

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: RAMADHANI, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 89 OF 1994

1. NAIMAN ABRAHAM 2. EMMANUEL LUCAS 3. PAULO ZAKARIA 4. ABRAHAM PAULO	}	APPELLANTS
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VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the Conviction of the High Court
of Tanzania at Arusha)**

(Nchalla, J.)

dated the 2nd day of March, 1994

in

Criminal Appeal No. 1 of 1994

JUDGMENT OF THE COURT

NSEKELA, J.A.:

The four appellants, Naiman Abraham, Emmanuel Lucas, Paulo Zakaria and Abraham Paulo were convicted of malicious damage to property and sentenced to eighteen (18) months imprisonment. Their appeal against both conviction and sentence was dismissed by the High Court, hence this appeal.

Mr. Makange, learned advocate, represented the appellants in this appeal. He filed a single ground of appeal, namely –

“That the first appellate court erred, in law in upholding the appellants’ conviction and sentence of 18 months imprisonment passed by the trial court, whereas, on evidence available in record, the ownership of the piece of land upon which the crops were alleged to have been uprooted and damaged was still in dispute between PW1 and DW1.”

Mr. Makange submitted that the issue in the appeal was the ownership of the shamba. PW1, Daniel Urassa, claimed that he bought the shamba from PW2, Benjamin Paul. On the other hand, DW1 Rosa Benjamin, claimed that the shamba in question had been given to PW2 and herself as joint owners for their use. It was a family shamba which could not be disposed of by way of sale without the consent of clan members.

On her part, Mrs. Lyimo, learned Principal State Attorney, submitted that the appellants were seen in the shamba uprooting crops and in so doing, used threatening language towards PW1, Daniel Urassa. This allegation of using threatening language was strongly countered by Mr. Makange who submitted that it was only PW4 who testified to that effect, but the totality of the evidence on record, did not point that way.

The central issue in this appeal, as we see it, revolves around the ownership of the disputed shamba. PW2 Benjamin Paul and DW1, Rosa Benjamin, were husband and wife respectively. DW1 claimed that the disputed shamba was given to PW2 and herself by PW2's father, that is her father in law, for their joint use. The appellants as such, did not claim to have any interest in the farm. However, on the material day that is, the 3.6.93, DW1 testified that she sent the appellants to the shamba to assist her in planting maize and tomatoes. And this is the day the offence with which the appellants were charged with was apparently committed. So the appellants went to the shamba on instructions of DW1, who claimed

to be a co-owner of the shamba with her husband PW2. DW1 was claiming or rather asserting a claim of right to the shamba.

The lower courts were of the view that the appellants knew that PW2 had sold the said shamba to PW1 and therefore PW1 was lawfully in possession and the act of destroying his crops by the appellants was malicious. With respect, we do not think so. As stated before, there is evidence that the appellants were sent to the shamba by DW1 who was asserting that she was a co-owner of that shamba. There is also evidence to the effect that, apart from DW1, the village council had not approved of the purported sale of the shamba to PW1. Hence the lawfulness of the purported sale of the shamba to PW1 remains an unresolved issue. The courts below did not give a conclusive answer to these rival contentions between PW1 and DW1. In the course of his judgment, the learned judge (Nchalla, J.) stated as follows:

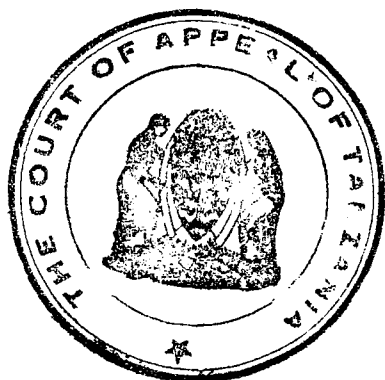
"I quite agree with Mr. Mwaimu's submission on this point that there was no genuine dispute of ownership of the land in dispute in

question between DW1 and PW1. DW1 well knew that her husband (PW2) had sold the said shamba to PW1. DW1 was just behaving in an obstinate manner having been incited by her brothers in law, her co-accused, to oppose the sale of the said shamba by her husband (PW2) to PW1."

The appellants defence was that DW1 Rosa Benjamin, wife of PW2, was a co-owner of the shamba in question since the shamba was given jointly to her and PW2 by her father in law. The core issue of ownership of the shamba is still unresolved. However, this issue is not before us and we cannot accede to Mr. Makange's prayer that we remit the case to the lower courts to determine the question of ownership of the shamba.

In the result, we allow the appeal. The conviction of malicious damage to property is quashed and the sentence of eighteen (18) months imprisonment is set aside.

DATED at ARUSHA this 15th day of July, 2005.



A.S.L. RAMADHANI
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.M. RUMANYIKA)
DEPUTY REGISTRAR