IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 08 OF 2020

(Arising from Criminal Appeal No 28 of 2019 of the District Court of Moshi, Originating from Criminal Case No 586 of 2019 of Moshi Urban Primary Court)

GODSON JONATHAN MATERU ..... APPELLANT

VERSUS

JUSTINE CHUWA..... RESPONDENT

JUDGMENT

MUTUNGI .J.

The background of this appeal is that, the Appellant was charged and convicted by the Moshi Urban Primary Court for the offence of malicious damage to property contrary to **section 326(1) of the Penal Code, Cap 16 R.E 2002**. He was sentenced to a conditional discharge of two months. The appellant was aggrieved by the trial court's judgment and unsuccessful appealed to the District Court of Moshi. Here thereafter losing the appeal opted to come to this court through the window of appeal on the following grounds: -

1. *That the respondent failed to prove beyond reasonable doubt that it is the appellant who destroyed and made holes in the respondent's side of the wall/fence.*
2. *That the District court fell in the same error like the trial Primary Court in failing to properly evaluate the evidence before it in favour of the appellant*
3. *That the district Court Magistrate erred in awarding costs to the respondent in a criminal appeal.*

The parties proceed by way of Written Submissions whereas the Appellant was represented by Faustin M. B. Materu, Advocate while the Respondent enjoyed the service of J. Semali, learned advocate.

The appellant's advocate getting the court under way, commented the evidence adduced by the Complainant was very weak to prove the offence charge. He called upon the court to find it was the "fundi" who alleged had seen a person damaging the wall or fence.

The learned advocate contended further, the alleged fundi one "Damian" was not called to give evidence. The only evidence available was that of the Complainant (Respondent) who did not witness the person committing the offence.

To cement his position, Mr Materu cited the case of **Jonas Nkize vs Republic 1992 TLR 213** stressing the point that, the onus of proving the case in criminal cases lies with the prosecution and the standard is beyond reasonable doubt. In due thereof such evidence has to be against the accused without a flicker of doubt. Failure of which the court will be entitled to dismiss the charge and acquit the accused. He also referred the court to the case of **Juma Ramadhan vs Republic 1968 HCD No. 147** which set down the ingredients of the offence of malicious damage to property. The law demands that the act must be done deliberately and intentionally. To establish this offence one must prove that, the accused destroyed or damaged the property in question and that he did so wilfully and unlawfully.

Mr. Materu elaborated further by casting on a conviction based on circumstantial evidence. He stated for the same to stand the inculpatory facts have to be inconsistence with the accused's innocence and incapable of explanation upon any reasonable hypothesis than the accused guiltiness. To cement his averment, he cited the case of **Simon Musoke v Republic 1958 E.A 715 CA**.

As far as the prosecution evidence is concerned, Mr Materu referred this court to page 26 of the typed trial proceedings which shows that, on 1/7/2019 when the offence was alleged to have been committed, the accused (appellant) was not at home as evidenced by SU2 Jonathan T. Materu. There were in fact other people who could have committed the offence if at all this did happen. For any stretch of imagination circumstances do not point to the conclusion that, the accused committed the offence. To the contrary it suggests two or more others could have done so who at the material time were at home or around the vicinity.

To cap it all the learned advocate explained, the only evidence connecting the appellant with the offence is that of the Complainant who testified that, he did not witness the accused committing such offence as seen in the proceedings. The circumstantial evidence relied on in this case did not meet the test set down to prove the offence of malicious damage to property.

Finally, the learned advocate submitted briefly that the learned District Magistrate misdirected herself in awarding costs in a criminal case. In his understanding, costs are normally awarded in civil cases. In concluding he prayed

the appeal be allowed since the charge against the accused was not proved beyond reasonable doubt as required in criminal jurisprudence.

Reacting to Mr. Materu's submission, the respondent's learned advocate (Mr. Semali) drew the attention of this court to the fact that, it was strange for Mr. Materu to reproduce the proceedings of the trial court as he was supposed to do so at the first appellate court but before this court he was to confine himself to the grounds of appeal.

Submitting to the grounds of appeal the learned advocate argued that, the case had been proved beyond reasonable doubt. He acknowledged the submission by Mr. Materu that the accused was convicted basing on circumstantial evidence. This was after the trial court had considered all the facts as well as the evidence of SMI, SM2, SM3 and SM4. Further, there was no co-existing circumstances which could weaken the inference that the accused was the one who committed the offence as no other person was on the premises other than the Appellant. The Appellant did not deny the same in evidence. He referred the court to the case of **Hassan Fadhil vs Republic (1994) TLR 89** to support his stance and the case of

Mustapha Maulidi Rashid vs Republic Criminal Appeal No 241 of 2014.

As to the ground of awarding costs in criminal cases, Mr. Semali responded that, awarding cost is the discretion of the court basing on the circumstances and the nature of the case. In the present case the nature of the offence entitled the award of costs because the Respondent incurred expenses since State Attorneys were not engaged and the Appeal had no Merit. Be as it may the appellant's counsel was to provide the legal authority that prohibits such awards. The learned advocate concluded by praying for the dismissal of the appeal for want of merits.

In rejoinder, the appellant's learned advocate explained as to why he cited the proceedings of the primary court. The sole reasons being that, this is where the conviction was based and the District Court Magistrate supported these findings. The Primary Court proceedings are crucial to this court to come up with a proper decision as to whether the lower courts were properly so directed.

On the issue of costs, the appellant's advocate cited the case of **In re Dara F Keeka and Mohamedali Nasser Damji 1967 HCD No. 320** to buttress his point that costs are

granted in civil actions and do not apply to remuneration in respect of criminal proceedings.

Having passed through the parties' submission as well as the subordinate court records, I find there is no doubt at all that, the trial Magistrate convicted the appellant based on circumstantial evidence. The evidence is loud that no witness proved before the trial court to have seen the accused commit the said offence.

The quality of circumstantial evidence required to prove the charge has been discussed in numerous decisions. In the case of **Mark Kasimiri vs Republic, Criminal Appeal No. 39 of 2017 (unreported)** the Court of Appeal laid down the basic principles for consideration before convicting basing on circumstantial evidence as outlined hereunder: -

i. ***That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all***

human probability the crime was committed by the accused and non-else (See Justine Julius and Others vs Republic, Criminal Appeal No. 155 of 2005 (unreported)).

ii. *That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from circumstantial evidence, it is necessary to be sure that there are no co-existing circumstances which would weaken or destroy the inference [See, Simon Msoke vs Republic, (1958) EA 715A and John Maguia Ndongo vs Republic, Criminal Appeal No. 18 o f2004 (unreported)].*

iii. *That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected, [see Samson Daniel vs Republic, (1934) E.A.C.A. 154].*

iv. *That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person, [See Shaban Mpunzu @Elisha Mpunzu vs Republic, Criminal Appeal No. 12 of 2002(unreported)]. vi. That the facts from which an adverse inference to*

accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See Ally Bakari vs Republic (1992) TIR 10 and Aneth Kapazya vs Republic, Criminal Appeal No. 69 of 2012 (unreported)."

Turning to the case at hand, it was testified that the accused resides with other people. The question is who among those did commit the offence? No one can tell with certainty, not even the complainant. For that the circumstances do not warrant conviction of the accused person. I support the submission by Mr. Materu learned advocate that, circumstances do not point to the conclusion that, the accused committed the offence as it suggests two or more conclusions or interpretations.

The respondent's advocate tried to mislead the court by stating that no other person resides on the premises than the Appellant. The proceedings are in black and white (at page 26 of the typed proceedings) where the Complainant (Appellant) is recorded as having said.

"Mimi naomba niwaeleze kwa nini ninasema hivyo, huyu baba ndugu zake na watoto wake huyu mshtakiwa wamezungushia ukuta wa

matofali geti moja ambalo halifunguliwi, yeye anaishi na mke na watoto na mfanyakazi wanakuwepo kila siku..."

From the above quotation the evidence raises doubts as to whether it is the appellant who committed the offence or the other people whom he resides with. This doubt makes the prosecution case fall short of the standard of proof in criminal cases which is universally applied.

Despite the Appellate Magistrate finding the appellant was not seen at the scene of crime but was convinced by the respondent's allegations which were supported by the evidence of an expert from the Tanzania Building Agency who discovered holes in the wall/fence. With due respect to the first Appellate Magistrate just noticing holes in the wall on the Appellant's side is far from suggesting or forming an interference that it was the appellant who damaged the same. There must have been co-existing circumstances which would not weaken or destroy the inference. The circumstances cumulatively should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the appellant and no other. To this the court

is guided by the holding in **Criminal Appeal No. 155 of 2005 (unreported) Justine Julius and other vs Republic**.

As to the complainant of awarding costs in criminal cases as submitted by the appellant, I find no need of labouring to discuss this ground. The first and second grounds have been answered in the affirmative, doing so will only amount into an academic exercise once the offence was not proved at the required standard in criminal jurisprudence.

Having found that the case was not proved as stated above, I therefore allow the appeal and quash and set aside the lower court's judgments, conviction sentence and proceedings.

B. R. Mutungi
Judge
27/4/2021

Judgment read this day of 27/4/2021 in presence of both parties and Mr. Wallance Shayo holding brief for Mr. Julius Semali for the respondent.

B. R. Mutungi
Judge
27/4/2021

RIGHT OF APPEAL IS EXPLAINED.

B. R. Mutungi
Judge
27/4/2021