IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB - REGISTRY OF SHINYANGA

AT SHINYANGA

PC CRIMINAL APPEAL NO. 8 OF 2022

LETISIA KONZOGWE.....APPELLANT

VERSUS

YOHANA ELIAS.....RESPONDENT

[Appeal from the Decision of District Court of Bariadi at Bariadi.]

(Hon. M. M. Nyangusi, RM)

dated the 25th day of October, 2021
in
Criminal Appeal No. 30 of 2021

JUDGMENT

27th July, 2023 & 30th January, 2024.

S.M. KULITA, J.

The appellant herein had instituted a Criminal Case No. 66 of 2021 at Mkula Primary Court against the respondent herein for offences of *Criminal Trespass* contrary to sections 299 of The Penal Code [Cap 16. RE 2019] and *Malicious Damage to Property* contrary to sections 326 of the same law.

In a nutshell, the allegations were to the effect that, on 17th November, 2020 at Busega Village within Busega District in Simiyu Region, unlawfully, the respondent entered the appellant's farm, uprooted sisal plants and cut down three trees therein. Hearing commenced and lastly, the trial court found that the appellant had failed to prove his case at the required standard. Hence, the respondent was acquitted. That was on 23rd July, 2021.

That decision aggrieved the appellant, hence appealed to the District Court of Bariadi for the ground, among others that, the trial court acted on a defective charge. However, the court refrained from ordering retrial for the reasons that, the trial court visited the farm in question and found that there were no any destructions done to the farm in question, thus ordering retrial would give chance to the appellant to fill in the gaps.

That decision too aggrieved the appellant, hence, this second appeal with three grounds; **one,** the trial court erred to act on a defective charge, **two**, the 1st appellate court erred by disregarding that no one can prove criminal case on a defective charge and **three**, the two lower courts erred to punish the appellant on the mistake of the officer of the court.

On 13th July, 2022 the matter was scheduled for hearing through written submissions. Both parties complied with.

In support of the appeal, the appellant's submissions are to the effect that, the charge used at the trial court was defective hence, there was no chance for the Respondent herein to properly prove her case at the required standard. She leveled the fault to the trial court which drew the said charge and for not amending the same after learning it being defective. She however stated that, retrial should be the best remedy as without ordering the same, it is as punishing her for the mistake she did not commit.

In reply the respondent submitted to the effect that, the appellant's appeal is unmeritorious, hence should be dismissed.

This was the end of submissions by both parties.

The submissions by the appellant reveal that, she agrees that the respondent was prosecuted at the trial court with a defective charge, hence the case at the trial court was not proved at the required standard. As such, what the appellant seeks for in this appeal, is only an order for retrial for the reason that, the said defective charge was not drawn by him, but the trial court.

Upon going through the records, I am in all four corners that at the trial court the respondent was tried with a defective charge. **First,** the

trial court's charge shows that, at the statement of offence, both counts; namely, *Criminal Trespass* and *Malicious Damage to Property* have been lumped together as one. **Secondly,** particulars of offence are not separated for each count/offence. And **lastly,** the subsections for the offences charged are not indicated.

In any way, these mistakes, render the charge defective. Through such mistakes, it cannot be certainly said that the respondent was sufficiently informed of the offences he was charged with. Hence, the appellant and the 1st appellate court, were right to hold that the charge was defective.

On account of the aforesaid discussion, it is my considered view that, the main issue for determination in this appeal is only one, and that is; whether retrial should be ordered when the impugned judgment has emanated from a defective charge.

In dealing with the like scenario, the Court of Appeal had this to say in **Mayala Njigailele vs. Republic, Criminal Appeal No. 490 of 2015, CAT at Tabora** (unreported);

> *"Normally an order for retrial is granted in criminal cases when the basis of the case namely, the charge*

sheet is proper and is in existence. Since in this case the charge sheet is incurably defective, meaning it is not in existence, the question of retrial does not arise"

In the same case the said court went on to hold that;

"a retrial is normally ordered on assumption that the charge is properly before the court".

As the above excerpt speaks by itself, this is the position of the law from the superior court of the country, of which this court is bound to follow, that, it was proper for the first appellate court not to order retrial after it had found that the respondent was convicted under a defective charge. For that matter, I see no point to fault the District Court's decision. Consequently, its judgment and orders thereof are hereby affirmed.

In upshot the **Appeal** is hereby **dismissed.**

S.M. KULITA
JUDGE
30/01/2024

DATED at **SHINYANGA** this 30th day of January, 2024.

THE HIGH COURT OF TANZANIA

S.M. KULITA
JUDGE
30/01/2024