

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SONGEA**

**AT SONGEA**

**PC. CRIMINAL APPEAL NO. 01 OF 2020**

**(From Criminal case number 19 of 2020 of Ndengu Primary Court and  
Criminal Appeal No. 12 of 2020 at Mbinga District Court)**

**SABINA KOMBA ..... APPEALANT**

**Versus**

**HENRICK KIHWILI .....RESPONDENT**

**JUDGMENT**

**Date of Last Order: 26/05/2021.**

**Date of Judgment: 07/06/2021.**

**BEFORE: S.C. MOSHI, J.**

This is a second appeal. The first appeal was heard by the District Court of Mbinga. The case originates from Ndengu primary court, and it was registered as Criminal case number 19 of 2020. The appellant was charged with an offence of malicious damage to property contrary to section 326 of the Penal Code, Cap. 16. It was alleged that on 15<sup>th</sup> day of March 2020 around 11: 30 Hours at Nyoni village in Mbinga District, the appellant destroyed Banana plants and cassava plants whose total value was T.shs. 235,000/= the property of the respondent. After a full trial, the appellant was found guilty as charged. Consequently, he was convicted and sentenced to pay a fine of T.shs. 30,000/= or in default, he was to serve imprisonment for a term of two months. He was further

ordered to pay compensation of T.shs. 100,000/=. Aggrieved by the decision of the trial court, the appellant appealed to the District Court where the decision of the trial court was upheld, hence this appeal on one ground as quoted hereunder: -

*That, both the trial court and the first appellate court entertained and adjudicated the case contrary to the law as the nature of the case was the land ownership dispute, thus lack jurisdiction over the case.*

The appellant was represented by Mr. Zuberi Maulidi, advocate whereas the respondent appeared in person. The appeal was disposed off by way of written submission. However, the respondent defaulted appearance and didn't file a reply.

Mr. Zuberi Maulid submitted among other things that, the respondent in the trial court claimed that he is the rightful owner and the appellant trespassed in his land and damaged his property but basing on the records it was doubtful if that the issue of ownership was persuaded by the two courts below to convict the appellant. He argued that, the appellant contended to be the lawful owner as he acquired the said plot from her mother in law and on the other side the respondent during his submission at the appellate court said the plot formerly belonged to appellant's mother in law. He said that, that being the case, the question of ownership and possession of the land in dispute between the parties was the point



in controversial before the trial court and first appellate court. Therefore, the trial court had to wait for the issue of ownership to be resolved first by competent court.

On the other line of argument, he said that, the offence which the appellant was charged with is malicious damage to property; the evidence was not enough to support conviction as the evidence on the record indicates that the respondent found the appellant in his farm taking cassava and bananas there is no information as to what type of cassava and bananas, and in what manner they were destroyed or damaged and they were for what purpose. He said that the mere fact that the appellant was found to have some cassava and bananas does not necessarily amount to malicious damage to property. He cited section 326(1) of the Penal Code which creates an offence when someone willfully and unlawfully destroys or damages property. He also said that it was not stated neither at the trial court nor at the first appellate court who planted the said cassava and banana plants.

He finally prayed that; the appeal be allowed by setting aside and quashing the decision of trial and first appellate court because the trial court and first appellate court erred in law for failure to decide the matter brought before, i.e it to see whether prosecution side proved the case

against the appellant beyond reasonable doubt instead, it went on to determine the issue of ownership of land.

That being the submission, the issue to be determined is whether this appeal has merits.

Looking at the evidence on record closely; the respondent had this to say at the trial court: -

*"mnamo siku ya tarehe 15/3/2020, nilikuwa nimeenda kusali kanisani. Baada ya kutoka kanisani ndugu yangu aliniomba nimchumie maparachichi kwenye shamba langu. Tuliondoka kanisani kuelekea kwenye shamba langu la kahawa ambapo kuna miti ya maparachichi, pembezoni mwa kahawa nimepanda mihogo wakati naelekea eneo hilo nilimuona mshitakiwa akingóa mihogo alishituka na kusimama akatuangalia na akaamua kutoroka na mihogo aliyoshika mkononi akaiachia, nikamchumia Bosco Nombo parachichi nikasema nimfuate M/kiti wa kitongoji ili mshitakiwa ahojiwe kwanini anangóa mihogo tukaelekea magengeni tukamkuta, tukaelekea eneo la tukio nilipigiwa simu na binti yangu akasema mshitakiwa anakata migomba. Tulipofika eneo la tukio tulikuta mshitakiwa anakata mgomba wa mwisho ambao una ndizi, tulipofika pale mshitakiwa alikimbia na kuingia kwenye nyumba ya Sarah Kihwili. M/kiti wa kitongoji alimkuta Narzis Kihwili ambaye ni kaka yangu*



*akamuuliza amefanya nani? Akamjibu labda hao wanaofanya biashara ya kuuza migomba kwaajili ya nguruwe, M/kiti akahoji mbona amemuona mshitakiwa amekimbilia ndani Narzis alijibu hajui . M/kiti aimwita mshitakiwa akatoka na kuja sehemu ya tukio akamhoji kwanini amekata migomba, mshitakiwa akajibu ametumwa, akaambiwa amlete aliyemtuma. Mshitakiwa akaingia ndani ya nyumba tukamsubiri hakutoka. Tukaelekea eneo la mihogo akaingalia na kuniambia niokote mbegu ataniandikia karatasi iende Mahakamani. Tukaelekea nyumbani mwisho wa maelezo yangu”.*

The evidence of the appellant was this,

*"Tarehe 15/3/020 nilikuwa nyumbani kwangu Nyoni, nilikuwa nimepika pombe nikamuona M/kiti wa Kitongoji cha Nyoni kati akaniita nikatoka nje akaniuliza kama nimekata migomba nikakataa. Mwisho wa Ushahidi wangu”.*

That being the evidence of the parties, I wish to state at the outset that in the course of determining the ground of appeal, I will be guided by the canon principle of criminal cases that onus of proof in criminal cases lies with the complainant to prove that the accused person committed the offence which he is charged with beyond a reasonable doubt. The question, in this case is whether

an offence of malicious damage to property was proved. At the trial court the respondent was under the law required to prove the following ingredients of the offence of malicious damage to property;

- (a) The property belonging to the respondent(complainant) was damaged or destroyed.
- (b) That the said property was damaged or destroyed through willful and unlawful actions.
- (c) That the property in issue was damaged or destroyed by none other than the appellant(accused) person.

After hearing both parties the trial court was convinced that the above ingredients were proved by the prosecution side beyond a reasonable doubt. The decision was upheld by the first appellate court. In this appeal the counsel for appellant is complaining that both subordinate courts erred to deal with the issue as it involves land matters.

It is a position of the law that if there is evidence showing that one of the parties has a claim over the land and that, a land dispute has not been finally determined, a charge of criminal trespass based on the land cannot stand. The parties must be referred to the court having jurisdiction in land matters for adjudication. See the case of **Sylivery Nkangaa vs. Rafael Albertho** [1992] TLR 110.



In the case of **Ismail Bushaija vs. R** [1991] TLR 100 a similar observation was made. The court held thus: -

- (i) *Since this case boil down to a dispute of ownership of the shamba which is the subject matter of these criminal proceedings it seems that this is clear defence of bona fide claim of right;*
- (ii) *It is wrong to convict a person for criminal trespass when ownership of the property alleged to have been trespassed upon is clearly in dispute between the complainant and the accused*
- (iii) *When in a case of criminal trespass a dispute arises as to the ownership of the land the court should not proceed with the criminal charge and should advise the complainant to bring a civil action to determine the question of ownership- Said Juma v. R [1968]H.D.C 158.*

The above position was in respect of criminal trespass, and not malicious damage to property. However, it applies to our present case as both involve invasion on the land.

Back to the case at hand, it is evident that the issue of land ownership was not raised when the parties gave their testimonies, rather the trial court's judgement shows that it was raised by SU2 when the trial

court visited the locus in quo that the area having banana plant is hers. However, the proceeding is silent, it does not show what transpired at the locus in quo. I quote the last order the court made before judgement.

*14/4/2020*

*Akidi: J.M Baliza Hakimu Mkazi*

*Washauri:- 1 Malenzewo Ndunguru*

*2 Anitha Tilia*

*Mlal-Yupo*

*Msht-Yupo*

*Sht: Kuharibu mali K/f 326(1) K.A Sura 16 R.E*

*2002*

*SGD*

*Hakimu Mkazi*

*14/4/2020*

*Amri: Ukaguzi wa eneo la tukio utafanyika siku ya tarehe 17/4/2020 kuanzia majira ya saa 5 mchana mlalalmikaji na mshitakiwa muwepo eneo la tukio.*

*SGD*

*Hakimu Mkazi*

*14/4/2020*

However, the proceeding does not show a coram of 17/4/2020, it does not show what went on at the scene of crime. It is only in the typed trial court's judgment at page 8 where the court narrated what SU2 said about ownership of the suit land. Procedurally the trial court was supposed to record what it found in the locus in quo in the trial court

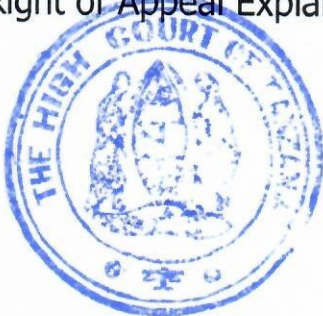


record. Furthermore, it was SU2 and not SU1, the appellant who claimed that the suit land is hers. Therefore, I find that the trial court was right to rule out as it did. To top up all, the judgement shows that the issue of ownership was raised during visit of the locus in quo, I find it to be just an afterthought, if at all she knew that she was the owner, then she was supposed to raise the issue when giving testimony in her defence. To make the matter worse, as indicated earlier, the proceeding record is silent.

Again, when passing through the trial court record, I came across exhibit D1, the record does not indicate the witness who tendered it. It is obvious that the procedures were not followed in its admission, see the case of **Jumanne Mohamedi and two others vs. R**, Criminal Appeal 543 OF 2015 Court of Appeal sitting at Dar es salaam (Unreported) where it was held that after a document is cleared for admission and admitted in evidence it shall be read out to the accused person to enable him understand the nature and substance of the facts contained therein.

That said, this appeal lacks merits. The decision of the trial court is upheld. consequently, the appeal is hereby dismissed in its entirety.

Right of Appeal Explained.



  
**S.C. MOSHI**

**JUDGE**

**07/06/2021**