

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL REVISION NO. 24 OF 2023

(Arising from Criminal Revision No. 13/2023, Kilombero District Court, Originating from Criminal Case No. 11 of 2022 in Kilombero Primary Court)

SAMSON FRANCO MWAKANYAMALE..... 1ST APPLICANT

MICHAEL JEOFREY MWAKITALIMA 2ND APPLICANT

VERSUS

CASTO ANOSISYE RESPONDENT

RULING

Ruling date on: 13/07/2023

NGWEMBE, J.

The applicants herein this revision, are in Kiberege prison serving 12 months imprisonment sentence awarded to them by the Primary court of Kilombero for the offence of theft contrary to section 265 of the **Penal Code** where they were convicted. This ruling is made in exercise of the supervisory and revisional powers of this court enshrined under section 30 of **the Magistrates Courts Act, Cap 11 RE 2019**.

The records of primary court (trial court) and that of the district court were called before me in order to verify propriety of the proceedings, judgment, sentence and orders. The trial court handed its judgment and sentence on 20/12/2022. The district court of Kilombero, under section 22 (1) of The MCA conducted revision *suo motu*, upon



being instructed by this court when the applicants lamented bitterly when I visited and inspected the prison.

However, the district court found no irregularity save for the sentence of 12 months imprisonment was required to be confirmed by the district court. It then substituted the imprisonment with that of Community Service to both applicants. The question I am going to deal with in this matter is whether the proceedings, judgment and orders by the lower courts were proper in law.

At the onset, I wish to point out that the charge sheet was clear on the offence facing the applicants; stealing contrary to section 265 of The Penal code. But particulars of the offence were that on 04/12/2022 in night hours, at Msolwa Station village and ward of Kidatu, Kilombero district within the region of Morogoro, the two applicants did steal two pigs valued at TZS 800,000/= the property of the respondent Casto Anosisye. The accused persons pleaded not guilty to the charge.

Apart from the propriety of the charge sheet, which will be addressed at a later stage, this court sought to deduce from the proceeding, if the offence was proved; *First* - whether two pigs were stolen; *Second* - whether it was established that the two accused persons are the ones who stole those pigs and were properly identified, taking into account the offence was allegedly committed at night hours.

However, the court's efforts to follow the proceedings were unsuccessful. The handwriting of Hon. Chapalama, trial magistrate was illegible. Very few words could be grasped. To *call a spade is a spade*, the proceeding was akin to dysgraphia; messy and totally illegible. The trial magistrate, knowing that he has recorded the proceeding so recklessly as it appears, yet he did not bother to type his judgment not even to make the proceeding word-processed. It is not known if the district court managed to follow those proceedings.



It is important to the trial magistrate to remember that all proceedings, judgments and orders of the courts are written to communicate to the parties and the public on what transpired in court also the decision thereon. Therefore, magistrates must write in a way that others may read from the file without much difficulty. It is important to note that even when the handwritten proceeding is word processed, yet there are times when courts may need to refer to the original version. Also, it is known that proceedings, decisions and orders are for public consumption, thus a trial magistrate should not write therein those public documents in the manner he would in his personal diary.

Legibility of handwriting is therefore indispensable for the current times when our courts still record a significant part of its proceedings by handwriting. On this aspect, this court is not referring to a beautified or decorated handwriting, but a legible handwriting.

Despite the above observation, I have observed other two irregularities both of which, the district court did not notice. I will address them accordingly.

The first irregularity is on recording of evidence by the trial court. This court brings to the trial court's attention, a fact that criminal proceedings in primary courts are governed by a number of statutes, rules and regulations, one of them is The *Primary Courts Criminal Procedure Code* set out in the Third Schedule to the Magistrates Courts Act.

The procedure of recording the evidence for court use, is provided for under section 35 of Primary Court Criminal Procedure Code. Since this court has endeavoured to point that section extensively in many other rulings, I will refer to subsection 6 of that section. It requires the court to record the testimony of a witness and read the evidence to the



witness, then incorporate amendments if any. Thereafter the magistrate must show at the foot of the evidence, that he complied with the requirement. The wording of section 35 (6) are as put hereunder: -

"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."

The provision is crystal clear on what the trial magistrate is required to do. Assigning any further interpretation will be ornamental and redundant.

The trial magistrate in this case recorded the testimonies of seven witnesses in total; 5 from prosecution and 2 from defence. In all testimonies he did not comply with the above provision. Only some signatures of the respective witnesses were being inserted at the end of the testimonies. The magistrate did not read the testimonies to the witnesses nor did he sign at the foot.

The rationale of this legal requirement is to safeguard accuracy and guarantee authenticity of court record. This court is justified to doubt if the proceedings were properly recorded.

The second irregularity is stemmed on the chargesheet. It is trite that a charge is the foundation of the whole criminal case. A trial founded on seriously defective charge, may be rendered a nullity. See the cases of **The DPP Vs. Mirzai Pirbakhshi @ Hadji and Three Others, Criminal Appeal No. 493 of 2016** and **Abdallah Ally Vs. Republic, Criminal Appeal No. 253 of 2013** among others.

The facts in this case were stated that the accused persons did still two pigs. However, that charge was of simple theft citing section 265 of

The Penal Code. But what this court is aware of so far, is that stealing of a pig is a scheduled offence, chargeable under section 268 (1)(3) called cattle stealing. The section provides: -

" **Section 268.-** (1) *Where the thing stolen is any of the animals to which this section applies the offender shall be liable to imprisonment for fifteen years.*

(2) *N.A*

(3) *This section applies to a horse, mare, gelding, ass mule, camel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig."*

The offence is also under **The Minimum Sentences Act, Cap 90 R.E 2002** whose section 5 (b) provides that a person convicted of stealing cattle shall be sentenced to imprisonment for a term of not less than five years.

To tell the least, the applicants were not aware that they were facing a scheduled offence with a relatively serious punishment. This is an apparent prejudice to them. Notwithstanding the fact that the trial magistrate proceeded in this case as if section 268 of **The Penal Code** and **The Minimum Sentences Act** were never existing.

I understand that, failure to comply with section 35 (6) of the Third Schedule, as we ruled in other revisions referring to **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** among others, is curable unless a party to the case is prejudiced by such omission. Also, that illegibility of the proceeding, in itself would not ground nullification of the trial save for exceptional circumstances.

However, in this case, the proceeding was imbedded with discrepancies. *First;* the charge was defective and the accused did not know the nature of the offence they were facing. *Second;* the



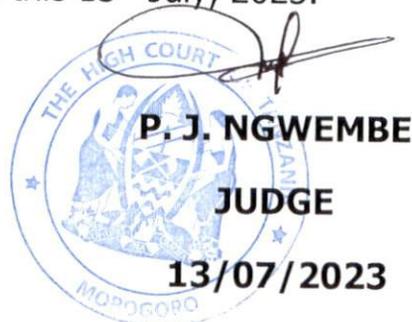
proceedings were recklessly recorded in an illegible fashion. *Third;* the testimonies of three witnesses were not signed by the magistrate who purportedly recorded them. *Fourth;* the trial magistrate defied the provisions of section 35 (6) of the Third Schedule to the MCA. For those irregularities, the trial court's proceedings were nullity.

This court is of the considered opinion that, the district court would have nullified the whole proceedings on those improprieties. On that basis the district court's ruling and its order for Community Service suffers the same fate as that of the trial court's proceeding and orders.

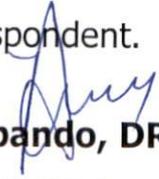
That being observed and done, this court proceeds to nullify the whole proceeding of the trial court, the judgment, sentence and its orders. Equally, the ruling of the district court in Criminal Revision No. 13/2023 and the subsequent orders, are quashed and set aside. I further order that the applicants who were serving the imprisonment term be released forthwith. Considering the nature of the offences alleged to have been committed, the complainant and the republic are at liberty, should they wish to reinstitute a fresh criminal proceeding against the applicants. In case the matter is reinstated, it should preferably be heard by a different magistrate with competent jurisdiction.

Order accordingly.

Dated at Morogoro this 13th July, 2023.



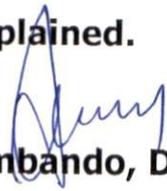
Court: Ruling delivered this 13th July, 2023 in the presence of the applicants and in the absence of Respondent.


A.W. Mmbando, DR

13/07/2023

Court: Right to appeal fully explained.




A.W. Mmbando, DR

13/07/2023