

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
ARUSHA SUB REGISTRY  
AT ARUSHA**

**PC CRIMINAL APPEAL NO. 05 OF 2023**

(C/F Criminal Appeal No 20 of 2022 in the District Court of Arumeru at Arumeru  
Originating from Criminal case No 455/2022 Maji ya Chaoi Primary Court)

**WILSON ANDREA MOLLEL ..... APPELLANT**

**VERSUS**

**SAMSON ANDREA MOLLEL .....1<sup>ST</sup> RESPONDENT**

**DANIEL MESEYEKI .....2<sup>ND</sup> RESPONDENT**

**SAMWEL MESEYEKI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

20<sup>th</sup> September & 19<sup>th</sup> December, 2023

**KAMUZORA, J.**

This is the second appeal preferred by the Appellant against the Respondents herein. The brief facts of this matter reveal that, before the Primary Court of Maji ya chai (the trial court) the Respondents herein were charged for the offence of malicious damage to property contrary to section 326(1) of the Penal Code, Cap 16 RE 2019. After a full trial, the trial court was satisfied with the case was proved against the Respondents herein. The trial court then found guilty the Respondents

guilty as charged and sentenced them to serve 6 months conditional discharge. Dissatisfied, the Respondents preferred an appeal before the District Court of Arumeru at Arumeru (the first appellate court) which quashed and set aside the judgment and sentence passed by the trial court on account that the trial court sentenced the Respondents before they were convicted of the offence charged. The Respondents were then discharged on the ground that at that time they almost finished serving the sentence imposed to them. The Appellant was aggrieved and preferred the current appeal raising two grounds of appeal which are reshaped as follows:

- 1) That, the first appellate court erred in law and in fact when discharged the Respondents herein after she had quashed and set aside the judgment of the trial court.*
- 2) That, the first appellate court erred in law and fact for failure to order the record of the proceedings in criminal case No 455/2022 before Maji ya Chai Primary Court be returned back for the trial court to prepare and deliver judgment after she quashed and set aside the judgment of the trial court.*

Hearing of the appeal was by way of written submissions as a matter of legal representation, Mr. Hamisi Mkindi, learned counsel drafted on behalf of the Appellant while Ms. Sara Lawena, learned counsel

represented the Respondents herein. Both parties filed its submissions save for the rejoinder.

Arguing in support of appeal, Mr. Mkindi submitted jointly for all two grounds of appeal and submitted that the first Appellate Court erred in law and in fact for discharging the Respondents herein after she had quashed and set aside the Judgment of the trial court. That, the magistrate erred for failure to order the record of the proceedings be returned to the trial court for proper conviction and sentence of the Respondents following the decision that no conviction was entered by the trial court.

The Appellant's advocate argued that, after the first Appellate Court had quashed and set aside the Judgment and sentence passed by the trial court following the trial court's failure to convict the accused persons (Respondents herein), the law required her to order the file and proceedings to be returned to the trial court for convicting and sentencing of the Respondents. Referring Rule 37 (1) of the 3<sup>rd</sup> Schedule to the Magistrate's Court Act, Cap 11 R.E 2022, the counsel for the Appellant argued that the trial was properly conducted and it was not vitiated by the failure of the trial court to convict the accused (Respondents herein). He was of the view that, the discharge of the

Respondents was in violation of the law as the Court only quashed and did set aside the Judgment and conditional discharge sentence but did not nullify the proceedings of the trial court.

The Appellant's advocate further submitted that, it is very rare for a second appellate court to interfere with concurrent findings of fact by two courts below unless there is a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice as stated in the case of **Mussa Mwaikunda Vs. Republic**, (2006] TLR 387. He however argued that the first Appellate Court erred for failure to order the record of the proceedings to be returned to the trial court for it to prepare and deliver a judgment. In his view, the Appellant's counsel argued the order by the first appellate discharging the Appellants (Respondents herein) on the ground that they have almost finished the sentence was not correct for no proceedings that were nulled.

The Appellants added that, the practice is that, whenever Appellate Court quash and set aside the conviction and sentence of the accused person without nullifying the proceedings, it has to order the file and proceedings be returned to the trial court for conclusion of the stage (s) nullified. Reference was made to the case of **Ismail Mustapha Vs. Republic**, Criminal Appeal No. 558 OF 2021 (unreported).

From his arguments and authorities cited, Appellant prays that the decision of the Second Appellate Court which discharged the Respondents herein be quashed and set aside and the proceedings in Criminal Case No. 455/ 2022 before Maji ya Chai Primary Court be returned to the trial court to convict the Respondents and deliver Judgment forthwith.

Responding to the Appellant's submission, Ms. Lawena is aware of the principles laid down on how the Appellate Court ought to handle an appeal where the judgment of the trial Court does not have a conviction. She submitted the position suggested by the Appellant herein is not the only position which the court can prefer where no conviction is entered by the trial court. To her, the decision on which position to take depends to the circumstance of each case. She referred the cases of **Ismail Mustapha Vs. Republic (Supra)** and **Joseph Mahona @ Joseph Mboje @ Magembe Mboje Vs. Republic**, Criminal Appeal No, 541/2015 and argued that Court of Appeal upon considering the circumstance of the case, did quash the proceedings of the trial court and high court and did set aside the sentence.

The Respondent's counsel insisted that each case must be decided based on its own peculiar material facts and circumstances. That, the

position opted by the District Court was proper as it considered that it could not remit the file to the trial court for preparation of a new judgment basing on clear reason that the accused/Respondents herein had already served the sentence thus, it was not in the interest of justice to do so.

The Respondent's counsel conceded to the fact that the District Court only quashed the judgment and set aside the sentence mated against the accused but did not proceed to quash the proceeding of the trial court. She however argued that, in the interest of justice as it was held in the case of **Joseph Mahona** (Supra), this court may proceed to invoke its revision powers and proceed to quash the proceedings of the trial court for interest of justice and order the file to be remitted to the trial court to prepare a fresh judgment. Basing on her submission, the Respondent's counsel prays that the appeal be dismissed.

I have dispassionately surveyed the rival submissions from both counsels and observed that indeed, it is undisputed fact from both parties that before the trial court, the Respondents were sentenced prior to their conviction. It is on that account that the Appellant is challenging the first appellate decision in acquitting the Respondents instead of

quashing and setting aside the trial court proceedings and remitting the case file case to the trial court for the composition of a fresh judgment.

In determination of this matter, I will be guided by the provision of Paragraph 37 (1) of the 3<sup>rd</sup> Schedule to the Magistrate's Courts Act which govern the Primary Courts in writing and pronouncing judgement.

The said provision read: -

***"37.- (1) Subject to section 6 of this Code, after all the evidence has been heard, the court shall proceed to **pass judgment and convict**, or acquit and discharge the accused accordingly."***

The above provision is clear that the court after passing judgment must either convict or acquit and discharge the accused. In the matter at hand, the first appellate court found that the trial court failed to convict the accused and in fact, I do not doubt such finding. The problem is on the remedy available upon finding that the accused persons were not convicted.

It was proposed by the counsel for the applicant that the remedy was to remit the case file to the trial court for it to enter conviction while the Respondent's counsel was of the view that the court can opt to discharge the accused upon finding that conviction was not entered. In case of **Mang'era Marwa Kubyo Vs. Republic**, Criminal Appeal 320 of 2013 [2014] TZCA 209 Tanzlii, the Court of Appeal held that;

*"It follows, therefore, that having found the accused person guilty of the offence charged, it was imperative upon the magistrate to convict him before passing sentence. In the absence of a conviction entered in terms of section 235 (1) of the Act, there was no valid judgment which the High Court could uphold or dismiss. In other words, the judgment of the High Court had no leg to stand on."*

Subscribing to the holding above, this court finds that in the absence of a conviction entered in terms of Paragraph 37 (1) of the 3<sup>rd</sup> Schedule to the Magistrate's Courts Act, there was no valid judgment which the district court could dismiss and discharge the Appellants therefrom. In my view, since the trial court sentenced the Respondents without first convicting them, the first appellate court was bound to set aside the judgment and nullify subsequent proceedings before ordering the trial court to re-compose the judgment and enter conviction before sentencing the Appellants.

On the argument that the Appellants were discharged merely because they almost finished serving sentence, this court finds that such cannot stand where there is legal error committed for failure to convict the accused by the trial court. The purpose for appeal is more than challenging serving sentence as other factors like not having criminal records or believing that the offence was not committed may be a reason for appeal. Therefore, finishing serving sentence in my view,



does not validate failure to direct the trial court to follow proper legal procedures.

While I agree with the argument by Respondent's counsel that each case should be decided in considering its circumstance, I refrain from taking the position of the Court of Appeal in **Joseph Mahona @ Joseph Mboje @ Magembe Mboje Vs. Republic**, (supra). The reason is that what triggered the order of the Court of Appeal in that case is different from the matter at hand. In that case, the Appellant was incarcerated for 12 years in prison and the court found that since there was a delayed justice in determining his right, it wouldn't be in the interest of justice to remit the record to the trial court for any attendant order. It instead opted to quash all proceedings of the trial court and high court and the sentence passed against the Appellant. That, is not the case in the matter at hand where the Respondents were challenging conviction and conditional discharge sentence.

It is in record that the failure of the trial court to convict the Respondents was not among the grounds of appeal before the district court. The magistrate raised suo motto the issue of failure to convict and asked parties to address the court over the same. It is on the basis of that ground, the Respondents were discharged. In my view, having

found that the Respondents were not convicted, the first appellate court was bound to direct the trial court to enter conviction before sentencing them so that the first appellate court could have mandate to determine the grounds of appeal before it.

That being said, I find merit in this appeal and find that the district court erred in discharging the Appellants (Respondents herein). Since the first appellate court abrogated its duty of directing the trial court to follow proper legal procedures, I step into the shoes of the first appellate court by quashing and setting aside the judgment of the trial court, the sentence and all proceedings which followed after the judgment was passed. The trial court case file should be remitted back for the same magistrate to compose a judgment and enter conviction in compliance to the legal requirement. Thereafter, the record should be forwarded to the district court to determine the grounds of appeal. In the upshot, the appeal is allowed.

**DATED** at **ARUSHA** this 19<sup>th</sup> day of December, 2023.



  
**D.C. KAMUZORA**

**JUDGE**