IN THE HIGH COURT OF TANZANIA

AT MBEYA

PC. CRIMINAL APPEAL NO. 19 OF 2013

(From Criminal Appeal No. 72/2012 of Mbeya District Court,
Originating from PM Criminal Case No. 404/12 of Mbeya Urban Primary Court)

FULUKO MLELWA ..... APPELLANT

VERSUS

ANDERSON MINJA ..... RESPONDENT

JUDGMENT

Date of last Order: 16/09/2015
Date of Judgment: 05/11/2015

HON. A. F. NGWALA, J.

The Appellant was charged before Mbeya Urban Primary Court of assault causing grievous bodly harm c/s 241 and use of abusive language, brawling and threatening violence c/s 89 (1) (b) both of the Penal Code CAP. 16 R.E. 2012. He was convicted and sentenced to six months imprisonment or to pay a fine of one hundred thousand shillings for each count. His appeal to the District Court of Mbeya via Criminal Appeal No.73/2012 was dismissed. He has now preferred this second Appeal.

Briefly, the circumstances leading to this Appeal are that; the Respondent, one Andarson s/o Minja lost a three wheel motorcycle (*Bajaji*). On 2nd July, 2012 the respondent received information through mobile phone from an unknown person that his motorcycle was seen in a pickup belonging to Aggressive Company. It was heading to Mbeya Bus Terminal.

The Respondent went to Mbeya Bus Terminal but could not trace it. He followed the matter up to the Offices of Aggressive Company. There he found the said *Bajaji* in a pickup. The Respondent called his friends to witness the incident. He also had a camera. His two friends who testified as PW2 and PW3 went to the Offices of Aggressive Company. While there, the Respondent instructed PW3, one Rashidi Hashimu to take his camera and make photographs of the pickup and "*Bajaji*" on it. The said act, made the Appellant and other workers of Aggressive Company furious. They initiated chaos. The Appellant apprehended the Respondent. He beat him up until his child came to his rescue. He sent him to Hospital after he had reported the matter at the Police.

The matter was then taken to Mbeya Urban Primary Court, where the Appellant was charged of and convicted and sentenced as aforesaid.

The Appellant has preferred only three grounds of Appeal. One; that the District Court erred in assuming that the first count was proved; Secondly; that the appellate District Court erred in law and

fact to hold the Appellant responsible for the loss of a camera and lastly that the two counts were not proved beyond reasonable doubt in the trial Court.

When the matter came for hearing, the Appellant was represented by Mr. Kyando, learned Advocate. On the other hand, the Respondent was represented Mr. Kihaka, learned State Attorney.

In determining the Appeal, I had to revisit the proceedings of the two courts below, only to find out that the trial Court omitted to take into consideration some mandatory procedures which unfortunately were not observed by the first appellate Court.

Going through the proceedings of the trial Primary Court from the beginning to the end, I have noted that the trial Magistrate was probably in a hurry. He never accorded the witnesses an opportunity to make re-examination. Just after the closure of cross examination of the witness by the court, he jumped to another witness. This is not a procedure worth commenting. Re-examination aims at covering up the lacunae that have been occasioned during cross-examination. The importance of re-examination need not be emphasized. Rule 45 (2) of the **Magistrate's Courts (Civil Procedure in Primary Court's) Rules, G. N. No. 310 of 1964 and 119 of 1983.**

Another serious procedural irregularity is seen at page 19 of the typed proceedings of the trial Primary Court. At page 19 at the very bottom it is written:

"Amri: *1) Hukumu tarehe 01/10/2012*
2) ABE

S. M. Mbillu – Hakimu
20/09/2012."

This marked the end of the proceedings. There is no place were the opinion of the assessors to the decision of the Court is recorded. This is a mandatory requisite under Section 7 (2) of the Magistrate's Court's Act, CAP. 11 R.E. 2002. For the sake of clarity the Section is reproduced here under:-

> *"All matters in the Primary Court including a finding in any issue, the question of adjourning the hearing, an Application for bail, a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award and all questions and issues whatsoever shall, in the even of difference between the Magistrate and the assessors or any of them, be decided by the vote of the majority of the Magistrates and assessors present and, in the event of an equality of votes, the Magistrate shall have the casting vote in addition to his deliberative vote."*

In the instant case, it is not clear who voted for the decision, which ended up in conviction. The corum shows there were two assessors and one Magistrate. The question is whose decision is assessors? Here there is no answer. In **Susana Joseph vs. Wambura Ihembe [1992] T. L. R. 375, Lugakingira, J**. (as he then was) held thus:-

> *"It seems that neither the trial Magistrate nor the appellate Magistrate is aware of the Magistrates Court (Primary Courts)*

(Judgment of Court) Rules, Government Notice No. 2 of 1988. I would particularly draw their attention to Rule 3 thereof which puts an end to the practice of summing up to the assessors. The assessors are to be consulted for their opinions after the conclusion of the evidence without preliminaries (emphasis mine)".

Likewise, in this case, neither the trial Magistrate nor the appellate one was aware of the requirement that after the closure of the evidence, the assessors are to be consulted for their opinions. This is absurd.

To emphasize on this point, the Court of Appeal in **Agnes Severini vs. Musa Mdoe [1989] T. L. R. 164**, nullified the Proceedings and Judgment of the lower courts because the trial Magistrate omitted to take the opinion of the second assessor. The court inter alia held:-

"The omission by the trial Magistrate to take the opinion of the second assessor was fatal and it rendered the purported Judgment null and void."

This takes me to another apparent irregularity committed by the trial Magistrate as per proceedings. The purported Judgment of the trial Primary Court does not bear signatures of the assessors. Infact does not bear even the Magistrate's signature. This is surely an incurable defect. The Magistrate's Courts (Primary Courts) (Judgment of Court) Rules, G.N. No. 2 of 1988, Rule 3 (2) reads:-

"(2) If all the members of the court agree on one decision, the Magistrate shall proceed to record the decision or Judgment of the Court which shall be signed by all the members."

Rule 4 (1) provides:-

"Where after consultations in accordance with Rule 3 the issue is determined by the vote of the majority, the Magistrate shall proceed to record the decision or Judgment of the majority which shall be signed by the assenting members of the court. (emphasis supplied).

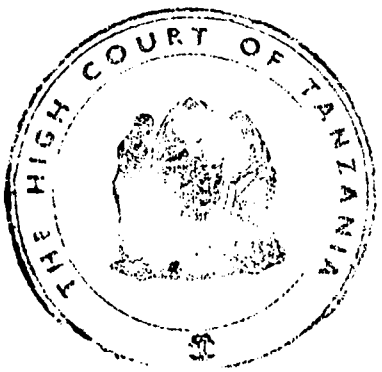
In view of the above quoted Rules, it appears mandatory that in all cases before a decision of the Primary Court is recorded; the court (the Magistrate and assessors) must give their opinion as to the decision to be recorded. Those assenting to it if it is the majority or all of them must sign the Decision/Judgment. This was not complied with in this case. For this reason, I am not hesitant to declare that the Proceedings and Judgment of the trial Primary Court are a nullity. Consequently, the Judgment of the first appellate Court necessarily crumbles.

It is principle of law that, one cannot Appeal from a nullity. If he appeals, the Appeal is equally a nullity. This principle was enunciated by Kisanga J. A. (as he then was) in **Baig and Build Construction Ltd vs. Husmait all Baig Civ. App. No. 12 of 1992** (unreported). In this case, Kisanga J. A. dismissing the preliminary objection and the Appeal altogether stated that any purported appeal from a nullity order is equally a nullity.

Before I conclude, I am indebted to make the following observation. This is a case originating from a Primary Court which came by way of Appeal. Under Section 34 (1) (b) of the Magistrate's Courts Act, CAP. 11 R.E. 2002, in such a case, the Appellant must inform the DPP of his intention to Appeal. The parties as they appear in the Petition of Appeal do not show the involvement of the DPP. However due to the fact that the State Attorney appeared together with the Respondent it offsets that defect. It is however necessary that the Republic appears as a party to the case.

That said, I hereby nullify all the Proceedings and Judgment of the two subordinate courts and Order that the case be heard denoval by another Magistrate in a Court of competent jurisdiction.

It is so ordered.



A.F.NGWALA
JUDGE
05/11/2015

ate: 05/11/2015

oram: Hon. A. F. Ngwala, J.

Appellant: Absent

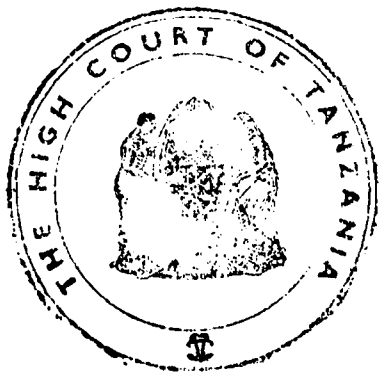
For the Appellant: Absent

Respondent: Present

For the Respondent: Absent

Court: Judgment delivered in court in the presence of the Respondent.

Court: Right of Appeal to the Court of Appeal of Tanzania explained.



A.F.NGWALA
JUDGE
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