeal was disposed of orally, but in the course of perusing the records of the case I noted a pertinent issue apparent on the record of the trial court, which necessitated the opening up of the proceedings.

It is settled law that a second appellate courts should not lightly interfere with the concurrent findings of the two courts below except where it is evident that such concurrent findings of fact, were a result of misapprehension, misdirection or non- direction of the evidence or omission

to consider available evidence. The position was reiterated in the case of **Asajile Henry Katule and Fredy John Mwashuya v. Republic**, Criminal Appeal No. 30 of 2019, Court of Appeal of Tanzania (unreported).

The records of the trial court reveal that, the witnesses who testified before the trial court were not sworn or affirmed. Hence, I invited parties to address the court on that anomaly and the way forward.

In the case at hand, the first appellate court, we respectfully think, should have re-appraised the evidence on the record and drawn its own inferences and findings. It is unfortunately that the first appellate court did not make finding that, the evidence before the trial court was received without administering an oath.

Responding to the issue raised, Mr. Kilobwa argued that, it is the requirement of the law for the witness to take an oath before giving their evidence. Mr. Kilobwa contended that the rationale is to make the witness tell the truth. He went on arguing that, when the witness testifies without taking an oath, it renders such evidence a nullity.

To buttress his arguments the learned advocate referred to the case of **Emmanuel Charles v. Republic** Criminal Appeal No. 369 of 2015

(unreported), where the court facing with an akin situation quashed the whole proceedings of the trial court.

The respondent on his argument he stated that, all witnesses of both sides took an oath according to their faith before giving their evidence. He remarked, he is not aware how the records do not reflect that, but he maintained his stance that, all witnesses were affirmed/sworn including himself.

Having gone through the parties' arguments on the issue raised, the records of the trial court reveal that five witnesses testified for the complainant (prosecution), while three witnesses testified for defence. Hence, a total of 8 witnesses testified during the trial before the trial court.

The records further reveal that, all 5 witnesses for the complainant testified without taking an oath. As for the defence side, only DW1 was affirmed while the other 2 witnesses testified without taking an oath.

On the particulars of those witnesses, it indicates the religion each witness professed was shown. That alone did not constitute sufficient affirmation or being sworn in. This position was underscored in the case of

Jafari Ramadhani v Republic, Criminal Appeal No. 311 of 2017 (unreported).

The need to administer oath or affirmation before a witness giving a testimony was emphasized in the case of **Augustino Daniel Mwimbe & another v. Republic,** Criminal Appeal No. 350 Of 2020 Court of Appeal of Tanzania at Dodoma (Unreported) succinctly held that;

> *"...it occurs to us that all witnesses **in any judicial proceedings** are competent to testify and must be affirmed or sworn before their evidence is taken unless any other law provides otherwise."* [Emphasis added].

As pointed out in the above decision, the notable exception regarding the requirement for the witness to testify on oath or affirmation is provided for under Section 127(2) of the Evidence Act, Cap. 6 R. E. 2019 which permits a child of tender age to testify without taking an oath or provided that he promises to tell the court the truth and not lies.

In the instant matter, there was no such exception on witnesses who testified before the trial court. The evidence before the trial court was received without administering any oath. It is therefore clear it is not worth

calling it "evidence". Such testimony has no evidential value and cannot be relied on to ground a conviction.

The position was also underscored in the case of **Emmanuel Charles v. Republic**, (supra) where the Court of Appeal nullified the entire proceedings on the omission to administer oath to witnesses.

I have taken into account the respondent's arguments that all the witnesses including himself were administered oath before testifying. However, the records of the trial court did not indicate the testimony was received under oath.

The records of the court should always speak for itself, including noting the demeanor of the witness when it is necessary. This emphasis was made by the Court of Appeal in the case of **Attu J. Myne v. CFAO Motors Tanzania Ltd.** Civil Appeal No. 269 of 2021 at Dar es salaam.

The omission to administer oath is fatal as it vitiates the proceedings of the case and prejudice the parties. See the case of **Catholic University of Allied Science (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020, Court of Appeal of Tanzania (unreported).

The pertinent question which follows is, what is the remedy? Mr. Kilobwa argued the court to quash and nullify the whole proceedings of the trial court.

A similar fate was reached by court in the case of **Augustino Daniel Mwimbe & another v. Republic** (supra), where the case was remitted to the trial court with direction of recording the evidence of witnesses from where the omission occured.

In the instant case the omission is fatal and renders almost whole evidence nullity, save for one defence witness whose evidence was received under oath. Under the circumstances of this case, aiming to strike a balance for both sides, the only remedy therefore is to quash the entire proceedings and judgment of the trial court as well as that of the first appellate court. The record is remitted to the trial court for trial *de novo* before another magistrate.

I have noted that appellant had paid a sum of Tsh. 100,000/= as evidenced by exchequer receipt with No. 25470124. I direct that should conviction arise from the new trial such amount already paid should be considered if there will be an option for fine or else such amount should be refunded to the appellant.

It is so ordered.

Dated at **Babati** this 13th June 2023

G. N. BARTHY,

JUDGE

Delivered in open court in the absence of both parties, the copy of the ruling to be supplied to the parties according to their addresses in the pleading.