IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

(PC) CRIMINAL APPEAL NO. 10 OF 2021

(Arising from Consolidated Criminal Appeal No. 27 and 28 of 2020 in Bukoba District Court and Originating from Criminal Case No. 08 of 2020 and Criminal Case No. 09 of 2020 in Katoma Primary Court)

PAULO ZEPHLIN---------- APPELLANT

VERSUS

AUSON BARUTI----------RESPONDENT

JUDGMENT

Date of last Order: 24.08.2022

Date of Judgment: 02.09.2022

A.E. Mwipopo, J.

It was on 13.03.2020 in the afternoon at Ilogero Village within Bukoba Rural area while the appellant namely Paulo Zephlin was cutting trees he bought from Julius Balongo, the respondent namely Auson Baruti came to the area and asked the applicant why he was cutting his trees. The appellant answered that he bought the trees from one Julius Balongo and that it was not the first time he was cutting down those trees. This lead to argument between them as result the respondent instituted two criminal cases against the appellant in the Primary Court for Bukoba District at Katoma. In criminal case No. 08 of 2020 the respondent was suing the

appellant for abusive language contrary to section 89 of the Penal Code, Cap. 16 R.E. 2019, and in the Criminal Case No. 09 of 2020 the respondent was charging the applicant for the offence of malicious damage to properties contrary to section 326 (1) of the Penal Code, Cap. 16 R.E. 2019. The trial Primary Court after hearing evidence in both cases it find the appellant guilty for both offences and proceeded to convict him. In Criminal Case No. 09 of 2020 the appellant was sentenced to 2 months conditional discharge and to pay Tshs. 1,500,000/= within two months as compensation for cutting down 21 trees which belong to the respondent, and in Criminal Case No. 09 of 2020 the trial Court sentenced the appellant to one month conditional discharge and to pay Tshs. 30,000/= to the respondent as compensation.

The appellant was aggrieved by the decision of the trial Primary Court and filed two appeals in Bukoba District Court. In Criminal Appeal No. 27 of 2020 at Bukoba District Court the appellant appealed against the decision of trial Primary Court in Criminal Case No. 08 of 2020 and in Criminal Appeal No. 28 of 2020 at Bukoba District Court the appellant was appealing against the decision of the trial Primary Court in Criminal Case No. 09 of 2020. The District Court consolidated the two appeals as Criminal Appeal No. 27 and 28 of 2020 and proceeded to hear the consolidated appeal by way of written submissions. The District Court delivered its

decision on 06.11.2020 and it dismissed the appeal for want of merits. The appellant was not satisfied with the decision and filed the present appeal.

The appellant has 4 grounds of appeal which are found in the petition of appeal as follows hereunder:-

1. *That, the trial Court erred in law and facts to handle this matter as criminal case while all facts and evidence adduced in Court show that the matter is purely based on land law (civil) as there was dispute on land ownership which the Court had no power to handle, hence default of justice.*
2. *That, the first appellate Court erred in law for holding the decision of the trial Court while the same was tainted with illegalities such as nature of the case which was purely civil, but handled as criminal case the fact which makes the same to lose power on the said matter.*
3. *That, both the trial Court and the first appellate Court erred in law for expressing that the appellant did make a plea of guilty, while the same was not properly established, as law requires, and hence convicted the appellant illegally.*
4. *That the first appellate Court erred in law as it handled the appeal without considering the same was establishes by the grounds of appeal. On this basis, the first appellate Court discussed nothing on the grounds of appeal which established it, and hence denied the appellant's right to appeal and be heard.*

On the hearing date, both parties were present. The appellant had service of Mr. Seth Niikiza, advocate. The hearing of the appeal proceeded viva vorce.

The counsel for the appellant submitted jointly on all grounds of the appeal. He said that the trial Primary Court erred to determine the matter on the dispute over land ownership which it has no jurisdiction to determine it as criminal case. The appellate District court also erred to support the trial Primary Court holding that the matter was criminal case. The jurisdiction of the court is matter of the law and it has to be provided by the law. Section 18 (1) (a) (i) of the Magistrate Court's Act, Cap. 11 R.E. 2019 provides that the Primary Court has no jurisdiction to determine the civil case which relates to land. This court was of similar position in the case of **Japhet Evod Mapunda and 2 Other vs. Lukresia Ciprian Mapunda,** PC. Criminal Appeal No. 2 of 2021, High Court at Songea, (unreported).

He said even the evidence on record shows that the appellant when he was defending himself he stated that he bought the trees in dispute from one Balongo. The dispute was who is the owner of the land where the trees were found between the respondent and Balongo. He relied in the decision of the Court of Appeal in the case of **DPP vs. Malimi Sendama and 3 Others**, Criminal Appeal No. 92 of 2018, CAT at Tabora, (unreported), where it was held at page 7 that proceeding with a criminal charge under the circumstances was wrong as the dispute of ownership of land was not determined through a civil court.

It was his submission that without determination of the ownership of the land by competent civil court, it was wrong for the trial court and appellate District

Court to hold that there was criminal case. The criminal case may proceed after the issue of ownership of the land has been finally resolved. What has to be done is to quash the proceedings, decision and sentence of the trial court and District Court at it was done by the Court of Appeal in the case of **Magando Paulo and Another vs. Republic,** [1993] TLR 219.

The counsel went on to say that the decision of the District Court in Criminal Appeal No. 27 and 28 of 2020 in Bukoba District Court did not give reason to consolidating Criminal Appeal No. 27 of 2020 and Criminal Appeal No. 28 of 2020. The act of consolidating two Criminal Appeals arising from two different criminal cases before the trial Primary court was denying the appellant right to be heard properly. Also, the appellate Magistrate did not give reasons for his decision. In the said judgment there is no reasoning and there is no point of determination leading to the decision. The judgment was composed contrary to the law.

In his response, the respondent said that there was no dispute over the ownership of the Land in both cases before the trial Primary Court. The land where the appellant went to cut trees is known as Kegangilo and it is different from the land in dispute with Julius Barongo. The area of Julius Barongo is at Mpeke. In Criminal Case No. 9 of 2020 before Primary Court the said Julius Barongo said he bought land from the person he do not know. This prove that the said Julius Barongo was lying in his testimony.

On the consolidation of Criminal Appeal No. 27 and 28 of 2020 by the District Court, the respondent said that it was the counsel for the appellant who prayed for consolidation order and the trial Magistrate consolidated the appeal. It was the appellant who persuaded the appellate Magistrate to consolidate those two appeals.

Regarding the issue of reasoning in the decision of the appellate District Court, the respondent said that the appellate Magistrate reasoned in his decision before reaching conclusion. This is seen in page 2 of the said judgment. Thus, it is not true there was no reasoning before reaching conclusion. He added that if this Court finds the District Court judgment falls short of proper judgment provided by the law, this Court has to set aside the said judgment and leave the appeal before District Court to start afresh before another competent Magistrate.

In his rejoinder, the counsel for the applicant said that it is not true that there was no dispute over land in Criminal Case No. 9 of 2020 and the evidence before the trial Primary Court proves the same. The court has to interfere and quash the decision of the Primary Court in the respective decisions. He retaliated his submission in chief and our prayers.

From the submissions, the issue for determination is whether the appeal before this Court has merits.

In determination of the appeal, I will consider the grounds of appeal in the sequence submitted by parties. The counsel for the appellant said in respect of the 1st and 2nd grounds of appeal that the trial Primary Court erred to determine the matter on the dispute over land ownership which it has no jurisdiction to determine it as criminal case. On his side the respondent said that there was no dispute over the ownership of land in the respective criminal cases since the dispute over the ownership of land was in respect of the land situated in another area.

The evidence available in record reveal that appellant was charged for two different cases in the Katoma Primary Court. In Criminal Case No. 08 of 2020, the appellant was charged for the offence of abusive language contrary to section 89 of the Penal Code, Cap. 16 R.E. 2019; and in the Criminal Case No. 09 of 2020 the appellant was indicted for the offence of malicious damage to properties contrary to section 326 (1) of the Penal Code, Cap. 16 R.E. 2019. Obvious, the appellant submission on the presence of dispute over the ownership of the land is in respect of the offence of malicious damage to property. The reason is that there is no relationship between the dispute over the ownership of the land and the use of abusive language save only when the issue of dispute over the ownership of land is used as defense or mitigating factor. As the counsel for the appellant submission is based on the point that the ownership of the land has to be determined first before the criminal case is instituted it means the counsel was submitting on the

Criminal Case No. 09 of 2020 where the appellant was indicted for the offence of malicious damage to properties contrary to section 326 (1) of the Penal Code, Cap. 16 R.E. 2019.

In order to prove the offence of malicious damage to property, the complainant is required to prove that the appellant had destroyed or damaged the property, the said property so destroyed or damaged is his property and the damaging was both willful and unlawful. This Court was of the same position in the case of **Tryphone Jeremiah vs. Ufoo Rogate Sawe,** PC. Criminal Appeal No. 13 of 2020, High Court at Mwanza, (unreported). There is no dispute that the appellant did cut down 21 trees for the purpose of processing woods. The evidence available in record shows the respondent testifying that the said 21 trees which the appellant cut were in his land and they belong to him. In response the appellant testified that he bought the said trees from one Julius Balongo. The proceedings of the trial Primary Court shows that the said Julius Balongo testified as SU2 and he said that the land and trees belongs to him and he sold those 21 trees to the appellant. This evidence prove that there is dispute over the ownership of the said trees which the respondent testified that it belongs to him and was maliciously destroyed by the appellant. Such a dispute over the ownership of land and trees is civil in nature and it has to be resolved by Civil Court before the criminal case is instituted against the appellant.

Section 18 (1) (a) (i) of the Magistrate Court's Act, Cap. 11 R.E. 2019 provides that the Primary Court has no jurisdiction to determine the civil case which relates to land. Thus, as there was dispute over the ownership of the land where the said trees which is subject matter in this appeal was said to be destroyed, the same was supposed to be determined by the Land Court. The Court of Appeal in the case of **DPP vs. Malimi Sendama and 3 Others**, Criminal Appeal No. 92 of 2018, Court of Appeal of Tanzania at Tabora, (unreported), at page 12 it cited with approval it's decision in the case of **Simon Mapulisa vs. Gasper Mahuya**, Criminal Appeal No. 221 of 2006 (unreported), where it was held that:-

> *"Dispute of ownership of land is not resolved in criminal proceedings. The law on the issue is that where there is dispute regarding boundaries of adjacent private land or ownership of a part or whole of adjacent land, such dispute is resolved in a civil Court. From then onwards, encroachment onto land of the other could be a trespass and a criminal charge can be brought against the offending party."*

The Court of Appeal went on to hold that the premature trial Court's proceedings and decision thereon cannot be felt to stand and it nullified the trial Court's proceedings and judgment thereon and directed the land dispute be referred to the Court or Tribunal of competent jurisdiction. It ordered the DPP if he is minded to initiate a fresh criminal proceedings against the respondents, the same should be done once the land dispute has finally been resolved. This court

was of similar position in the case of **Japhet Evod Mapunda and 2 Other vs. Lukresia Ciprian Mapunda,** (supra).

Thus, on the Criminal Case No. 09 of 2020, it was wrong for the trial Primary Court to proceed with determination of criminal case where there is dispute over the ownership of the land where the trees alleged to be destroyed were cut.

In the Criminal Case No. 08 of 2020 at Primary Court for Bukoba District at Katoma where the appellant was charged for the offence of abusive language, the appellant appealed to the Bukoba District Court as Criminal Appeal No. 27 of 2020. The said appeal was consolidate with Criminal Appeal No. 28 of 2020 and the District Court determined the appeal. However, the counsel for the appellant said that the consolidation was not proper since the said appeal originates from to different criminal cases. The respondent said that it was the appellant counsel who persuaded the appellate Magistrate to consolidate the two appeal cases.

I admit that it was wrong for the Hon. Appellate Magistrate to consolidate the two appeals which originates from two different criminal cases especially where the witnesses in the said two cases are different. The reason is that the nature of the offences are different, in Criminal Case No. 08 of 2020 the offence which the appellant was charged with was abusive language and in Criminal Appeal No. 09 of 2020 the offence was malicious damage to property. The evidence adduced was different as witnesses based their testimonies to the respective criminal offence.

Further, I have read the proceedings of the appellate District Court and there is no order of the Court consolidating the Criminal Appeal No. 27 of 2020 and Criminal Appeal No. 28 0f 2020. In absence of any order of the Court consolidating the two appeals, it was wrong to treat these appeals as consolidate case and to determine them together.

On the 3rd and 4th grounds of appeal the counsel for the appellant submitted that the judgment of the District Court was contrary to the law. He said that appellants grounds of appeal were not considered in the judgment of the appellate District Court. He said in the said judgment there is no reasoning and there is no point of determination leading to the decision. The respondent in his reply he said that there was reasoning in the page 2 of the judgment of the District Court.

I do not agree with the respondent assertion that there is reasoning in the judgment of the District Court in the Consolidated Criminal Appeal No. 27 and 28 of 2020. Upon reading the said judgment, there is no points for determination, the decision there on and the reasons for such decision. The appellate Magistrate in the said judgment pointed out the origin of each case in the said consolidated appeal and sentence imposed to the appellant on each case. Also, he stated that the appeal was heard by way of written submission and the appellant pleaded guilty to offences he was charged with in both cases. But, this fact that appellant pleaded guilty to both offence in trial Primary Court is not correct. The appellate

magistrate concluded by saying that there is no doubt and he find no justifiable reasons for shaking the proceedings, decision and orders of the trial Primary Court. As consequence the District Court dismissed both appeals.

From the decision of the District Court, there was no points for determination and the reasons for such decision. Also, it is obvious that the appellate Magistrate did not read the proceedings and decisions of the trial Primary Court since he said that the appellant pleaded guilty to the offence while the evidence in record shows that the appellant never pleaded guilty to the offence. He pleaded not guilty to both offences and he called witnesses in his defence. Section 312 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2019 provides for the content of the judgment. The said section states as follows:-

> *"312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."*

From the above cited section, the judgment of the Court must be written in the language of the Court and shall contain point of determination, decision thereon and reasons for the decision. In the judgment of the Bukoba District Court in Consolidate Criminal Appeal No. 27 and 28 of 2020 these contents were missing.

Therefore, I find that the judgment of the Bukoba District Court in Consolidate Criminal Appeal No. 27 and 28 of 2020 was composed contrary to the law. As result, the same is set aside for contravening section 312 (1) of the Criminal Procedure Act. Moreover, as there is no order of the District Court to consolidate Criminal Appeal No. 27 of 2020 and 28 of 2020, I hold that it was wrong for the Bukoba District Court to treat the appeal as consolidation case. The Criminal Appeal No. 27 of 2020 and Criminal Appeal No. 28 of 2020 in Bukoba District Court have never been consolidate as result they are supposed to be determined independently.

Finally, as I have already hold that there was dispute over ownership of the land in Criminal Case No. 09 of 2020 in Katoma Primary Court, the trial Primary Court had no jurisdiction to determine the said case and as result I quash the proceedings and I set aside its decision and orders. The appellant is discharged in respect on the said Criminal Case No. 09 of 2020 in Primary Court for Bukoba District at Katoma. Also, the proceedings of Criminal Appeal No, 28 of 2020 in the Bukoba District Court which originates from Criminal Case No. 9 of 2020 at Katoma Primary Court is accordingly quashed. The only case which remains pending in the Bukoba District Court is Criminal Appeal No. 27 of 2020 which originates from Criminal Case No. 8 of 2020 at Katoma Primary Court and I order for the appeal

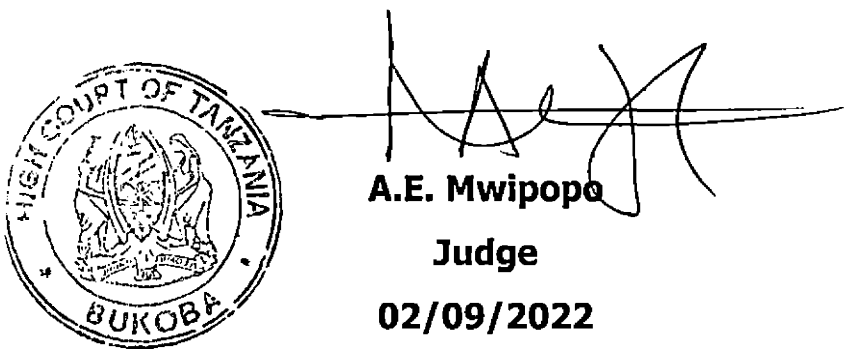
to start afresh before the same Magistrate namely Hon. D.P. Nyamkerya, SRM and be determined on merits. It is so ordered accordingly.

A.E. Mwipopo

Judge

02/09/2022

Court: The Judgment was delivered today 02/09/2022 in the presence of the appellant and the respondent.



A.E. Mwipopo

Judge

02/09/2022