

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA  
AT ARUSHA**

**CRIMINAL APPEAL NO. 31 OF 2020**

*(Originating from Criminal case No 281/2018 in the Resident Magistrates  
Court of Arusha)*

**STEVEN SAMWEL KIMBELE ----- APPELLANT**

**VERSUS**

**THE REPUBLIC ----- RESPONDENT**

**JUDGMENT**

04/10/2021 & 12/11/2021

**MZUNA, J.:**

This appeal is against the conviction and sentence of conditional discharge for a term of six months imposed on the appellant by the Resident Magistrates Court of Arusha (the trial Court). Before that court, the appellant stood charged with the offence of disobedience of a lawful order contrary to section 124 of the Penal Code Cap 168 RE 2002 (sic).

Particulars of the offence alleged that, on the 2<sup>nd</sup> day of March 2018 at Sekei area, within the city and region of Arusha, the appellant unlawfully disobeyed a lawful order given by the District Court of Arusha in Civil revision No 6/2018 originating from Probate and Administration cause No. 176/2013, the act which is in contravention of the law.

The brief facts of the case being that, Resident Magistrates Court of Arusha in Civil Revision No. 06/2018 while exercising its revision power, quashed the judgment and proceedings of the probate and administration cause No. 176/2013. It proceeded to order the applicants (Nemburis S. Kimbele, Ruth Kimbele and Naanyuni S. Kimbele) to be the legal beneficiaries of the estate of their late mother Naitajuala Samwel Kimbele, and ordered that they should not be disturbed in any how unless otherwise the contrary occurred. The judgment of Msoffe, RM was tendered as exhibit P1 while the sketch map which was drafted by PW3 John William Ngowi, was admitted as exhibit P2. Thereafter the appellant was arrested and charged.

The appellant was alleged to have disobeyed the order because according to PW1 Naanyuni Samwel Kimbele, the appellant is her elder brother. She noticed such disobedience on 16/08/2018 after the appellant had put some soft drinks and cocacola fridge at their area which they were given (women) by their late mother and confirmed by the court and therefore acted in contravention of the court order which gave the said PW1 and her relatives to own a house where the appellant placed such items. According to PW1 and PW2, the appellant was also allocated his own properties and therefore had no share in that house.

In his defence the appellant stated to be the tenant in that area and tendered exhibit D1 being a contract entered between him and the administrator of the estate, thus he claimed not to have violated any court order.

The trial magistrate acting under such evidence presented before her proceeded to convict and sentence the appellant as shown above. Being aggrieved with both the conviction and sentence the appellant preferred this appeal on the following grounds: -

- 1) That the learned trial Magistrate erred in law and fact to proceed with the trial and convict the appellant while the charge was fatally defective as the said charge was made under the wrong and non-existing piece of legislation that is the Penal Code [Cap 16 of the Laws]*
- 2) That the learned trial Magistrate erred in law and fact to convict the appellant under the wrong and non-existing piece of legislation that is the Penal Code [ Cap 168 R. E 2002]*
- 3) That the learned trial Magistrate erred in law and fact to base the conviction on the invalid District Courts ruling in civil revision No 6 of 2018 while the said Revision was done after the expiry of twelve months from the conclusion of the proceedings of the Primary Court from which the said Civil revision originated.*
- 4) That the learned trial Magistrate erred in law and fact to proceed with the hearing and the determination of the criminal case No 281 of 2018 while there was evidence that the Ruling which is the subject of the conviction was in the process of being challenged in the High Court vide*

*an application for extension of time within which to file an application for revision in misc. Civil application No. 66 of 2018.*

- 5) That the learned trial Magistrate erred in law and fact to proceed with the trial in criminal case no 281 of 2018 basing on the revisional ruling in civil proceedings that was not executed as there was no drawn order extracted therefor and therefore the complainant had no tittle over the land in dispute.*
- 6) That the learned trial Magistrate erred in law and fact to proceed with the trial in criminal case no 281 of 2018 basing on the revisional ruling in civil proceedings.*
- 7) That the learned trial Magistrate erred in law and fact for failure to evaluate the undisputed prosecution and defence evidence that the appellant did not claim ownership but was a tenant in the disputed premises and thus his presence was consented by the complainant.*
- 8) That the learned trial Magistrate erred in law and fact to convict the appellant by basing on a ruling of the court of Resident Magistrates Court of Arusha which ruling does not exist in the record at the registry of the said resident magistrates Court.*

During hearing of the appeal which proceeded by way of written submissions, the appellant was represented by Mr. Francis Stolla, while the respondent enjoyed the service of Ms. Akisa Mhando the learned state attorney.

Reading from the appellant's grounds of appeal, this court will deal with effect of procedural defects as well as merits of the appeal. I

should say right from the outset that Mr. Stolla opted to abandon the 8<sup>th</sup> ground of appeal. Ms. Akisa Mhando, the learned state attorney did not object this appeal.

Grounds No. 1 and 2 which Mr. Stolla opted to consolidate, deals with procedural defects. He says, there is no any piece of legislation known as the Penal Code Cap. 168. In effect he says, the said legislation does not exist in Tanzania which means wrong citation of the law is as good as not citation and therefore the accused has not been charged under the law. To cement his submission, he cited the case of **Fabian Akonaay v. Mathias Dawite**, Civil Application No 11 of 2003, CAT at Arusha (unreported)

Ms. Mhando, the learned state attorney had no any submission in relation to the first and second ground of appeal meaning that they conceded.

My answer to this finds support from the case of **Jamali Ally @ Salum v. The Republic**, Criminal Appeal No. 52 of 2017 (unreported) which dealt with the point where the charge of statutory rape cited section 131 (1) (e) (instead of section 131 (2) (e) of the Penal code). It was argued that such provision does not exist. The court held at page 18 that such omission is curable under section 388 (1) of the Criminal

Procedure Act, Cap 20 RE 2019. Similarly, that holding applies to the case under consideration because the appellant was found guilty under section 124 of the Penal Code Act Cap 168 R. E 2002, the section was correctly cited and it exists save for the Cap 168 which ought to have been Cap 16. This is a mere slip of a pen which is curable under the slip rule, see the case of **Sebastian Stephen Minja v. Tanzania Harbours Authority**, Civil Appeal No. 107 of 200, CAT at Dar es Salaam (unreported). This ground fails.

I revert to the third ground of appeal. Mr. Stolla, the learned counsel, challenged the trial courts conviction which was made while the High Court of Arusha in revision No. 5 of 2020 had quashed the Ruling which was subject of the conviction for contravening section 22(4) of The Magistrates Courts Act [ Cap 11 R. E 2002] Now [R. E 2019]. That the ruling in civil revision No. 6 of 2018 was done after the expiry of twelve months from the conclusion of the proceedings of the Primary Court from which the said Civil revision originated.

Replying on this Ms. Mhando stated that, under page 4 of the trial court judgment the court relied on the decision by Hon. Msofe to convict the appellant and as per the judgment issued by the High Court on

22/12/2020 it nullified the decision of the District Court which again the trial court based to reach its decision.

Ms Mhando went on to submit that, since the ruling subject of conviction by the trial court was nullified then the criminal case is nullified. That even the current appeal has no any basis.

This court has this to say, it is not disputed that the offence that the appellant was charged and convicted with emanated from the disobedience of a lawful order in Revision No 6 of 2018 and since the High Court in Civil revision No. 5 of 2020 nullified revision No 6/2018 there is no any charge that stand against the appellant herein.

The third ground of appeal is therefore answered in affirmative to the extent that the ruling (exhibit P1) which was the basis for the disobedience of the lawful order is no longer in existence and therefore even the conviction, sentence and the present appeal automatically crumbles.

I tend to agree with Ms. Mhando that, having answered the third ground of appeal in affirmative, the remaining grounds of appeal will serve an academic exercise. I see no need to deal with them.

The judgment from which the conviction and sentence of the appellant was based are hereby quashed and set aside.

Appeal allowed.



**M. G. MZUNA,**  
**JUDGE.**  
**12/11/2021.**