IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CRIMINAL APPEAL NO. 22 OF 2020

(C/f Karatu District Court, Criminal Appeal No. 2 of 2020 as Originated from Karatu Primary Court in Criminal Case No. 757 of 2019)

MARTINE PETRO .....APPELLANT

VERSUS

DANIEL PETRO ..... RESPONDENT

JUDGMENT

01/09/2021 & 05/10/2021

KAMUZORA.J.

This a second appeal after the appellant was dissatisfied with the decision of the trial court Criminal Case No. 757 of 2019 and the first appellate court in Criminal Appeal No.2 of 2020. He preferred this appeal on the following grounds as hereunder reproduced: -

1. *That the District Court erred in law and fact to confirm and uphold the conviction of the appellant by the trial court while the case against him was not proved beyond reasonable doubts.*

2. *That the District court grossly erred in law and fact for failure to quash and set a side or nullify the decision of the trial court on the basis that ownership of the subject matter alleged to have been maliciously destructed is in dispute (pure land dispute) therefore the trial court lacked jurisdiction.*

3. *That the District court erred in law and fact to uphold the decision of the trial court basing on the weak and unreliable evidence of the prosecution side (respondent herein) and has failed to scrutinise the evidence on record.*

4. *That both lower courts erred in law and in fact for their failure to take into consideration the appellant evidence in their decision.*

5. *That the trial magistrate erred in law and fact to give judgment without complying with the law regarding participation of the court assessors, but the District Court has totally failed to employ correct reasoning on that.*

6. *That, both lower courts erred in law and fact to entertain the case filed and prosecuted by the respondent on behalf of the estate of Petro Lawala while there is an administrator of the said estates.*

Briefly the background of this matter is that, the appellant and the respondents are siblings sharing the same father (who is now deceased) but each with a different mother. It was alleged that, on 24th November 2019 at Ayalabe area in the district of Karatu in Arusha region, the

appellant maliciously damaged the house of their late father valued at Tshs 450,000/=.

Upon the full hearing of the case before the Primary Court at Karatu (the trial court) the appellant was found guilty hence convicted to serve imprisonment for six months. Being dissatisfied, the appellant preferred an appeal to the District Court of Karatu (the first appellate Court) but still the trial court decision was upheld by the district court hence this appeal.

During hearing of this appeal, the appellant was well represented by Mr. Samwel Welwe while the respondent appeared in person and the hearing of the appeal was done orally. Mr Welwe when submitting for the appeal decided to argue jointly the first and third ground of appeal, the second ground of appeal was argued separately while abandoning the fourth, fifth and sixth grounds of appeal.

Submitting for the first and third ground of appeal, Mr. Welwe argued that, the case was not proved before the trial court beyond reasonable doubt as what is claimed to be damaged is a house at Ayalabe area and there was no witness of the prosecution side who is from Ayalabe area. He went on and submitted that, SM1 resides at Bashai while SM2 resides at Gongali and no one between them was present at the time of the incident.

Mr. Welwe also submitted that, at the trial court the respondent claimed that he was informed of the damage as he was phoned by a person who was not brought to court as a witness. That a witness who was summoned in court his evidence can be tressed at page 50 of the typed proceedings. That, the witness did not witness the incident rather he heard of the incident. Thus, the counsel for the appellant was of the view that, the evidence by SM2 was hearsay evidence which has no weight under the law. For those doubt he argued that, the trial court could have acquitted the appellant as the proof in criminal cases is beyond reasonable doubt.

Mr. Welwe went on to submit that, the other doubt is on the evidence of the complaint. That, the house claimed to be damaged belong to his father Petro Lawala. That, the evidence before the primary court is clear that the administrator of the estate of the father is Levina Petro and the records shows that Levina Petro is the one who informed the respondent on the damage to their father's house. That, failure to call the administrator to testify while she is the one responsible to protect the deceased's properties brings two doubts; one, whether the incident took place, two, whether the house belong to the respondent's father who is the deceased. Basing on those doubts, Mr. Welwe pray this court to allow the

1st and 3rd grounds of appeal as the prosecution evidence was weak and unreliable.

Submitting for the Second ground of appeal, Mr. Welwe stated that, it was not proper to convict the appellant while there was a land dispute over the property alleged to be damaged. He further pointed that, where there is a dispute as to the ownership of land, no offence of criminal trespass or malicious damage to property can stand. He insisted that, there was a land dispute as the respondent claimed that the land belonged to their father while the appellant claimed the land to be his property as given to him by his late mother. That, the said argument was also supported by the respondent who testified as SM1 at page 3 and page 7 of the typed proceedings. That, the appellant's defence reveal that, he has been living in that house and the said evidence being supported by SU2 at page 8 of the typed proceedings.

Mr. Welwe maintained that, basing on the nature of the evidence, there is an issue as to who is the owner of the house alleged to be damaged and that question must be responded to before convicting the accused/appellant. Mr. Welwe went further to state that, since the primary court has no jurisdiction over land matters, it cannot respond to the question of ownership. That, the trial court was supposed to direct the

parties to the land tribunal for determination of the land dispute first. That, it is a defence under section 9 of the Penal Code that a person cannot be convicted of a criminal offence based on properties where there is bona fide claim of right. That, the appellant was supposed to be acquitted.

Mr. Welwel prayed for this Court to allow the appeal and the decision of the two lower courts be quashed and the conviction be set aside and the court give any other order which it thinks fit.

The respondent in reply decided to reply all the grounds of appeal jointly and stated that, Regarding the ownership of the house, it was not a good ground as the evidence of their aunt who is aged 85 reveal that the house belongs to his brother, and they are the children for her brother.

On the argument that no one witnessed the incident, the respondent stated that, in his evidence at page 4 of the proceedings is clear that he went at the scene and found the appellant completing the act of unroofing the house. The respondent insisted that, he witnessed the incident.

On the argument that the case was to be forwarded to the land tribunal, the respondent submitted that, they already have a case filed before the tribunal and what was damaged is the house and not land thus, it was purely damage to property.

The respondent went on to submit that, it is true that the accused/appellant is living in that house, but the house does not belong to the appellant. That, the appellant is the last born and they left him there to live as a family, but they did not allow him to demolish the house and shift the same to another place.

The respondent also submitted on the issue that Levina did not testify and argued that she is a woman and busy attending a lot of cases filed by the Martine who is the appellant in this case. That, since he is also a family member, he had a right to file a charge against Martine since the house belong to their father and no distribution of the deceased properties was yet done. The respondent concluded that, the decisions of the two lower courts were correct and prayed that they be sustained.

In a brief rejoinder, Mr. Welwe reiterated his submission in chief and further added that, section 2 of the Village Land Act Cap 114, define land to include buildings and other permanent structures and one cannot separate ownership of the house from land ownership.

On the evidence by SM2 he insisted that, it was hearsay evidence and despite that she mentioned the house to belong to her brother it was not a

proper forum to establish ownership as the proper person to prove ownership was the administrator who was not called in court.

On the submission that respondent witnessed the unroofing, Mr. Welwe also re-joined that, such evidence is uncollaborated hence weak and cannot prove the case against the appellant. On the claim that the appellant was left to take care of the house, the counsel argued that it is a new matter which was not raised before the primary court, thus rising it at this stage is an afterthought. On the submission that the appellant was taking away the deceased's property Mr. Welwe insisted that, such argument is unsubstantiated as there was a need for proof that the house did belong to the deceased.

Before dealing with the grounds of appeal, I will first address the issue related to the charged sheet as it is the basis of this matter. The appellant was aligned before the primary court for the offence of malicious damage to property. The contents in the particulars of the offence to which the appellant was charged are as hereunder reproduced: -

"Wewe MARTINE s/o PETRO, unashitakiwa kwamba mnamo tarehe 21.11.2019 majira ya saa 10:00hrs huko maeneo ya ALABE, Wilaya ya Karatu na mkoa wa Arusha uliharibu nyumba ya

marehemu baba yetu DANIEL PETRO yenye thamani ya Tshs 450,000/= ukijua kufanya hivyo ni kinyume cha sheria."

From the wording of the particulars of offence as reproduced above, it obvious that the property alleged damaged belonged to Daniel Petro claimed to be the decease. However, the evidence reveal that Daniel Petro is the complaint and not the deceased and the deceased name was mentioned in evidence as Petro. Likewise, the fact shows that the deceased was the father of the person not mentioned. The facts read, *'mali ya marehemu baba yetu'*, whose father it is unknown. Theus there was inconstancies in the charge sheet as pointed out. It has been a trite law that the accused bust be charged with a proper charge and be made to understand the charge he stands to answer. Thus, in to be satisfied that the charge against the accused person was proved beyond reasonable doubt, the trial court must be satisfied that the accused was properly aligned before the court by a proper laid down charge sheet. That was also the holding of the Court of appeal in the case of **Jackson Venant Vs the Republic**, Criminal Appeal No. 118 of 2018 CAT at Bukoba (Unreported) at page 8 that,

" We need to emphasize that, in any Criminal trial, a charge is an important aspect of the trial as it gives an opportunity to the accused to understand in his own language the allegations which are sought to be

made against him by the prosecution. It is thus important that the law and the section of the law against which the offence is said to have been committed must be mentioned and stated clearly in a charge. The charge therefore must tell the accused precisely and concisely as possible the offence and the matters in which he stands charged."
(Emphasis provided)

In the present matter the charge was defective for containing contradictory facts not disclosing the proper name of the deceased who is the owner of the property alleged to be damaged. However, this court asked itself if the defects prejudiced the appellant. The appellant was called to defend himself and his defence reveal that, he real understood the nature of the offence and father was referred to in the charge sheet. I that regard I rule out that the defect was not fatal and did not prejudice the appellant. However, it necessary to address the same to put the records clear.

Now, turning to the appeal at hand, I will first address the 2nd ground as the 1st and 3 grounds are much based on the existence of the evidence proving the offence of malicious damage to property on the required standard.

Regarding the 2nd ground which is based on the propriety of the trial court to determine the matter based on land dispute, it was argued that the district court erred for not considering that there was a dispute over

ownership of the property alleged to be maliciously damaged by the appellant and the fact that the trial court lacked jurisdiction over land matters. The appellant did not deny unroofing the house, but he insisted that the house belonged to him, and he was planning to rebuild the same house to another area. His evidence was supported by SU2 who testified to the effect that the house belonged to the appellant. Now the question is whether a person can be charged for a criminal offence by unroofing the house claimed to belong to him. In my view, the evidence in records suggest the existence of land dispute. While the appellant claim to be owner of the house claimed to be damaged, the respondent claim that the house belonged to their late father. As well submitted by the counsel for the appellant, for the appellant to be properly convicted for the offence of malicious damage to property, there was a need to prove that the appellant damaged the house not belonging to him.

There are various decisions on this issue including the case of **Sylivery Nkangaa V Raphael Albertho [1992] TLR 110** where it was held that,

"A criminal court is not the proper forum for determining the rights of those claiming ownership of land. Only a civil court via a civil suit can determine matters of land ownership."

Also, the case of **Kibwana Mohame V Republic** [1980] TLR 321 where it was held that, "*From the facts there could be no doubt that at the time of the appellants entrance in the land he honestly believed that he was the lawful owner of the land and such belief absolved him from the blame.*"

In the matter at hand, as there was no determination of the dispute over ownership, the appellant was wrongly convicted for the offence of malicious damage to property. The contention by the respondent that the pending land dispute between them does not relate to the damage over the house is weak. Much as the land to which the dispute was filed relate to the land to where the house claimed to be damaged is built and much as the appellant claim to be the owner of the land to which he is charged for damaging the house, it goes without say that the charge for malicious damage to property cannot stand unless the ownership issue is determined. Since the issue regarding the ownership is yet to be determined, the court could not have properly convicted the appellant for the offence of malicious damage to property to which there is dispute if it is the appellants property or the property of the deceased.

At page 3 of the typed judgment of the trial primary court, the magistrate made a finding that the house was a family property despite acknowledging the existence of land dispute before the land tribunal. That finding was blessed by the district court. This court is of the view that,

since the appellant claimed to be the owner of the house alleged to be damaged and since the respondent claimed that the house belonged to their late father, there was matter in controversial relating and the real question of ownership. By starting that the house was a family property, the trial court wrongly assumed jurisdiction in determining the ownership over the land. It is inappropriate in a criminal case to decide on dispute over ownership of land.

Regarding the 1st and 3rd grounds it was argued that the trial court decision was based on weak and unreliable evidence of the respondent. It was insisted that, the case against the appellant was not proved beyond reasonable doubt. I had ample time to revisit the evidence or records, the decision of the trial court as well as the decision of the first appellate court. There is no doubt that the appellant was convicted for the damaging the house belonging to their late father. It was also alleged that one Levina Petro who is the administrator of the estate of their late father was the one who saw the appellant damaging the house. It is unfortunate that she did not report the incident to the relevant authority but to the respondent. Bad enough she did not even appear in court to testify on what she saw. The respondent is the one who appeared and claimed that after being informed by Levina he went at the scene and did find the appellant on the final

stage of unroofing the house. I agree with the respondent that he has right to report a criminal offence. I however agree with the argument by the counsel for the appellant that, if Levina is the administratix of the estate of the deceased to whom the house damaged is alleged to belong, she was in a good position testify on important facts over the matter. The law gives the admonitors powers to protect the interest of the deceased and can sue or be sued for the deceased's estate. Failure to present that witness who clearly knows real fact of the incident and is responsible to protect the deceased properties would have driven the trial court to draw adverse inference toward the complainant's case. It must be noted that, for an offence of malicious damage to property to stand, the court must be satisfied that the elements of the offence created by the provision of section 326(1) of The Penal code Cap 16 R. E 2019 are proved. The section provides as follows: -

" 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."

Being guided by the above provision of the law, for one to prove malicious damage to property then, it must be proved that the accused acted willfully and unlawfully in destroying or damaging the property. The appellant while testifying before the trial court raised a defence that was

the owner of the said house thus, no mens rea could be drawn from the appellant's conduct. The appellants evidence at page 10 to 11 shows that, the house in dispute belongs to the appellant as it was built by him in plot belonging to his mother. With that in mind, the ownership of the damaged property was questionable. The administrator who is the proper person to clear on the issue of ownership of land was not summoned to testify and the respondent during hearing of the present appeal acknowledged the existence of a land dispute. Thus, the evidence presented by the respondent's side before the trial court did not prove the charge against the appellant. It was held in the case of **John Mokolobela Kulwa Makolobela and another V Republic** [2002] TLR 296 that, *"A person is not found guilty of a criminal offence because his defense is not believed rather a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilty beyond reasonable doubt."*

From the above arguments and reasons there to it is considered view that, if the trial court had directed itself to the evidence in support of the charge, it could not have arrived at a conclusion that the offence of malicious damage to property was proved against the appellant. I therefore find that the first appellate court misdirected itself in upholding the decision of the Primary Court since the case against the appellant was not proved beyond reasonable doubt.

In the upshot, I find this appeal full of merit. I hereby quash and set aside both the judgment, sentence and orders arising from both the trial primary court and the District Court. The appeal is therefore allowed.

DATED at **ARUSHA** this 26th day of October 2021

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D.C. KAMUZORA

JUDGE