

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

AT ARUSHA

PC. CRIMINAL APPEAL NO. 4 OF 2021

(Originating from Karatu District Court in Criminal Appeal No. 28 of 2020 originally from Karatu
Primary Court in Criminal Case No. 452 of 2020)

THOMAS AWTUAPPELLANT

VERSUS

CHRISTINA AWTU RESPONDENT

JUDGMENT

22/07/2021 & 5/10/2021

GWAE, J

In the Karatu Primary Court, the appellant, **Thomas Awtu** complained to the police against the respondent, **Christina Awtu** for the offence of unlawful creating disturbance by restraining him from unloading building especially sand from a tractor on a parcel of land on which he was constructing a house, the act which is contrary to section 89 (1) of the Penal Code, (Cap 16, Revised Edition, 2019). It was alleged that on the 27th August 2020 at about 09: 30 hrs at Masabeda area within Karatu District in Arusha Region, the said respondent did commit the said offence.

In its conclusion, the primary court of Karatu (trial court) found that the appellant failed to prove his ownership over piece of land where the alleged

commission of the offence occurred considering the fact that the respondent also claims to be a lawful owner of the same piece of land. For the sake of clarity, part of the trial court's holding is reproduced herein under;

"Kwa vile SM1 alidai eneo lake ambalo SU1 alienda kufanya fujo kwa kuzuia trekta isimwage mawe., na hakuweza kuleta uthibitisho wa umiliki wake kwenye eneo, ni wazi kwamba hajaweza kuthibitisha shitaka pasipo kuacha shaka yoyote ile. Kwa sababu ameacha mashaka mengi kuhusiana na nani ni mmiliki wa eneo tajwa ambalo fujo ilifanyika. Kwani SU1 naye anadai eneo lake, na ndio sababu ya kwenda kumzuia dereva wa trekta isimwage mawe.... SMI alikuwa na wajibu wa kuthibitisha kuwa SU1 alienda kufanya fujo kwenye eneo lake na sio eneo ambalo lina mgogoro....."

Aggrieved by the trial court's decision acquitting the respondent, the appellant appealed to Karatu District Court at Karatu (1st appellate court) where his appeal was dismissed on the ground that, the respondent was constitutionally entitled to protect her property. Still dissatisfied, the appellant filed this appeal to the court armed with five grounds of appeal though in essence there are four grounds, namely;

1. That, the 1st appellate court erred in law and in fact in bringing the issue of the deceased's estate which was not the case before the trial court

2. That, the 1st appellate court erred in law and in fact in misinterpreting section of the offence under which the respondent was charged with.
3. The decision of the 1st appellate court has miserably caused injustice in the eye of the law.
4. The 1st appellate court erred in law and in fact in disregarding the petition of appeal before it and in the end, it arrived at erroneous decision

On the 22nd July 2021 when the parties appeared in person for hearing, it was ordered that, this appeal be disposed of by way of written submission. Subsequently, the parties filed their respective written submissions to the court accordingly.

Arguing the **1st ground of appeal**, the appellant stated that his institution of criminal proceedings against the respondent amounted to neither questioning or reviewing a civil matter before the trial court nor does it interfere with independence of judiciary since in the present criminal matter, the respondent was unjustifiably preventing the appellant's workers from depositing the building materials.

In the 2nd ground, the appellant argued that the appellate court failed to comprehend the charge and the meaning of brawls and it failed to take judicial notice as provided for under section 43A section 59 (a) of the Evidence Act, Cap

6 Revised Edition, 2019 and the judicial decision in **Isidore Tusevo vs. Altvate** (2005) that the respondent was previously convicted of the same offence.

The appellant equally expounded the **ground no. 3** by stating that, the pronouncement by the courts below that, the matter was either probate or land dispute is unnecessary importation of endless litigation while the former dispute was determined vide Probate and Administration Cause No. 27 of 2016 filed in the trial court.

Supporting **ground 4** of the appeal, the appellant argued that it was a misdirection on the part of the 1st appellate court for its failure to determine grounds of appeal before it.

Opposing this appeal and praying this court to be pleased to uphold the concurrent decisions of the lower courts, the appellant argued that, the 1st ground of appeal is baseless since the land on which the appellant was after building a house was among the deceased's estate that was not yet distributed by the appellant to the heirs.

Responding to the appellant's submission on the 2nd ground of appeal, the respondent argued that there was no wrong interpretation of the provision of the law by both court of first instance and the 1st appellate court except that the courts below were of the view that the case was not proved beyond reasonable

doubt to warrant conviction. He then referred this court to section 9 of the Penal Code (Supra) and a decision in **Ismail Bushaija v. Republic** (1991) TLR 100 where it was held that;

“Since this case boils to a dispute of ownership of the shamba which is subject matter of these criminal proceedings, it seems that this is a clear defence of bonafide claim of right”.

Equally, the respondent argued that, the 3rd ground 4 is meritless for the reason that, the substantive justice of the parties can only be determined in either probate case to determine exclusivity of other deceased's heirs if so or in land case to determine ownership of the suit land, the source of the institution of these criminal proceedings. He also argued that the appellant as an administrator has no right whatsoever to commence construction over the property.

The respondent also attacked the appellant's submission on the 4th ground by stating that, the 1st appellate court properly directed its mind to important and relevant issues that is to say, the matter is either probate or land dispute.

In his rejoinder, the appellant stated that, the sand was to be deposited not in a virgin land but the site where the house was demolished and that it was imprudent to believe that the respondent had been bequeathed the estate of the

appellant's late mother. He further stated that a claim of right is applicable when a person holds a genuine belief that he or she has a legal right over certain property or money.

Having briefly outlined the parties' written submissions in respect of the raised grounds of appeal contained in the petition of appeal as portrayed herein above, I should determine each ground of appeal seriatim and when it appears necessary two or more grounds may be jointly determined.

1. That, the 1st appellate court erred in law and in fact in bringing the issue of the deceased's estate which was not the case before the trial court

It is lucidly depicted in the 1st appellate court's judgment where it was held that, the dispute between the parties is either a probate case or a land dispute.

Examining the trial court's record especially the testimonies of the parties which is to the effect that, the appellant is an administrator of his late father (See letters of administration-PE1) who is also the late husband of the respondent.

The respondent is thus a step mother to the appellant. According to the testimony of the appellant, elements of criminality is only based on the appellant's accusations that, the respondent went to the scene of crime while armed with a stick which she intended to use inflicting the appellant on his head ("Trekta ilipokuja, mshtakiwa alikuja na fimbo akitaka kunipiga kichwani

nikakwepa). On one hand, the dispute was on ownership of the parcel of land on which the appellant's late mother was alleged to have been living and the appellant is claiming to be given by his late father before his demise. Parts of the appellant's testimony is reproduced for easy reference;

"Mshtakiwa akaondoka tukaenda kumwaga mawe....tukapata barua kutoka ofisi ya Kijiji tusiendeleo kufanya kazi eneo hilo. Xx Eneo ni langu kabla hujaolewa...marehemu baba aliniambia ni jenge kwenye eneo hilo... eneo nilolopeleka mawe ni langu".

Similarly, the respondent is also found strongly contending that, she is a lawful owner of the land where the alleged offence occurred as she was given to her by her late husband before he passed away as revealed by pieces of evidence adduced during her defence (Nilimwambia dereva asiingie kwenye eneo langu.. marehemu alifanya mgao kabla hajafariki...eneo tunalogombania na ninaloishi liko ndani ya fensi moja...xxSU3 eneo ni la mshtakiwa.. mgao ulifanyika wakati wa uhai wa baba...").

That being the case as intimated above, the finding of the 1st appellate court was not absolutely erroneous since the evidence on record envisages that the dispute may be either a probate cause necessitated by a failure by the appellant as an administrator to distribute the estate of the deceased person, the

late **Awtu** or a land case where either of the parties may institute a land proceeding before a competent court where the parties will be availed an opportunity to establish ownership over the disputed parcel of land since each party is claiming to have been given by the said deceased erstwhile to his demise. Thus, this ground is dismissed.

2. That, the 1st appellate court erred in law and in fact in misinterpreting section of the offence under which the respondent was charged with.

Before answering this ground of appeal, I would like to reproduce herein under section 89 (1) of the Penal Code (supra) in respect of the offence which the accused person now respondent stood charged with;

“89 (1) Any person who-

(a) uses obscene, abusive or insulting language to any other person in such a manner as is likely to cause a breach of the peace; or

(b) **brawls or, in any other manner, creates a disturbance in such a manner as is likely to cause a breach of the peace** (bold supplied)”,

In his submission, the appellant argued that the 1st appellate court erred in law for its failure to properly interpret the above cited and bolded provision of

the law as a result it unwarrantedly acquitted the respondent. from the outset, I am mindful of the position of the law that, existence of either a land case or probate and administration cause may not justify a person who is party to either one or both cases or having a genuine claim of right, to commit an offence such as murder, malicious damage to properties, abusive language, threatening to kill and so on and so forth, on an account, that she or he claims ownership of a piece of land **unless** an offence with which an accused person stands charged is or bonafide claim of right (see **Ismail Bushaija v. Republic** (supra) where each part is claiming to be a rightful owner of a subject matter allegedly stolen or an offence of a criminal trespass over a piece of land where each party is claiming to be owner of the same as was correctly decided in **Saidi Juma v. Republic**. (1968) HCD 158 where it was held that;

~~“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. Parties are to be directed to start a civil action before the District Court of Kondoa to settle the issue of ownership”.

In in this criminal matter, as earlier explained, the offence if proved to have been committed to the required standard, the respondent would have been convicted contrary to the views of the trial court as well as that of the 1st

appellate court which were to the effect that, since the parties are observed to have claimed ownership, thus question of ownership should be established first before an institution of a criminal proceeding. This was wrong as complained by the appellant since the offence under section 89 (1) (b) of the Code (supra) must contain acts creating disturbance in such manner as is possibly to cause breach of the peace such as scuffles, fights (fracases) or clashes. Since the appellant was accusing the respondent to have intended to inflict him by using the stick, act which was likely to cause breach of the harmony, the courts below were to assess the evidence on record and see if the offence against the respondent was proved to the required standard instead of basing their decision on question of ownership. Having taken that direction, this ground is therefore merited.

In the 3rd and 4th ground, that, the decision of the 1st appellate court has miserably caused injustice in the eye of the law and that the 1st appellate court erred in law and in fact in disregarding the petition of appeal before it and in the end, it arrived at erroneous decision.

Examining the records, I am really persuaded by the appellant that, the 1st appellate court was duty bound to determine the grounds of appeal contained in the appellant's petition of appeal. However, as vividly depicted by the judgment of the 1st appellate court, the learned Resident Magistrate generally and briefly determined the appellant's appeal without analyzing the evidence adduced

before the trial court as complained in the ground No. 2 and 3. That was wrong since the 1st appellate court ought to have ascertained if the evidence was properly assessed by the trial court and if otherwise to step into shoes of it and analyze the evidence on record (See **Kukal Properties Development Ltd v. Maloo and others** (1990–1994) 1 EA 281).

Nevertheless, when I pass through the evidence on record, I am not convinced if the appellant sufficiently proved the offence against the respondent. I am of that view simply because the appellant had plainly complained that the respondent intended to inflict him on his head by using a stick but he managed to avoid however his witnesses, PW2, PW3 and PW4 gave different versions from the appellant's testimony by testifying that, the respondent chased away the appellant, the threatened the driver by the stick (PW2."akamnyoshea dereva fimbo na kumkimbiza mlalamikaji" PW3...."akamnyoshea fimbo mlalalmikaji akasema mawe hayatarudi"...PW4 na kumnyoshea dereva fimbo"). Therefore, the appellant's witnesses including PW5 did not support the appellant's evidence at all.

When I further carefully looked at the testimonies of the respondent and her witnesses, I have noted that the respondent had raised serious doubts as to who precisely caused a breach of the peace as the respondent's defence is to the effect that, it was the appellant who, during quarrel or fracas, forcibly pushed

the respondent by using his body (“alimsukuma kwa mwili”) and her testimony was glaringly supported by that of DW4 and DW6 (See typed proceedings at page 30 and 35).

Since onus of proof in criminal cases is always on the shoulders of the one who complains/prosecution (Case of **Jonas Nkize v. Republic** (1992) TLR 213 adopted). It follows therefore, the appellant was duty bound to prove the respondent’s guilt to the required standards since it is not in dispute that, the respondent was looking after her livestock and had a stick but that alone is not capable of making her liable as mere possession of the stick does not necessarily construe an intention to assault the appellant and considering the apprehended contradictions of the appellant’s evidence, I therefore find the appellant to have failed to prove his case beyond reasonable doubt.

In the upshot, this appeal lacks merit to the above extent, the same is partly dismissed

It is ordered accordingly



M. R. GWAE,
JUDGE
05/10/2021

Court: Right of appeal explained fully



M. R. GWAE,
JUDGE
05/10/2021

Court: Parties are at liberty to collect their copies of judgments from collection desk as the same are collectable from today



M. R. GWAE,
JUDGE
05/10/2021