IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC CRIMINAL APPEAL NO. 1 OF 2021

(Arising from Rombo District Court Criminal Appeal No. 7 of 2020, Originally Criminal Case No.136 of 2017 of Mengwe Primary Court)

MOSES ELFAS ---------- APPELLANT

VERSUS

EDWARD MOSHI ----------1ST RESPONDENT

WILBROAD HENRY----------2ND RESPONDENT

JUDGMENT

16/11/2021 & 21/12/2021

SIMFUKWE, J.

The Respondents herein were charged before the primary court of Mengwe with the offence of malicious damage to property contrary to **section 326(1) of the Penal Code Cap 16 R. E 2002**

It was alleged that on 03.08.2017 at Mahida Mahango within Rombo District in Kilimanjaro Region, the two Respondents herein Edward Moshi and Wilbroad Henry maliciously damaged 43 trees valued Tsh 3,500,000/= the properties of Moses Elfas the Appellant herein.

Briefly, the facts of the case as captured from the record are set out as follows: the Respondents herein were charged and convicted with an

offence of malicious damage to properties before Mengwe Primary Court (trial court) where they were sentenced to pay a fine of Tsh 170,000/- each or in the alternative, imprisonment for a term of three months. They were also ordered to pay Tsh. 450,000/= each as compensation.

The Respondents herein were aggrieved, they lodged an appeal before Rombo District Court vide Criminal Appeal No.7/2018 in which the matter was ordered to be tried de novo before a Magistrate of competent jurisdiction in order to resolve a land dispute. The Appellant herein was not satisfied, he filed the instant Criminal appeal No. 1 of 2021 before this Court. He raised the following grounds of appeal:

1. *That the Honorable 1st appellate court Magistrate erred in law and fact for allowing the appeal in favor of the respondents herein and set aside the judgment, conviction, sentence and order against them without justification, something which occasioned injustice on both parties.*
2. *That the learned 1st Appellate Court Magistrate erred in law and in fact for delivering judgment which is contradictory by itself and prejudice justice on both parties hence misconception of the law.*
3. *That the 1st Appellate Court Magistrate erred in law and in fact for contending that the accused persons (the respondents herein) didn't objected (sic) that the trees belonged to the respondent (appellant herein), yet quashed and set aside the trial court's judgment, sentence and order without justifiable reasons to that effect, an act which*

rendered injustice to the appellant herein.

4. *That the 1st Appellate court's Magistrate erred in law and fact for raising the issue of ownership of the land something which was not an issue at the trial court, which is misconception of the law.*
5. *That the 1st Appellate Court Magistrate erred in law and in fact for purporting to set aside the conviction, sentence and order against the respondents herein and purported to order re-trial before the trial court to re determine the same on the basis of the ownership of the land while knowing that the trial court has no jurisdiction to determine land cases.*

The appellant prayed that the decision of the 1st Appellate Court be quashed and set aside and the appeal be allowed.

When the matter was set for hearing, due to the fact that both parties were unrepresented, it was prayed and ordered that the appeal be argued by way of written submissions.

The appellant consolidated all the grounds of appeal to be argued as one. He submitted among other things that evidence adduced before the trial court was very clear and left no doubt that the respondents herein deliberately caused destruction of trees and grass planted on the appellant's land without consent/justification which caused him to suffer loss of his properties. He argued that, the trial Magistrate apart from evidence which was adduced before him, he visited the locus in quo and he was satisfied that there was destruction and there was enough evidence that the properties destroyed belonged to the appellant something which was not disputed by the Respondents.

Concerning the issue that the 1st appellate judgment was contradictory, the appellant referred to the court records and stated that the 1st Respondent herein raised the issue of his locus standi, that he was sued in person while he was acting as a village chairperson. Then, the learned Magistrate proceeded to decide that the Respondents herein who were the accused persons before the trial court had admitted to had damaged the trees on the ground that the same were on the road reserve. The Appellant was of the view that, the findings of the 1st appellate court were contradictory, as the trees cannot be on the road reserve and still be the property of the Appellant herein.

The Appellant continued to state that the issue as to whether the trees were planted in the road reserve area was not supposed to be an issue because evidence of SMII at page 3 paragraph 1-3 of the trial court judgment, was so obvious that the damaged trees were on the land of the appellant herein. Further, it was stated that the trial court visited the locus in quo and it was satisfied that the trees were on the land owned by the appellant herein.

In respect of this argument, the appellant was of the view that there no reason to doubt as to whether the property damaged was in the land owned by appellant or in the road reserve. Furthermore, this was not raised in the trial court and the same could not be raised for the 1st time at the stage of appeal since the respondents' witnesses did not testify anything about the road reserve. It was thus commented that the evidence adduced during trial was so clear that the trees were owned by the appellant and were planted in the boundaries as a demarcation of

the land and the road.

The appellant also referred the court at page 4 paragraph 2 of the 1st appellate court which states;

> *"There is also no dispute through the evidence relating to the wording of the above section that the appellants (respondents herein) damaged the trees which belongs to the respondent (appellant herein)"* emphasis added.

Basing on this quoted paragraph the appellant commented that the 1st appellate court should have not allowed the appeal.

Further to that, the appellant faulted the 1st appellate court findings that the trial Magistrate did not show where and how it was satisfied the land where the trees were said to be damaged belonged to the Respondents. According to the appellant, the truth is that the land where the trees were planted belongs to him. He referred to page 3, 1st and 3rd paragraph of the trial court judgment and stated that, the trial Magistrate visited the locus in quo to satisfy himself that the offence was committed by the Respondents. That there was no doubt that the trees were damaged and that the same were owned by the Appellant. In this respect, he condemned the 1st appellate Magistrate's findings that the trees belonging to the respondent was one thing and then the respondent being the owner of the land was another thing. He termed the findings as misconception of the law since the evidence before the trial court was very clear that the damaged trees were owned by the appellant and the same were planted on the boundaries of his farm and the road.

The Appellant submitted further that the perception that the trees were

planted in the road reserve was raised by the 1st appellate Magistrate *suo motu*. The appellant was of the view that had it been that the trees were planted in the road reserve, the remedy was not to destroy them but to sue the accused for trespass onto the road reserve so that he could be ordered to remove the same.

The appellant faulted the cited case of **Laurent Mateso vs Republic [1996] TLR 118** which was quoted by the 1st appellate Magistrate for the reason that the Magistrate did raise the issue of mistake of fact which was not pleaded by respondents during the trial nor at the appeal. He said that the case of **Laurent Mateso** (supra) was distinguishable to this case as the said case was an application for bail which is not the case in this matter.

Also, the appellant faulted the findings of the 1st appellate Magistrate at page 5 of the judgment where she stated:

> *"Therefore, due to the explanation above this court set aside the conviction and sentence and ordered for a Retrial at the trial court before a magistrate of competent jurisdiction and the ownership of land."*

The appellant argued that, the directives and orders quoted above are erroneous since the primary court is not the Land Court as per **section 167(1) (a)- (e) of the Land Act 1999, Cap 113 R.E 2019**. Thus, the Magistrate ordered retrial to the wrong court.

Lastly, the appellant stated that the whole judgment and order of the 1st appellate court were erroneous, misconceived and in fact baseless. That, the trial court's proceedings, judgment and order are very clear and

professionally done and the appellants to the 1st appellate court could not shake the evidence, findings, determination, judgment and orders of the trial court magistrate. (sic)

Opposing the appeal, the Respondents replied to the effect that, the 1st appellate court acted according to the law when delivering judgment in favour of the Respondents. The Respondents argued that the 1st appellate court's judgment contain all contents of judgment as per **section 312(1) of the Criminal Procedure Act, Cap 20 R.E 2019** including point of determination, decision thereon and reasons for the decision, dated and signed by presiding Magistrate hence justice done.

In addition, the respondents argued that the assessment of appellate court decision was based on nature of offence against respondents since it was not clear and certain on how appellant was the owner of such piece of land as there no evidence to prove that.

Regarding to the arguments that the 1st appellate court judgment is contradictory, the Respondents averred that the quotation under paragraph 5 of page 3 of the Appellant written submissions was wrongly quoted and does not form basis of concluding that the judgment was contradictory since it is only a statement to prove that the Respondents were innocent.

The respondents supported the 1st appellate court's findings that the issue of ownership should be cleared first for the conviction and sentence to stand.

It was also submitted that the appellate court Magistrate clearly

considered the fact that the respondents were local government leaders that is Village chairman and sub-village Chairman who were enlarging the road already measured by the village meeting. This was cemented in the case of **Lawrence Mateso** (supra).

Further to that, the Respondents submitted that the fact that the 1st appellate court Magistrate at page 5 paragraph 2 stated that there was no dispute through the evidence relating to the wording of **section 326(1) of the Penal Code, Cap 16 R.E 2019** which establishes elements of malicious damage to property does not mean that they were not required to file an appeal at 1st appellate court, hence such contradiction. The respondents thus faulted the trial court findings for failure to analyze and evaluate the substantial evidence adduced before it determined and finalized up with the wrong and unjust decision.

The respondents also supported the appellate Magistrate's findings by stating that, she applied all principles and legal requirement for decision to be reached, including weight of evidence and proving the case beyond reasonable doubts. They added that the evidence which was adduced by appellant before the trial court does not hold water and the weight of evidence does not suffice to convict them. To cement this, the respondents made reference at page 5, 2nd paragraph of 1st appellate court 'judgment where it was stated that:

> *"In our case at hand it seems that there is unclear dispute of ownership of where the tree grew as that, the appellants stated the same were in the road reserve and the respondent stated that the land was his as he legally bought it."*

Also, the respondents supported the order of retrial by stating that the order requires the issue of ownership of land be cleared by proving exactly who is the owner of the land where the damage was alleged to have been committed since the appellant alleged to buy the same in 2012 while the respondents produced a letter of direction on road sizes from the District Executive Director. Hence, they were acting in their official capacity as Village Chairman and Sub- village Chairman respectively; and not on individual capacity pursuant to the decision of the village meeting held on 24/7/2017 based on community road demarcation.

In conclusion, the respondents prayed for the decision of the 1st appellate court magistrate to be upheld and dismiss this appeal with costs.

In his rejoinder, the Appellant reiterated what he submitted in his submissions in chief. He added that page 2, 3rd paragraph of respondents' reply is not clear and page 2 paragraph 5 of the same is a misconception. Responding to the claim that the respondents were the local governments leaders; it was stated that the same is irrelevant since the offence was committed with malice and grudge while not acting as leaders. They had no authority to destroy properties of the appellant. That, they did not tender evidence in the trial court to such effect.

The appellant also crossed the respondents' arguments at page 3 paragraph 1 and 2 and argued that the same is vague, unclear and had nothing to challenge the appeal. For the two cases cited by the respondents, he argued that the same are irrelevant authorities to be applied in this appeal.

Having considered carefully submissions of both parties, the grounds of appeal as well as the records of two courts below, the issue is ***whether this appeal has merit.***

In the due cause of answering this issue, I will start discussing the 5th ground of appeal since the same touches the issue of law.

Under the 5th ground of appeal, the appellant condemned the 1st appellate Magistrate for ordering retrial of the matter for the trial court to redetermine the issue of land while the trial court has no jurisdiction to determine land disputes

I have keenly examined the 1st appellate court's judgment, at page 5 of it, the appellate court in conclusion had this to say:

> *"Therefore, due to the explanation above this court set aside the conviction and sentence and ordered(sic) for a retrial at the trial court before a magistrate of competent jurisdiction and the ownership of the land issue be cleared for the conviction and sentence to stand."*

As rightly submitted by the appellant, the primary court is not vested with jurisdiction of entertaining land disputes/issues. Under s**ection 167(1) (a) (e) of the Land Act, Cap 113 R.E 2019** courts vested with jurisdiction to determine land disputes are Court of appeal of Tanzania, High Court Land Division, District Land and Housing Tribunals, Ward Tribunals and Village Land Councils. Basing on this provision of the law, it suffices to conclude that the 1st appellate court's order of retrial before the primary court to determine land dispute is not executable.

In the premises therefore, I invoke my revisionary powers bestowed to this Court under **section 373 (1) (a) of the Criminal Procedure Act,**

nullify the trial court's order of retrial.

Having nullified the order of retrial, I have keenly gone through the 1st appellate court's records, the reasons for the appellate court to order retrial are found at page 4 and 5 of the judgment. For ease reference I quote;

> *"However, despite all that fact the court didn't show where and how it was satisfied that the land where the trees were said to be damaged belongs to the respondent on the reason that the trees being respondents' is one thing then him being also the owner of the land where the trees grow is another thing, and if that is not certain one cannot decide whether there was damage to property or not until it is final that the land belongs to either A' or B'..."*

These findings prompted me to peruse the trial court's records, the respondents herein were charged and convicted with the offence of malicious damage to property. As per the trial court's records, there is a dispute in respect of the area where the trees were planted. The appellant is claiming the same to belong to him as well as the trees, while the respondents claimed the same to be on the road reserve. I am persuaded by the words of my learned brother **Hon. Kakolaki, J** in the case of **Asha Amir Mng'agi and Another vs Maulid Rashid Mneka, PC CRIMINAL APPEAL NO. 05 OF 2021 (HC) (Unreported)**, while dealing with the issue of malicious damage to property had this to say:

> *"I hold that view as anything attached to land is part of the land as rightly submitted by the appellants when applying the latin maxim* ***"quid quid plantatur solo solo cedit."*** *The*

respondent in my considered opinion could not have claimed the damaged cassava plants and maize were his without first establishing ownership of the land in which they were planted on as the appellants also claimed ownership over the same land alleging to have been bequeathed to them from their late mother's estate. It is therefore my conviction that in absence of evidence to prove ownership of the land and therefore of the plants planted on it, the first ingredient was not proved."

Basing on this persuading authority, I am of considered view that the 1st appellate court was correct in its findings that the land dispute had to be determined first. However, the 1st appellate court was wrong to order retrial in the trial court while it has no powers to determine land issues.

In the upshot, the appeal is partly allowed to the extent explained herein above. The parties are at liberty to institute a land dispute before the court/tribunal of competent jurisdiction subject to the law of limitation. It is so ordered. No order as to costs.

Dated and delivered at Moshi this 21st day of December, 2021.

S. H. SIMFUKWE

JUDGE

21/12/2021