

**IN THE HIGH COURT OF TANZANIA  
BUKOBA DISTRICT REGISTRY  
AT BUKOBA**

**(PC) CRIMINAL APPEAL NO. 7 OF 2023**

*(Arising from Muleba District Court in Criminal Appeal No. 23 of 2022, Originating from Criminal Case No. 79 of 2022 of Mubunda Primary Court)*

**SYLVIANUS RUAYA ..... APPELLANT**

**VERSUS**

**AUDAX PROTAZ ..... RESPONDENT**

**JUDGMENT**

**K. R. Mteule, J**

**14<sup>th</sup> June 2023 & 26<sup>th</sup> June 2023**

In Mubunda Primary Court in Muieba district, vide Criminal Case No. 79 of 2022, the respondent was charged and convicted under the offence of malicious injuries to property. The law alleged to have been contravened was **Section 233 (d) of the Penal Code, Cap 16 of 2002 now 2019 RE (Penal Code)**. It was alleged in the trial Court that on 21<sup>st</sup> May 2022 around 17:00 at Rukunya Village, at Ngenge ward, within Muieba District, Kagera Region unlawfully the respondent allowed his cattle to enter into the farm of the appellant which destroyed his crops, including beans, cassava and bananas all crops valued at TZS 600,000/= while knowing that such act is contrary to the law.

The Trial Court found the respondent guilty as charged and sentenced him to 6 months imprisonment or to pay a fine of **TZS 500,000/=** plus compensation of **TZS 400,000/=** for damages occasioned to the complainant's properties, instead of TZS 600,000/= as claimed in the charge sheet. Being dissatisfied with both conviction and sentence, of the trial Court the respondent challenged the decision to the District Court.

The District Court being the 1<sup>st</sup> appellate Court, allowed the appeal on the reason that the evidence adduced before the trial Court did not prove the offence of omitting to take precaution against any probable danger from animal in his possession, under which the respondent was charged with. Being resentful with the findings of the 1<sup>st</sup> appellate Court the appellant has preferred this appeal with three (3) grounds covering the following:-

- i. That the 1<sup>st</sup> appellate Court erred in law for failing to determine the raised grounds of appeal, and reply thereof on merit, hence prejudicing the parties' right to be fairly heard.
- ii. That the 1<sup>st</sup> appellate Court failed to consider, during his re-evaluating the trial Court's evidence, that, the victimization of human activity done negligently by the respondent's animal

amounted to endangering human life, which could result after a month of his animal's action.

- iii. That the 1<sup>st</sup> appellate Court erred in law by failing to notice that, even the evidence or defense brought by the respondent, during hearing at the trial Court, did not shake the weight of the prosecution evidence, as it included issues of alibi, which were not proved to the required standard.

The Respondent did not file a reply to the petition of appeal, but he appeared to argue the appeal. The appeal was heard orally. The Appellant was represented by Mr. Sethi, Advocate, while the respondent was represented by Mr. Jovin Rutahinurwa, Advocate.

Having explained the history of the case in the submission, Mr. Sethi proceeded to explain that the appeal, Criminal Appeal No. 23 of 2022 in the District Court of Muleba had three grounds of appeal, the 1<sup>st</sup> one challenging the procedure of admitting exhibits, the second one challenging the receipts of hearsay evidence while the third one challenging the identification of the cattle which caused the alleged distraction. According to Mr. Sethi, the right to be heard was violated because the appeal was determined out of these grounds of appeal. He

stated that his client prepared for the hearing based on the grounds presented but he was surprised to find a completely new thing.

Mr. Sethi argued that the District Court erred in law by creating its own grounds of appeal and ignoring the presented grounds of appeal, something which denied the appellant's right to be heard. He stated that the District Court said it has power to reevaluate the evidence of the trial court and proceeded to do that reevaluation and found that what was being complained in the primary Court was not proved and decided to quash and set aside the decision of the Primary Court.

According to Mr. Sethi if there was something to be contested by the parties or resolved, then the parties ought to be given opportunity to address that issue. The District Magistrate proceeded to decide the matter on her own whims. He cited the Court of Appeal case of **Mosi Chacha @ Iranga & Another vs. Republic, Criminal Appeal No. 508 of 2019 CAT, at Musoma (unreported)** and submitted that in this case, the Court of Appeal explained at page 7 & 8 that when the Court decides to shift from the grounds of appeal, the Court must allow parties to address on the ground raised suo moto before deciding on them. He stated that at page 8 of the Judgment, the Court of appeal held that failure to allow parties to address the Court on a ground raised

suo moto means there is a replica petition and that it is incurable irregularity, and the remedy is to quash and set aside all the proceedings due to that failure.

Mr. Seth thus prayed for the Court to hold that the District Court disregarded the grounds of appeal and created its own grounds without giving parties a chance to address it, and that the remedy is for the judgment to be quashed and set aside.

In reply, Mr. Rutahinurwa submitted that the 1<sup>st</sup> appellate Court was correct in what it decided because all three grounds of appeal as indicted at page 3 of the District Court Judgment in **Criminal Appeal No. 23 of 2022**, talk about requirement of proving prosecution case.

Mr. Rutahinurwa submitted that it is a trite principle of law that prosecution has the onus to prove its case as per **S. 110 of the Law of Evidence Act Cap 6 RE 2019**. He insisted that this provision regarding duty to prove a case was discussed in the case of **Jonas Mklize vs. Republic (1992) TLR, 213**.

Mr. Rutahimurwa submitted that the accused in the Primary Court was charged with having contravened **S. 233 (d) of the Penal Code Cap. 16 of 2019 RE** which concerns negligence of a person in keeping

animals causing such animals to endanger a person's life. According to him, the evidence brought in Court concerned livestock destruction to crops. In his view, the evidence could not establish ingredients to support the offence charged under **Section 233 (d) of the Penal Code** and that was the reason which led to the findings of the District Court. Mr. Rutahinurwa argued that since all the three grounds concerned the requirement of the prosecution to prove its allegation, the 1<sup>st</sup> appellate Court's re-evaluation of evidence was very correct to reach the conclusion that there was no evidence proving that there was any person whose life was endangered. He referred to **page 5, 1<sup>st</sup> paragraph, and 1<sup>st</sup> paragraph of page 6 of the typed 1<sup>st</sup> appellate Court Judgment** and submitted that there was no new ground of appeal and therefore there was no need to call parties to address it.

It was further submitted by Mr. Rutahinurwa while referring to page 3 last paragraph of the 1<sup>st</sup> Appellate Court Judgment, that parties got chance to argue the appeal, but they allowed the court to go through the record and prepare a judgment. In his view, the case of **Mose Chacha @ Iranga vs. Republic**, cited by the Appellant, is distinguishable from the case at hand. He thus prayed for this Court to

dismiss the appeal and affirm the decision of the 1<sup>st</sup> Appellate Court as issued in **Criminal Appeal No. 23 of 2022**.

In rejoinder, Mr. Sethi submitted that the Primary Court when receiving evidence is normally governed by the **Magistrate Court Rules of Evidence in Primary Court, G.N No. 22 of 1964**. According to him the respondent's counsel submission using the **Evidence Act** is not relevant in this matter.

Mr. Sethi further argued the Magistrate did not state if she was addressing the grounds jointly. He referred to page 5 of the District Court judgement showing the intention of endangering human life which in his view, was a new issue. His concern is that the 1<sup>st</sup> Appellate court did not invite the parties to address him and in his view the right to be heard was not observed, not only to his client but even to the Respondent.

Having considered the parties submissions, the next task is to determine as to **whether the Appeal has merits**.

From the rival submissions, parties argued only one ground of appeal which is the first ground. They are contesting whether the 1<sup>st</sup> Appellate court failed to consider the grounds of appeal and formed a new ground

and decided on it. In the 1<sup>st</sup> appellate Court, the appeal was allowed on the reason that the evidence adduced before the trial Court does not prove the offence of omitting to take precaution against any probable danger from animal in his possession, under which the respondent was charged with. While Mr. Seth considered this finding as a new issue, Mr. Rutahinurwa maintained that parties were afforded with right to be heard but they surrendered their right by requesting 1<sup>st</sup> appellate Court to go through the trial Court records and decide on it and therefore it was correct in its findings by reevaluating the evidence.

It is on record that the respondent was charged and convicted for the offence of malicious injuries to property contrary to Section 233 (d) of the **Penal Code, Cap 16 of 2002 now 2019 RE (Penal Code)** as per page 6 of the trial judgement. For the sake of clarity, I also find wise to reproduce hereunder the offence under which the respondent was charged with as quoted from the judgment of the 1<sup>st</sup> Appellate Court; -

***OFFENSE CHARGED CONTRARY TO THE LAW; malicious injuries to property contrary to Section 233 (d) of the Penal Code, Cap 16 of 2002 now 2019 RE (Penal Code).***

*It was alleged in the trial Court that on 21<sup>st</sup> May 2022 around 17:00 at Rukunya Village, at Ngenge ward, within Muleba District, Kagera Region unlawfully the respondent allowed his cattle to*

*enter into the farm of the appellant and destroyed his crops, including beans, cassava and bananas all crops valued 600000/= while knowing such act is contrary to the law.*

At the first Appellate Court the ground for appeal were based on; -

- i. procedure of admitting exhibits.*
- ii. receipts of hearsay evidence and*
- iii. identification of the cattle.*

The above grounds were very specific in the appeal. This means parties were not concerned with the issue of endangering life but on what is in the grounds of appeal. I agree with the counsel for the Appellant that these grounds were supposed to be addressed by the 1<sup>st</sup> appellate Court in exercising its appellate power. However, the court endeavored to form a new aspect on endangering life which was not an issue amongst the parties. As stated by the Appellant's counsel, the magistrate did not state if she was addressing the grounds of appeal jointly. She raised what she determined as if that was the main concern in the grounds of appeal. In my view this is a shortfall.

In such circumstances I agree with appellant's Counsel that a new issue was raised and determined by the 1<sup>st</sup> Appellate court without affording parties the right to be heard on those issues. This was an error which

was addressed by the Court of Appeal in **Mosi Chacha's case supra**. At page 10 of that judgment, the court of appeal held that the impugned judgment which considered new ground leaving the grounds raised in the appeal undetermined, suffered an irreparable irregularity.

From the above discussion, it is apparent that, the 1<sup>st</sup> appellate Court raised new issue in exercising its appellate power, and the remedy available is to quash the proceedings and set aside the decision emanated therefrom.

Consequently, I find the appeal to have merits. The Appeal is allowed. The judgment of the 1<sup>st</sup> Appellate Court and any orders arising therefrom is hereby quashed and set aside. It is so ordered.

Dated at Bukoba this 23<sup>rd</sup> Day of June 2023



**KATARINA REVOCATI MTEULE**  
**JUDGE**  
**23/06/2023**

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From the above discussion, it is apparent that, the 1<sup>st</sup> appellate Court raised new issue in exercising its appellate power, and the remedy available is to quash the proceedings and set aside the decision emanated therefrom.

Consequently, I find the appeal to have merits. The Appeal is allowed. The judgment of the 1<sup>st</sup> Appellate Court and any orders arising therefrom is hereby quashed and set aside. It is so ordered.

Dated at Bukoba this 26<sup>th</sup> Day of June 2023

**KATARINA REVOCATI MTEULE**  
**JUDGE**  
**26/06/2023**

