

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CRIMINAL APPLICATION NO. 103 OF 2021

**(C/F P. C Criminal Appeal No. 17 of 2020 in the High Court of Tanzania at Arusha,
Criminal Appeal No. 48 of 2019 Babati District Court, Originating from Criminal Case No.
107 of 2019 at Galapo Primary Court)**

DEEMAY HANGURY.....APPLICANT

VERSUS

MOHAMED FARAH.....RESPONDENT

RULING

01/06/2022 & 31/08/2022

GWAE, J

This ruling emanates from an application for leave and certificate on points of law which has been bought under section 6 (7) (b) of the Appellate Jurisdiction Act Cap 141, Revised Edition, 2019. The application is supported by the sworn affidavit of the applicant and opposed by the counter affidavit of the respondent.

Essentially, the applicant's sworn affidavit is to the effect that, the applicant was charged and convicted of the offence of malicious damage to property contrary to section 326 of the Penal Code, Cap 16 Revised Edition, 2019 by Gallapo Primary Court (Trial court). He was subsequently

sentenced to six (6) months' imprisonment and to pay compensation of Tshs. 1, 040, 000/=. Dissatisfied by both conviction and sentence, he unsuccessfully appealed to Babati District Court (1st appellate court).

Still aggrieved, the applicant filed an appeal to the High Court of Tanzania at Arusha vide PC. Criminal Appeal No. 17 of 2020 where he also lost. The applicant now wishes to file his appeal to the Court of appeal of Tanzania. Hence, this application since it is the requirement of the law that, before appealing to the Court of Appeal of Tanzania for a matter originating from primary court, the intending appellant must obtain leave and certificate on points of law, he has thus filed this application with the following points of law to be considered by the Court of Appeal of Tanzania;

1. Whether the High Court properly held that the charge filed against the applicant was not defective and;
2. Whether the trial court's visit to the locus in quo was proper and the evidence obtained thereat could be used to convict him.

On the other hand, the respondent opposed the application and stated that, the point of law mentioned by the applicant are not purely points of law to be determined by the Court of Appeal of Tanzania.

When the matter was placed for hearing on the 20TH April 2022 applicant was represented by Mr. John Materu, the learned advocate whilst the respondent appeared in person, unrepresented. The matter was ordered to be disposed of by way of written submissions and parties filed their respective submissions as directed by the court.

In his submission the applicant contended that, the charge against him was defective as it did not cite the subsection creating the offence with which the applicant was charged with, moreover the applicant stated that he did not willfully and unlawfully destroy the respondent's property but it was his employees. He went on submitting that even the visit to the locus in quo was defective and had some irregularities contrary to the procedures demonstrated by the Court of Appeal of Tanzania in the case of **Nizar M.H vs. Gulamal Fazal JanMohamed** (1980) T.L.R 29. The applicant thus prayed for the certification of the points of law as enlisted in the proposed memorandum of appeal.

Opposing the application, the respondent strongly argued that the applicant did not cite in particular the subsection which he alleges to create the offence. He went on to state that the issue that it is not the applicant who destroyed the respondent's property but rather his employees and that the visit of the locus in quo was defective are new

issues which were not raised in the courts below and therefore cannot be discussed at this stage. The respondent added that, the points of law raised by the applicant are not pure points of law.

From the records of this application the contentious matter between the parties is, whether the High Court properly held that the charge filed against the applicant was not defective and whether the trial court's visit to the locus in quo was proper and the evidence obtained thereat could be used to convict him.

As to the first point for the sought certification, the applicant maintained that, the charge against him was defective for creating the not the offence of malicious damage to property. Therefore it is apposite to consider provisions of section 326 of the Penal Code Cap 16, R.E 2019 which creates the offence of malicious damage to property to ascertain as to whether the act complained by the respondent constituted the mentioned offence.

"326.(1) Any person who wilfully 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."

From the above quoted part of the law, it is apparent that, in proving the offence of malicious damage to property the accused person must

have done the act (s) complained wilfully and unlawfully. In our instant matter, the complained defects, are all about the charge and respondent's alleged acts. My reading of the copy of the charge against the applicant and the judgments sought to be appealed before the Court of Appeal, I find there is appoint of law worth for determination by the Court of Appeal of Tanzania which is, whether the acts complained by the respondent constitute the offence of Malicious damage to property as per section 326 (1) of the Penal Code (supra).

As to the issue of alleged irregularities in the visit of the locus, in my considered view, in quo, it is purely a matter of fact and not of law which needs to be ascertained through evidence and thus not a point of law worthy to be considered by the Court of Appeal of Tanzania. It is a principal of law that for a point to be certified as a point of law to be determined by the Court of Appeal of Tanzania, the same be a pure point of law (See the decision in the case of **Saidi Ramadhani Mnyanga vs Abdallah Salehe** [1996] TLR 74). Moreover, it has also been the principle that, in an application for leave and certificate on point (s) of law to appeal to the Court of Appeal of Tanzania, the applications must demonstrate that there is a point of law involved for the attention of the Court of Appeal (See the decision in the case of **Simon Kabaka Daniel**


vs. Mwita Marwa Nyang'anyi & 11 others (1989) TLR 64). Though the point shown by the applicant was not well drafted, but its essence is as indicated and certified above namely;

"Whether the acts complained by the respondent constitute the offence of Malicious damage to property under section 326 (1) of the Penal Code, Cap 16, Revised Edition, 2019"

Consequently, the applicant is granted leave to appeal and one point of law exhibited above is certified as a fit point of law for consideration by the Court of Appeal. Since this is the criminal application, each party shall bear the costs.

It is so ordered.




M.R. GWAE
JUDGE
31/08/2022