

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

(DC) CRIMINAL APPEAL NO. 1 OF 2021

(Originating from the Criminal Appeal No. 60 of 2020 of the District Court of Tanga by Hon. Masua, RM arising from Criminal Case No. 377 of 2020 of the Tanga Urban Primary Court by Hon. M. R. Kombo, SRM)

DONALD KITUNDU.....APPELLANT

-VERSUS-

AKANIWA MARUBE.....RESPONDENT

JUDGMENT

Date of last order: 15/09/2021

Date of the judgment: 20/10/2021

AGATHO, J.:

The background of this case is that the Appellant prosecuted the Respondent in criminal case No. 377 of 2020 before Tanga Urban Primary Court. The prosecution alleged that the Respondent maliciously damaged the property of the Appellant c/s 326(1) of the Penal Code [Cap 16 R.E. 2019]. The Respondent denied the charge and the Appellant brought witnesses in a bid to prove the allegation beyond reasonable doubt. The Primary Court decided that the Appellant has failed to prove the charge against the Respondent beyond reasonable doubt and consequently acquitted the Respondent. The Appellant dissatisfied with that decision he

appealed to the District Court of Tanga. The latter Court dismissed the appeal citing Appellant failure to make submissions on the grounds of appeal. Aggrieved further by the decision of the District Court the Appellant appealed to this Court on the following grounds of appeal:

- (1) That the trial Magistrate erred in law and facts for failure to analyse the whole testimony properly and without bias in order to reach in a time and justifiable decision.
- (2) The trial Magistrate erred in law and facts for not visit in the scene of crime physically to observed about the said damage.

The Court fixed the date for hearing. And on the hearing date the Appellate said that he is adopting his grounds of appeal as they are and he has nothing to add.

Mr. Chanjarika, the Respondent's counsel submitted against all the grounds of appeal and prayed for the Court to dismiss the appeal and upheld the decisions of lower Courts because the Appellant failed to prove the case beyond reasonable doubt. He simply made allegations against the Respondent without any proof.

Before evaluating the evidence on record, I should state clearly that the Appellant ought to level his Appeal against District Court decision. But

looking at the two grounds of appeal the Appellant seems to be aggrieved by the both the decision of trial Court and District Court. Nevertheless, he ought to relate his appeal with the decision of District Court which he is appealing against.

The first ground of appeal reads as follows the "trial magistrate" the second ground again "trial magistrate". The Appellant erroneously crafted his grounds of appeal. They ought to refer to the District Court decision and connecting the same with the trial court decision as he was aggrieved by both decisions.

Nevertheless, for the sake of substantive justice I will proceed to determine the appeal. I will start by re-evaluating the evidence on record. But before doing that, this Court asks itself why when the alleged SU1 was painting the trees in the boundary, neither the Appellant (complainant) nor the hamlet chairperson called the Respondent (SU1) to inquire as to his involvement if any?"

To begin with, I will examine the testimonies of the Appellant (complainant) witnesses. SM4: Abdallah Rajabu Waziri – he was Kitongoji hamlet chair. He testified that they were taken by SU1 (the Respondent) to

be shown the boundaries of his shamba. He did not see SU1 damaging the properties of SM1 (the Appellant).

The other prosecution witness was SM5: Jumanne S. Sendega. He testified that the trees were not damaged, they were pruned, because the branches were cut down. He added that the trees were cut down are in the centre of the farm/shamba, and in the boundaries two trees have been painted red colour.

SM6: Majaliwa Hussein Rajabu – member of Kitongoji Local Government was yet another witness of the prosecution. His testimony was that on 20/03/2020 together with his fellow members and the Chairperson they went with SU1 (Respondent) to his shamba to verify and set boundaries. They painted same tree with red colour and paint "X" mark on the boundaries.

He added that there was no body with a panga. Thus, nobody proved on fell down any tree. He went on stating that when verifying boundaries they simply walked along the boundaries of the shamba.

SM6 stated that he knows SM1's shamba when they were verifying the boundaries he did not see my free damaged or fell/cut down.

SM6 also testified that in the Kitongoji Government meeting nobody said she/he knew who damaged the property of SM1.

SM6 went and testifying that he did neither see anybody cutting/felling the tree nor did he say that he knows the person who damage SM1 properties. This is seen on pages 30 – 33 handwritten proceedings of the trial Court.

With regards to the Respondent (Accused person) SU1 - defence Case, there were witnesses too. The Respondent himself SU1 – Akaniwe Marumbe Mkaya, his testimony is found at page 34 – 37 of the trial Court's handwritten proceedings.

He testified that he went with Kitongoji leaders (Chair and members) to his shamba to put marks on the boundaries. He admitted being at the Police Station and that he was granted bail. Thereafter he was by Bwana shamba and they went to the crime scene. He was charged at the Primary Court for damaging properties of SM1 that is cutting down the trees.

SU1 testified that the trees he painted red colour are in his shamba not in SM1's shamba. That is visible on page 35 of trial Court's handwritten proceedings. He added that nobody had a Panga when they visited the shamba. And he was not alone he was with Kitongoji leaders. This is shown on page 36 of handwritten proceedings of the trial Court.

SU1 testified that the damage (properties) was done at the centre of the SM1's shamba. SU1 testified further that when they were verifying boundaries, they did not go to the centre of the shamba. They do not know who damaged SMI's properties.

SU2 Latifa Saidi a member of Kitongoji Local Government she said she was involved in verifying the boundaries of SU1 shamba. She did not see anybody damaging the SM1's properties. According to SU2, on 30/04/2020 they went to visit the crime scene, she testified that the place when the properties were damaged not when they went to verify boundaries.

SU3, Victoria Julius a member of Kitongoji leaders (local government) testified that they went to SU1 shamba to put boundaries mark. They did not enter SM1 shamba. Nobody had Panga he does not know who damaged SM1 properties. The evidence of SU3 is found on pages 39 – 43 of handwritten trial court proceedings.

As for SU4 the testimony was not useful as he stated that he does not know anything. This is found on page 43 of trial Court handwritten proceedings].

SU5 – Rajabu Abdallah Myevu (pp) member of Mbugani Kitongoji Local Government. He went to do the verification of SM1 shamba boundaries. He

does not know who damaged SM1's trees. In the meeting nobody told a confirmed to SM1 that they knew who damaged his properties.

SU5 testified further that at the meeting it was SM1 who stated that he thanks the Kitongoji leaders while he was recording that in his radio conversation/meeting that he knows who damage his properties. This is visible on pages 44 – 45 of trial Court's handwritten proceedings.

SU5 testified that it was SM1 himself who said he knows who damaged his properties [see page 46]. SU5 said that damage of properties was did far away from where they passed. SM1 filed his claim/complainant a week later, after they were passed to verify boundaries, he further stated that he does not who damaged SM1's properties.

The Primary Court /trial Court on pages 48 – 52 of the proceedings analyzed the evidence of both the complainant and Respondent and concluded that none of complainant Respondent's witnesses who testified that they saw SU1 (Respondent/accused person) cutting down the trees (damaging SM1 properties).

It is the law that he who alleges must prove [Section 110 & 111 of the Evidence Act, Cap 6 R.E 2019]. Again, as it was stated in the case of

Jonas Nkinze v Republic [1992] TLR No. 123 proof in criminal cases is beyond reasonable doubt. Moreover, it was stated in the case

of **Erasimu Daudi v R, (1992) TZ HC 4** that suspicion however strong cannot be the basis for conviction. This was amplified in the case of **Nathaniel Alphonse Mapunda and Benjamini Alphonse Mapunda v R [2006] TLR 395**.

Since the Appellant has for second times during the conduct of the appeal alleged that the proceedings of trial Court and District Court have been mutilated, altered, or not properly recorded. It is for that reason I went through both the handwritten and typed/word processed and printed out trial Court proceedings. I should also add that this Court relied on trial Court and first Appellate Court (District Court) proceedings and judgments. At this second appellate Court, we are dealing with evidence on record.

As for what the trial Court did, I found no fault in the whole proceedings and the judgment. I did not see anywhere in SM1 testimony given before the trial Court where he asked the Court to visit locus in quo (crime scene). However, I noted his concerns about lack of trust with the trial Court and assessors. The trial Magistrate and the assessors recused themselves from

matter. Thereafter, the case was assigned to another Magistrate and new assessors.

I think in the end justice was done and seen to be done. Nevertheless, I do not condone the behavior of the Appellant to place unfounded blames on the trial Court and District Court. It is unfair to paint a bad picture of those who are administering justice without any justification.

As for the District Court judgment the Appellant filed memorandum of appeal but failed to make submissions on the grounds of appeal. The District Court rightly treated that as failure to prosecute the appeal [seen on pages 4 – 5 of District Court Judgment]. The Appellant did not submit anything on the grounds of appeal. He simply insisted that it was the Respondent who damaged his properties. That is on page 5 of the District Court proceedings.

The Appellant also complained that the trial Court did not visit the crime scene. I should state that the Appellant did not ask the trial Court to visit the crime scene. Nowhere in the trial Court proceedings where it is shown that he did make such a request.

But if SM1 made such request to the trial Court, did the failure to visit locus in quo led to failure of justice. My view is that it did not occasion any

failure of justice. I am saying because all SM1 witnesses (except the Appellant himself), and even the Respondent's (SU1) witnesses did not see anyone including the SU1 cutting down the tree (or damaging SM1's properties). Such evidence negates a need for the Court to visit the locus in quo. Moreover, a visit to locus in quo has certain procedure that ought to be followed.

Moreover, there was no dispute that SM1's trees were cut down, rather the dispute was as to who damaged the properties. The answer to this question can be drawn from the evidence adduced by the SM1 and SU1 witnesses. That answer cannot and could not be derived by merely visiting the locus in quo. And the lower Courts did not see a need for visiting the locus in quo. The nature of this case did not require a visit to locus in quo.

The Appellant's complain that the District Court did not visit the locus in quo. This again is not reflected in District Court proceedings. Thus, the request to visit locus in quo (crime scene) was not made. And the Court did not see a need to do so. Otherwise, such an order to visit the locus in quo may be made by the Court even suo motu.

As for the appeal itself, the Appellant during the hearing submitted that he was aggrieved by the decision of trial Court on the reason that it did not

consider his evidence. This was not among his grounds of appeal. And it sounds more like final submission. He is aggrieved by the decision of trial Court by not taking into consideration his evidence. This is seen on pages 3– 4 of District Court judgment.

Apart from that submission the Appellant said nothing about the grounds of appeal. The Appellant insisted that it was the Respondent who damaged his properties. That is apparent on page 5 of the District Court proceedings.

I should stress that neither the trial Court proceedings nor the judgment show that the Appellant asked the Court to visit the crime scene/locus in quo. Therefore, the claim that the trial magistrate refused to visit the locus in quo (the crime scene) is unsubstantiated. He blamed the trial Court and District Court for failure to visit the crime scene while he did not make such request.

As for the voice recording, there nowhere in the trial Court proceedings when the voice recording was tendered. Again the SM6 testified that the record was recorded by SM7 himself when he was telling the Kitongoji leaders that he know who damaged his properties.

Again, as obiter dictum, the admission/tendering and necessary of that voice recording would have offended Section 18(2) and (3)(b) of Electronic Transactions Act, Act No. 13 of 2015, because its maker/recorder is the one who could have tendered it in evidence. Under the aforesaid provisions the reliability of the data message should be established. Moreover, although the authenticity of electronic records system in which electronic record is recorded or stored shall in the absence of evidence to the contrary be presumed where: 18(3) (b)

"...it is established that the electronic record was recorded or stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it..."

But assuming that the record was received in evidence I am of the view that it would have been difficult to prove that it was SU1 (Respondent) who damaged the Appellant's properties because if SMI would have tendered it, the same would have been contradicted by even his own witnesses. As already shown hereinabove that some of the Appellant's witnesses testified that the voice note was recorded by the SM1 himself, and it tells that SM1 knows the person who damaged his properties.

In the end I find this appeal to lack merits and I dismiss it.

DATED at TANGA this 18th Day of October 2021.




U. J. AGATHO
JUDGE
20/10/2021

Date: 20/10/2021

Coram: Hon. Agatho, J

Appellant: Present

Respondent: Present

B/C: Zayumba

Court: Judgment delivered on this 20th day of October, 2021 in the presence of the Appellant, and the Respondent.




U. J. AGATHO
JUDGE
20/10/2021

Court: Right of Appeal fully explained.