IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA.

PC CRIMINAL APPEAL NO. 7 OF 2020

(Originating from Karatu District Court in Criminal Appeal No. 30 of 2019, arising from Karatu Primary Court in Criminal Case No. 338 of 2019)

PAMPHIL VICENT ..... APPELLANT

Versus

BERTHA MICHAEL ..... RESPONDENT

JUDGMENT

3rd September and 6th November, 2020

Masara, J.

Pamphil Vicent, the Appellant herein, preferred a charge of Malicious Damage to Property against Bertha Michael, the Respondent, at the Karatu Primary Court (the trial Court) in Criminal Case No. 388 of 2019. After hearing evidence from both parties, the trial Court found that there was a land dispute between the parties. It therefore held that a criminal charge against the Respondent was inappropriate. The trial Court acquitted the Respondent and advised parties to refer the matter to the appropriate forum which would resolve the dispute between them. The Appellant was aggrieved, he unsuccessfully appealed to the District Court of Karatu (the first Appellate Court) vide Criminal Appeal No. 30 of 2019. The Appellant was still aggrieved, he has preferred this second appeal on the following grounds:

a) *That, as the government leadership had supported in writing vide exhibit "P" the Appellant's ownership over the damaged property, both the District Court and the Primary Court grossly erred in law and fact*

by accepting the Respondent's defence that the land on which the damaged trees situate belong to the government;

b) *That, the Honourable District Magistrate grossly erred in law and fact by confirming the Primary Court decision that there was dispute of ownership of land over the place where the damaged trees situate while there is ample evidence that the Respondent never claimed ownership of the dispute property;*
c) *That, the honourable District Magistrate grossly erred in law and fact by not finding that the Primary Court Magistrate erred by proceeding with defence hearing while the Appellant had not closed his case and while the Primary Court had not decided whether there was a case to answer for the Respondent to make defence;*
d) *That, the Honourable District Magistrate grossly erred in law and fact by not finding that there was improper analysis of evidence by the Primary Court and thus he arrived to a wrong and unfair decision;*
e) *That, the District Court Magistrate erred in law and fact by not finding the Primary Court framed wrong/irrelevant issue; and*
f) *That, the District Court Magistrate erred in law and fact by determining appeal without answering other grounds of appeal.*

The Appellant prays that this Court be pleased to set aside the decisions of both lower courts, convict the Respondent, sentence her and order her to pay compensation according to exhibit "P", as well and award any other reliefs the court thinks fit and just to grant. At the hearing of the appeal, both parties appeared in court in person unrepresented. The appeal was argued through filing written submissions.

Submitting in support of the appeal, the Appellant combined the first and second grounds of appeal contending that the first Appellate Court failed to consider exhibit "P" in which the hamlet chairman, one Paulo Inyasi, signed as a witness acknowledging that the Appellant is the lawful owner of the damaged trees deserving to be compensated Tshs .60,000/=. He therefore

faulted the lower courts' findings that there is a land dispute between him and the Respondent while even the Respondent while cross examined admitted that there existed no land dispute between. He cited decision of this court in ***Eliaza Zakaria and 12 Others Vs. Attorney General &3 Others***, Civil Case No. 02 of 2015 which declared Ayalabe as part of Karatu Township.

Submitting on the third ground of appeal, the Appellant stated that as soon as the third prosecution witness gave his evidence, the magistrate did neither ask the Appellant whether he had any other witness nor make a ruling whether the Respondent had a case to answer. On the contrary, he proceeded to fix a defence hearing date. In his view, this contravened Rule 36 of the Primary Court Criminal Procedure Code, in the 3rd schedule to the Magistrate Courts Act, Cap 11 [R.E 2019].

The Appellant's submissions regarding the fourth ground is that both the first Appellate Court and the trial Court failed to analyse his evidence as recorded at page 11 of the proceedings and the contents of exhibit "P" which concluded that there was no land dispute.

Regarding the fifth ground of appeal, the Appellant stated that the trial magistrate misdirected himself in drafting an irrelevant issue. He was of the view that as the charge against the Respondent related to the offence of malicious damage to property, contrary to section 326 of the Penal Code, the issue relating to criminal trespass was uncalled for. Therefore, the relevant issue would be whether the accused committed the offence of

malicious damage to property, and not whether there existed land dispute between the parties as the trial magistrate did, which led to unfair decision.

The Appellant's argument regarding the last ground of appeal is that the first Appellate Magistrate determined only the second ground of appeal out of the six grounds of appeal. This, according to the Appellant, is a serious error as stated in the case of ***Malmo Montagekonsult AB Tanzania Branch Vs. Margaret Gama*** [2011] 2E.A 259, which held that the Appellate Court is expected to address all the grounds of appeal before it.

Contesting the appeal, the Respondent made a general denial of all the grounds of appeal contending that the damaged property belonged to the government and that she was punished by paying a fine of fifty thousand shillings for cutting trees. According to her, the case was between her and the government. The Respondent commended the first Appellate Court's decision by advising the Appellant to institute a fresh case before a forum of competent jurisdiction that will adjudicate their land dispute. According to the Respondent, both courts below examined the evidence as well as the contents of exhibit "P" and the hamlet chairman also admitted that the trees belonged to the Government. She concluded that the decisions of the two lower courts were fair and just. She therefore implored the court to dismiss the appeal and uphold the decisions of the two lower courts.

I have meticulously considered the grounds of appeal as well as the submissions made by the parties, I will discuss the grounds of appeal in the same way they were presented by the Appellant.

To begin with the first and the second grounds of appeal, the Appellant's claim is that there was no dispute over land ownership where the damaged trees is situated. Before responding to the rival arguments of the parties, I am alive to the principle that this being a second appeal, I am ordinarily expected not to interfere with concurrent factual findings of the two courts below unless there is misapprehension of evidence or misdirection leading to miscarriage of justice. This is per this Court and Court of Appeal decisions. In ***Nchangwa Marwa Wambura Vs. Republic***, Criminal Appeal No. 44 of 2017 (unreported), the Court of Appeal observed:

> *"It is trite law that in a second appeal, like the present, the Court is not entitled to interfere with the concurrent findings of facts by the two courts below except in rare occasions where it is shown that there has been a misapprehension of the evidence or misdirection causing a miscarriage of justice."*

Having that in mind, I note that it was the Appellant's (SM1) evidence that on the material date the Respondent arrived at his plot and cut down two trees. When he asked her why she was doing that, she replied that she was widening the road. The Appellant called the District Forest Officer who after noting the damaged trees, he prepared a valuation report which is exhibit "P". According to the Appellant, the damaged trees were on his roadside. SM2 stated that he was told by the hamlet chairman that the damaged trees belonged to the Appellant. In addition, SM3 stated that he witnessed the Respondent cutting the trees which were on the Appellant's roadside as the parties herein are separated by a road. The Respondent on her part admitted to have cut the trees for firewood purposes adding that the trees were on

the roadside at her border. In her testimony, the trees were not on the land bought by the Appellant but on the public land which is a road reserve.

The trial court after scrutinizing the evidence made a finding that there was land dispute between the parties as each claimed the trees to be on his/her side. The first Appellate Court made the same finding. A land dispute would entail that each one of them is claiming ownership of the land from which the trees were cut. It is trite law that in proving the offence of malicious damage to property, ownership of the damaged property has to be sorted out. That is as per the decision in ***Scolastica Paul Vs Republic*** [1984] TLR 187.

In the case at hand, it is not certain whether the damaged trees were in the Appellant land, since the Respondent claimed that the trees were on the road reserve. Likewise, the Appellant when cross-examined by court assessor one J. Dodo he replied that the tree is on his side of the road. This entails that there exists a dispute over ownership of the land from where the trees were cut. The allegation by the Appellant that even the hamlet chairman proved that the trees were in his land and that there was no land dispute is unfounded since the said chairman did not testify in court. He merely signed exhibit "P" which, in my opinion, was a mere valuation of the trees damaged. Therefore, determining whether the offence of malicious damage to property was committed presupposes that the trees belonged to the Appellant. That has been the swing in criminal cases where ownership of land is in question. In the case of ***Ismail Bushaija Vs. Republic*** [1991] TLR 100 the court stated the following:

"In my view, it is wrong to convict a person for criminal trespass when ownership of the property alleged to have been trespassed upon is in dispute between the complainant and the accused.

I am mindful that the above cited case concerned the offence of criminal trespass, but yet the facts of the case at hand borders around trespass since the Appellant claims that the Respondent entered in his land and cut down trees therefrom. Therefore, since the dispute of ownership of the land in which the trees are said to be damaged is unresolved, the lower courts were right to acquit the Respondent and direct the parties to refer the dispute to the forum competent to resolve such dispute. It is also acknowledged that such a case may be difficult as the Respondent does not seem to claim ownership over the place where the trees were cut from. Her contention is that the trees were natural (miti ya asili) located along the road that separates them. That notwithstanding, if the Appellant is certain that the place where the trees were cut from belongs to him, declaration of his ownership will be a determining factor of the offence that the Respondent stood charged with. Therefore, the first and second grounds are devoid of merits.

Regarding the third ground of appeal, the Appellant complains that his case was marked closed before he was asked if he had other witnesses. I have thoroughly gone through the lower court's record; I have noted that the ground was neither raised nor discussed in both the trial court and the first Appellate court. It is an afterthought. Although there is no record that the Applicant prayed to close his case or whether the evidence was enough to require the Respondent to enter her defence, I refrain from discussing the

same. I am guided by the Court of Appeal decision in ***Hussein Ramadhan Vs. Republic***, Criminal Appeal No. 195 of 2015 (unreported), where the Court observed:

> *"The principle of the law is that an appellate court will not deal with new grounds of appeal not raised and determined by the trial court and first appeal court."*

Similarly, in ***Godfrey Wilson Vs. Republic***, Criminal Appeal No. 168 of 2018 (unreported), the Court of Appeal observed:

> *"..... we think that those grounds being new grounds for having not been raised and decided by the first appellate Court, we cannot look at them. In other words, we find ourselves to have no jurisdiction to entertain them as they are matters of facts and at any rate, we cannot be in a position to see where the first appellate Court went wrong or right. Hence, we refrain ourselves from considering them."*

I subscribe to the position above.

Regarding the fourth ground of appeal, the Appellant complains that the trial court did not analyse the evidence properly. I have carefully gone through the trial court records. It is noted that at Pages 3 and 4 of the typed judgment in an endeavour to tackle the issue raised, the trial magistrate made a thorough analysis of the evidence of both sides and came to a conclusion that there is a land dispute between the parties. I see no merits in this ground as well.

The fifth ground is the Appellant's complaint that the trial court framed a wrong issue. As I stated while discussing the first and the second grounds, in order to prove the offence of malicious damage to property, one has to prove ownership of the damaged property. The trial magistrate raised an

issue whether there was dispute of ownership of the land where the alleged trees were cut so as to determine the culpability of the Respondent in the damaged property. I do not find any error committed by the trial magistrate, the issue was properly raised and responded to.

The last ground is the complaint by the Appellant that the first Appellate Court determined only one ground leaving other grounds undetermined. It is true that the first Appellate Magistrate at page 2 of the typed judgment discussed only the second ground of appeal which was pivotal to the claim whether there was dispute of land ownership between the parties. Although the learned appellate magistrate did not elaborate on the reasons why he did not consider the other grounds of appeal, the crafting of the judgment militates against any malice on the part of the learned first appellate Magistrate. Being a legal issue, the second ground of appeal was capable of disposing of the appeal without there being a need to discuss the other factual grounds. The court is bound to discuss all the grounds where they involve matters of law. Having revisited the grounds of appeal presented before the first Appellate Court, all those other grounds were based on facts. Therefore, the approach taken by the first Appellate magistrate can be condoned.

Before concluding, I note that the Appellant, as an alternative to allowing the appeal, prayed that the proceedings and decisions of the two lower courts be nullified and a trial *de novo* be ordered. That prayer cannot find room in the case at hand because a trial *de novo* may not be ordered in

order for the prosecution to fill in gaps left in their evidence. In ***Fatehali Manji Vs. Republic*** [1966] EA 344, it was held that:

> *"In general a retrial may be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill gaps in its evidence at the first trial ... each case must depend on its own facts and an order for retrial should only be made where the interest of justice require it."*

In the instant appeal, the original trial was not defective. What appears is that the Appellant seeks to reconstruct his case because some of the witnesses he mentioned did not testify in the trial court. Further, the directive given takes care of the concerns that the Appellant has. Therefore, a retrial under the circumstance is inappropriate.

For the above reasons, I dismiss the appeal in its entirety. The decisions of the two lower courts are hereby upheld.

Order accordingly.

HIGH COURT OF TANZANIA

Y. B. Masara
JUDGE
6th November, 2020