

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

PC. CRIMINAL APPEAL NO. 3 OF 2022

*(C/f Karatu District Court Criminal Appeal No. 24 of 2021 as originated from Karatu
Primary Court, Criminal Case No. 257 of 2021)*

THADEUS QUWANGA UMBEAPPELLANT

VERSUS

SIMON KULE1ST RESPONDENT

ELIAS JOSEPH @ HOMBO2ND RESPONDENT

EMANUEL LEONARD3RD RESPONDENT

JUDGMENT

24/08/2022 & 05/10/2022

KAMUZORA, J.

The Appellant herein sued the Respondents at the Primary Court of Karatu (Trial Court) for the offence of theft contrary to sections 258 and 265 of the Penal code Cap 16 R.E 2019. The trial court after hearing the evidence adduced by both parties found the Respondents not guilty hence acquitted them. Aggrieved by the said decision the Appellant preferred an appeal to the District Court (The First appellate Court) which upheld the decision of the trial court and dismissed the appeal. The Appellant preferred this second appeal on the following grounds: -

- 1) That, the District Court erred in law and fact for failure to convict the Respondents while the case against them was proved beyond reasonable doubt.*
- 2) That, the District Court magistrate erred in law and fact for failure to uphold the finding of the trial courts magistrate that the 1st Respondent is guilty.*
- 3) That, both the lower courts erred in law and in fact for they did not properly scrutinize/ analyse the evidence on records and employ wrong reasoning resulting into the wrong and unfair decision.*
- 4) That, both lower courts erred in law and fact to decide that none of the parties was given a right to use the farm while the Appellant was in the use and occupation of the said farm.*

Hearing of the appeal was by way of written submission whereas each part filed the submission save for rejoinder from the Appellant. As a matter of legal representation, the Appellant enjoyed the service of Mr. Samwel S. Welwe, learned advocate while the Respondents appeared in person with no legal representation.

Arguing in support of the 1st ground of appeal, the counsel for the Appellant stated that, the case against the Respondents was proved beyond reasonable doubt as their identification at the scene of crime was proper as SM2 informed the Appellant (SM1) who went at the farm and saw the Respondents harvesting his crops at Huduma Village. That,

SU6 the Chairman of the Kitongoji also witnessed the Respondents harvesting the crops. That, the 1st Respondent (SU1) in his evidence also admitted to have harvested those crops.

The Appellant's counsel was of the view that, the said act amounted to theft as both the intent to steal and asportation was satisfactorily proved against the Respondents. That, as the Appellant won the case at the District Land and Housing Tribunal and continued to cultivate the said land then, the 1st Respondent had ill motive to harvest the crops which he did not cultivate after the decision of the High Court ordering retrial. He claimed that, the farm was being used and cultivated by the Appellant since 2018 thus it could not be cultivate by the Respondent after the decision of the High Court. He added that, the defence of alibi raised by the 2nd and 3rd Respondent should not be accorded weight as it was an afterthought as it was raised without notice.

The Counsel submitted for the 2nd ground of appeal that, after the trial court had reached its decision that the 1st Respondent was guilty of the offence as charged, the first appellate court ought to have upheld the decision of the trial court and convicted the 1st Respondent.

Arguing in support of the 3rd and 4th ground of appeal, the counsel submitted that, there was no proper analysis of evidence done by both

lower courts as to who was in use of the disputed land. That, the Appellants evidence was not shaken by the accused person as there was no any order of the High Court which allowed the 1st Respondent to use the dispute land, and before the High Court order the land was under the use of the Appellant. That, it is illogical to justify trespasser to use the land as the same amounts to benefiting from his own wrong doing. That, as SU6 asked the 1st Respondent why he was harvesting in other people's land, he knew well that the land did not belong to the 1st Appellant hence the opinion of the assessors be quashed and set aside.

He added that, even in the District Court was wrong in its reasoning as there was no any order of the High Court that allowed any of the parties to cultivate the land. That, had the lower courts properly analysed evidence, it would have found that the Appellant is the one who cultivated the land and therefore the 1st Respondent act amounts to theft.

Responding to the 1st ground of appeal the Respondent submitted that, the Appellant did not show how the trial court erred in law in reaching to its fair and just decision. That, it is evident that the Appellant failed to prove its case beyond reasonable doubt as the 1st Respondent who was SU1 at the trial court stated that the land belongs

to him and that the evidence of the Appellant did not show that he was the one who planted the crops.

Regarding the 2nd ground of appeal, the Respondent replied that, there is a pending Land application before the Karatu District Land and Housing Tribunal in Land Application Number 68 of 2018 between the Appellant and the Respondent herein which affects the criminal charged against the Respondents. That, even the decision of the trial court found the Respondents not guilty since the proof established by the Appellant herein was full of doubt hence the Respondents were acquitted.

On the 3rd and 4th ground of appeal, it is response by the Respondents that, all the lower courts exercised its power judiciously and after analysing weight and considering the evidence adduced before the courts. That, an appeal can be made against the decision or sentence and not reasoning. That, the Appellant had no ownership or possession of the land he claimed to cultivate but rather a trespasser and that the land belongs to the Respondents hence cannot be held criminal liable as the nature of the dispute is not stealing crops but purely land matters. The Respondents prays that the appeal be dismissed with costs.

I have considered the records of both the trial court and the first appellate court, the grounds of appeal as well as the submission by the parties for and against the appeal. Before I go to the root of the matter it is pertinent to point out that, the respondents were charged for stealing on account that they harvested crops alleged to belong to the Appellant. It is in record that the farm to which the respondents allegedly harvested crops is under dispute and the said dispute is yet to be determined.

Looking into the 1st, 3rd and 4th grounds of appeal, the same are centred on the analysis of evidence by the two lower courts. It is the Appellant's contention that, had the District Court clearly analysed the evidence, it could not have reached to a conclusion that neither of the parties had right to use the land. To him the Appellant was in use and occupation of the land hence the offence of theft was proved against both Respondents.

The records show that, the said crops were planted in the farm which is under dispute as between the Appellant and the 1st Respondent and the dispute is unresolved until now. The records also show that, before the DLHT, the Appellant was declared a lawful owner of the land to which the crops were allegedly planted but, the High Court reversed

the decision of the DLHT and ordered retrial of the matter and such retrial is still pending. Both the Appellant and the 1st Respondent claim to cultivate the disputed land and planted the crops allegedly stolen by the respondents. While the Appellant claim to cultivate the farm by January 2021, the 1st Respondent claim to cultivate the farm by February 2021. By that time, the dispute was still pending and both parties were aware that the dispute over the land in question was not yet resolved. I say so because, by January when the Appellant alleged to have planted the crops, the dispute was still pending before the High Court as the 1st Respondent and others were challenging the decision of the DLHT which was in favour of the Appellant. On 24th February 2021 when the 1st Respondent alleged to have planted the crops, the decision of the High Court was already made on 19th February 2021 and such decision was not in favour of anyone as the court ordered for the retrial of the case.

The District Court upon considering such evidence came to a conclusion that criminal liability could not be established in a situation where the dispute between the parties stands unresolved. I agree with reasoning by the first appellate court that where there is dispute over ownership, a criminal conduct arising out of disputed land cannot stand

until when the dispute over ownership is conclusively determined. With the evidence on record, both the Appellant and the 1st Respondent claims ownership over the disputed plot of land to where the alleged theft of the crops was raised. For the Respondent to be properly convicted for the offence of theft of the crops, there is a need to prove that the Respondent harvested the crops from a land that did not belong to him.

Thus, in this matter before determining who is criminally liable for the offence of theft it is important first to clear and ascertain who is the lawful owner of the land in dispute. In this matter the court was responsible to look into criminal responsibility of the accused and not the ownership of the land. In this, I subscribe to what was held in the case of **Sylivery Nkangaa Vs. Raphael Albertho** [1992] TLR 110 that,

"Criminal court is not the proper forum for determining the rights of those claiming ownership of land. Only a civil court via a civil suit can determine matters of land ownership."

In this matter both the Appellant and 1st Respondent claim ownership over the land to which the crops were alleged stolen. The Respondent does not deny harvesting the crops but he insisted that the crops were planted by him in the farm which belong to him. With that

evidence it becomes important that the issue of ownership be resolved for proper determination of criminal responsibility of the Respondents.

It was contended by the Appellant that, the court would have considered that he was the one using the land and thus, the Respondent could not have cultivated the crops. However, there is no evidence in record proving the person who was in use of land as both the Appellant and the 1st Respondent claimed to be in possession and use of land. The trial court opted to believe the Appellant's story that he was the one in use of the land but did not give the reason for disbelieving the 1st Respondent's version. It was held in the case of **John Mokolobela Kulwa Makolobela and another Vs. Republic** [2002] TLR 296 that,

"A person is not found guilty of a criminal offence because his defense is not believed rather a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilty beyond reasonable doubt."


The District Court therefore properly analysed the evidence before it and came to the conclusion that the Respondents could not be criminally responsible for the offence of theft before the dispute over land is conclusively determined by the court with competent jurisdiction. I therefore find no merit for the 1st, 3rd and 4th grounds of appeal.

On the second ground of appeal, it is the claim by the Appellant that it was wrong for the first appellate court not to uphold the finding of the trial court that the 1st Respondent is guilty. The decision of the trial court was a decision of majority as both assessors opined in favour of the Respondents while the magistrate found in favour of the Appellant. The first appellate court analysed the evidence and found the same not proving the criminal offence against all Respondents. Thus, the first appellate court could not have upheld the opinion of the magistrate after it found that the case was not proved against the Respondents. I therefore find this ground to have no merit.

In the upshot, I find this appeal devoid of merit. I hereby dismiss the appeal and uphold the decision by the first appellate court.

DATED at ARUSHA this 5th October, 2022




D.C. KAMUZORA

JUDGE