

TANZANIA / JUDGMENT

JUDGMENT Romana P

COURT
TANZLII

DECIDED
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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA SONGEA SUB-REGISTRY AT SONGEA PC. CRIMINAL APPEAL NO. 25518 OF 2024 (Arising from Mbinga District Court in Criminal Appeal No. 19704 of 2024, Original Criminal Case No. 249 of 2023, Mbinga Urban Primary Court) ROMANA P. NDUNGURU
APPELLANT VERSUS NIKAS P. NDUNGURU 1ST RESPONDENT
DASTSN P. NDUNGURU 2ND RESPONDENT SIMBILIUS P.
NDUNGURU 3RD RESPONDENT ORESTA P. NDUNGURU
..... 4TH RESPONDENT

JUDGMENT

Date of Last Order: 22nd October, 2024. Date of Judgment: 12th November, 2024. KAWISHE, J.:
The appellant in this appeal has approached this court in an effort to impugn the decision of Mbinga District Court, the first appellate court. 1 Before Mbinga Urban Primary Court (trial court), the respondents stood charged with the offence of disobedience of lawful orders contrary to section 124 of the Penal Code (Cap. 16, R.E 2022). They were sued by their own closely related sister who is the appellant in this appeal. Upon trial they were convicted and sentenced to serve a sentence of conditional discharge for twelve months and ordered to obey the order given in Application No. 55 of 2013. For better appreciation of what has driven the parties into the court corridors, I find it is important to depict, in albeit brief, the background of the matter at hand. The respondents herein above named, were sued by the appellant before Myangayanga Ward Tribunal vide Land Case No. 08 of

2013. It was followed by an application for execution made before the District Land and Housing Tribunal for Mbinga in Miscellaneous Application No. 55 of 2013, in which Twins Auction Mart was appointed to execute the orders given in Land Case No. 08 of 2013. The execution order required the court broker (Twins Auction Mart) to execute the decree after the lapse of fourteen days from the date the order was issued, that is on 26th June,
2014. The records are silent on what transpire thereafter. It was up to 22nd January, 2024, when the respondents were arraigned before Mbinga Urban 2 Primary Court for the offence of disobedience of lawful orders contrary to section 124 of the Penal Code (supra). Dissatisfied with both conviction and sentence, the respondents successful appealed before Mbinga District Court (first appellate court) where the proceedings and judgment of Mbinga Urban

Primary Court were declared to be nullity and quashed. The first appellate court quashed the proceedings and judgment of the trial court for the reason that, the respondents were not given the right to be heard. It was submitted that, only the first respondent was given an opportunity to give his defence and the remaining three were denied the right to give their defence. In obiter dictum, the first appellate court held that, the matter was not fit to be referred in criminal case since it is purely a land case. It further advised the parties to opt to go before the land tribunals. Aggrieved by the decision of the first appellate court, the appellant filed this appeal basing on the following grounds of complaint:

- i. That the first appellate court erred in law and in facts by holding that the trial court denied the respondents the right to defend themselves and that the trial court convicted them by using the evidence of DW1 only, while, in fact, they were availed that opportunity but they opted to call only three witnesses including the first accused (1st respondent herein). 3 ii. That the first appellate court erred in law and in facts by quashing the proceedings and judgment of the trial court and advising the parties to go to land tribunal while the matter had already been determined to finality by the said land tribunals. iii. That the first appellate court erred in law and in facts by setting aside the decision of the trial court while in facts the evidence adduced by the complainant's side at the trial court proved beyond reasonable doubt that the respondents had committed the offence they were charged with. The appellant in this appeal had the legal service of Mr. Moses Ndunguru, learned advocate while the respondents appeared in person and fended for themselves. By consent of both parties, the appeal was disposed of by way of written submission and the scheduled orders were compiled by the parties. On the first ground of appeal, the appellant is challenging the findings of the first appellate court that the second, third and fourth respondents were not availed with the right to be heard. It is the appellant's advocate submission that, the respondents were availed with an opportunity to give their defence and call witnesses and the first respondent testified together with two other witnesses making a total of three witnesses. He argued that, after receiving the testimony given by the first respondent and the two other witnesses, the defence closed their 4 case. He contended that, paragraph 35 of the Primary Courts Criminal Procedure Code, Third Schedule to the Magistrates' Courts Act (Cap. 11, R. E 2019), provides that, it is not necessary for the accused person to give his defence. He may call other witnesses as the second, third and fourth respondents did before the trial court. He was of the view that, the respondents were not denied with the right to be heard. Arguing on the second ground of appeal, the appellant's learned counsel criticized the first appellate court for quashing the proceedings and judgment of the trial court and advising the parties to go to land tribunal while the matter had already been determined to finality by the said land tribunals. He contended that the matter originated from Land Case No. 08/2013 which was determined by the Myangayanga Ward Tribunal and then Land Execution Case No. 55/2013 at the District Land and Housing Tribunal for Mbinga District, between the parties herein. He averred that in the Land Case No. 08/2013 the appellant herein was the winner and was declared the owner of the suit land. Hence, it was his view that, the first appellate court erred in quashing the proceedings and judgment of the trial

court and advice the parties to go to the tribunals. 5 Submitting on the third ground of appeal by which the first appellate court's judgment is faulted for setting aside the decision of the trial court while in facts the evidence adduced by the complainant's side at the trial court proved beyond reasonable doubt that the respondents had committed the offence they were charged with. That the respondents were charged with the offence of disobedience of lawful orders contrary to section 124 of the Penal Code, (Cap 16 R.E. 2022). The complainant's side managed to prove that the respondents disobeyed the order of the District Land and Housing Tribunal for Mbinga. The appellant's learned counsel added that, after the land case at Myangayanga Ward Tribunal, in which the appellant won, the respondents did not appeal against the judgment. He cited rule 5(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, G.N. NO 22/1964 and the case of Malik George Ngendakumana vs. Republic (Criminal Appeal 353 of 2014) [2015] TZCA 295 TANZLII. Countering the first ground of appeal, the respondents submitted that the 2nd, 3rd and 4th respondents were not availed an opportunity to defend themselves. They stated that it, is true that, it is not mandatory for a person to defend himself as per the law cited by the appellant's learned 6 advocated but it does not mean to deny the respondents the right to defend themselves. Challenging the second ground of appeal the respondents argued that, the appellant's learned counsel stated that the matter originated from the land cause before Myangayanga Ward Tribunal and subsequently Mbinga Land and Housing Tribunal. That still there is a pending Probate Cause No. 14/2000 before Mbinga Urban Primary Court. They prayed this appeal to be dismissed and uphold the first appellate court's decision. The appellant's learned counsel in his rejoinder reiterated his submission in chief that the respondents were availed right of defence. That the respondents have introduced new thing which was never raised before. He concluded by stating that, the respondents have admitted that they were availed with right to defend themselves, hence the appeal be allowed with costs. Having gone through the grounds of appeal, submissions made by both parties and the original records, I find the appellant's complaint is that, the first appellate court erred by nullifying the proceedings and decision of the trial court while the respondents were availed with the right 7 to be heard. The respondents support the decision of the first appellate court. Thus, the issue which will lead this court in determining this appeal is whether this appeal has merits. I dedicated some time to go through the proceedings of the trial court and the first appellate court, which led to the impugned decision. In fact, I have seen nowhere the second, third and fourth respondents told the trial court that they will not give their testimonies or they will call witnesses to testify on their behalf. It was the first respondent who told the trial court that he will call two other witnesses. With regard to the second, third and fourth respondents, the trial court's records are silent. They neither testified during trial nor told the trial court that they will call witnesses to give testimony. Under such circumstances, it is my view that, they were denied their fundamental right to be heard which is among the basis of fair trial as enshrined under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. The right to be heard was discussed at length in the case of Mbeya- Rukwa Autoparts and Transport Ltd vs. Jestina George Mwakyoma (2003) TLR 252 and Abbas Sherally and Another vs. 8 Abdul S.H.M Fazalboy, Civil

Application No. 3 of 2002 (unreported). In *Abbas Sherally and Another (supra)*, where it was stated that: “The right of the party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same would have been reached had the party been heard, because the violation is considered to be a breach of natural justice”. From the passage quoted, the Court has put it very clear that, the right to be heard is so basic that it cannot be curtailed intentionally or accidentally. Translating the principle accentuated in the case cited, it means that once the right to be heard has been violated, the outcome of the suit is fit for one remedy, which is nullification. In this appeal the appellant’s learned counsel faulted the first appellate court’s decision by stating that the respondents were afforded the right to be heard. His submission has been challenged by the respondents. Also, the records available show that it was the first respondent who defended himself and called witness. The rest never said anything before the trial court. The proceedings of the trial court show that respondents were present before the trial court and specifically on 23rd April, 2024 when the complaint’s case was heard, and the 1st respondent defended himself. The respondents in 9 their reply to this appeal have claimed that they were not afforded the right to be heard, so does the records of the trial court reveal. In the circumstances, from the totality of what I have stated herein above with regard to the first ground of appeal, I am of the view that, the complaint made by the appellant that the first appellate court erred in finding that the second, third and fourth respondents were denied the right to be heard is unfounded and it is dismissed. With respect to the second and third grounds, it is the appellant’s complaint that she proved the charge against the respondents to the required standard. That, there was nothing wrong to empower the first appellate court to nullify the proceedings and decision of the trial court. The appellant’s learned advocate implored this court to find that the first appellate court had on reason to nullify the trial court’s proceedings and set aside the decision. It was the appellant’s learned counsel view that, the matter was proved to the required standard before the trial court. Considering his argument, I wish to state that, the principle enunciated in the case of *Abbas Sherally and Another (supra)*, is very clear. That even if the court was to arrive at the same decision if the right to be heard was accorded to the party, as long as the party was not heard, the 10 proceedings and the decision therefrom are nullity. This appeal sought to impugn a judgment which quashed proceedings and set aside a judgment which was a result of violation of the right to be heard. I cannot see any reason to incline to the learned appellant’s counsel submission and crush the constitutional right to be heard. In addition, the learned counsel did not manage to show where the respondents were availed with the right to defend themselves. The trial court’s proceedings do not support his submission. They are very clear that the respondents were not afforded with the right to be heard. Consequently, the second and third grounds of appeal also fail and they are dismissed. Subsequently, based on what I have discussed herein above, the issue raised whether this appeal has merits, is answered in the negative. In the event, I find the appeal has no merit and it is accordingly dismissed. The decision of the first appellate court is upheld. Both parties in this appeal prayed for costs. Given the fact that, this is a criminal

case, I make no orders as to costs. It is so ordered. 11 DATED and DELIVERED at Songea this 12th day of November, 2024. E. L. KAWISHE JUDGE COURT: Judgment delivered in the presence of Mr. Thomas Kindombe Ndunguru with power of attorney ordained by the appellant and in the presence of 1st, 2nd, 3rd and the 4th respondents in person. Right of appeal explained. E. L. KAWISHE JUDGE 12/11/2024 12

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