

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(MOROGORO DISTRICT REGISTRY)**  
**AT MOROGORO**

**CRIMINAL REVISION NO. 21 OF 2023**

*(Arising from Kilombero District Court in Criminal Revision No. 15/2023, Originating  
from Criminal Case No. 58 of 2023 in Mang'ula Primary Court)*

**EMILY JUMA ..... APPLICANT**

**VERSUS**

**LOTARY LIPINGU ..... RESPONDENT**

**RULING**

*Ruling date on: 13/07/2023*

**NGWEMBE, J.**

The applicant Emily Juma was charged before Mang'ula Primary Court (trial court) for the offence of theft contrary to section 265 of **The Penal Code, Cap 16 RE 2022**, the offence which is claimed to have been committed by him on 24/04/2023 at Kiberege in the respondent's farm by stealing six maize cobs.

The applicant pleaded not guilty to the offence, evidence was adduced on both sides, eventually he was convicted and sentenced to 12 months imprisonment. The district court confirmed the sentence in its revision having observed that there was no irregularity committed by the trial court.

When this court called the records for examination as to propriety, only the charge sheet was clear on which offence the applicant was charged with, and at least the plea given by the applicant. The

conviction and sentence in the handwritten judgment was also recognizable, though with difficulty. Very few sentences in the witnesses' testimonies were legible. The trial magistrate recorded the evidence roughly and negligently. The proceeding was generally illegible. The handwriting by the trial magistrate was close to a dysgraphia condition, thus almost impossible to grasp. Again, neither the proceeding nor the judgment of the trial court was typed. This court therefore was denied convenient access to the proceedings recorded by the trial magistrate. The district court seems to have faced similar difficulties, that is why in its ruling, it did not reflect anything from the testimonies.

My interest was to go through the whole proceedings, in order to grasp whether the offence was proved beyond reasonable doubt and whether there were sufficient factors for the applicant who was said to have stolen six maize cobs to suffer twelve (12) months imprisonment sentence. But I have failed to follow the proceedings in the manner observed.

I would have required the case file be remitted for word processing of the proceedings and judgment. But the fact that the applicant is still in prison serving twelve (12) months for theft of six maize cobs remained an alarm to the consciousness of justice. Very probable, the typing of the file would mean extending further the applicant's stay in prison while he has already served four (4) months.

Again, even section 35 (6) of The Third Schedule to the MCA was not complied with. The section requires primary court to read over to the witness, his testimony as recorded. Then incorporate any amendments if pointed out by the witness. At the foot of the evidence so recorded, the magistrate must certify that he complied with the requirement. The wording of that section is clear as appears: -





*"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."*

In all previous cases of non-compliance of section 35 (6) of The Third Schedule to **the Magistrate Courts Act** in this same cluster of revision this court ruled such omissions were curable following the precedents in **Iddy Salum @ Fredy Vs. Republic (Criminal Appeal No. 192 of 2018) [2020] TZCA 1853** and **Jumanne Shaban Mrondo Vs. Republic, Criminal Appal No. 282 of 2010**.

The statute though makes the requirement mandatory; it does not provide for the status of the proceedings recorded in its contravention. Interpreting section 210 (3) of The CPA which is much similar to section 35 (6) of The Third Schedule, the courts have made a clear position. This court resorts to that position for the purpose of section 35 (6) of the Third Schedule to the MCA. The question is whether the omission did prejudice parties in the case. In other cases, this court was satisfied that such omission occasioned no miscarriage of justice and there was no dispute on the proceedings, which is not the case in this one as I will endeavour to exhibit.

In this case, the court wants to know how did the trial magistrate reached at twelve (12) months imprisonment on the applicant for stealing 6 maize cobs. This court would affirm the sentence or rule otherwise if it accessed the proceedings, but due to the magistrate's recklessness in recording the proceedings this court is impeded from understanding them.




Can this court in anyway assume that the applicant's trial and sentence was fair under the circumstance? Unfortunately, even the said testimonies were not read over to any witness and the magistrate did not bother to make the proceeding legible. Also, the accused was not supplied with the copy of judgment leave alone that of the proceedings.

It has not been common in our jurisdiction to nullify the proceedings for non-compliance of section 35 (6) of the Third Schedule to the MCA in most cases where no prejudice was occasioned to the parties. Likewise, it is rare to nullify the proceedings for illegibility of the trial magistrates' handwriting. This is because, remitting the case file for typing would be a proper remedy.

But the situation in this case is exceptional as I will address. Currently, almost all magistrates including the trial magistrate, are supplied with sophisticated Lap Top computers. In any other case, each primary court has a computer for preparing proceedings, judgment copies and other related undertakings. To tell the least, there was no justification of whatsoever nature for the trial court's failure to type the judgment and the proceedings. Remitting the case file which was closed by the trial court and without any justifiable cause not typed, will inevitably cause more prejudice to the applicant. I have addressed it earlier.

It seems the trial magistrate has adamantly decided to live in the past. He did not want to type his judgment and cause the proceedings be word processed. In thinking the proper remedy, this court has paid paramount importance to justice and that it would not be just for the accused to suffer any longer for the magistrate's recklessness in recording the court proceedings. Likewise, the law is clear that any procedural controversy like this at hand, should not be handled to prejudice the accused, to its contrary must be resolved in his favour.







Apart from the record being indiscernible as above observed, the mandatory provisions of the law were not complied with, the court will therefore proceed to nullify all the proceedings of the trial court. Even the ruling of the district court, which confirmed the trial court's sentence should equally suffer nullification. Judgment, sentence and orders made by the lower courts are quashed and set aside.

Considering that most of our courts are still in the era whose significant part of proceedings are originally made in handwriting, magistrates are encouraged to write legibly. Even when there is a word-processed copy, there are times when resort to the original copy of the proceeding will be needed.

The nature and circumstance of this case, strongly dictates that no retrial should be ordered or any proceedings be reinstituted on the same facts. I have already observed that the applicant has served four months out of 12. I thus order immediate release of the applicant. Justice will be served if the applicant will be released without any fear of rearrest or retrial.

**Order accordingly.**

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

**P. J. NGWEMBE**  
**JUDGE**  
**13/07/2023**

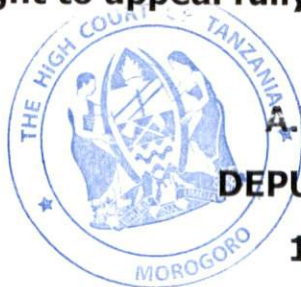
**Court:** Ruling delivered at Morogoro in chambers on this 13<sup>th</sup> day of July, 2023 in the presence of the applicant and in the absence of Respondent

  
**A.W. Mmbando**

**DEPUTY REGISTRAR**

**13/07/2023**

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



  
**A.W. Mmbando**

**DEPUTY REGISTRAR**

**13/07/2023**