IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

PC CRIMINAL APPEAL NO. 24 OF 2019

(Appeal from the District Court of Babati Criminal appeal No.5 of 2019, Originating from Dareda Primary Court Criminal Case No. 113 of 2018)

TLUWAY MARGWE SLAA..... APPELLANT

Versus

BENEDICT SEHHA DIYAYI.....RESPONDENT

JUDGMENT

16th June & 13th August, 2021

MZUNA, J.:

This is a second appeal lodged by the appellant one Tluway Margwe Slaa against the judgment of the Babati District Court which was adjudged in favour of the Respondent Benedict Sehha Diyayi.

The background story of the complaint is that, the said appellant was charged in the Primary court of Dareda with Malicious damage to property contrary to section 326 of the Penal Code Cap. 16, Revised edition 2019 (The Penal code). It was alleged that on 30/09/2018 at 7:45 hours in the village of Seloto, Dareda Ward, Babati District in Manyara Region, negligently and intentionally, he left the cart without control leading to the destruction of respondent's Toyota Noah car with registration Number T507DCY. He was

convicted as charged and sentenced to six months imprisonment. He was further ordered to compensate the respondent Tshs 1,794,000/=.

The record shows, there was a move to pay the respondent Tshs 1, 794,000/- after entering into a settlement agreement to refund him the destruction costs. The appellant did not head to the agreement allegedly that it was not a voluntary agreement, which made the respondent to institute the criminal case. He was convicted and sentenced by the trial Primary court. The appeal at the District court met a snagging block hence the present appeal.

In the petition of appeal, the appellant raised seven grounds which reads as follows;

1. *That, the Appellate Court erred in both in law and fact for failure to observe that the trial court has (sic) no jurisdiction to entertain the suit.*
2. *That, the Appellate Court erred both in law and fact for failure to observe that the matter was civil in nature and not criminal.*
3. *That, the Appellate Court erred both in law and fact when ordered Appellant to pay compensation which is not justifiable in law.*
4. *That, both trial and the Appellate court erred both in fact and law when raised and determined issue which was not part to issues in question.*
5. *That, the Appellate Court erred in law and fact for upholding decision of primary court which based on offence which is not found in court records.*

6. *That, the Appellate Court erred in law and fact for upholding decision which was made relying on contradictory and hearsay evidence.*
7. *That, the Appellate Court erred in law and fact for upholding decision which was made without proof of the intention of the accused.*

During hearing which proceeded by way of written submissions, the appellant appeared in person but was assisted by Legal Aid Unit, Legal and Human Rights Centre Arusha while the respondent was ably represented by Mr. Abdallah Kilobwa and Mr. Ephrahim Koisenge, the learned counsels.

The appeal grounds raise four issues: - First, whether it was a civil or criminal matter? Second, Whether the Primary court had jurisdiction to deal with the matter? The third issue is whether the order for compensation was proper in law? Lastly, what are the merits of the appeal.

In his written submission the appellant decided to drop ground number 6 and argued grounds 1 and 2 jointly which in essence touches on the first and second issues. The question is, was the matter a civil or a criminal matter. If so, what is the appropriate court?

Arguing in support of the said grounds, the appellant submitted that, the matter was all about civil and therefore dealing with it in a criminal way was unjustifiable and illegal. His argument stems from the respondent's claim of being paid Tshs 1,794,000/= the cost of purchasing destructed spare parts

and mechanical repair expertise. Copy of the agreement which the appellant refused to comply with was received as exhibit B.

To him, the respondent's claim amounts to agreement which should be a civil matter rather than criminal.

The respondent's submission is that the respondent's claim relates to the destruction and damage of property to wit, a motor vehicle make Toyota Noah, with registration no. T507DCY. That, the agreement voluntarily entered between the respondent and the appellant was auxiliary to the offence done to his motor vehicle. The respondent further adds that, he decided to file the case after the appellant's failure to honour the promise which has lasted for one good month. It was his view that the court had mandate to deal with the mater as a criminal case. He played for these two grounds to be dismissed for lack of merit.

In his rejoinder the appellant reiterated his earlier arguments and insisted that it was a civil cause not criminal case because it was not proved by evidence that the appellant wilfully and maliciously damaged the respondent's motor vehicle as it is asserted but that is the cart which did so. It was his view that the elements of malicious damage to property could not be proved to the required standard of proof.

This issue should not detain me. The question to ask, in the first issue, was the matter a criminal or civil? The relevant provision, Section 326 (1) of the Penal code under which the appellant was charged with reads;

> *326(1)* ***Any person who wilfully and unlawfully*** *destroys or damages any property is guilty of an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years. (Emphasis supplied).*

This provision talks about "person" who wilfully and unlawfully destroys or damages any property. The available facts, shows, it is the cart belonging to the appellant which damaged the vehicle of the respondent not the appellant himself. There is nowhere in the trial proceedings which established that the cart was accompanied by the appellant in person or by his agent and intentionally or negligently left it and thereby leading to the destruction. In such a situation the intention or *mens rea* which forms wilfulness as one of the ingredients establishing the offence the appellant was charged with, could not be established.

I am fortified to this view by the case of **Lawrance Mateso Versus Republic** [1996] TLR 118, 121 that:-

> *"What constitutes the offence of malicious damage to property? I start with that. Before a person is convicted of that offence, malice, inter alia, must be admitted or proved. But the word malice here is not used in the sense understood by the layman; it is used in a technical sense. Here the word does not necessarily mean personal spite against the*

owner or possessor of the damaged property. It is enough if the accused intended wrongful damage to the property, because if that intention is admitted or demonstrated to have existed, the law will presume malice. The presumption is, of course, rebuttable."

I agree with that finding. By so looking, the intentional element which is one of the subjective elements of the offence of malicious damage to property was not so well proved. So, to speak, when one of the elements establishing the offence which the appellant was charged with is not proved that offence is not proved beyond reasonable doubt.

Not every wrong must be punished in a criminal case. In our case, there is no dispute that the cart which damaged the property of the respondent belonged to the appellant. The only option available to the respondent was to institute a civil suit on tortious liability. It is here where the question of jurisdiction comes into play, relevant for the second issue. In the case of **Jacob Mwangoka v. Gurd Amon** [1987] TLR 165 (HC), Mroso, J (as he then was) that:-

"It is not quite clear to me what the District Court meant by saying that the appellant's claim was "under the law of tort" and that a primary court had no jurisdiction to entertain it. We know that there are torts which come under customary law."

The present matter fell under tort of negligence, it is a common law tort (not customary law) and therefore not triable in the Primary court. That would mean, it was not criminal matter but a civil matter triable in other

courts not primary court. The primary court lacked jurisdiction to deal with the matter for the above stated reasons. This is also cemented by another similar High court decision of **Daniel v. Koyak** (1971) H.C.D 323. This is an answer to the second issue.

For that reason, the first and second issue are answered that the matter ought to have been a civil case not criminal case. Since it was a tort of negligence, a common law tort so to speak, definitely, the Primary court had no jurisdiction to entertain it. The respondent if he is still minded may institute a civil suit in the appropriate court.

That said, the conviction, sentence and order for compensation are hereby set aside. Appeal allowed.

M. G. MZUNA,
JUDGE.
13/08/2021.