

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(MOROGORO DISTRICT REGISTRY)**

**AT MOROGORO**

**CRIMINAL REVISION NO. 22 OF 2023**

*(Arising from Criminal Revision No. 17/2023 Kilombero District Court, Originating  
from Criminal Case No. 30 of 2023 in Mang'ula Primary Court)*

**ADAM ATHUMAN ..... APPLICANT**

**VERSUS**

**SHAFI MUSTAFA ..... RESPONDENT**

**RULING**

*Ruling date on: 13/07/2023*

**NGWEMBE, J.**

This revision originates from the judgement of primary court of Mang'ula whereby the applicant was charged and convicted for the offence of stealing contrary to section 265 of the **Penal Code, Cap 16**.

According to the charge sheet the applicant did steal a motorcycle make Haujoe, bearing registration No. MC 206 CWJ valued at Tshs, 1,700,000/=, property of the respondent. The alleged offence was committed on 30/01/2023 at Mang'ula, Kilombero district within Morogoro region.

The evidence adduced before the trial court was very difficult to read and internalize its meaning due to reckless and shabby handwriting of the trial magistrate. Since the whole proceedings was not typed equally the judgment was also not typed despite the fact that the trial magistrate like every magistrate in our judiciary have been supplied with



lap top computers. It is not known why he did not want to make good use of it. But the minimal I understood with hardship, is that the respondent owned the named motorcycle, which he had handed it to one Erick Ngalika. On 30/01/2023 the said Erick called the respondent telling him that, the applicant borrowed that motorcycle to transport his mother to Msolwa hospital. It seems Erick had some trust on the applicant, so the respondent allowed the applicant to take the motorcycle.

The applicant was given the motorcycle around 13:00 hours, and Erick was communicating with the applicant through his mobile phone. However, it happened two hours later, the applicant's phone could not be reachable. He did not return the motorcycle from that day of 30/01/2023 up to 09/02/2023. The respondent went to the applicant's home and met his mother who stated that, she had no journey and did not go to hospital on that date.

The accused in his defence admitted to have borrowed the motorcycle, but it was for his other route to Itete. When he was on the way back, he carried another person who was heading to the same direction. Somewhere on the way they got an accident after knocking down a cow. He had to service the motorcycle, but he had no money. He admitted in cross examination that he did not inform the respondent nor the said Erick.

Having received all that evidences, the primary court was satisfied that stealing was proved, thus proceeded to convict the applicant and sentenced him to one year imprisonment.

The district court of Kilombero revised the proceeding *suo motu*. It found no irregularity in the trial court's proceedings. But pointed out that the one-year imprisonment was required to be confirmed. For that, she substituted the sentence with that of Community Service.






This court called for the records under section 30 (1) of **The Magistrates' Courts Act, Cap 11 R.E 2019** for the purpose of satisfying itself on the propriety of the proceedings. In my examination, I accept both findings of the lower courts, the offence was proved beyond reasonable doubt, hence conviction was justified. The sentence as well, considering the aggravating factors relevant to the accused (the applicant) was fair and just, correctly as the lower courts found. Save that such sentence of 12 months, under section 7 (1) of MCA, was subject to confirmation by the district court before the applicant started serving his imprisonment. Such omission was rightly observed and cured by the district court.

Apart from failure to seek confirmation of the district court, there is another procedural omission by the trial court, which I have observed in about 20 other case files of the primary courts of Kilombero district. This omission was for the district court to identify and issue directive rulings on that. Since the district court did not manage, I have devoted part of this ruling to address the omission and what ought to have been done by the trial magistrate.

This is about recording of evidence by primary court. It should always be noted that generally, all stages of a court proceeding are provided for in the statutes, rules and precedents. There are procedural statutes for all trials. Trials conducted by primary courts in our jurisdiction are governed by a number of rules and regulations, including but not limited to; *The Magistrates' Courts (Civil Procedure in Primary Courts) Rules*, *The Primary Courts (Administration of Estates) Rules*, *The Magistrates' Courts (Primary Courts) (Judgment of Court) Rules* and *Primary Courts Criminal Procedure Code* set out in the Third Schedule to the Magistrates Courts Act.



What is subject of my address is The Primary Courts Criminal Procedure Code in the Third Schedule. In that Code, the procedure of recording the evidence, among others is provided for under section 35 of The Third Schedule to the MCA in respect of recording the testimony of a witness. I have preferred to reproduce it as whole hereunder: -

**Section 35** (1) *The evidence shall be given in such order as the court directs: Provided that- (a) without prejudice to the power of court to recall him, the complainant shall give evidence first; (b) subject to the provisions of item (c) of this proviso, if the accused person wishes to give evidence, he shall give such evidence before his witnesses; and (c) the accused person shall be afforded an opportunity of giving evidence in rebuttal of any evidence given after he himself has given evidence, by the complainant, the complainant's witnesses or witnesses called by the court.*

(2) *The evidence of the complainant, the accused person and all other witnesses shall be given on affirmation save in the case of a child of tender years, who in the opinion of the court does not understand the nature of the affirmation.*

(3) *The court and the accused person may put relevant questions to the complainant and his witnesses.*

(4) *The court and the complainant may put relevant questions to the accused's witnesses and, if he gives evidence, to the accused person.*

(5) *The accused person and the complainant may, with the consent of the court, put questions to witnesses called by the court.*

(6) *The magistrate shall record the substance of the evidence of the complainant, the accused person and the witness and*





*after each of them has given evidence shall read his evidence over to him and record any amendment or corrections and thereafter the magistrate shall certify at the foot of such evidence, that he has complied with this requirement."*

I have ruled earlier in another Criminal Revision that, the law required a magistrate to read the testimony to the witness and make any corrections if pointed out. At the foot of each witness's testimony, the trial magistrate must certify that he had complied with the provision. Appending a signature and date is a good practice, but usually falls short of the legal requirement.

What subsection 6 requires the court to do after recording the testimony is to read the evidence to the witness and incorporate the observed amendments if any. Then the magistrate must show that he complied with the requirement at the end of each witness's testimony.

This provision is *pari materia* to Rule 46 of **The Magistrates' Courts (Civil Procedure in Primary Courts) Rules**. Reproducing this provision will not offend the purpose of this revision. It is beneficial to the magistrates in primary courts to understand this requirement whose spirit is the same in Criminal Procedure and Civil Procedure Rules, it provides thus: -

**Rule 46** (1) *"The evidence of each witness shall be taken orally in open court.*

*(2) The evidence of each witness shall be given on affirmation save in the case of a child of tender years, who in the opinion of the court, does not understand the nature of the affirmation.*

*(3) The substance of such evidence shall be recorded in Kiswahili by the magistrate, and after each witness has given evidence the magistrate shall read over his evidence to him*



*and shall record any amendments or corrections. The magistrate shall certify at the foot of such evidence, that he has complied with this requirement."*

In both of those provisions, it is mandatory for a magistrate to read the evidence over to the witness, and incorporate the alterations if any. It is also mandatory requirement that the magistrate must certify at the foot of the evidence of a witness that he has complied with the requirement in the respective proceedings. The rationale of this legal requirement is to safeguard accuracy in recording the witnesses' testimony and guarantee authenticity of court proceeding.

The trial magistrate in this case omitted the requirement throughout. Also, as I noted earlier, same omission has featured significantly in 20 other case files which passed through my hands on revision. I do not raise suspicion that, all the magistrates have always defied such requirement, but in 21 casefiles from primary courts in Kilombero, on which I laid my revision, no single file had such compliance.

Failure to follow this requirement makes the proceedings fall short of the value. In case the record is disputed, nullification of the proceedings may happen. But generally, the remedy will depend on the prejudice occasioned to the parties as it has been ruled by our courts in **Iddy Salum @ Fredy Vs. R, (Criminal Appeal No. 192 of 2018) [2020] TZCA 1853** and **Jumanne Shaban Mrondo Vs. R, Criminal Appal No. 282 of 2010.**

I call upon all magistrates in primary courts, on top of other legal requirements prescribed in the procedural laws, they must also comply with section 35 of the Third Schedule to the MCA as they should do in respect of Rule 46 of The Civil Procedure, in order to preserve the sanctity of court record. A certification that they have complied with



section 35 (6) of the Third Schedule and 46(3) of The Civil Procedure Rules must appear in their case files.

Having observed as above, I rule that the omission under scrutiny was curable also did not prejudice the applicant. Save for the above instructive observations, which magistrates in primary courts must abide by, I accept the district court's ruling in its revision, including the order substituting the custodial sentence with Community Service.

**Order accordingly.**

**Dated** at Morogoro this 13<sup>th</sup> July, 2023.



**P. J. NGWEMBE**

**JUDGE**

**13/07/2023**

**Court:** Ruling delivered this 13<sup>th</sup> July, 2023 in the presence of the applicants and in the absence of Respondent.

**A.W. Mmbando, DR**

**13/07/2023**

**Court: Right to appeal fully explained.**

**A.W. Mmbando, DR**

**13/07/2023**