

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT IJC MOROGORO

CRIMINAL APPEAL NO 84 OF 2022

(Arising from the decision of the District Court at Kilombero District in Criminal Appeal No. 11 of 2022)

BIKO MALWATA.....APPELLANT

VERSUS

SAID ALLY KIKULACHO.....RESPONDENT

DATE OF JUDGEMENT- 17/11/2023

JUDGEMENT

This appeal has a long history starting way back in 2003. The background of the case is that way back on 6th July 2003, Said Kikulacho, the respondent in this appeal purchased two houses situate at Kiberege Ward in Ifakara. The two houses belonged to Adam Malwata and Diro Malwata. He bought the houses on a public auction conducted by Moto-Moto Court Brokers in execution of the Decree/Orders passed by Mang'ula Primary Court. Adam Malwata and Diro Malatwa refused to yield vacant possession, this compelled



Said Kikulacho to ask for the help of the Tribunal. He, thus, filed an application No. 29 of 2009 before the District Land and Housing Tribunal for Kilombero/Ulanga at Ifakara. In this case, Diko Malwata (Biko Malatwa or Diro Malatwa) gave his testimonies as DW2. The case ended in favor of Said Kikulacho, and the two were ordered to vacate the premises. The order of the Court was issued on 20th January 2010 by Hon L R Rugarabamu, the Chairperson of the Tribunal. Then, on 11/08/2010, the District Land and Housing Tribunal appointed M/S Property International Limited, Auctioneers and Court Brokers to evict Adam Malwata and Diro Malatwa from the suit premises. They were forcefully evicted, and the houses were handed over to the respondent herein. It is alleged by the respondent and as seen in Criminal Case No. 95 of 2017, Diko Malwata also known as Diko Maliwata trespassed into the house on 10th August 2017 at 9. 00 am. The respondent instituted at Mang'ula Primary Court Criminal Case No. 95 of 2017 for criminal trespass, the appellant herein was found guilty of the offences under section 299 (a) of the Penal Code and section 32- (1) NY III SMM No. 2/84 R-2003, Cap 11, he was sentenced to a three

months' imprisonment, and thereafter he was ordered to vacate the house. In the proceedings before Mang'ula Primary Court, there was the evidence of SM11, who confirmed before the Court that Diro Malatwa or Diko Malatwa or Biko Malatwa was the same person who had a case with the respondent before the District Land and Housing Tribunal, and that he was forcefully evicted from the suit premises after the case, that the appellant Biko Malatwa was evicted from the premises by the Court Broker, and the exercise was supervised by the police. In 2017, this same person re-entered the house in dispute claiming that the house is still his property. In the case before Mang'ula Primary Court, Biko Malatwa also known as Diko Malwata gave his defense as SU1, he also had three other witnesses who were Faustin Mwelu (SUII), and Stanislaus Koffi (SUIII), and Bakari Kimbokoto (SUIV). In his defense he admitted to have been sued by the respondent at the District Land and Housing Tribunal, but he claims to have won the case before the District Land and Housing Tribunal. The respondent never supplied any proof whatsoever to show that he had won the case before the District Land and Housing Tribunal. However, we have, on record

the Judgement passed by the District Land and Housing Tribunal in Application No. 29 of 2009, in which Biko Malwata was the 2nd respondent, and he was ordered by the Tribunal to yield vacant possession of the disputed premises. He never appealed against the decision of the Tribunal.

Biko Malatwa appealed against the decision of Mang'ula Primary Court to the District Court of Kilombero at Ifakara, Criminal Appeal No 7 of 2018. The appeal was adjudicated and determined by Hon B N Mashabara –SRM, the appeal was struck out on 31 July, 2018. Biko Malwata made the 2nd appeal before the High Court, it was PC Criminal Appeal No. 18 of 2018, in this appeal Hon Mutungi J, said the appeal before the District Court was not determined as issues of the case i.e. the grounds of appeal were not determined, Honorable Judge quashed the Judgement and Proceedings of the District Court and ordered that the appeal be tried de novo before another competent Magistrate. This order was passed on 19 September, 2019. After the order of Honorable Judge Mutungi, the appellant herein, Biko Malatwa filed a fresh Criminal Appeal No. 11 of 2022 before the District Court of Kilombero at Ifakara, and Hon L

O Khamsini PRM gave a Ruling on 25th August, 2022 dismissing the appeal for the reasons that the appeal before the Court was incompetent as the order of Hon Judge Mutungi was to hear the Criminal Appeal No. 7 of 2018 afresh, and not to institute a fresh appeal.

Aggrieved by the decision of the District Court in Criminal Appeal No. 11 of 2022, the appellant Biko Malwata filed this appeal before the High Court raising four grounds of appeal, and to be honest I never grasped the grounds of appeal, however during the hearing I realized that the appellant Biko Malatwa who appeared unrepresented is a lay person, and did not actually understand the orders passed by Hon Judge Mutungi in PC Criminal Appeal No. 18 of 2018. The order of Hon Judge Mutungi were to the effect that Criminal Appeal No 7 of 2018 had no Judgement to stand on, as the judgement and its entire proceedings were quashed and set aside, and she also ordered that the Criminal Appeal No 7 of 2018 be heard and determined afresh (de novo). The order of Hon Judge Mutungi had the effect that Criminal Appeal No 7 of 2018 is still pending before the District Court of Kilombero at Ifakara, and



parties i.e. Biko Malwata and Saidi Ally Kikulacho were ordered to go back to the District Court of Kilombero at Ifakara in the same Case File I.e. Criminal Appeal No 7 of 2018, and the appeal is now to be heard and determined afresh by another Magistrate. Biko Malwata was not required to file a fresh appeal, and Hon. L.O Khamsini was not in the error when he struck out the Criminal Appeal No 11 of 2022, for it was filed contrary to the orders issued by the High Court by Hon Mutungi J.

That being said, the appeal lacks merits, and it is hereby dismissed. The appellant Biko Malatwa is advised to go back to Kilombero District Court at Ifakara to pursue his Criminal Appeal No. 7 of 2018, which is still pending before the District Court of Kilombero at Ifakara.

It is so ordered.

**DATED AND DELIVERED AT MOROGORO THIS 17TH DAY OF
NOVEMBER 2023**




(L MANSOOR)
JUDGE

17TH NOVEMBER 2023