

TANZANIA / JUDGMENT

marcus mteweale another vs castro mtavike 2023 tzhc 19981 9 august 2023

COURT
TZHCDECIDED
9 August 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IRINGA SUB REGISTRY) AT
IRINGA PC CRIMINAL APPEAL NO. 1 OF 2023 (Arising from Criminal Appeal No. 4/2022 of the
District Court of Njombe before Hon. I.R Mtowe, SRM, Original Criminal Case No. 42/2022 of the
Primary Court of Njombe District at Njombe Urban before Hon. KJ Mahona, RM.) MARCUS
MTEWELE 1st APPELLANT MARCUS ATILIO MTEWELE
2nd APPELLANT VERSUS CASTRO MTAVIKE RESPONDENT

JUDGMENT

24h May & 4h August, 2023 I.C MUGETA, J: Before the Primary Court of Njombe District at Njombe Urban, the two appellants were charged and convicted of malicious damage to properties contrary to section 326(1) of the Penal Code [Cap. 16 R.E 2019]. According to the record, the respondent had a land dispute with one Onesphory Marcus Mtewele who is the son of the 2nd appellant. The District Land and Housing Tribunal held that the land belonged to the respondent. The respondent at one occasion saw the two appellants in the dispute land cultivating it. He reported the matter to the police. On the material day, the respondent found seven avocado trees cut down, his hut burnt and water Page 1 of 5 pipes destructed. Presuming the culprits are the appellants, they were charged as above stated. The appellants in their defences, denied any involvement in the charged offence. The 2nd appellant in his defence contended that he has been using the land since 2012. The trial court decided in favor of the respondent and convicted the appellants. Both appellants were sentenced to conditional discharge and ordered to compensate the respondent. Aggrieved by the trial court's decision, they filed their appeal to the District Court. In its judgment, the district court did not consider the appellants' grounds of appeal and the submissions filed by the parties. Instead, the learned magistrate noted and decided the case based on shortcomings in the trial court's judgment and proceedings on matters he raised suo motu. Those are one, that witnesses gave their testimonies without oath, two, exhibit SMI was not read out after admission, three, the charge against the appellants was not proved beyond reasonable doubts as no witness saw the appellants doing the alleged act and four, the appellants' defence was not considered. In the light of the above shortcomings, the district court quashed the trial court's proceedings and ordered the matter to be heard in the same court by another magistrate. The appellants are aggrieved by the decision of the district court. They have filed the

present appeal based on six grounds, whose substance are:

1. That the first appellate court grossly erred in law and fact by refraining from considering all the grounds of appeal and the submissions by the parties as all the shortcomings outlined by the magistrate were the appellants' grounds of appeal.
2. That the first appellate court grossly erred in law and fact by ordering retrial of the matter.
3. That the first appellate court erred in law and fact for failure to exercise its powers as the first appellate court. The appeal was heard by virtual court. The parties and their advocates were at Njombe Resident Magistrates' Court. The appellants were represented by Tunsume Angumbwike, learned advocate and the respondent was represented by Musa Mhagama, learned advocate. Due to the nature of the orders I intend to make, I shall deal with the first complaint only. In *Jayant Kumar Chandubhai Patel & 3 Others v. AG & 2 Others*, Civil Application No. 160 of 2016, Court of Appeal - Dar es Salaam (unreported) it was held that when a court, in the course of composing a judgment, uncovers matters not argued before it by the parties, it ought to stop there and summon the parties to address it on those matters. The first appellate court, when composing a judgment, discovered, among other matters, that the witnesses evidence at the trial court was taken without oath/affirmation and that after admission of exhibits the same were not read to the other party. Those issues had not been raised in the grounds of appeal. It was an error to decide on them without hearing the parties first as argued by counsel for the appellants. Counsel for the respondent did not respond appropriately to this complaint. However, if one reads carefully the submissions of the parties, most of the issues raised by the first appellate court were covered. It is just unfortunate that the learned magistrate declared that he will not touch on the submissions. Consequently, I hold that the first appellate court erred to decide the case on matters it raised suo moto and refrained from considering the grounds of appeal and the submissions of the parties. This amounted to denying the parties the right to be heard. Page 4 of 5 In the event, I allow the appeal. I remit the file to the first appellate court to determine the appeal on the grounds of appeal raised by the appellants in that court and the written submissions filed by the parties. Should that court find anything for consideration which is not covered in the grounds of appeal and the submissions, it shall require the parties to address it before determining that issue. I further direct that the appeal shall be determined by another magistrate of competent jurisdiction. Court: Judgment delivered through video conference in the presence of Tunsume Angumbwike, learned advocate for both appellants, Gervas Semgabo, learned advocate holding brief of Musa Mhagama, learned advocate for the respondent, the 2nd appellant and the respondent in person and in the absence of the 1st appellant. Sgd. I.C. MUGETA JUDGE 9/8/2023 Page 5 of 5

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