

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

**IN THE SUB-REGISTRY OF MANYARA**

**AT BABATI**

**PC. CRIMINAL APPEAL NO. 11 OF 2023**

*(Arising from Criminal Appeal No. 4 of 2023 of Kiteto District Court and originating from Criminal case No. 29 of 2021 Kibaya Primary court)*

**EXAVERY ZABRON MBOGOLO.....APPLICANT**

**VERSUS**

**SHIRINI MAHUNGU ..... RESPONDENT**

**JUDGMENT**

*4<sup>th</sup> & 22<sup>th</sup> August, 2023*

***Kahyoza, J.:***

**Shirini Mahungu (Shirini)** instituted criminal proceedings against **Exavery Zabron Mbogolo (Exavery)** in the primary court, who was charged with the offence of criminal trespass. After full trial the primary court convicted and sentence **Exavery**. **Exavery** appealed unsuccessfully to the district court. Aggrieved still, **Exavery** appealed to this Court contending the two courts below erred to convict him with the offence of criminal trespass before the land dispute was settled, that the trial magistrate violated the rule

against bias, the appellate court did not analyze the evidence and that offence was not proved beyond reasonable doubts.

There are three issues as follows-

1. was **Exavery** properly convicted with the offence of criminal trespass?
2. was the trial court biased?
3. did the appellate court fail to analyze the evidence?
4. was the offence of criminal trespass proved beyond reasonable doubt?

A brief background is that **Shirini** owned a piece of land at Pori No. 1 within Kiteto district. She sold part of her land to **Exavery**, which is not part of this criminal proceedings. She alleged that later **Exavery** criminally trespassed to her land, built a house. She alleged further that after **Exavery** criminally trespassed to her land, started constructing a house day and night. She resolved to commence criminal proceedings.

On his part, **Exavery** alleged that he denied to have trespassed. He deposed that he purchased two pieces of land from **Shirini**. He deposed that when he purchased the piece of land which is not subject of criminal

proceedings, they executed a temporary sale deed. He tendered a copy of the deed. He averred that when he purchased the land which is subject of the current criminal proceedings no sale deed was executed as **Shirini** told him they cannot execute a sale deed in the absence of her children.

**Exavery**, the appellant, enjoyed the services of two learned advocates, Mr. Dominisius Nkwera and Mr. Pastory Florence Kong'oke. **Shirini**, the respondent, fended for herself. The appeal was heard orally. I wish to state that I do not intend reproduce the submissions as I will refer to the submissions while replying to the issues raised by the appeal. Given the nature of the issues raised by the grounds of appeal, I am of the view that I will have to determine the issued raised by second ground of appeal. The second ground of appeal touches the competency of the trial.

### **Was the trial court biased?**

**Exavery**, the appellant, complained to the first appellate court and this Court that the trial magistrate erred to preside over the matter, of which her court clerk was a party to it. He alleged that the trial magistrate violated the rule against natural bias. Mr. Pastor, one of the appellant's advocate submitted that **Shirini**, the respondent, was the court clerk and thus part of

the court, which tried the case. For that reason and the bases of the natural justice, she was a judge of her own cause. He added that the respondent was keeping files of the trial court and hence she kept her own file. He contended that the appellant tendered evidence, which were not considered in the judgment. He prayed the second ground of appeal to be upheld and the judgment set aside.

**Shirini**, the respondent, refuted the allegations that the trial magistrate was biased. She stated that the appellant had duty to raise the complaint before the trial magistrate and not to raise it at the appellate stage.

Irrefutably, one of the cherished principles of natural justice is the rule against bias. It is vital for a person or a body exercising judicial functions to comply with the rules of natural justice. Consequence of the failure to observe the rules of natural justice as held in **Ridge Vs. Baldwin** [1963] 2 All ER 66, is to render the decision void and not voidable. The issue is whether the **Shirini**, the respondent, was the judge of her own cause as complained of.

Obviously, the respondent did not decide that case complained of. It is the trial magistrate who decided the case and not the respondent. There is no dispute that the respondent is the court clerk posted to the primary court where she had instituted the suit and trial magistrate was her immediate boss. The appellant complained that being a court clerk and keeping records of the primary court, she was keeping record of her case file. Keep records and deciding cases is a different matter. The rule against bias prohibits a person to a judge of his own cause, that is it prohibits deciding a case to which one has interest.

Was the appellant's advocate justified to argue that the trial magistrate was biased because he decided a case involving his court clerk? To answer the question, I examined the **Code of Conduct for Judicial Officers of Tanzania** and the **Code of Conduct and Ethics for Non-Judicial Officers**. Both Codes stipulates dos and don'ts for judicial and non-judicial officers. I will commence with the **Code of Conduct and Ethics for Non-Judicial Officers**, (the Code of Conduct and Ethics) which is the **Fourth Schedule to the Judiciary Administration (General) Regulations, 2021**, G. N. No. 1 of 2021. Items No. 7 and 11 of the Code of Conduct and Ethics are relevant to the complaint, which stipulate that-

## **"7. *Involvement in actions before a Court***

*An employee shall inform the appointing authority of any circumstances or activity of the staff member that might serve as a basis for disqualification of either the staff member or the judge, in a matter pending before the court.*

### **11. *Prohibition [of] personal interest***

*Certain employees, because of their direct relationship to a judicial officer or the nature of their duties, shall not perform any official duties in any matter with respect to which such person knows that:*

*(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;*

*(b) he, individually or as a fiduciary, or the spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or is a party to the proceeding; or*

*(c) he, a spouse, or a person related either within the third degree of relationship, or the spouse of such person:*

*(i) is a party to the proceeding, or an officer, director, or trustee of a party;*

*(ii) is acting as a lawyer in the proceeding;*

*(iii) has an interest that could be substantially affected by the outcome of the proceeding; or*

*(iv) is likely to be a material witness in the proceeding."*

Obviously, the respondent was not a trial magistrate but a court clerk, hence, she was prohibited to perform official duties in relation to the case

under consideration. Item 11 of *Certain employees because of their relationship to a judicial officer...shall not perform any official duties in any matter with respect to which such person knows that...is a party to the proceeding*. The appellant's complaint is that the respondent being a court clerk posted at the trial court kept the record of her case file. He added that they tendered exhibits which the trial magistrate did not refer to. They were suspecting that the respondent tampered with the exhibit. There is no doubt that keeping court files is an official duty. However, to what extent did it affect or raise biasness in the appellant's mind? There is no evidence that the respondent tampered with the record.

The appellant's apprehension of bias was unsubstantiated. Was there any alternative of not keeping the file at the trial court where the respondent worked? The answer is negative. It is a trial court or the appellate court which has a duty to keep the court record. Should we have transferred the respondent to another court during the pendency of her case? I do not think there was a need to transfer the respondent to another court during the pendency of her case. Should we bar employees of the Judiciary to be party to the proceedings? The answer is negative. Judiciary employees have a right to sue or be sued or to institute criminal proceedings like any other

person. Item 7 of the **Code of Conduct and Ethics** states that when an employee finds herself or himself into that situation her duty is to inform the *appointing authority*. In the present case, the respondent if anything ensued the court record is well-kept. Applying an objective test, I do not think a role, the respondent played was prejudicial to the appellant or sent signals to the appellant for reasonable apperception of bias.

That done, I now considered whether the trial magistrate was biased merely because he entertained a criminal case involving a co-worker as a complainant. No wonder the trial magistrate had personal bias or prejudice about the respondent. He ought to have disqualified and let the matter proceed before another magistrate. The **Code of Conduct for Judicial Officers of Tanzania** and item 9(1)(a) stipulates that-

*Conflict of Interest*

*9.-(1) A judicial officer shall disqualify himself in any case in which that judicial officer:*

*(a) ...*

*(b)...*

*(c) has a personal bias or prejudice concerning a party or personal knowledge or facts;*



It is long established and cherished maxim that justice must not only be done but must be seen to be done. It is further established that the test whether a judicial officer may be impartial or biased is not subjective but an objective test. Thus, the test is whether a reasonable litigant would have perceived the judicial officer impartial or biased. The test is not whether the trial magistrate was in reality impartial or is likely to have been impartial. It is rather, whether the appellant had a reasonable perception of the trial magistrate's impartiality or biasness. The Court of Appeal in **Mwita Chacha & 4 Others v. R.**, Mza Criminal Revision No.1 of 2007 quoted with approval the decision of the Supreme Court of South Africa in **S v Malindi and Others** 1990 (1) SA 962 CA) at pages 969 G-I, where the court stated as follows-

*"The common law basis of the duty of a in certain circumstances to recuse himself was fully examined in the cases **S v Radebe: 1973 (1) SA 796 (A)** and **South African Motor Acceptance Corporation (Edms) Bpk Obernotzer 1974 (4) SA 808 (T)**. Broadly speaking the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer that he will not adjudicate impartially. The matter must be regarded from the point of view of*

*the reasonable litigant and the test is a reasonable one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important."*

I am of the firm view that the appellant had a reasonable apprehension that the trial magistrate who was working with the respondent in the same office was likely to be biased. It was a fit case for the trial magistrate to recuse himself. I uphold the third ground of appeal that there was likelihood of bias on the part of the trial magistrate. Consequently, I allow the appeal, nullify the proceedings, quash the conviction and sentence of both, the trial and appellate court. I order trial *de-novo* of the appellant before another magistrate.

Having nullified the proceedings and ordered a retrial, I find not only no impetus to determine the remaining grounds of appeal but also to do so would have an adverse impact on the trial *denovo*.

I order accordingly.

**Dated** at Babati this **22<sup>nd</sup>** day of **August**, 2023.



**John R. Kahyoza,  
Judge**

**Court:** Judgment delivered presence of the respondent and in the absence of the appellant and presence of his advocate. and . Ms Fatina (RMA) is present. Right of appeal explained.



A handwritten signature in black ink, appearing to read "John R. Kahyoza", written over a horizontal line.

**John R. Kahyoza**  
**Judge**  
**22. 08.2023**