

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

PC CRIMINAL APPEAL NO. 5 OF 2021

MABULA BULYAKI.....APPLICANT

VERSUS

MADUHU MBOYI.....RESPONDENT

[Appeal from the Decision of District Court of Bariadi at Bariadi.]

(Hon. M.M. Nyangusi RM)

dated the 17th day of May, 2021

in

Criminal Appeal No. 52 of 2020

JUDGMENT

27th April & 29th June, 2022.

S.M. KULITA, J.

Mabula Bulyaki, referred to as the Appellant in this appeal, was charged at Nyakabindi Primary Court for stealing, contrary to the provisions of section 258 and 265 of the Penal Code, Cap. 16. It is in the particulars of offence that, on the 3rd day of March, 2021 at Mwakilalo area, Bariadi District in Simiyu Region, the Appellant stole by harvesting maize which belong to the complainant without color of right.

Though the Appellant denied, at the conclusion the trial court found the Appellant guilty of the offence and upon conviction a 6 months' conditional discharge sentence was met to him. That was on 17th March, 2021.

Aggrieved with that decision, the Appellant unsuccessfully preferred an appeal to the District Court. He was further aggrieved with it, hence the instant appeal on four grounds which can be summarized as follows; **One**, the trial court erred to entertain the criminal case on stealing before confirming whose land the maize in question were planted. **Two**, the trial court erred for not considering the evidence that every party claimed that the stolen maize were planted onto his own land. **Three**, it was wrong for the appellate court not to observe that the Appellant at the trial court was not accorded right to be heard. **Four**, it was wrong for the Appellant to be convicted in a case that he is not concerned.

The Appeal was heard on the 27th day of April, 2022. Following non-appearance of the Respondent, though he was effectively served, the court decided the hearing to proceed *ex-parte* as against him. The Appellant appeared in person.

Submitting in support of the appeal, the Appellant stated that, the case at hand involves land. He went ahead stating that, the complained maize were cultivated by him on his land. He added further that, during trial he was also not given right to be heard. He was not allowed to call witnesses. That was the end of the Appellant's submission.

I have taken into consideration the Appellant's submission and the available records as well. I am going to determine the grounds of appeal one after the other in seriatim.

Concerning the first and second grounds of appeal, both being the complaints that there were claims from both sides that the maize alleged to have been stolen were planted onto the land that each of them alleges to be his property, it was safe for the trial court to have first confirmed on the issue of the land ownership.

I went through the lower courts' records and found out that the Respondent complained that the stolen maize were his and that he had planted them on his land. The same records also provide that, the Appellant testified that, the maize alleged to have been stolen were his property and they had been planted on his land. With this evidence, it is vivid that, each party claims the farm land is his. Further, it is open that,

the trial court did not discuss the issue of ownership of land, mainly because it does not have jurisdiction, but also it did not refer the issue to the tribunals which have jurisdiction to determine it.

In the case of **STRABAG INTERNATIONAL (GMBH) v. ADINANI SABUNI, CIVIL APPEAL NO. 241 OF 2018, CAT at TANGA** the Respondent therein complained against the Appellant over his destroyed crops. As there arose the issue of land ownership as between parties, at page 10 to 11 of it, the court held to the effect that, the issue of land ownership was of important to be determined first.

Also, in the case of **SYLIVESTER NKANGAA v. RAPHAEL ALBERTHO [1992] TLR 110** it was held;-

"This court on numerous occasions has held that the charge of criminal trespass cannot succeed where the matter involves land in dispute whose ownership has not been finally determined by a civil suit in a court of law. In this case both the complainant and the respondent claim ownership of the land in dispute. The respondent claims that it is his clan land, while the complainant/appellant claims that he was lawfully allocated by the land allocating committee. That being

the case, the charge of criminal trespass is not maintainable as the ownership of the land in dispute has not been resolved by a court of law in a civil suit. The rationale behind that doctrine is that under section 9 of the Penal Code Cap. 16 the alleged trespasser is protected because he has an honest (bona fide) claim to the land in dispute, even though the claim may be mistaken. The honest claim of right can only be destroyed after a court of law in a civil suit determines who is the owner of the land in dispute."

As long as the parties to our case claim for ownership over the same land that the purported stolen maize were planted on, I am settled in mind that, this case was filed in the trial court prematurely. With the dictates of the above quoted principle of law, the court with jurisdiction should have determined first the issue of land ownership before this case being filed. Having found so and as long as these points suffices to dispose of this appeal, I will not endeavor into discussing the rest grounds of appeal.

On that account, **I allow the appeal.** Both, the lower courts' proceedings and judgments are hereby declared a nullity, hence quashed.

If the Respondent so wishes, he should refer the matter to the land tribunal with jurisdiction to determine the land ownership as between them, before filing a fresh criminal or civil case.



S.M. KULITA

JUDGE

29/06/2022

DATED at **SHINYANGA** this 29th day of June, 2022.



S.M. KULITA

JUDGE

29/06/2022