

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC CRIMINAL APPEAL NO. 32 OF 2019

(Arising from the District Court Criminal Appeal No. 35 of 2018, Original PC Criminal Case No. 1041 of 2018)

ANDREW AINEMANAPPELLANT

VERSUS

SIJAONA JAMES RESPONDENT

JUDGMENT

07 & 20/05/2020

RUMANYIKA, J.:

The appeal is against conviction and a sentence of six (6) months community service passed by Mwanza Urban Primary Court (the trial court) on 02/11/2018 and upheld by the Nyamagana district court (the 1st appeal court) on 25/07/2019 Andrew Aineman (herein the appellant). The particulars of offence read that having removed roof of the hut, contrary to Sections 326 and 89(1) B of the Penal Code Cap 16 R.E. 2002 he (the appellant) did on 14/04/2018 at about 11.30 am at Mwananchi Street in Town maliciously damage assortment of articles (list as per charge sheet) that in the same course most likely he caused breach of peace (1st and 2nd counts) respectively.

Rephrased the 5 grounds of appeal revolve around five (5) points:-

1. That on its own the 1st appeal court framed up a new ground and it decided the appeal.
2. That the 1st appeal court failed to address the grounds of appeal before it.
3. That the case wasn't beyond reasonable doubts proved against the appellant.
4. That the two courts below improperly evaluated the evidence.
5. That the 1st two courts erroneously shifted the burden of proof onto the appellant.

Messrs. Heri Emmanuel and Erick Mutta learned counsel appeared for the appellant and respondent respectively.

When the appeal was called on 7th May, 2020 for hearing, but following global outbreak of the Coronavirus Pandemic and pursuant to my order of 01/04/2020 parties were present online (mobile numbers 0713535072 and 0752558188) respectively, by way of Audio Conferencing they were heard.

Mr. Heri Emmanuel learned counsel argued the 1st two grounds together he faulted the 1st appeal court for having determined the appeal on a ground not raised by the appellant. With regard to the 3rd ground, the learned counsel submitted that the impugned judgment was against weight of the evidence on record much as also no single property alleged to have destroyed by the appellant was produced in court. For the ground 4, Mr. Heri Emmanuel submitted that if anything, the circumstantial evidence did not irresistibly point to the appellant's guilty the later only having admitted to have assigned the "fundis" to renovate the hut and therefore only the

"fundi" should have been charged and prosecuted leave alone the trial court's unusual order for costs in the criminal proceedings. That is all.

On his part Mr. E. Mutta learned counsel submitted that although he was properly identified, for grounds 1 and 2 of the appeal the appellant was not fairly heard therefore the omission vitiated the conviction. That is it.

The evidence on record read thus:-

SM1 Sijaona James Kaloli stated that as he was at the material time away busy but through mobile phone the grocery attendant informed him that the appellant had removed roof of the hut, indeed on his arrival he (SM1) found the appellant and another taking away some iron sheets that there occurred a fracas but he contained it and reported the case to police.

SM2 Josephat Byemanyile the SM1's grocery attendant supported it and he testified more or less a material replica of SM1's.

SM3 Sele Machage stated that with regard to the incident, having had observed it all through mobile phone he called SM1 back to the scene of crime (his testimony materially was similar with SM1's).

SM3 Marwa Lawrence Mohore stated that as he was at the material time around waiting for SM2 he saw a person on the roof of the grocery remove iron sheets but due to bad weather of the day he could not wait any further he left for home.

SM4 Joseph Makori stated that on the material date he witnessed the appellant and the "fundi" remove the iron sheets. That is it.

SU1 Andrew Aineman Kalalu stated that as he had powers of attorney granted by father, following his intention to renovate the commercial hut he arrived at the scene at about Noon or 13.00 hours to see how far had the "fundis" gone then he quitted the place only later on to be informed that the respondent had just stopped them that if anything, only Mama Rose @ Neema Shiliwa was the recognized tenant whom he had issued a notice of renovation.

Neema Pastory Shiliwa (the court witness) stated that she was only the business supervisor thereof and wife of the respondent (SM1). That as she was at the material time away, she learnt about the incident, through the attendant's mobile call at 13.00 hours. That with the roof now removed and it rained heavily a lot of items were destroyed.

SU2 Elifazi Masinde stated that with regard to the premises sometimes in March, 2018 in his presence the tenant (wife of SM1) refused the appellant's notice of termination of the tenancy agreement.

SM3 Aineman Kalalu, the true landlord stated that as he was, on medical ground now away in the US he was informed that the tenants had refused instructions of the attorney appellant.

SU4 Robson Mwita the material "fundi" stated that working under the appellant's instructions in the process of renovation he removed the iron sheets. That is it.

At least with his evidence but in capacity of the principal the appellant admits having had been instructed and perhaps paid by SU2 (his agent) and he removed the iron sheets. The issue of whether or not the

appellant was identified therefore is neither here nor there. Grounds 4 and 5 of the appeal are dismissed.

Now that the appellant and the respondent were landlord and tenant respectively and now that no doubts at the time Neema Pastory Shiliwa was appellant's wife, according to her the business supervisor thereof both logic and common sense would demand that whether or not the appellant was the respondent's tenant it was immaterial under the circumstances much as none of them did not sufficiently deny to have refused the alleged notice of termination of the tenancy agreement. Whereas I would not condone the appellant's act, that one served purposes as the last wake up call to arrogant and unreasonably hostile tenants. However improper constructive eviction might be, the appellant's action depicted kind of **bonafide** claim of right which therefore negated **mens rea** such that the conviction was both premature and improper. I shall, as hereby do quash the conviction and set aside the sentence. Grounds 2 and 3 allowed suffice the points to dispose of the appeal.

Like late in the day the two courts below but correctly in my view advised, of course subject to the law of limitation now the respondent may wish to institute the case in a land tribunal with competent jurisdiction. The appeal is allowed in its entirety. It is ordered accordingly.

Right of appeal explained.


S. M. RUMANYIKA

JUDGE

17/05/2020

It is delivered under my hand and seal of the court in chambers. This
20/05/2020 in absence of the parties with notice (copies to be supplied
immediately).



S. M. RUMANYIKA

JUDGE

20/05/2020