

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CRIMINAL APPEAL NO. 07 OF 2017

(Originating from Criminal Case No. 77 of 2016 of Kiteto District Court)

LEMSEI KIMONO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Maige, J.

This appeal is against the decision of the District Court of Kiteto (“the trial court”), convicting the appellant with the offense of malicious damage of property contrary to section 326(1) of the Penal Code, Cap. 16 R.E. 2002 and sentencing him to pay fine of TZS 500,000/= and default thereof a twelve months imprisonment.

The accusation framed in the charge sheet was that; on 6th day of August 2016 at 17:15 hours at Emarti village within Kiteto District, the appellant together with a person called KIMONO S/O EKONETI whom was found innocent, did willfully and unlawfully destroy 94 acres with pigeon peas worth TZS 13,500,000/=, the property of Emmanuel Masawe, by allowing his head of cattle to graze thereunto.

In accordance with the memorandum of facts deposed during preliminary hearing as well as the prosecution evidence in totality, the appellant was not at the scene of the crime when the alleged offence was being committed. The head of cattle which is claimed to have destroyed the crops were being taken care of by the said KIMONO S/O EKONETI. The appellant was convicted solely on account of being the owner of the cattle.

In his memorandum of appeal, the appellant has challenged both the conviction and sentence on six grounds which in essence point on the correctness of the trial magistrate in assessing the evidence.

In his submissions, Mr. Stephen who represented the appellant was of the humble opinion that the evidence adduced by the prosecution was not sufficient to prove the allegation in the charge sheet. He recapitulated on the material contradictions apparent on the face of the record among the prosecution witnesses and between the evidence and fact. Relying on the authority in **YONA DIENESE AND SHIJA SIMON VS. THE REPUBLIC, CRIMINAL APPEAL NO. 114 AND 115 OF 2009**, the counsel invited the Court to hold that the

evidence at the trial court was so incredible that it could not be relied upon to sustain conviction.

MISS. GRACE, learned state attorney who took the conduct for the Republic thought that the evidence at the trial court was sufficient to prove the charge. She placed reliance on the evidence in the caution statement (exhibit P-1) and submitted that it was the best evidence. On contradictions, she submitted that they were so trivial that they could not affect the credibility of the prosecution evidence. She referred the Court the authority in **MOHAMED SAID VS. R** in support of the view that trivial contradictions can be ignored.

With the above remarks, it is desirable to consider the appeal. As said above, the offence with which the appellant was charged is created by section 326(1) of the Penal Code which provides as follows:-

"326-(1) Any person who willfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and he is liable, if no other punishment is provided, to imprisonment for seven years.

For the offence of malicious damage of property to be established, it must, among others, be proved beyond reasonable doubt that; the damage or destruction of the property was occasioned by a willful and unlawful action of the accused person. The phrase 'willful' in my understanding, is synonymous with the word "deliberate" or

“intentional”. An act is therefore said to be willful if it is done with deliberate intention and not merely accidentally or inadvertently.

The issue therefore is whether there was adduced any evidence to the effect that the destruction of the crops in question resulted from any intentional action of the appellant? It is very unfortunate that this issue was not addressed at all by the trial court. The trial magistrate spent much of his time considering if the head of cattle which destroyed the crops belonged to the appellant. Indeed, that was the basis of the conviction of the appellant and acquittal KIMONO EKONET, the keeper of the cow.

It is common ground from the prosecution evidence that the appellant was not at the scene of the crime when the alleged crime was being committed. There was not adduced any evidence out of the six prosecution witnesses to establish that the destruction in question resulted from any willful action of the appellant. The purported confessional statement in exhibit **P-1**, I have read it, does not amount to a confession to the offence within the meaning of section 57 of the Evidence Act. For, what the appellant confessed in the statement is only ownership of the head of cattle and the fact that the said KIMONO EKONET was keeping the cattle when they escaped into the farm of the complainant.

For those reasons therefore, I will agree with the counsel for the appellant that there was no sufficient evidence at the trial court to warrant conviction of the appellant. The appeal therefore shall

succeed. The conviction and sentence of the appellant are hereby quashed and set aside. The appellant is set free unless withheld for other lawful causes.

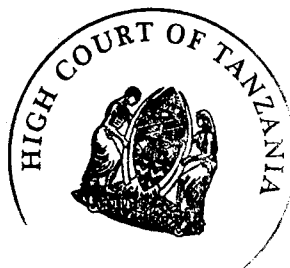
It is so ordered.

MAIGE.I
JUDGE
24.10. 2018

Judgment delivered in the presence of Mr. Stephen learned advocate for the appellant and Miss. Grace, learned state attorney this 24th day of October 2018

MAIGE.I
JUDGE
24.10. 2018

I hereby certify this to be a true copy of the Original.




S. M. KULITA
DEPUTY REGISTRAR
ARUSHA

30/10/2018