

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., MWANDAMBO, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 128 OF 2020

JUMA ROBI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the Resident Magistrate's Court of
Kibaha at Kibaha)**

(Massam, SRM. (Extended Jurisdiction))

dated the 28th day of January, 2020

in

Extended Jurisdiction No. 15 of 2019

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JUDGMENT OF THE COURT

11th & 18th July, 2022

KENTE, J.A.:

The appellant Juma Robi appeared before the District Court of Bagamoyo where he was charged with two counts viz. criminal trespass and malicious damage to property contrary to sections 299(a) and 326(1) respectively of the Penal Code. The particulars in support of the first count alleged that, on an unknown date in December, 2018 the appellant unlawfully entered into a farm owned by the complainant one Thadeus Kisanga with the intention of committing a criminal offence therein. In support of the second

count it was particularized that, sometime in December, 2018 having entered into the said farm, the appellant went on and unlawfully destroyed and caused damage by cutting 200 neem trees, 10 orange trees, 30 African blackwood trees, 50 cashew nuts trees and 4 pawpaw trees all valued at TZS. 27,700,000/= the property of the said Thadeous Kisanga. According to the charge sheet, the two offences were committed at a place called Tungutungu Mapinga area within the District of Bagamoyo in the Coast Region. To these charges the appellant pleaded not guilty thereupon placing the burden of proof onto the prosecution side to prove the charged offences beyond reasonable doubt.

However, while investigation of the two offences was said to be still underway, the trial court either on its own motion or at the instance of the appellant's counsel, made an observation on 8th April, 2019 that the appellant had filed a notice of preliminary objection raising two points which had to be determined first. The objection was predicated on two reasons. One that, the first count was in respect of an offence which was yet to be committed and two that the second count was prematurely preferred as it emanated from a land dispute between the appellant and the

complainant which was still pending before the Kibaha District Land and Housing Tribunal. Based on the above stated reasons, it was submitted on behalf of the appellant that in essence, the trial District Court was not clothed with the requisite jurisdiction to entertain the criminal case.

Having heard the parties, the learned trial Resident Magistrate was not impressed by the arguments marshalled by the appellant's counsel one Mr. Samwel Shadrack. He went on dismissing the preliminary objection for lack of merit holding that, in terms of section 164(1) of the Criminal Procedure Act Cap 20 R.E 2019 (hereinafter the "CPA") read together with part A of the 1st schedule of the same Act, both criminal trespass and malicious damage to property are offences triable by the District Court. As for the argument by Mr. Samwel that the appellant could not be charged with malicious damage to property as he was clearing his own farm, the learned trial magistrate was of the firm view that, the appellant could not be heard to seek shelter under the provisions of section 9 of the Penal Code which provides for bona fide claim of right as one of the general defences against criminal liability. All in all, the trial magistrate was of the view that the prosecution side ought to be

given the opportunity to discharge its duty to prove the case beyond reasonable doubt.

Dissatisfied with the decision made by the trial District Court, the appellant appealed to the High Court of Tanzania (sitting at Dar es Salaam) from where the appeal was transferred to the Resident Magistrate's Court of Kibaha to be heard by Hon. Ruth Massam, a Senior Resident Magistrate with Extended Jurisdiction.

Having heard the parties, the first appellate court took the view that since there was a pending suit before the Kibaha District Land and Housing Tribunal in which the appellant and the complainant were disputing over the ownership of the farm alleged to have been trespassed onto, the appellant could only be charged with the offence of malicious damage to property. The learned Senior Resident Magistrate based her decision on the stance that the defence of bona fide claim of right was not available to an accused person who is charged with malicious damage to property contrary to section 299(a) of the Penal Code. In the light of the above stated finding, the learned Senior Resident Magistrate went on dismissing the appeal in respect of the second count and allowing the appeal on the first count. In the circumstances, she

ordered the matter to be remitted to the District Court for continuation of the trial from where it had stopped. Aggrieved by the decision of the Resident Magistrate's Court, the appellant has appealed to this Court citing two grounds of complaint.

To prosecute this appeal, the appellant deployed the professional legal services of Mr. Samwel Shedrack, learned advocate as was the case in the two courts below while the respondent Republic was represented by Ms. Grace Mwanga, learned Senior State Attorney and Ms. Jacqueline Werema, learned State Attorney.

Before the hearing of the appeal could start in earnest, we drew the attention of Mr. Shedrack to the provisions of section 359(3) CPA which impedes appeals from a subordinate court to the High Court to challenge an interlocutory decision or order which has no effect of finally determining the criminal charge.

For purposes of exactitude we think this is an appropriate moment for us to set out in full the provisions of that sub-section which makes it quite clear thus;

(3)" Notwithstanding the provisions of subsections (1) and (2), no appeal shall lie

against or be made in respect of any preliminary or interlocutory decision or order of a subordinate court unless such decision or order has the effect of finally determining the criminal charge.”

At first the above-quoted legal impediment imposed by section 359(3) of the CPA was thought by Mr. Shedrack to be avertable. To that end, it was submitted on behalf of the appellant that the parties were informed by the trial magistrate immediately after delivery of the ruling on the preliminary objection that whoever was aggrieved by his decision, could appeal to the High Court. However, after we managed to persuade Mr. Shedrack to put the law above the trial magistrate's clear misconception seemingly drawn from the cluelessness of section 359(3) of the CPA, the learned counsel realized but not without some difficulties that, he needed to change tack. He submitted in effect that, the appeal before the Resident Magistrate's Court and subsequently before this Court was a flagrant violation of section 359(3) of the CPA. However, the learned counsel was understandably adamant on what should thereafter be the path forward to get out of this judicial impasse.

Answering the question as to what action that needs to be taken in this matter, Ms. Mwanga implored us rightly so in our view, to remit the case to the trial District Court for continuation of trial right from where it had been halted.

We have no doubt whatsoever that the proposal by the learned Senior State Attorney is eminently sound. It is a proper way forward, in the circumstances of this matter. For, it was not open for the learned Senior Resident Magistrate of the first appellate court to entertain an appeal against an interlocutory decision of the trial court which had no effect of finally determining the criminal charge contrary to the mandatory provisions of section 359(3) of the CPA. Sharing the suggestion by the learned Senior State Attorney, we are unable to entertain this appeal on merit and render any conclusive and meaningful judgment thereon. This is so because, as it was before the Resident Magistrate's court, there is no competent appeal before us deserving determination.

We accordingly invoke our revisionary powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 and nullify the proceedings before the Resident Magistrate's Court, quash and set aside the resultant orders and in lieu thereof, we order the

matter to be remitted to the Bagamoyo District Court for continuation of trial from where it had reached.

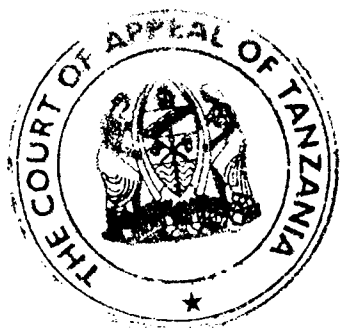
DATED at **DAR ES SALAAM** this 15th day of July, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 18th day of July, 2022 in the presence of Mr. Goodluck Charles Rwiza, learned Counsel for the Appellant and Mr. Jaribu Sebastian Bahati, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "J. E. Fovo", is written over a horizontal line.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL