

TANZANIA / JUDGMENT

# MELKIZEDEK MOIKAN

## 222 Edited J kamuzora

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB- REGISTRY OF  
MANYARA AT BABATI PC CRIMINAL APPEAL NO. 31769 OF 2024 (Appeal from the decision of the  
district court of Simanjiro at Orkesumet in Criminal Appeal No. 14067 of 2024, Originating from  
the primary court at Orkesumet in Criminal case No. 19 of 2024) MELKIZEDEK  
MOIKAN..... APPELLANT VERSUS NEEMA  
GELPITA..... RESPONDENT

### JUDGMENT

11th November & 10th December, 2024 KAMUZORA, J. The appellant and three others were aligned before Engasmet primary court (the trial court) for causing disturbance at the village offices. It was alleged that, on 28/1/2024 at Okutu village within Simanjiro district in Manyara region, the appellant and his colleague locked the offices of the village chairman and the village executive officer causing them fear and failure to do their works. Page 1 of 11 After hearing the matter, the appellant was found guilty and sentenced to six months imprisonment but his co-accused were acquitted. The appellant unsuccessfully appealed against the conviction and sentence before the district court of Simanjiro. He has now appealed to this court on four grounds which are reduced into three as follows;

1. That, the 1st appellate court erred in dismissing the appeal and ordering the appellant to start afresh serving his sentence which he had already served.
2. That, the 1st appellate court erred in law for upholding conviction basing on the evidence which was contradictory and not proving the case beyond reasonable doubt
3. That, the 1st appellate court's magistrate had interest to serve in the matter. This appeal was disposed of by written submissions. Mr. Daudi Haraka, learned advocate represented the appellant while respondent appeared in person, unrepresented. In his submission on the 1st ground of appeal, Mr. Haraka faulted the 1st appellate court for ordering the appellant to serve the sentence which he had already served. He argued that the order by the 1st appellate court contravenes Article 13(6) of the Constitution of the United Republic of Page 2 of 11 Tanzania and section 21 of the Penal Code [Cap 16 R.E 2022] which prohibit a person from being punished twice. Submitting for the 2nd ground of appeal, the learned advocate

argued that, the 1st appellate court erred in upholding the appellant's conviction basing on contradictory evidence which did not prove the offence to the standard required. He argued that, while the charge sheet shows that the appellant was charged with the offence of causing violence, the evidence adduced shows that the appellant closed the office. To him, there was variation between the charge and the evidence adduced before the trial court for the evidence does not disclose the victim of the offence. That, had the 1st appellate court objectively analyzed the evidence on record, it would have acquitted the appellant. On the 3rd ground of appeal, the learned advocate for the appellant submitted that magistrate before the 1st appellate court erred in determining the appeal for had interest. That, the appellant asked the magistrate to recuse himself from hearing the appeal because he had relationship with the respondent and this had the effect of compromising his impartiality for the magistrate had determined Criminal Case No. 80 of 2023 to which the complainant was the respondent herein against the appellant. That, the Page 3 of 11 appellant was convicted in that case thus he could not be fair as the respondent, in several occasions had said to the appellant that he could not be successful because the case is before the same magistrate. The learned advocate was of the view that, based on that allegation, the learned magistrate before the 1st appellate court should have recused himself after being asked to do so. That, there was a clear bias on the part of the magistrate as he ordered the appellant to serve the sentence afresh after even dismissing the appeal. He therefore prayed for this court to allow the appeal and set aside the sentence imposed on the appellant. In reply to the 1st ground of appeal, the respondent submitted that, the provision of section 89(1)(b) of the Penal Code Cap 16 R.E 2022 provides for one year sentence thus, the 1st appellate court in exercising its jurisdiction was correctly to order the appellant to serve six months imprisonment since the penalty for the offence he was charged with is one year imprisonment. In reply to the 2nd ground of appeal the respondent submitted that the case against the appellant was proved to the standard required and there were witnesses who saw the appellant closing the door. She added that, she was the victim of the offence committed by the appellant for she was worried and failed to open the office and perform her official duties. She insisted Page 4 of 11 that, both the trial and 1st appellate courts clearly scrutinized and evaluated the evidence adduced by both parties before arriving to the conclusion. She argued that, the act of the appellant to add another padlock caused disturbance and the citizens could not receive the office service. In the 3rd ground, the respondent submitted that, the magistrate in 1st appellate court delivered a ruling refusing to recuse himself from entertaining the matter for there was no sufficient ground for him to do so. She referred the case of Laurean Rugaimukamu vs Inspector General of Police and another Civil Appeal No. 13 of 1999 and prayed for the dismissal of the appeal for want of merits. Having gone through the parties' rival submissions and record of the two courts below, I will start with the 2nd ground which is based on the evaluation of evidence. I have gone through the judgment of the first appellate court and discovered that there was analysis of evidence as can be seen at pages 2 and 3 of the judgment of the first appellate court. However, for purpose of clarity, I will revisit the evidence on record. It is on record that, on the material date there was a meeting convened at the village's office by the district

executive director purposely to hear the complaints from the villagers. It appears that, the director intended to Page 5 of 11 attended complainants individually but the villagers refused as they wanted a public meeting. It was upon such fracas the meeting was cancelled. Later the respondent closed her office and went for lunch. According to SM2 and SM7 they claimed to have seen the appellant closing the respondent's office by adding another padlock on top of what was put by the respondent. According to SM5, a police officer who visited the scene, he found and broke the padlocks which were tendered as exhibit P2 and P3. In his defence, the appellant admitted to have attended the said meeting although he denied commission of the offence. From the evidence on record, I have no reason to doubt the evidence of SM2 and SM7 that the appellant locked the door of the office used by the respondent as village executive officer and it was on the following day when the police officers were able to break the padlock. The question is whether the appellant's act constitutes the offence under section 89(l)(b) of the Penal Code, Cap 16 R.E

2022. The said section reads: - "89.- (1) Any person who-

- (b) brawls or in any other manner, creates a disturbance in such a manner as is likely to cause a breach of the peace, is guilty of an offence and liable to imprisonment for one year." Page 6 of 11 The simple interpretation of the above provision is that, a person who fights or cause disturbance in a manner likely to cause breach of peace commits an offence. The appellant herein was charged for locking the village offices such an act was intended to cause disturbance not only to the officer working in that office but also those who receives services from that office. By its nature, that act was likely to cause breach of peace. In his submission, the learned advocate claimed that, there was no victim of the act done by the appellant. With due respect, I do not agree with the learned advocate because, although the office was closed in the absence of the respondent, it remained closed until the next day when the police interfered to break the padlock. The appellant's conducts costed the respondent not to perform her official duties and the villagers who wanted service of that office. The office of the village executive officer plays an important role on day to day lives of the villagers. Its closure by the appellant without powers would have resulted into breach of peace. Therefore, I am satisfied the evidence on record proved the offence charged to the standard required. The 2nd ground of appeal lacks merits and it is accordingly dismissed. Page 7 of 11 On the 3rd ground, the learned advocate for the appellant raised an issue that the learned magistrate of the 1st appellate court had interest to serve since he previously entertained another matter between the same parties and the appellant was convicted but later acquitted by this court. The record shows that the magistrate was asked to recuse himself from hearing the appeal because he had previously entertained another matter involving the same parties and that, the respondent was heard publicly stating that the appellant would lose in his appeal. Such allegations were disregarded by the magistrate who opted to continue attending the matter. Having gone through the records I am of the considered view that, the mere fact that the magistrate entertained another matter involving the same parties was by itself, not a sufficient reason for the magistrate to recuse himself. Equally, the fact that the respondent claimed that the appellant could not win his appeal

simply because it was before the same magistrate who had dealt with them before, is not a sufficient reason for the magistrate to recuse himself. There must be strong reason for the recusal and not mere allegations. I therefore find the 3rd ground of appeal without merits and it is dismissed. Page 8 of 11 Turning to the 1st ground of appeal in which the appellant complained that he was punished twice, I find merit in this ground. It is on record that, the appellant was sentenced to six months imprisonment by the trial court. The record shows that, after being convicted by the trial court and sentenced to six months imprisonment, the appellant started to serve his sentence on 10/5/2024 but still, he appealed against the decision of the trial court. He was released on 9/9/2024 after he has fully served his sentence but before the decision to his appeal was made by the first appellate court. The decision of the first appellate court was delivered on 10/10/2024 and it read: - "Having so shown to the extent, this appeal is dismissed to its entirety, the conviction and sentence meted by the trial court are upheld, the appellant to serve sentence from the date of determination of this appeal" From the above holding, the first appellate court upheld the conviction and sentence passed by the trial court. It however ordered the appellant to start serving the six-months sentence imposed to him by the trial court from the date of the decision of the appeal. In his argument, the respondent insisted that the first appellate court was justified in imposing that sentence since the offence to which the appellant was charged attract one year sentence. I do agree with such Page 9 of 11 argument because the first appellate court only upheld the sentence passed by the trial court which was six months. There is no record showing that the first appellate court enhanced the sentence from what was passed by the trial court for anyone to consider that the enhanced sentence was to be served by the appellant from the date of the decision of the appeal. Much as the appellant served his sentence while waiting for the determination of his appeal, upon upholding the trial court conviction and sentence, the first appellate court should have refrained from making an order for the appellant to start serving sentence from the date the determination of appeal. Such order could have been applicable if the appellant was released on bail pending determination of appeal or there was enhancement of sentence by the first appellate court. Since none of the two existed, the order by the learned 1st appellate court was a serious error. I therefore find merit in the first ground of appeal. Basing on the above discussion, the appeal is partly allowed and partly dismissed. The conviction and sentence passed by the trial court is maintained but the order of the 1st appellate court for the appellant to serve afresh the sentence is quashed and set aside. Since the appellant has already Page 10 of 11 served his sentence fully, he should be set to liberty unless, lawful held for any other lawful cause. DATED at BABATI this 10th day of December, 2024. D. C. KAM ORA JUDGE Page 11 of 11

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