

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC CRIMINAL APPEAL No.03 OF 2020

(Arising from the decision of the Sengerema Urban Primary Court in Criminal Case No. 62/2018 and Criminal Appeal No.29/2019 at the District Court of Sengerema)

JULIUS MALOBO.....APPEALANT

VERSUS

REVOCATUS MSIBA & ANOTHER.....RESPONDENT

JUDGMENT

02nd April, & 11th May, 2020.

TIGANGA, J.

Before the primary Court of Nyakarilo in Sengerema District the respondents had been charged, found guilty and finally were convicted of malicious damage to property (trees) contrary to section 326 of the Penal Code [Cap 16 RE 2002]. The trees alleged to have been destroyed were the property of the appellant and were worth Tsh. 2,622,000/=.

Dissatisfied, the respondents successfully appealed to the District Court of Sengerema which quashed the conviction of the respondents and set aside the sentence imposed upon them by the Primary Court of Nyakarilo.

Dissatisfied by the decision of the District Court, the appellant has knocked the door of this honourable court to challenge the said decision and in doing so, he has advanced the following grounds of appeal namely;

- i) That the appellate District Court grossly erred in law and in fact by acquitting the respondents basing on the reason that the respondents damaged the appellant's properties basing on the principle of bona fide claim of right without considering the fact that the respondents did not follow legal procedures in claiming the alleged right.
- ii) That the appellate District Court grossly erred in law and in fact by acquitting the respondents basing on the reason that the case was based on land dispute, while in fact there was no any dispute at all on the ownership of land rather the properties destroyed were lawfully owned by the appellant.
- iii) That the appellate District Court Magistrate grossly erred in law and in procedure by deciding the case basing on the reasons which were never advanced by the respondents in their grounds of appeal hence he stepped into the shoes of the respondents.

The facts which gave rise to this case were that, the respondents were leaders of the SACCOS which the appellant was also a member. That SACCOS was lending money to its members refundable on the agreed terms. Though not expressly clear from the evidence, but from the circumstances in the evidence, the loan were given on the condition of depositing or pledging security to secure the loan. In this case the evidence show that the appellant took a loan from the SACCOS and pledged as a security, his land, on which the trees alleged to have been damaged were.

It is evident that the appellant failed to repay the loan as agreed, consequent of which his fellow members, the respondents, attached his farm in lieu of the debt of Tshs 3,751,300/=. After attaching the said farm, they started cutting trees therefrom, before the appellant had complained, a complaint which led to their arrest, prosecution and finally conviction before they had appealed to the District court, where their appeal was allowed.

On the day this appeal was called on for hearing, both the appellant and the respondents appeared in person and unrepresented. The appellant prayed that his grounds of appeal be adopted as he had nothing to add.

On the part of the respondents, the first respondent, just like the appellant, prayed for his reply to be adopted and form part of his submission, as he had nothing more to add. The second respondent on the other hand submitted that they once had a complaint before the village land council, which was decided in their favour after the appellant had admitted to be owing them money. He submitted further that their actions were justified because after the village land council had resolved the matter the appellant did not appeal.

Having gone through the grounds of appeal, and the submissions by both parties, I will start with the first ground of appeal in which the appellant's concern was that, the appellate court erred in law and fact in acquitting the respondents basing on the principle of bonafide claim of right. The records show that the parties had agreed that the appellant was to pay the loan and offered his farm as a security for the said loan.

It was after he had failed to clear the loan, when the respondents then took over the security through the Village Land Council.

In dealing with this ground of appeal I will be guided by the principle of burden and standard of proof as contained in The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations G.N. No. 22 of 1964 and 66 of 1972 made under the Magistrates Courts Act [Cap 11 RE 2002].

Regulation 1(1) provides inter alia that;

"Where a person is accused of an offence, the complainant must prove all the facts which constitute the offence, unless the accused admits the offence and pleads guilty.

While regulation 5 (1) provides the standards of proof as follows;

"(1) In criminal cases, the court must be satisfied beyond reasonable doubt that the accused committed the offence.

(2) If, at the end of the case, the court is not satisfied that the facts-in-issue have been proved the court must acquit the accused."

Before the primary court the complainant was supposed to prove all the facts constituting the offence of malicious damage to property as provided by the law under which the respondents were charged, under which, in my considered view, its interpretation requires the complainant to prove the following ingredients;

- (i) He owns the property or properties,
- (ii) That the said property(ies) has or have been destructed or damaged,

- (iii) That the same was damaged or destructed by the accused person,
- (iv) That the act of so damaging or destructing must have been actuated by malice.

The second ingredient, was stressed by my brother Hon. Mushi, J (as he then was) in the case of **Scolastica Paul Vs Republic** [1984] TLR 187 HC where it was held *inter alia* that, to constitute malicious damage to property, there must be evidence of damage or destruction of the property. The issue remains to be, whether the above ingredients were proved by the complainant before the primary court to the standard of beyond reasonable doubt?

From the evidence, there is no dispute that the complainant was the owner of the land and trees alleged to have been cut. There is also no dispute that the trees were cut by the respondents as alleged and so were destructed. The only issue is whether the act by the respondents was actuated by malice?

The term malice as defined in the Black's Law Dictionary 9th Edition means;

"The intent, without justification or excuse, to commit a wrongful act. It also mean reckless disregard of the law or of a person's legal rights, or ill will; wickedness of heart. Generally speaking "Malice means in law, wrongful intention. It includes any intent which the law deems wrongful, and which therefore serves as a ground of liability. Any act done with such an intent is, in the language of the law, malicious, and this legal usage has etymology in its favour. Hence the

malice in English law, including all forms of evil purpose, design, intent, or motive. Malice in the legal sense imports the absence of all elements of justification, excuse or recognized mitigation.”

Now the issue is whether, given the above definition of malice, there was any malice in the act of the respondents and whether there was no justification of what they did? These issues can be resolved by looking at the evidence on record as given by both sides.

While proving the case, the appellant told the court that his land was trespassed into without justification. The defence, to the contrary, categorically told the trial court that the land they are alleged to have trespassed into, had already been handed over to them by the village land council on the ground that the appellant failed to pay back the loan which he borrowed from the SACCOS run by the respondents. That was after the council had been satisfied that the appellant mortgaged the said land as the security to secure the loan. These facts are contained in the evidence of the respondents who testified before the primary court, in their various capacities in the administration and management of the SACCOS.

That in my considered view, makes the foundation of justification of what the respondents did thereby vitiating the possibility of having been malicious while so acting. They may be faulted probably in other branches of the law, but not to have committed any criminal offence recognised by our laws. In my considered opinion, failure to follow procedures as alleged, does not constitute any criminal offence, after all the respondents were not charged for not following the procedure, but for committing the

offence of malicious damage to property which the complainant was required to prove, but which he failed to prove. That said, I find the first ground of appeal to be devoid of merit, it is dismissed.

In the second ground of appeal, which raises the complaint from the appellant that the case was being treated as a land dispute, I entirely agree with the appellant that the appellate District Court erred in acquitting the respondent on the basis that the case was a land dispute. In my considered view, it was supposed to acquit them on the ground that the case was not proved beyond reasonable doubt, by the failure of the appellant to prove the case. That said, I find the second ground of appeal to be meritorious. The ground therefore is sustained, though for reasons given, this finding has no effect on the verdict of the first appellate court, which is the District Court of Sengerema.

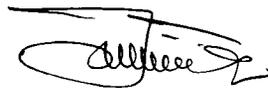
On the third and last ground of appeal, the appellant's concern was that the first appellate magistrate decided the appeal basing on his own reasons and not the ones advanced by the appellants. In deciding whether this assertion has any truth or not, I went through the judgment of the first appellate court to ascertain the truth or falsity of the ground. The record at page 2 of the judgment, the appellate magistrate outlined two main issues to be determined. Looking at those issues, it is apparent that they were derived from the grounds of appeal which were advanced by the appellants (now respondents). This ground has no merit. It is hereby dismissed for want of merit.

Now having found the two grounds of appeal to have no merit, and the one allowed to have no effect on the verdict passed by the appellate District Court. I dismiss the appeal and uphold the decision of the District

Court which quashed the conviction and set aside the sentence passed by the Primary Court and its orders. The respondents are entitled to the costs of this appeal.

It is so ordered

DATED at MWANZA this 15th day of May, 2020.



J.C.Tiganga

Judge

15/05/2020

Judgment delivered in open chambers in the presence of the respondent on line through tele-conference, in the absence of the appellant who was not found on line



J.C.Tiganga

Judge

15/05/2020

Right of appeal explained and guaranteed



J.C.Tiganga

Judge

15/05/2020