

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 09 OF 2021

*(Arising from Criminal Appeal No. 05/2021 of Pangani District Court originating from
Criminal Case No. 04/2021 of Pangani Urban Primary Court)*

MBARAKA ZUBERI ABASI.....1st APPELLANT

HASSANI ZUBERI ABASI.....2nd APPELLANT

MOHAMED ZUBERI ABASI.....3rd APPELLANT

-VERSUS-

NASSORO FEHEDI.....RESPONDENT

JUDGMENT

Date of last order: 05/10/2021

Date of Judgment: 26/10/2021

AGATHO, J.:

The Appellants were charged in criminal case No. 04/2021 before Pangani Urban Primary Court for criminal trespassing (c/s 299 of the Penal Code [Cap 16 R.E. 2019]) and stealing coconuts in the farm of the Respondent c/s 258 of the Penal Code [Cap 16 R.E. 2019] and were found guilty, convicted, and sentenced to fine and imprisonment. They were aggrieved by the conviction and sentence entered by Pangani Urban Primary Court, hence they appealed to Pangani District Court (in Criminal Appeal No.05/2021) where the conviction was confirmed, and sentence was elevated from 6 months imprisonment to 11 months

imprisonment. They were dissatisfied by the District Court decision and appealed further to this court outlining three grounds of appeal.

1. That, the Primary Court and District Court honourable Magistrates erred both in law and fact by convicting the appellants without taking into consideration that there is a land dispute pending of which the lawful owner of the disputed land have not yet been determined.
2. That, the Primary Court and District Court honourable Magistrates erred both in law and fact by convicting the appellants basing on weak and unproved evidence beyond any reasonable doubt adduced by the Respondent to prove the alleged offences.
3. That, the Primary Court and District Court honourable Magistrates erred both in law by imposing maximum sentence without giving justifiable reasons and while it was not among the reasons of an appeal before the District Court.

On the date fixed for hearing the parties were ordered by the Court to prosecute the appeal by way of written submissions to which they complied with the court schedule. While the Appellant had the services of learned counsel George Raphael, the Respondent had no legal representation, and prosecute the Appeal by herself.

To determine the appeal the Court asked itself several questions matching the grounds of appeal. While answering and evaluating these issues the Court dispose the appeal. The Court referred to the parties' submissions, the evidence on record (the record of proceedings of Primary Court and District Court, their respective judgments, and the existing law.

1. Whether the Primary Court and District Court honourable Magistrates erred both in law and fact by convicting the appellants without taking into consideration that there is a land dispute pending of which the lawful owner of the disputed land have not yet been determined.
2. Whether the Primary Court and District Court honourable Magistrates erred both in law and fact by convicting the appellants basing on weak and unproved evidence beyond any reasonable doubt adduced by the Respondent to prove the alleged offences. There is sufficient evidence on record that the Appellant committed the offences they were charged with as shown on page 3 of the Primary Court judgment.
3. Whether the Primary Court and District Court honourable Magistrates erred both in law by imposing maximum sentence

without giving justifiable reasons and while it was not among the reasons of an appeal before the District Court.

To begin with whether the Primary Court and District Court honourable Magistrates erred both in law and fact by convicting the appellants without taking into consideration that there is a land dispute pending of which the lawful owner of the disputed land have not yet been determined. The record of proceedings is clear that the Mikunguni Ward Tribunal and Tanga District Land and Housing Tribunal ruled that the owner of the disputed land or farm was the Respondent since he bought it back from Jane Ngwatu (see page 2 of Primary Court judgment). The decision of the District Land and Housing Tribunal of Tanga was tendered as exhibit 1 before the Primary Court (see also ruling of Tanga District Land and Housing Tribunal in Land Appeal No. 16 of 2020 originating from land case No. 32/2019 Mikunguni Ward Tribunal). But on my perusal of the Tanga District Land and Housing Tribunal ruling I noted two discrepancies: first the parties in that case were different from the parties in the Appeal before this Court. In the District Land and Housing Tribunal the parties were Mbaraka Zuberi v Kombo Mnyamani. Second: the decision of Mikunguni Ward tribunal declared Jane Vincent Ngwatu as lawful owner (see page 3 of Tanga District Land and Housing Tribunal judgment). However, Jane Vincent Ngwatu was not a party to

the case before the Ward tribunal and the appeal to District Land and Housing Tribunal. These details are found on pages 3 – 4 of the District Land and Housing Tribunal ruling.

Again, as to whether there was pending land dispute at any tribunal (be it Ward tribunal or District Land and Housing Tribunal) the Primary Court stated categorically on pages 13-14 that it was satisfied that there was not pending land dispute before any tribunal regarding the said farm. That gave the Primary Court impetus to adjudicate on the issues of criminal trespass and theft. Similar view was held by the Pangani District Court in Criminal Appeal No. 05 of 2021 on page 5. In fact, the District Land and Housing Tribunal ruling states (on page 4) when quashing and setting aside the decision of Mikunguni Ward tribunal that:

"the proper parties if they so wish are ordered to file a fresh application before a proper forum."

This was the order of the District Land and Housing Tribunal and that holding is reflected on the Primary Court judgment page 10 and the District Court judgment on pages 5-6.

Regarding the second ground of appeal, whether the Primary Court and District Court honourable Magistrates erred both in law and fact by convicting the appellants basing on weak and unproved evidence beyond any reasonable doubt adduced by the Respondent to prove the

alleged offences. There is sufficient evidence on record that the Appellant committed the offences they were charged with as shown on page 3 of the Primary Court judgment. The general rule in and standard of proof in criminal proceedings is that the charge must be proved beyond reasonable doubt. This was articulated in the case of **Jonas Nkinze v Republic [1992] TLR No. 123**. In the case at hand the Respondent proved his case beyond reasonable doubt, there was eyewitness one Thomas Likoko and there were exhibits (the stolen coconuts). The eyewitness testified on the issue of trespass as well as stealing. It is on record at the Primary Court and District Court that the said witness was threatened by the Appellants as he tried to stop them. These are visible on pages 4 - 5 of the PC judgment. In that premises the case of **Alphonse Mapunda and Benjamin Alphonse Mapunda v R [2006] T.L.R No. 395** is relevant as it cements the holding that the Respondent proved his case to the required standard in criminal cases that is, he proved the charges beyond reasonable doubt as rightly held by the Primary Court and the District Court. From the evidence on record, I have no reason whatsoever to fault the findings of the two lower courts.

In **Ally Kauzeni v R [1985] TLR 79** it was held by Mapigano J, that in the offence of criminal trespass that:

"Now it is self-evident that the section whereunder the appellant was charged and convicted has two essentials:

- (1) Unlawful entry into or upon property in the possession of another (actus reus),*
- (2) Such entry must be with intent*
 - (i) to commit an offence (which was not the allegation), or*
 - (ii) to intimidate, insult or annoy the person in possession of the property (this was the mens rea alleged in the charge in this case)."*

From the above cited case, and since there was no pending land dispute anywhere to implement the order of the District Land and Housing Tribunal of Tanga, I find the case of **Nkangaa v Raphael Alberto [1992] TLR 110** referred to by the Appellant's counsel to be irrelevant. I also do not have to over emphasize that the Appellant did not raise any doubt that could have shaken the evidence adduced by the Respondent in the case at the Primary Court and later District Court.

As for the final ground of appeal, the courts asked itself whether the Primary Court and District Court honourable Magistrates erred both in law by imposing maximum sentence without giving justifiable reasons and while it was not among the reasons of an appeal before the District Court. It is trite law (section 21(b) of the Magistrate Courts Act [Cap 11 R.E. 2019]) that while the Court (the appellate Court) may vary the decision of lower Court either by inter alia lowering or increasing the sentence such increase or lowering should be backed by reasons. The

District Court Magistrate increased the sentence of imprisonment from 6 months to 11 months (seen on page 7 of District Court judgment). In sentencing with exception to offences whose minimum sentences are prescribed by statutory law the Court may impose a sentence that it deems fair and just in the circumstances of a particular case. I should add that that sentencing there are aggravating and mitigating factors. These are the ones that help the Court in imposing a sentence. Were the Appellants repeat offenders (did they have criminal record)? Did they jump bail? Were violent in the commission of the crime? These could be aggravating factors. It is on record that at page 7 of District Court judgment, the Magistrate stated that there has been a tendency in Pangani of people trespassing on other people farms. There was no reason given that the Appellants were among those who have been previously convicted on trespassing. Moreover, the Hon. Magistrate did not give any statistics to justify the heightening of the penalty (sentence). To make it a lesson to others is a general reason for imposing a sentence. In my view that cannot be a sole reason for increasing the sentence. That said I find the 11 months sentence excessive. I therefore lower the sentence to 6 months as was imposed by the Primary Court.

The appeal is otherwise lacking merits, and it is dismissed save for the sentence which I have varied to extent stated herein above.

It is so ordered.

DATED at TANGA this 26th Day of October 2021.




U. J. AGATHO
JUDGE
26/10/2021

Date: 26/10/2021

Coram: Hon. Agatho, J

Appellant: Present

Respondent: Present

B/C: Zayumba

Court: Judgment delivered on this 26th day of October, 2021 in the presence of the Appellant, and the Respondent.




U. J. AGATHO
JUDGE
26/10/2021

Court: Right of Appeal fully explained.


U. J. AGATHO
JUDGE
26/10/2021