

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA
HC CRIMINAL APPEAL NO.11 OF 2021

*(Arising from Criminal Appeal No.32 of 2020 Sengerema District, originating from
Nyamatongo Primary Court in Criminal Case No.33 of 2020)*

SARA KAPELA APPELLANT

VERSUS

BUSHESHA FAUSTINE RESPONDENT

JUDGMENT

Date of last order: 25.06.2021

Date of Judgment: 28.06.2021

A.Z.MGEYEKWA, J

This is a second appeal filed by Sara Kapela (the appellant) after her first appeal at the District Court of Sengerema with respect to Criminal Appeal No. 32 of 2020 was unsuccessful.

A brief background to this appeal is that, before Nyamatongo Primary Court, the respondent filed a suit against the appellant. The

appellant was charged for malicious damage to property contrary to section 326 (1) of the Penal Code Cap.16 [R.E 2019]. It was alleged that on 5th October, 2020 around 07:00 hours she maliciously destructed the respondent's room and caused a loss of Tshs. 254,000/= knowing that her act was contrary to the law of this country. After the hearing of the case, the trial court decided the matter in favour of the respondent, and the appellant was found guilty as charged and sentenced to three months conditional discharge.

Dissatisfied and aggrieved by the decision of the trial court the appellant filed an appeal before the District Court of Sengerema and lost the same. Dissatisfied, the appellant preferred the instant appeal. The appeal is predicated on the following three grounds of grievance:

- 1. That, the trial Magistrate erred in law and fact for holding the decision of Nyamatongo Primary Court in favour of respondent without considering that the case was not proved beyond reasonable doubt.*
- 2. That, the trial Magistrate erred in law and in fact for holding the decision of Nyamatongo Primary Court which was based on contradictory evidence.*
- 3. That, the trial Magistrate erred in law and in fact for holding the decision of Nyamatongo Primary Court without considering that it has no jurisdiction in land matters.*

When the matter was called for hearing, the appellant enjoyed the legal service of Mr. Siwale, learned counsel while the respondent enjoyed the service of Mr. Kaswahili, learned counsel.

Mr. Siwale, learned counsel was the first one to kick the ball rolling. On the first ground of appeal, the appellant's Advocate submitted that the appellate court upheld the decision of the trial court while the complainant did not prove his case. He went on to submit that at the trial court the respondent complained that the appellant maliciously destructed the respondent's foundation. He lamented that to substantiate his claims the respondent tendered an exhibit A & B before the court, the same were related to Land Case No. 6 of 2020 which was before the Ward Tribunal.

He added that the Ward Tribunal visited locus in quo and determined that each party was owning her/his plot and the Ward Tribunal made a demarcation. He further contended that there was no evidence that the appellant destructed the respondent's property instead the Ward Tribunal ordered each party to obey the demarcations and observe 1 feet space.

Mr. Siwale did not end there he argued that neither of the parties filed an appeal opposing the Ward Tribunal decision neither, none of them applied for execution. Astonishing, the respondent later on filed a Criminal Case No. 33 of 2020 at Nyamatongo Primary Court while the Ward

Tribunal determined the same case with the same claims that the appellant destructed his properties. He contended that the Primary Court based its decision on the Ward Tribunal judgment and he referred to the same exhibit which was tendered at the Ward Tribunal. Mr. Siwale further submitted that the issue of ownership was not determined to its finality as the matter is pending before the District land and Housing Tribunal of Geita.

It was Mr. Siwale further submission that the Primary Court found that the Ward Tribunal decision was defective still he proceeded to find the appellant guilty as charged. He complained that the appellant builds the said foundation before the existence of the land case at the Ward Tribunal.

Submitting on the second ground, Mr. Siwale contended that the Primary Court decision was based on contradictory evidence thus the same was required to be decided in favour of the appellant. Insisting, Mr. Siwale argued that the claims before the Primary Court in Criminal Case No.33 of 2020, the appellant was charged for destruction of the respondent's properties, and before the Ward Tribunal in Land Case No.6 of 2020, the matter was related to the construction of blocks on the respondent's foundation.

With respect to the third ground, Mr. Siwale argued that the dispute was a land matter, not a criminal matter. He went on to submit that in land disputes the matter is determined by the Ward Tribunal and the District Land and Housing Tribunal. Fortifying his position, he referred this court to section 3 of the Land Dispute Courts Act, Cap.216, and the Land Act Cap.113. He stressed that the Primary Court had no jurisdiction to determine the said case since the issue of who is the rightful owner is not determined.

On the strength of the above submission, the learned counsel for the appellant beckoned upon this court to allow the appeal, quash and set aside the conviction and sentence.

In reply thereto, the learned counsel for the respondent from the outset opposed the appeal and argued that the appeal is misconceived. Submitting on the first ground, he stated that the case was proved beyond reasonable doubt. He went on to state that it is evident that the appellant destructed the respondent's property. To substantiate his submission he referred this court to exhibit C, a sale agreement to prove that the respondent bought the disputed plot in 2016.

He went on to state that, the appellant admitted to have destroyed the respondent's property. To support his submission he citing the case of **Joseph Maganga Mlezi & Another vs R**, Criminal Appeal No. 536 and 537 of 2015. He went on to state that exhibit A shows that the matter was determined to its finality at Ward Tribunal. He added that the issue before the Ward Tribunal was relating to the suit land and the issue before the Primary Court was related to destruction of property. He further argued that the respondent proved the case beyond reasonable doubts and the District Court rightly upheld the decision of the trial Court.

On the 2nd ground, the alleged contradictions that the respondent claimed that the appellant destroyed the respondent's foundation. He claimed that this is the new issue which was not raised at the District Court. He insisted that there is no contradiction as the appellant constructed blocks on the respondent's foundations and went on destroying the respondent's foundation. He insisted that the offence of property destruction is intact and this ground is demerit.

As to the 3rd ground, he objected and stated that the trial court determined the criminal offence and not a land matter and therefore the Primary Court had jurisdiction to determine the matter. He referred this court to section 3 (2) of the Land Disputes Courts Act, Cap. 216 [R.E

2019] and stated that the Primary Court had jurisdiction to determine the matter.

On the strength of the above submission, he urged this court to substitute the 3 months conditional discharge to 7 years imprisonment.

In his short rejoinder, the learned counsel for the appellant reiterated his submission in chief and insisted that there are no evidence on record that the appellant destroyed the respondent's foundation. He retires praying for this court to allow the appeal.

Having heard the submissions of the appellant and the learned counsel for the respondent, I should state at the outset that in the course of determining these grounds, I am not losing sight of the fact that this is a second appeal and as a general rule this court may not interfere with the concurrent findings of facts by the two courts below. Consequently, the trial court found the respondent's claims were genuine and the first appellate court uphold the decision of the trial court.

Therefore as per the general rule referred to above this court may not fault that finding. However, there is an exception to that rule, and that is when the finding has been reached in the misapprehension of facts or wrong interpretation of a principle of law. **In Jafari Mohamed v**

Republic, Criminal Appeal No. 112 of 2006 (unreported), The Court of Appeal of Tanzania held that:-

"An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it unreasonable or perverse leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law: see, for instance, Peters v Sunday Post Ltd. [1958] E.A. 424: Daniel Nguru and Four Others v Republic, Criminal Appeal No. 178 of 2004, (unreported).

In my determination, I will consolidate the first and second grounds because they are intertwined. Except for the third ground will be argued separately in reverse order.

With respect to the third ground of appeal, that the trial Magistrate erred in law and fact to consider that the trial court had jurisdiction to determine the land matter. I have scrutinized the trial court records and found that the respondent lodged a suit at the trial court claiming that the appellant has maliciously destructed properties contrary to section 326 of the Penal Code Cap. 16 [R.E 2019], the claim is a criminal matter in nature. The evidence on record reveals that on 05th October, 2020, the appellant was alleged to have committed the said offence even when she

was restricted by the Village Executive Officer. SM1 and SM2 witnessed the appellant destructing the respondent's property. On his side, the appellant testified to the effect that the disputed land belongs to her. She also referred the trial court to annexure "B" a copy of the Ward Tribunal judgment.

Reading the holding of the trial court on page 3 of its judgment, the trial court found that the appellant faulted herself to proceed with constructing a house without accomplishing the legal procedure.

The trial Magistrate recognized the existence of land case at the Ward Tribunal and the parties were required to execute the Ward Tribunal order. Therefore, in my view, the trial court was wrong to convict the appellant because the trial court verdict and its findings differs. In its findings the trial tribunal observed that there was a judgment delivered by the Ward Tribunal and that the appellant proceeded with construction while execution was not effected and ordered the parties to go back to the Ward Tribunal for clarification of the said judgment. With the findings on the record, the trial tribunal ended to convict the appellant for the offence charged knowing that the issue of ownership was not determined to its finality. Parties were supposed to be given an opportunity to claim damages

Moreover, in my opinion, the trial court did not prove whether the appellant maliciously destructed the respondent's property. The criminal wrong was not determined by the trial court. In order to prove malicious destruction of property the accused person must not have ownership over the disputed property. But in the instant appeal, both parties claimed ownership over the disputed land. The appellant insisted that the disputed area belonged to her. In such a situation, the issue of ownership was not determined to its finality. The tribunal was required to exhaust the hearing of the case and the remedy would be compensation therefore the proper forum to complain was through the tribunal. Therefore, I am in accord with the learned counsel for the appellant that the trial court wrongly determined the case without noting that parties were still disputing the issue of ownership. In the end result, I have found that both lower courts misdirected themselves to decide the matter in favour of the respondent while the parties' dispute was not determined to its finality at the Ward Tribunal.

In order for the trial court to determine the criminal case it was required to satisfy itself that there was no dispute on ownership of the land in dispute. And that where there is a dispute over the ownership of the land in dispute, the criminal matter should stop pending the

determination of the dispute upon land ownership before the Land Tribunal, as observed in the case of **Sylvester Nkangaa v Raphael Alberto** (1992) TLR 110 where it was held inter alia:-

(ii) A charge of Criminal trespass cannot succeed where the matter involved land indispute whose ownership has not finally determined by a Civil Suit via Court of Law.

(iii) A Criminal Court is not a proper forum for determining the rights of those claiming ownership of Land. Only a Civil Court via Civil Suit can determine matters of Land ownership.

Applying the above authority, the charge was is related to a criminal case, however, the findings were based on land matter. In the instant appeal, the Ward Tribunal determined the matter to and no appeal was preferred. However, the trial court in its findings found that the execution did not take place and the Ward Tribunal was required to clarify its judgment. Prudently, the trial court could have put on hold the determination of the criminal matter until the same could be properly instituted before the trial court.

I think the above-discussed deficiencies sufficiently dispose of the appeal. I shall, therefore, not delve to consider the first and second grounds of appeal for the same will not serve any useful purpose.

For the reasons I have endeavored to demonstrate, I entirely allow the appeal. In consequence, I quash the proceedings and judgment of the first appellate court and the trial court. I also set aside the conviction and sentence.

Order accordingly.

Dated at Mwanza this date 28th June, 2021.



A.Z.MGEYEKWA

JUDGE

28.06.2021

Judgment delivered via audio teleconference on 28th June, 2021 whereas the appellant and Ms. Sabina, learned State Attorney for the respondent Republic were remotely present.

A.Z.MGEYEKWA

JUDGE

28.06.2021

Right to appeal fully explained.