

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 21 OF 2022

(C/F the District Court of Same Criminal Appeal No. 15 of 2022 Original
Criminal Case No. 39 of 2021 Gonja Primary Court)

STANLEY JOHN KICHUMBI..... APPELLANT

Versus

HASSANI ALLY KITENGE.....RESPONDENT

Last Order: 18th July, 2022

Date of Judgment: 22nd August, 2022

JUDGMENT

MWENEMPAZI, J.

The appellant Stanley Kichumbi is challenging the decision of the District Court of Same in Criminal Appeal No. 15 of 2021 which confirmed the decision of the Primary Court of Gonja. At the trial court the appellant was charged and convicted with the offence of malicious damage to property contrary to section 326(1) of the Penal Code [Cap 16 R.E. 2019]. Being satisfied that the charge against the Appellant was proved beyond reasonable doubt, the trial court sentenced him to six months suspended sentence and also ordered him to pay the Respondent a compensation



amounting 759,000/- Tshs. Now, before this court the Appellant has advanced four (4) grounds of appeal as follows:

1. That the first appellate court erred in law by disrespecting the binding decision of the Court of Appeal of Tanzania and thereby giving a decision per in curium.
2. That the first appellate court erred in law and in fact by failure to base its decision on the grounds of appeal as raised in the memorandum of appeal and argued by the parties in their respective written submissions.
3. That the first appellate court erred in law and in fact by failure to answer a question that it raised as one of the bases of its decision.
4. That the first appellate court erred in law and in fact by failure to show as to how the grounds of appeal, the submissions and authorities thereof were considered to the effect of raising an independent issue which was used to determine the appeal instead of the grounds of appeal.

The Appellant is therefore praying this court to quash the proceeding of the first appellate court and determine the appeal based on the grounds of appeal.

At the trial court it was alleged that on 29th July 2021 around 08:00 a.m at Myonge area in Same district in Kilimanjaro region, the appellant did unlawfully destroy ginger, cassava and grass by digging and clearing the respondent's farm thereby causing loss valued at Tshs. 759,600/= an act

which is contrary to the law. The appellant denied the charge and the case had to go for a full trial. After the close of prosecution case the trial court ruled that the Appellant had a case to answer and was required to give his defence. In his defence the Appellant told the trial court that he was given the plot in question from a person known as Semu Solomoni Manase to use it for cultivation for a period of three years. The appellant tendered the said contract and also called witnesses in his defence. At the end of trial, the trial court decided that the respondent had established his case beyond reasonable doubt thereby it convicted the appellant for the offence charged. Dissatisfied the appellant unsuccessfully appealed to the District Court of Same which confirmed the trial court's decision. Yet still the appellant is before this court challenging the lower courts' decision on four grounds as listed above.

At the hearing of this appeal, the appellant was represented by Ms. Fay Grace Sadala learned advocate while the Respondent was present in person and unrepresented. By consent of parties this court granted leave for the hearing to proceed by way of written submission in a set schedule. All parties submitted timely and the effort is appreciated.

Submitting on the first ground of appeal the Appellant stated that the Appellate court erred by disrespecting the decision of the Court of Appeal of Tanzania in the case of **MALMO MONTAGEKONSULT AB TANZANIA BRANCH VS. MARGRET GAMA**, *Civil Appeal No. 86 of 2001*. He stated that in this case the court directed the appellate court to deal with the ground of appeal as submitted by the appellant.



On the second and fourth grounds the learned counsel submitted that the first appellate court failed to base its decision on the grounds of appeal raised; failure of which he argued made the judgment defective. He supported his point with the case of **STANSLAUS RUGABA KASUSURA AND THE ATTORNEY GENERAL VS. PHARES KABUYE** [1982] TLR 338. The learned counsel further submitted that the Court of Appeal of Tanzania when dealing with the similar issue in the case of **CHEYONGA SAMSON @ NYAMBARE VS. THE REPUBLIC** Criminal Appeal No. 510 of 2019 it held that such irregularity was fatal. Quoting what was held in the above cited case, she said the court held that: -

"The appellate court is not expected to answer the issues as framed at the trial as that is the role of the trial court. That the appellate court is however expected to address the ground of appeal before it. Even then it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. That it may if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately".

Based on the cited authority the learned counsel prayed for this court to find, merit in the two grounds and allow the appeal.

With respect to the third ground of appeal, the learned counsel complained that the first appellate court failed to answer the question that it raised as one of the bases of its decision. She submitted that the question was whether the prosecution had proved its case beyond reasonable doubt to warrant conviction for the offence of malicious damage to property. It was

her further submission that failure by the first appellate court to answer the question it raised made its judgment defective and for that reason it ought to be quashed and its order be set aside.

In response, the Respondent submitted with respect to the first ground of appeal that the first appellate court's decision was not given *per incurium* as stated by the appellant because the appellate court did go through all the grounds of appeal and came up with the decision given. He thus argued that the ground lacked merit.

On the second and fourth grounds of appeal the Respondent submitted that the first appellate court did consider the grounds of appeal and submissions thereof which helped the court to arrive in its decision. He argued that it was okay to deal with grounds of appeal generally or separately and that it was not mandatory to deal with the grounds of appeal in seriatim. He contended that this was the position stated in the case of **MALMO MONTAGEKONSULT AB TANZANIA BRANCH VS. MARGRET GAMA**, CIVIL APPEAL NOP.86 OF 2001(Unreported.)

Submitting in reply to the third ground of appeal the Respondent stated that the first appellate court did answer affirmatively the issue as to whether the prosecution proved its case beyond reasonable doubt to warrant conviction for the offence of malicious damage to property. The Respondent also submitted that the issue was not raised suo moto but it was rather one of the grounds of appeal raised by the Appellant in the memorandum of appeal before the first appellate court. It was the respondent's submission that this ground also lacked merit, he therefore

prayed for this court to uphold the decision of the first appellate court and dismiss the appeal with cost.

I have thoroughly studied the record of proceedings of both lower courts and submissions for and against the appeal. In determining the present appeal, I have noted that in all the grounds of appeal the appellant is complaining of one thing which is that the first appellate court did not address or consider his grounds of appeal but raised a different issue. The appellant also complained that the first appellate court after raising a different issue it failed to answer the same when making its decision. Although all the grounds of appeal seem to talk of one issue, I will be responding to each ground in the process of determining the appeal.

With respect to the first ground of appeal the appellant claimed that the first appellate court disrespected the binding decision of the Court of Appeal of Tanzania in the case of **MALMO MONTAGEKONSULT VS. MARGRET GAMA** (supra). Expounding this ground in his submission the appellant's learned counsel submitted that in that case the Court of Appeal directed the appellate court to deal with grounds of appeal as submitted by the appellant. Revisiting the cited case for purposes of determining this ground of appeal I will quote what the court of appeal stated hereunder;

*"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds as listed in the memorandum of appeal. It may, if convenient, **address the***

grounds generally or address the decisive ground of appeal only or discuss each ground separately". (Emphasis added)

I have carefully gone through the judgment of the first appellate court and from what I have gathered in the decision is that the court did address all the grounds of appeal generally and not each ground separately. This can be seen from page 13 to page 15 of the appellate court's judgment where the Honorable Magistrate made her findings after analyzing and evaluating the evidence afresh. The issue of existing land dispute which the appellant had complained off in his first ground of appeal the appellate court addressed it as seen on the second paragraph of page 14. The issue of proof of ownership of disputed land was also addressed as seen on the third paragraph of page 14 of the appellate court's judgment. The third ground of appeal was regarding proof of the charge on the required standard, this was in fact the issue raised by the first appellate court in determining the appeal. Therefore, the same was accordingly addressed. On the fourth and the fifth grounds of appeal the appellant complained the conviction and sentence were unlawful, this was as well addressed in the decision as the appellate court decided that the conviction and sentence were safe based on the analysis and evaluation, he made on the evidence tendered during trial. For this reason, I find the first ground of appeal lacking merit and it is hereby dismissed.

Having determined the first ground as explained above, the second and fourth grounds of appeal also collapse as they all touch on the issue as to whether the first appellate court determined the appeal based on the

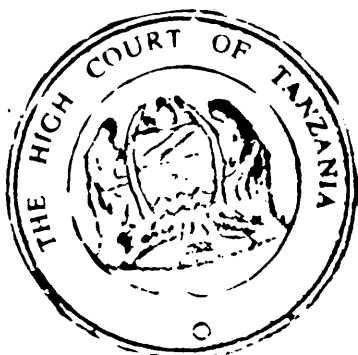
grounds of appeal raised by the appellant. This issue has already been answered when determining the first ground of appeal.

Finally on the third ground the appellant complained that the first appellate court erred in law and in fact by failure to answer a question that it raised as basis of its decision. The question or issue raised by the first appellate court as basis of its decision was whether the prosecution proved its case beyond reasonable doubt to warrant conviction for the offence of malicious damage to property. Going through the judgment of the first appellate court the record is very clear that the court did answer the question it raised as seen on page 14 paragraph 3 of the judgment. In the paragraph the trial Magistrate has concluded as follows:

"All these items of evidence, in summary his knowledge, acts and omission suffice for his conviction of the offence of malicious damage to property. DW4's insistence that the farm is his is of no relevance as he failed to show that he was the administrator of the estate of his late father."

In light of the above, I find this appeal without any merit and proceed to dismiss it forthwith. It is so ordered

Dated and delivered at Moshi this 22nd day of AUGUST, 2022




T. MWENEMPAZI
JUDGE

Judgment delivered in court this 22nd day of August, 2022 in the presence of Mr. Wilhard Kitaly Advocate holding brief for Ms. Fay Grace Sadalla, Advocate for the Appellant and Respondent was present in person.


T. MWENEMPAZI
JUDGE