

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

PC. CRIMINAL APPEAL NO. 13 OF 2023

(From the ruling of Ilemela Criminal Revision No. 01/2023)

**JOHN NYAKITEBE..... APPELLANT
VERSUS**

GIVENESS ADRIANORESPONDENT

JUDGEMENT

12th October 2023 & 13th February, 2024

ITEMBA, J.

The judgement of the District Court of Ilemela in Criminal Revision No. 01/2023 aggrieved the appellant herein. He fronted three grounds of appeal. The grounds are rephrased the purpose of clarity that, the District Court erred in law and fact by finding that the plea by the respondent before trial court was equivocal; it erred by delivering contradictory decision; and that it erred by finding that revision was proper instead of appeal.

From available records, the appellant is a landlord of the respondent. The respondent removed a steel gate and replace it with another. The respondent was asked to replace the former gate but she did not. As a result, the appellant initiated criminal proceedings at Ilemela Primary Court against the respondent for malicious damage to property contrary to section 326 of the Penal Code Cap 16 R.E 2022. It was alleged

that the respondent damaged the appellants steel gate worth of TZS. 800,000/=. The respondent pleaded that, "*ni kweli niliondoa geti lililokuwa kwenye nyumba ya mlalamikaji, kama hataki nitalirudisha lililokuwepo*" which meant that 'it is true I removed the gate, if he does not want it to be removed, I will restore it'. The trial court's findings were that the respondent's plea was unequivocal. She was convicted upon her own plea and she was sentenced to pay fine of TZS 300,000/= or imprisonment of three months in default. The respondent was further ordered to replace the gate or to compensate the appellant with TZS 800,000/=.

The respondent was aggrieved. He filed an application for Revision before Ilemela District Court *inter alia*, claiming that her plea was equivocal. Although the appellant raised an objection that the respondent ought to have appealed rather than filing revision, the district court decided in respondent's favour that an application for revision was proper and that, the plea was equivocal. Hence this appeal.

During hearing of this appeal, parties were respectively represented by Messrs. Venance Kiburika and Steven Mhoja both learned advocates. It was the submission of Mr. Kiburika regarding the first ground of appeal that, the District Court erred in revising Primary Court decision. That, the records are clear that the respondent admitted to the plea that "*Ni kweli*

niliondoa geti kama hataki nitarudisha". The respondent agreed to the facts constituting the offence. That, Section 32 (i) (a), (b), and (c) of the Primary Courts Criminal Procedure Code, third schedule to Cap 11 R.E 2019 was complied with. That, The District Court was moved by assumptions of prior arrangement between parties, but the court should not be moved by assumption. I was referred to the case of **Clement Pancras v. R.**, Cr. Appeal No. 321/2013 (unreported) to the effect that once an accused person plead guilty, facts are read and conviction is entered.

Regarding the second ground of appeal, he submitted that, the District Court decision was very contradictory. That, at page 12 of judgment, the District Court found that there is no dispute that the respondent caused damages. Such findings were in line with the trial court decision that the respondent committed an offence. Therefore, to him, the District Court ought to have uphold the trial court's decision.

In the last ground of appeal, he submitted that, revision before District Court was brought as an alternative to appeal. That the respondent opted for revision because he was barred by time to file an appeal. To him, judgment in admission cannot be revised the proper way is to appeal. He made reference to the case of **Mansoor Daya Chemicals Ltd v. National Bank of Commerce Ltd** Civil Application

No. 464/16 of 2014, (unreported) which held at page 7 that if there is a right to appeal it has to be pursued instead of the party opting for revision. He prayed for the appeal to be allowed.

In reply Mr. Muhoja submitted that, principles of criminal law require that for an offence to be committed, *actus reus* and *mens rea* have to be established beyond reasonable doubt. That the respondent was a tenant of the appellant she had no ill intention against him. I was also referred to the case of **Said Omar Kombo v. Republic [2000] TLR 315.**

With regards to the second ground, he submitted that, the counsel for the appellant did not read the whole judgment because for damage to sustain, there must be *mens rea* and *actus reus*. As to the third ground of appeal he submitted that the trial courts' decision is marred with illegality therefore revision application was properly filed.

In rejoinder it was submitted that, the respondent had *mens rea* because she knew the whereabouts of the appellant but he did not consult him before removing the gate. That, the illegalities identified by the respondent were not expounded, they were just mentioned. He insisted that the appeal has merit.

I will start with the third ground of appeal as it touches competency of proceedings before the District Court. The appellant is of the view that

the application for revision was filed as an alternative to appeal. The respondent's view is that, it was proper to file the said revision because there were irregularities.

As correctly submitted for the appellant, right to appeal is constitutional right therefore it is jealously protected. Therefore, when the aggrieved party has a right to appeal, he cannot invoke revisional powers of the court. In this, I make reference to the Court of Appeal cases of **Mansoor Daya Chemicals Ltd v. National Bank of Commerce Ltd** (supra); **Baghayo Gwadu v Michael Ginyau**, Civil Application No. 568/17 of 2017; **AG v Oysterbay Villas Limited and Kinondoni Municipal Council**, Civil Application No. 168/16 of 2017; and **Simon Hamis Sanga v Stephen Mafimbo Madwary**, Civil Application No. 193/01 of 2021 (all unreported). It is also trite law that, revisional powers of the court can be resorted to, in lieu of appeal only under special circumstances see the case of **Hallais Pro-Chemie v Wella AG** [1996] TLR 269.

In this matter at hand, revision was resorted to by the respondent from conviction and sentence of the trial court which was the outcome of her plea. The only question is whether a person can appeal against the plea which was held to be unequivocal. As a general rule an appeal cannot

be allowed against conviction which was passed on plea of guilty. It can only be allowed in respect of the sentence issued.

However, there are exceptions which allows an appeal to be entertained against conviction. **One**, that, even taking into consideration the admitted facts, his plea was imperfect, ambiguous or unfinished and, for that reason, the lower court erred in law in treating it as a plea of guilty; **two**, that he pleaded guilty as a result of mistake or misapprehension; **three**, that the charge laid at his door disclosed no offence known to law; **four**, that upon the admitted facts he could not in law have been convicted of the offence charged; and **five** where an appellant was pressured into pleading guilty or the plea of guilt was procured as a result of threat or promise offered by a person with authority. See the celebrated cases of **Rex v Forde** (1923) 2KB 400; and Laurence **Mpinga vs Republic** [1983] TLR 166. See also the Court of Appeal cases of **Khalid Athuman vs Republic**, Criminal Appeal No. 103 of 2005; **Josephat James vs. Republic**, Criminal Appeal No. 316 of 2010; **Njile Samwel @John vs Republic**, Criminal Appeal No. 31 of 2018; **Zengo Benjamin vs Republic**, Criminal Appeal No. 562 of 2019 and **Ally Sanyiwa vs Republic**, Criminal Appeal No. 527 of 2017 (all unreported).

In this matter at hand the respondent stands to his position that his plea was equivocal and that his action as a tenant proves no *mens rea* to commit an offence as she removed the appellant's gate and replaced it with another. The appellant's arguments fall in some of the exceptional circumstances mentioned above which allows appeal against conviction passed on plea of guilty. It appears that, the respondent believed that since she was a tenant and she intends to replace the gate, it is correct to enter the plea and explain her intention. As a result, she found herself entering a plea of guilty. It can be said that the respondent pleaded guilty as a result of misapprehension and his plea was ambiguous and unfinished. I make reference to the case of **Sungulwa Lukalasha Vs. R**, Cr. Appeal No. 90/2008 CAT, Tabora (unreported). Therefore, I will partly agree with the Respondent that her plea before the primary court was equivocal. Consequently, the plea being equivocal, the respondent had right to appeal. She could not by law, be allowed to file revision.

Thus, the third ground of appeal has merit. An application for revision before the District Court was filed as alternative to appeal. Therefore, all proceedings, ruling and orders thereat are incompetent. I therefore find no need to decide on the rest two grounds of appeal. The appeal is thus allowed basing on the third ground of appeal. Consequently, I hereby nullify the proceedings, ruling and orders of the

District Court in Criminal Revision No. 1 of 2023 for being incompetent.
This being criminal proceedings I order no costs. It is so ordered. Right
of Appeal fully explained to the parties.

DATED at **MWANZA** this 13th Day of February, 2024.



**L. J. ITEMBA
JUDGE**