IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA.

PC CRIMINAL APPEAL NO. 17 OF 2020

(C/F Babati District Court Criminal Appeal No. 48 of 2019, Originating from Gallapo Primary Court, Criminal Case No. 107 of 2019)

DEEMAY HANGURY ..... APPELLANT

Versus

MOHAMED FARAH ..... RESPONDENT

JUDGMENT

11th August & 29th October, 2021

Masara, J.

The Appellant and one Juma Farah (who is not a party to this appeal), stood charged with the offence of unlawful damage to property contrary to section 326(1) of the Penal Code, Cap. 16 [R.E 2002] before Gallapo Primary Court (hereinafter "the trial court"). It was alleged by the Respondent that the two did damage his maize by grazing their herds of cattle in his farm on 31/5/2019 at 1400hrs to 1500hrs, at Endadosh village, Babati District and Manyara Region. The Appellant and his colleague denied commission of the offence. After hearing evidence, the second accused (Juma Farah) admitted the offence. He prayed to have the matter settled out of court. That prayer was granted; hence charges against him were withdrawn. The Appellant maintained his innocence and preferred to proceed with the case. The trial court found the Appellant guilty as charged. He was convicted and sentenced to serve six months imprisonment and thereafter pay the Respondent TZS 1,040,000/= as compensation for the destroyed maize.

That decision did not please the Appellant, he appealed to Babati District Court (hereinafter "the first appellate court"). The first appellate court dismissed the appeal. Still aggrieved, the Appellant has preferred this second appeal on the following grounds:

a) *That, the 1st appellate court ought to have made a finding of fact that the decision of the trial court was illegal for failure to cite subsection creating the offence;*
b) *That, the 1st appellate court erred in law and in fact for failure to properly re-evaluate the decision and decree thereon of the trial court as the prosecution did not prove the aforesaid criminal case beyond reasonable doubts;*
c) *That, the 1st appellate court erred in law and fact when it upheld the decision of the trial court which was marred by irregularity; and*
d) *That, the decision of the 1st appellate court is bad in law for lack of legal reasoning.*

At the hearing of the appeal, the Appellant was represented by Mr. Kuwengwa Ndonjekwa, learned advocate, while the Respondent appeared in Court himself, unrepresented. The appeal was heard orally.

Submitting in support of the first ground of appeal, Mr. Ndonjekwa contended that the charge against the Appellant was defective in that the charge only cited section 326 of the Penal Code; but, section 326 has several sub sections, none of which was cited. To support his assertion, he referred the Court to the decision in the case of **Shedrack Loshoc @Lotha Vs. Republic**, Criminal Appeal No. 28 of 2016 (unreported) which was cited in **Jonas Ngolida Vs. Republic**, Criminal Appeal No. 351 of 2017 (unreported). In those cases, non-citation of a particular sub-section or paragraph was held to be fatal, because the Appellant was not informed the particular offence he had committed.

On the second ground, Mr. Ndonjekwa submitted that the first appellate court failed to assess the evidence obtained at the trial. To him, the evidence tendered by the prosecution did not prove the charges against the Appellant beyond reasonable doubts. He maintained that at the trial court the Respondent (PW1) did not mention the number of cows that entered in the farm. Similarly, PW2 differed in the number of cattle/goats, therefore the prosecution evidence was insufficient to prove the charges. He cited the case of ***Johnson***

Makorobera and Another Vs. Republic [2002] TLR 296, which held that a person should be convicted on the strength of the prosecution evidence beyond reasonable doubts. According to Mr. Ndonjekwa, there is no evidence to prove that the cattle entered in the farm of the Respondent.

Regarding the third ground of appeal, Mr. Ndonjekwa submitted that there were procedural irregularities at the trial court. He asserted that the trial court record shows that they visited the *locus in quo*, but the Appellant was not involved nor was he given opportunity to challenge the evidence obtained at the *locus in quo*. According to Mr. Ndonjekwa, the valuation report was made in the Appellant's absence. He also faulted the trial court decision on the ground that assessors were not involved as required by section 7 of the MCA. He insisted that the trial court record does not suggest that assessors gave their opinions. To support his contention, he cited section 37(2) of the Magistrates Courts' Act, Cap. 11, which requires participation of assessors in the trial court's decision.

Mr. Ndonjekwa did not submit on the 4th ground of appeal. It was accordingly marked as abandoned. He concluded by praying that the appeal be allowed and the decisions of the two lower courts be quashed and set aside.

On his part, the Respondent submitted that the Appellant was charged with another person and he admitted in writing that his 39 cows entered and destroyed the Respondent's 4 acres of land. The other accused person admitted that his 25 goats did the same and asked to settle the matter out of court. That both accused persons at the trial court admitted in writing and the Bwana shamba made a valuation report. During the making of the valuation report, the Appellant was summoned but he did not attend while they are neighbours. According to the Respondent, it is not true that the Appellant did not attend at the *locus in quo*. He was the one who asked the court to visit the *locus in quo*,

and he contributed the money to move the court there. Therefore, the Appellant attended, he also prayed to settle the matter out of court, but they failed to agree on the terms.

The Respondent maintained that assessors participated in the trial court; that they asked questions during trial, and they participated in the trial court judgment. They also agreed with the verdict; thus, it was a decision of the court and not only the magistrate. Also, the Appellant asked the court to give him suspended sentence of one month. The Respondent prayed for dismissal of the appeal with costs.

In a short rejoinder submission, Mr. Ndonjekwa averred that it is not true that the Appellant admitted the offence. Regarding ownership of the cows, he stated that even the Respondent did not know whose cattle they were.

I have considered the grounds of appeal and the submission made by Mr. Ndonjekwa as well as that of the Respondent. The issues for consideration in this appeal are whether the trial court record was marred with irregularities as suggested by Mr. Ndonjekwa, and whether the prosecution proved the case against the Appellant beyond reasonable doubts.

The first issue reflects the 1st and 3rd grounds of appeal. According to Mr. Ndonjekwa, the charge sheet was defective for failure to cite specific paragraph of the offence the Appellant was charged with. In my view, this submission is flawed. It is evident that Mr. Ndonjekwa did not scrutinize the trial court records properly. The trial court records show that the Appellant was charged with the offence of malicious damage to property contrary to section 326(1) of the Penal Code, Cap. 16 [R.E 2002] and not section 326 as the learned advocate alleges.

In my view, that is the proper section for the offence the Appellant stood charged. For the purpose of clarity, that provision provides:

> *"326.- (1) Any person who willfully 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."*

That section is a general section on malicious destruction to property. It makes reference to any item or property that is not mentioned or covered under section 326(2) to (9) of the Penal Code. My perusal of all subsections and paragraphs of that section reveals that there is no specific subsection or paragraph which deals with destruction of agricultural products such maize, which is the subject matter that was destructed in the appeal under determination. In the absence of such specific subsection, resort is made to subsection 1, which is a general one. That sub section is the one that creates the offence of malicious damage to property. The decision in ***Shedrack Lashoc*** (supra) referred to by Mr. Ndonjekwa is distinguishable because in that case the charge was found defective for failure to cite the provision creating the offence.

Even if it was to be taken that the cited subsection 1 was not the proper subsection, as Mr. Ndonjekwa suggests, still the charge would not be defective. I hold this view because failure to cite the relevant subsection would not render the charge defective where particulars of the offence and the evidence on record sufficiently informed the Appellant about the charge he was facing and he readily made his defence by calling a witness. I do not find any prejudice suffered by the Appellant. In this view, I am fortified by the decision of the Court of Appeal in ***Jamali Ally @ Salum Vs. Republic*** Criminal Appeal No. 52 of 2017 (unreported), where it was held inter alia that:

> *"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all*

possible prejudices. Hence, we are prepared to conclude that the irregularities over non-citations and citations of the inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA"

Thus, the contention that the Appellant was convicted based on defective charge is unfounded.

Next, Mr. Ndonjekwa faulted the proceedings and decision of the trial Court stating that assessors were not involved in the decision. On his part, the Respondent resisted the argument stating that assessors were there from the hearing of the case to the composition of the judgment. I do note from the trial court records that from 24/7/2019 when the charge was admitted in court to 9/8/2019, the case was before C. S. Tuji RM. On 9/8/2019, he heard three prosecution witnesses, SM1, SM2 and SM3. The record does not show if assessors were involved at the hearing of those witnesses. However, on 30/8/2019, the file was re-assigned to C. Frank, PCM, after the C. S. Tuji was transferred to another working station. The record further shows that on that day, the successor magistrate decided to re-hear all the three prosecution witnesses after she failed to read the handwriting of her predecessor magistrate. On that day, the charges were read over to the accused persons who entered a plea of not guilty. The case was re-heard, and throughout hearing of the case, the trial magistrate sat with two assessors, Hiiti Emmanuel and Safari Baghayo. The record shows that the two assessors participated at the hearing of all the witnesses and also in the decision. They signed all the proceedings and the judgment. Mr. Ndonjekwa's contention that assessors did not participate at the hearing of the case is therefore not backed with the records. I therefore hold that section 7 of the Magistrate Courts Act was properly complied with by the trial court.

The other issue raised by Mr. Ndonjekwa hinges on the visit to the *locus in quo* by the trial court. Mr. Ndonjekwa contended that the Appellant was not involved at the visiting of the *locus in quo* and that he was not given an opportunity to challenge the evidence obtained there. The Respondent refuted the assertion, stating that it was the Appellant who prayed that the trial court visits the *locus in quo* and they shared the costs of moving the court there.

My perusal of the trial court record shows that on 3/9/2019, after hearing the defence witnesses, the Appellant prayed that the court visits the *locus in quo*. After that prayer, the Court did not make a determination whether it was to visit the area or otherwise. It just fixed a day of judgment. Incidentally, page 4 of the trial court typed judgment makes reference to what was found when the court made a visit. The relevant part reads:

> *"Mahakama hii tukufu kupitia Ushahidi uliotolewa mbele yangu ilianza kujibu hoja hizo kama ifuatavyo:* ***hakuna ubishi kuwa mali ya Mlalamikaji imeharibiwa hii ni kwa sababu Mahakama hii tukufu ilienda eneo la tukio na tuliona eneo limechungiwa."*** *(Emphasis added)*

The above prescript shows that the trial court visited the *locus in quo* and found that the Respondent's farm was grazed. However, that record and what transpired thereat, is not part of the trial court record. Ordinarily, a visit to a locus in quo is made in land disputes of a civil nature. It is made in order for the trial tribunal to determine certain issues. It is rarely done in criminal matters. Even when it is made, the same cannot be a basis for convicting or acquitting an accused person. In civil matters, the proceedings at the *locus in quo* forms part of the trial court proceedings. If it is not included, that omission becomes an appellate court is not in a position to speculate what was found at the *locus in quo*. The Court of Appeal decision in **Avith Thadeus Maşsawe vs. Isidory Assenga,** Civil Appeal No. 6 of 2017, while making reference in its previous decision in **Nizar M. H. vs. Gulamali Fazal Janmohamed** [1980] TLR 29, gave detailed procedure on visiting *locus in quo*. It held:

"When a visit to a locus in quo is necessary or appropriate, and as we have said this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with much each witnesses as may have to testify in that particular matter, and for instance if the size of a room or width of road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated. Witnesses then have to give evidence of all those facts, if they are relevant, and the court only refers to the notes in order to understand or relate to the evidence in court given by the witnesses. We trust that this procedure will be adopted by the courts in future."

As stated earlier on, the procedure of visit a *locus in quo* in a criminal matter is not mandatory. It is unfortunate that the trial court made reference to it. The trial court was not sitting as a land tribunal, its duty was to determine whether the charges against the Appellant were proved or otherwise. No wonder that the first appellate court did not make any reference to such visit. It only examined the evidence and was satisfied that the case against the Appellant was proved to the hilt. Challenging the visit at the locus in quo was made at the first appellate court, albeit on other grounds. In the written submissions filed by the same advocate, the Appellant said the following at page 5 of the written submissions:

"Your honour, at page 5 of the typed judgment the trial court is shown to have visited locus in quo to assist the Respondent in adducing evidence. Being the trial court it ought to receive evidence and make an appropriate evaluation of evidence and reach to affair (sic) decision. ***Visiting locus in quo could be of supportive evidence if the case involved dispute of ownership."*** (Emphasis added)

From the submission, the Appellant's advocate was not saying that the Appellant did not attend, but was faulting the visit itself. Unfortunately, the visit, if any, was not made at the instance of the Respondent but the Appellant. The allegation that the Appellant did not participate comes as an afterthought. Be it as it may, I do not think the visit has any relevancy in the determination of

the Appeal before me. Other than the unfortunate comment made by the trial magistrate about the visit, the trial court analysed the evidence before it and concluded that the charges were proved. This decision was confirmed by the first appellate court. I, sitting as a second appeal, has no good reasons to fault the unanimous findings of the two courts below. Like the first appellate court, I agree that the Appellant was rightly convicted. Other than the oral evidence, the trial court examined the written admission by the Appellant and his co-accused. This is what the trial court stated:

> *"Hakuna ubishi kua mshtakiwa ametenda kosa hilo kutokana na maadishi yaliyotolewa mbele ya Mahakama hii ambapo Mshitakiwa alikiri na kusaini na anakubaliana na uharibifu huo na ni mifugo yake ndio iliyofanya hivyo na pia tathmini iliyofanywa."*

The trial court's finding tally with the evidence tendered by the Respondent and the Acting Village Executive Officer, Abbasi Ibrahim (SM2). I therefore have no hesitation to confirm the decisions of the two lower courts, that the charge of malicious damage to property preferred against the Appellant was proved beyond reasonable doubts. Similarly, it is not true that the trial of the Appellant was marred with irregularities.

For the above reasons, this appeal is dismissed in its entirety. The findings of the two lower courts are hereby confirmed.

Order accordingly.

Y. B. Masara
JUDGE
29th October, 2021