# WILLIAM MREMA v. SAMSON KIVUYO

## COURT OF APPEAL OF TANZANIA AT ARUSHA

## (Kisanga, Lubuva and Lugakingira, JJ.A.)

## CIVIL APPEAL No. 56 OF 1996

(From the decision and order of the High Court of Tanzania at Arusha, Mroso, J., dated 25 July 1995, in Civil Appeal No. 29 of 1994)

*Appeals – Second appeal to the High Court – Additional evidence taken by way of affidavit – Section 29 of the Magistrates' Courts Act 1984.*

*Natural justice – Right to cross examine a witness – Additional evidence by way of affidavit taken on appeal – Natural justice required an opportunity to cross examine the deponent.*

*Civil Practice and Procedure – Appeal – Additional evidence taken by way of affidavit on second appeal – appellant not afforded opportunity to cross-examine deponent – Whether High Court was wrong – Omission not occasioning injustice – Effect thereof – Rule 108 of the Court of Appeal Rules 1979.*

On a second appeal the High Court called for additional evidence. Such evidence was given by the trial Primary Court magistrate in the form of an affidavit. The appellate judge did not give the appellant opportunity to cross-examine the deponent. On the evidence on record, together with the affidavit, the judge dismissed the appeal. The appellant appealed to the Court of Appeal, and the omission by the Judge to afford the appellant opportunity to cross-examine the Primary Court magistrate came for consideration.

**Held:** (i) Though there is no provision in the Magistrates' Courts Act for the right of cross-examination in relation to additional evidence taken on appeal, natural justice required the judge to give the appellant the opportunity to cross-examine the Primary Court magistrate;

A (ii) The judge's errors did not however, affect the merits of the case and thus came within the purview of rule 108 of the Court Rules

*Appeal dismissed*

B Statutory provisions referred to:

1. Appellate Jurisdiction Act 1979, section 5(2)(*c*)

2. Magistrates' Courts Act 1984, section 29

C 3. Court of Appeal Rules 1979, rule 108

*Mr Lundu,* for the Respondent

## JUDGMENT

D (Dated 26 October 2000)

**Lubuva, J.A.:** This is a third appeal. It arises from the decision of E the High Court at Arusha in (PC) Civil Appeal Number 29 of 1994 (Mroso, J.) of 25 July 1995. It all started with a boundary disputed between the appellant and the respondent. That appellant unsuccessfully filed a suit against the respondent in Arusha Urban Primary Court. F He appealed to the District Court, Arusha, and lost. He lodged a second appeal to the High Court where again he was unsuccessful. After hearing the parties on appeal, the learned judge on second appeal called for additional evidence of the trial Primary Court magistrate to clarify on the assessors who had taken part at the trial. This was G prompted by the fact that it was indicated on record that at some stage the names of two assessors had been cancelled and substituted with two others thus giving the impression that two sets of assessors were used in the trial. The additional evidence was by way of an H affidavit by the trial Primary Court magistrate. On the evidence on record together with the affidavit, the judge on second appeal dismissed the appeal.

The appellant was dissatisfied, he has appealed to this Court. I The points of law certified in terms of section 5(2)(*c*) of the Appellate

Jurisdiction Act 1979 were; first, whether the appellate High Court had power in law to take additional evidence and secondly, the propriety of the learned judge's omission to afford the appellant an opportunity to cross examine the deponent of the affidavit, the Primary Court magistrate.

At the hearing of the appeal the appellant appeared in person while the respondent was represented by Mr Lundu, learned counsel. In the memorandum of appeal the two points certified by the High Court are raised. The appellant did not have anything of substance to add to the memorandum of appeal apart from his lengthy vascilating repetition of matters which are otherwise not relevant and proper for the court to consider in this, a third appeal. With regard to the first ground of complaint, namely that it was wrong for the High Court to take additional evidence by way of affidavit Mr Lundu countered that the High Court has such powers under section 29 of the Magistrates' Courts Act 1984. Since the law allows the High Court to take such additional evidence on appeal, Mr Lundu said, the appellant's complaint in ground one is without merit. We agree with Mr Lundu that the High Court has power in appropriate cases to take additional evidence. Section 29 of the Magistrates' Courts Act 1984 in part provides:

> In the exercise of its appellate jurisdiction under this Part, the High Court shall have power:
>
> (a) to take or to order some other Court to take and certify additional evidence and ....

In this case, as provided under this section, the learned judge in exercise of the appellate jurisdiction of the High Court took the additional evidence of the trial Primary Court magistrate for purposes of ascertaining the assessors who sat with the magistrate at the trial. The trial magistrate in her affidavit confirmed that she sat throughout the trial with the same set of assessors. Not only that, the learned judge examined the record of the trial and was satisfied that the signatures of the assessors for the date complained against, are similar to those shown in respect of other dates for the trial. We also have

had the opportunity to glance through the record, and we are like the learned judge satisfied that the signatures of the assessors for the date 4 February 1994 are similar to the signatures of the assessors for the rest of dates involved in trial. If the additional evidence sought by the learned judge showed that the same set of assessors sat with the trial magistrate throughout the trial such evidence to our minds was neither prejudicial to the appellant nor was it further evidence in proof of the case. It was additional evidence for the purpose of enabling the learned judge to satisfy himself that the procedure followed by the trial magistrate was correct. In the circumstances, we are satisfied that the learned judge properly exercised the powers vested in the High Court in exercise of its appellate jurisdiction in taking the additional evidence of the trial magistrate to ascertain the assessors who sat with the trial magistrate.

Next we shall deal with ground two. Here, the appellant's complaint is that he was not given the opportunity to cross examine the trial magistrate in her additional evidence. That if he was given the opportunity, he would have been in a position to question the trial magistrate why the names of the assessors Yusuf Ally and Kohole Koreka were initially entered in the coram for 4 February 1994 but were cancelled in substitution for Loi Loticia and Bakari Lwavi. The appellant adamantly maintained that failure to afford him to opportunity to examine the magistrate occasioned an injustice and prejudice against him. In response to this submission Mr Lundu took the view that section 29 of the Magistrates' Courts Act Number 2 of 1989, does not provide for the right to cross examination. However, as a matter of natural justice, Mr Lundu conceded and we think correctly so that the learned judge should have given the appellant such an opportunity. Even then, Mr Lundu concluded, the breach of the rules of natural justice in this case was not prejudicial to the appellant. From our reading the provisons of section 29 of the Magistrates' Court Act 1984, there is no provision for the right of cross examination of the giver of the additional evidence taken. However, as matter of natural justice, we think it was erroneous on the part of the learned judge not to give the appellant the opportunity

to cross examine the magistrate on the matter. Despite this error, we do not think that the appellant was in anyway prejudiced.

From the additional evidence namely, what the magistrate stated to the judge and her affidavit, the established fact was that the trial magistrate conducted the trial throughout with the aid of the same assessors. In that situation, we agree with the appellant that it was improper for the learned judge not to accord him the opportunity to be heard on the additional evidence, it is nevertheless to be heard on the additional evidence, it is nevertheless our settled view that no injustice was occasioned to the appellant. As a matter of fact, we think in the circumstances of the case, error on the part of the learned judge comes within the purview of rule 108 of the Court Rules. It was an error which arose in the High Court in the course of hearing the appeal. Rule 108 provides to the effect that the decision of the High Court shall not be revised or substantially varied by the court on appeal on account of any error or irregularity not affecting the merits of the case. In this case, the omission complained of was, we think, an immaterial error which did not affect the merits of the case, and so, rule 10 comes into play. In the event, for the foregoing reasons, we find no merit in the appeal. It is dismissed with costs.