

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
PC CRIMINAL APPEAL NO. 12 OF 2023**

FELICIAN MATIMBA KIMARIO.....APPELLANT

VERSUS

ASIA ZUBERI.....RESPONDENT

26/10/2023 & 02/11/2023

JUDGMENT OF THE COURT

KAFANABO, J.:

Before this court is an appeal originating from a decision of the district court of Kinondoni in a Criminal Appeal No. 09 of 2022 delivered on 5th April 2023, having its roots from a decision in Criminal Case No. 1522/2021 of Kawe Primary Court also delivered on 08/04/2022.

The brief facts of the case are that the appellant was arraigned and charged at the primary court of Kawe for two counts. The first count was common assault contrary to section 240 of the Penal Code, Cap. 16 R.E.2019. Particulars of the offence are clear that the appellant on 06/11/2021 at around 11:30 hours, at Goba Kinzudi, Ubungo district, Dar es Salaam region assaulted the Respondent herein by slapping her on her right hand and caused pain thereby whilst knowing that it is contrary to law.

The second count is the use of abusive language contrary to section 89 of the Penal Code, Cap 16 R.E. 2019. It is alleged that the appellant 06/11/2021 at around 11:30 hours, at Goba Kinzudi, Ubungo district, Dar es Salaam region used abusive language against the respondent that she is a whore and a witch whilst knowing that it is an offence.

It is on record that the matter was heard and determined by the primary court of Kawe. The appellant was convicted on both counts and sentenced to serve a penal servitude for eight (8) months. The appellant being aggrieved by the said decision appealed to the district court of Kinondoni against conviction and sentence. The district court of Kinondoni heard the appeal and, impliedly, upheld the decision of the primary court and ordered the appellant to serve the sentence as pronounced by the primary court. The appellant still aggrieved approached this court armed with five grounds of appeal as follows:

- 1. That learned District Magistrate erred in law and in passing judgment by adding conviction that the Kawe Primary Court convicted the appellant for two offence(sic) while in fact, it was one count*

- 2. Both District Court and Primary Court flawed in contradicting(sic) on conviction as the accused failed to know which offence(s) he was convicted (sic).*
- 3. The primary court erred in law and in delivering judgment discussing allegations which was (sic) not before the court.*
- 4. The primary court erred in law convicting appellant without satisfy(sic) itself if the offence was proved.*
- 5. That the primary court erred in law by convicting the appellant without discussing his defence.*

On 26/07/2023 this court ordered disposition of the appeal by way of written submissions and both parties complied with the schedule of written submission. However, after perusing the appellant's written submissions in support of the appeal it is noted that there are six (6) grounds of appeal instead of five as stipulated in the Petition of appeal. Ground six as enshrined in the Appellant's submissions, that is "that the Court erred in law to rely on record which were not relevant to the case before it" was not part of the memorandum of appeal. Rule 14 of the **Judicature and Application of Laws (Criminal Appeals and Revisions in Proceedings Originating from Primary Courts) Rules, 2021**, provides that:

An appellant or his agent shall not, except by leave of the appellate court, be entitled to be heard on any ground not set forth in his petition of appeal.

Given that the appellant, stealthily, introduced ground six of the appeal contrary to the dictates of rule 14 above reproduced, the same is hereby expunged from the records of this court.

Moreover, upon further review of the memorandum of appeal, it is also noted that some grounds of appeal are challenging a decision of the primary court instead of that of the district court. To put things alight, grounds three, four, and five of the appeal are directly attacking the decision of the primary court which is not on appeal before this court. Therefore, the said grounds of appeal will not be considered in this appeal for being out-of-place.

Therefore, this court is left with two grounds of appeal of which to determine, namely grounds one and two of the appeal. Moreover, the said grounds of appeal will also not be determined in this judgment for reasons which shall become apparent herein below.

In the course of composing this judgment, this court has noted with concern that the district court, when exercising its appellate jurisdiction in respect of Criminal Appeal No. 09 of 2022, in its decision delivered on 5th April 2023,

determined only one ground of appeal, that is the first ground of appeal amongst five grounds of appeal. Moreover, the said first ground of appeal did not dispose of the appeal. This means that four grounds of appeal had been left undetermined and the district court did not provide any reason for that omission. This court is of the view that leaving the grounds of appeal undetermined was a serious irregularity on the part of the district court. It is also unfortunate that none of the parties raised it in this appeal. For ease of reference, the grounds of appeal as presented in the district court on 6th May, 2022 were as follows:

- 1. The Primary court erred in law in convicting the accused in both counts whilst acknowledging that the prosecution failed to prove their case.*
- 2. The primary court wrongly directed itself in discussing offenses which the appellant was not charged with.***
- 3. The primary court erred in law in convicting the appellant for using abusive language without the offense being proved according to law.***
- 4. The court erred in law in convicting the accused without considering his defense.***

5. The court erred in law in considering records of an alleged offence which the appellant has never been convicted of.

The district court in determining the grounds of appeal stipulated above observed, on page 9 of the judgment, that:

"I have gone through the explanation and submissions of both parties in-depth and re-read the evidence and judgment of the primary court of Kawe, hence this court is convinced to ask itself the following questions considering one major issue:

1) *Did the primary court err in law in convicting the accused in both counts?"*

That is the only issue (ground) that was considered by the district court in its judgment, leaving the other four grounds of appeal undetermined and, in the end, dismissed the appeal. This court is of the view that snubbing the grounds of appeal as done by the district court is a fatal irregularity and amounts to condemning a party unheard. This would vitiate the judgment of the district court. It is for this reason that, as stated above, the need for considering the remaining two grounds of appeal as filed in this court does not arise.

Coming back to resolving the entanglement, this court was at a crossroads on what to do given that the parties to the appeal had not addressed the matter in the memorandum of appeal and their written submissions filed in this court. Opportunely, the appellant and respondent appeared in court on 2nd November 2023 for judgment, and for reasons already explained, the court asked them to address the court on the issue of undetermined grounds of the appeal filed in the district court.

The appellant submitted that the undetermined grounds of appeal will cause injustice to him given that he is a professional in record management. Further, since the criminal record is there the same may be a reason for him to be disqualified in leadership and social issues. His honesty is also questionable, and if all grounds of appeal are not determined he will not be trusted and he lacks confidence as he is being scolded by the members of his community for his criminal record.

The respondent was brief, she submitted that the court did not consider and determine the other grounds of appeal because they had no merit. Also, she argued that it may be perceived by the public that she used extra judicial means for the case to be ruled in her favour which, essentially, is not true.

After hearing the parties on the matter, the key issue to determine is whether the decision of the district court remains valid irrespective of undetermined grounds of appeal.

As per the judgment of the district court dated 05/04/2023 from the last paragraph of page 1 to page 2, it is indicated that the appellant stipulated five grounds of appeal and the same are reproduced on page 2 of the judgment. It is also on record that, both parties filed their submissions as ordered by the district court. The appellant filed his on 2nd June 2022 and the Respondent filed hers on 2nd July 2022. However, the trial magistrate considered only the first ground of appeal and dismissed the appeal as stated on page 10 of the trial court judgment. It was not stated why the other grounds of appeal were not considered.

It is settled now in our jurisdiction that failure to determine grounds of appeal renders a judgment of the court a nullity. There is a plethora of authorities in this area. In the case of **Malmo Montagekonsult AB Tanzania Branch v. Margret Gama, Civil Appeal No. 86 of 2001** (unreported) it was held that:

'In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is,

however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately".

In the appeal before the district court, the district court magistrate considered the first ground of appeal and ruled that he agreed with the respondent and dismissed the appeal. The other grounds, apart from being addressed by the parties and a summary of submissions being captured on pages 2 to 9 of the district court judgment, were not determined as required by law.

In the case of [Simon Edson @ Makundi vs Republic \(Criminal Appeal 5 of 2017\) \[2020\] TZCA 1730 \(18 August 2020\)](#) , the Court of Appeal held that:

'..... the appellate court is bound to consider the grounds of appeal presented before it and in so doing, need not discuss all of them where only a few will be sufficient to dispose of the appeal. It is also necessary for the first appellate court to re-evaluate the evidence on record before reaching to its conclusion. With respect, the impugned judgment fell far below the required standard and for that reason, it

was not a judgment known in law. It was a nullity. For the stated reasons, we invoke our revisional powers under section 4 (2) of the AJA and nullify the purported judgment.'

In another case of [Nyakwama s/o Ondare @ Okware vs Republic \(Criminal Appeal 507 of 2019\) \[2021\] TZCA 592 \(21 October 2021\)](#) the Court of Appeal held that:

'... failure to consider appellant's grounds of appeal was a fatal irregularity rendering the first appellate court's judgment a nullity. In this regard, we wish to emphasize that though it is not the duty of the first appellate court to resolve the issues as framed by the trial court, yet it is expected and bound to address and resolve the complaints of the appellant in the grounds of appeal either separately or jointly depending on the circumstances of each appeal.'

In the present case, the complaints of the appellant as stipulated in grounds two, three, four and five of the appeal were not resolved by the district court when determining the first ground of appeal. It was not done either separately or jointly as it was expected of the court.

Under the circumstances, and in the light of the settled position of the law as demonstrated in the cases cited herein above, this court finds that the

judgment of a district court is a nullity for not determining the four grounds of appeal.

Therefore, this court invokes its revisionary powers over the district court when exercising its appellate jurisdiction on matters originating from primary courts under section 31 of the Magistrates' Court Act, Cap. 11, R.E 2019. The purported judgment of the district court dated 5th April 2023 is hereby nullified for not determining the second, third, fourth, and fifth grounds of appeal in Criminal Appeal No. 09 of 2022 without providing reasons.

The issue, now, is to determine the way forward. Having nullified the judgment and given the authorities cited herein above, there are two obvious options. One, either to remit the record to the district court for it to compose a fresh judgment according to law. Two, in the alternative, to step into the shoes of the district court and determine the unresolved grounds of appeal.

Given the circumstances of the matter, the record of appeal is remitted to the district court for it to consider the appellant's grounds of appeal and prepare a fresh judgment according to law. Inspiration is drawn from the case of [Mantra Tanzania Ltd vs Joaquim Bonaventure \(Civil Appeal 145 of 2018\) \[2020\] TZCA 356 \(17 July 2020\)](#) where the Court of Appeal held that:

'On the way forward, it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter.'

It is this court's understanding that the above-cited case was not discussing undetermined grounds of appeal, but rather undetermined issues, but it is found to be relevant regarding resolving matters raised by parties in the lower court and left undetermined.

The option of stepping into the shoes of the district court was not taken for reasons that: one, the appellant had already served the sentence and now he is a free man, the option would have been considered if the situation would have been otherwise. Second, remitting the matter to the district court to compose a fresh judgment according to law would alert the district court to be careful when exercising its appellate jurisdiction. It would also remind the district court to consider all relevant issues and/or grounds of appeal as raised for determination.

In conclusion, therefore, this court orders that:

1. The appeal is allowed for reasons other than stated in the appellant's memorandum of appeal.
2. The judgment of the district court is vitiated and thus nullified for being a result of the fatal irregularity.
3. The record of the district court and primary court are remitted to the district court with a view to comply with order number 4 herein below.
4. The district court is ordered to consider and determine all grounds of appeal according to law.
5. The district court should prepare a fresh judgment after determining all issues/grounds raised and argued on appeal.

Order accordingly:



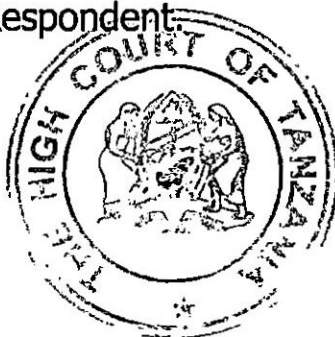
A handwritten signature in black ink, appearing to be "K. I. Kafanabo".

K. I. KAFANABO

JUDGE

02/11/2023

Judgment delivered in the presence of the Appellant and in the presence of the Respondent:



A handwritten signature in black ink, appearing to be "K. I. Kafanabo".

K. I. KAFANABO

JUDGE

02/11/2023