

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)**

AT ARUSHA

(PC) CRIMINAL APPEAL No. 4 OF 2018

**(C/F the judgment of District Court of Karatu at Karatu in Criminal
Appeal No 27 of 2017 originating from Criminal Case No 237 of 2017
before Primary Court of Karatu at Karatu)**

KALISTI BENEDICT-----APPELLANT

VERSUS

MARIA ALOYCE-----RESPONDENT

JUDGMENT

DR. OPIYO, J.

Appellant Kalisti Benedict has been aggrieved by the decision of the District Court of Karatu at Karatu in criminal appeal No 27 of 2017 he has preferred the present appeal on the following grounds:

1. That, the Honourable Magistrate of the District Court was unable direct his mind to discuss the grounds of appeal in the petition of Appeal and argued by the by the appellant and at last ending into unfair Judgment.

2. That, the District Court Magistrate erred in law and fact in adjudging that, the respondent was not right person to be charged.
3. That, both the Primary Court Magistrate and District Court Magistrate erred in law in basing their reasoning on the respondent's defense of alibi which was raised by the defence.

Before me both the appellant and respondent appeared in person unrepresented. The facts of the case as they can be gathered from the records of appeal are that, respondent Maria Aloyce was arraigned before Karatu Primary Court for the offence of malicious damage to property contrary to section 326 (1) of the Penal Code, Cap 16. She pleaded not guilty to the charge. After a full trial the trial magistrate acquitted her. Aggrieved appellant appealed to Karatu District Court in which his appeal was dismissed, again aggrieved he has come to this court for his second appeal.

The appeal was disposed of by the way of written submission, submitting on the first ground of appeal that the honourable Magistrate, the District Court was unable to direct his mind on the grounds of appeal which ended into unfair Judgment. The appellant submitted that, the appellant before the District Court of Karatu raised nine (9) grounds of Appeal (Criminal Appeal No 27 of 2017). The District magistrate without giving reason directed his mind to only one ground of appeal which was ground No 7. It was his submission that, failure of District Magistrate to analyze grounds No 1, 2, 3 and 5 of the appeal which is strong evidence of Prosecution witness No SM 1, SM2 and SM 3 was a basis of reaching wrong decision for both Primary Court and District Appellate Court.

The testimony of both witnesses clearly states the ownership of the goats, the residence of the accused and her responsibility in respect of the destruction by goats.

On the second ground of appeal it was his submission that, District Court Magistrate erred in law and in fact in adjudging that, the respondent was not right person to be charged, he submitted that, both witnesses particularly SM 1, SM 2 and SM 3 proved that the accused was the owner of the House and Goats (animals) which caused the destruction of the trees; It is stated and proved beyond reasonable doubt that the accused the owner of the House and Goats SU1 was present or around on the time of action that is when the Goats trespassed onto the land of the appellant. He further submitted that, it was established that she is the owner of the House and Goats so she was the one who was supposed to be charged as it was the crime which was done due to her negligence and not her husband who was not living in the house and was in charge of the animals.

On The 3rd ground of appeal that, both the Primary Court magistrate and District Court Magistrate erred in law in basing their reasoning on the Respondent's defense of alibi which was raised on defense. It was the appellant submission that, there was no evidence to that defense of alibi. Both SM 1, 2 and 3 testified that she is always residing in the house and was present particularly on 31/1/2017. The defence of alibi was creation of both Trial Magistrate and appellate District Magistrate. He did pray for the appeal to be allowed.

Responding to the first ground of appeal that the grounds of appeal were not discussed by the District Court Magistrate, it was his submission that, the grounds were vague and baseless that is why the magistrate pointed out one ground and disposed off the appeal.

On the appellant's second ground of appeal it was his submission that, the two lower courts acquitted the respondent as she was not the right person to be charged since she was not present at the scene nor was there any proof that she was the right person to be charged with the said offence. It was his contention that it was clear fact that respondent was not the owner of the house and the goats and she was not the one who was taking care of them on that particular day.

On the last ground, it was her submission that, respondent clearly stated that she was not around during the commission of the offence, she was at her husband's place, and it is cardinal principle that, when the defence of alibi is raised the burden shifts to the respondent and she successfully proved her defence.

I have carefully gone through the evidence and the judgments of the lower courts, I have also considered the appellant's grounds of appeal and his written submission as well as that of the respondent. Before Karatu primary court respondent was charged with the offence of malicious damage to property, after full trial the trial magistrate was convinced that the offence was not proved against the respondent and he acquitted her. In criminal charge it is trite law that all the ingredient of the offence must be proved. In the matter at hand the

respondent was charged with malicious damage to property, it was alleged that, her goats ate and destroyed the appellant's tree. For the offence of malicious damage to property to stand the following ingredients must be proved;

- (i) Destruction of property
- (ii) Willfully and unlawfully
- (iii) Maliciously
- (iv) By the accused.

In the instant case there is evidence that, there was destruction of the property in the sense that, the appellant trees were destroyed by the goats, the question which follows is whether the said trees were maliciously damaged or destroyed by the respondent. From the evidence on record, I did not find any which suggest that it was the respondent who was responsible for the destruction of the trees, it is not established that respondent was the one whose malicious act resulted to the goats destroying the appellant's trees. In such a case, it is not enough to prove ownership of the goats that caused the destruction in criminal charge, but the accused malicious act in controlling the said goats at the time of destruction. Appellant's own words at page 6 of trial court proceedings reads;

*"... ilikuwa tarehe 30/1/2017 muda was aa 4 asubuhi hii walikuwa mbuzi wa mshitakiwa katika shamba langu la miti na niliwarudisha nyumbani kwa mshitakiwa na **hapakuwa na mtu** muda wa saa nane mchana walirudi mbuzi hao na **nilibaini hawana mchungaji**. Niliwafungia ndani mua was aa 12 jioni watoto wa mshitakiwa wawili walikuja kuwatafuta. Niliwaambia aje mshitakiwa au baba yao lakini siku hiyo hakuna mtu aliyekuja mbuzi walilala kwangu. Tarehe 31/1/2017 hakuna mtu aliyekuja,*

*nilianza kuwapa chakula. Nilimwita balozi nilimwonyesha kwani tayari walishaaribu miti. Nilimtaka balozi amwite mshitakiwa kwa simu. Mshitakiwa **alidai hayupo nyumbani**....Na alimtuma Karatu Lapyo muda was aa tano hivi..." (bold emphasis supplied)*

The gist of the above testimony is that, the goats that supposedly destroyed the trees were left unattended, so it is not the respondent who maliciously took them to the defendant's trees. It also shows that nobody was at respondent's home, respondent inclusive, at the time of destruction as appellant testified to have gone there, but found no one. For a criminal charge to stand, accused involvement in a criminal act is a must. Thus, in the circumstances of this case where accused/ respondent herein absence has been proved, even by the appellant himself, indeed there was no evidence to be relied upon to convict the respondent with the offence she was charged with as consistently held by the first two courts, trial and first appellate courts. Both the trial Karatu Primary Court, (Hon Kashweta) and first appellate court, Karatu District Court (Ho. Mbonamasabo) were right in acquitting the respondent; I see no reasons to fault their decisions.

In the result, the appeal lacks merit and the same is dismissed.



A handwritten signature in blue ink, appearing to read "M. Opiyo", is written above a horizontal line.

**DR. M.OPIYO,
JUDGE
27/08/2018**