IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

PC CRIMINAL APPEAL NO. 10 OF 2021

(Originating from District Court of Dodoma in Criminal Case No. 83 of 2020 and Criminal Case No. 210 of 2020 before Makang'wa Primary Court)

PATRICK MADEJE.....APPELLANT

VERSUS

CHRISTOPHER MALAMALA.....1ST RESPONDENT
DAVID CHIMWENDA.....2ND RESPONDENT
YOHANA PHILIMONI.....3RD RESPONDENT
KENETH CHIDOLE.....4TH RESPONDENT

JUDGMENT

15/6/2022 & 20/7/2022

KAGOMBA, J

The appellant, PATRICK MADEJE appeals against the decision of District Court of Dodoma which quashed the entire proceedings of the Primary Court of Makang'wa and set aside the conviction and sentence meted to the respondents.

The appellant's petition of appeal has two grounds namely;

1. That, the appellate District Court erred in law and fact by nullifying the proceedings, set aside the conviction, sentence and orders of the trial Primary Court.
2. That, the appellate District Court erred in law and fact by not holding that the charges at the primary Court against the respondents were proved beyond reasonable doubt.

The back ground of this matter is that the respondents were jointly charged by the appellant in the Makang'wa Primary Court with the offence of Malicious injury to property contrary to S. 326 of the Penal Code, Cap 16. The Primary Court found that the charge was proved by the appellant against the respondents and held the respondents liable for the offence they were charged and, accordingly, convicted them and, sentenced them to pay fine of Tsh. 400,000/= or serve 12 months imprisonment plus payment of compensation of Tsh. 5,000,000/=.

The respondents were aggrieved by Primary Court's decision and therefore lodged an appeal to the District Court. The District Court found out that the respondents were convicted basing on defective charge. For that reason, the whole Primary Court's proceedings were nullified. The conviction and the sentence imposed to the respondents were also set aside. It is the said decision of the District Court which has initiated this appeal.

On hearing, the appellant was represented by Mr. Fred Kalonga learned advocate and the respondents were unrepresented and therefore they presented their case by themselves.

Mr. Kalonga submitted the two grounds of appeal stated above jointly. He argued that the decision of the District Court Magistrate that the charge which arraigned the respondents was defective was not proper in law. That, the failure to mention a subsection to section 326 of the Penal code did not render the charge defective because particulars of the offence specified the offence of malicious injury to property.

Mr. Kalonga further contended that the learned District Magistrate was supposed to consider the evidence of SM1 which was supported by the report of a veterinary officer on the assessment of destructions occurred (exhibit A1) which linked the respondents with the offence. He added that the evidence adduced during trial showed that it was the respondents who set fire on the appellant's farm and caused destruction thereof. He argued that the respondents, on their part, didn't deny working in the site where the incident occurred. For these reasons, Mr. Kalonga prayed this Court to quash the decision of the District Court and uphold Primary Court's decision.

All the respondents on reply contended that the appeal was filed out of time hence time barred.

Mr. Kalonga, on rejoinder, maintained his submission in chief. On the issue of appeal being filed out of time, he contended that it was filed within time. He narrated that the District Court's decision was on 22/7/2021 and the 30 days allowable for filing an appeal were elapsing on 21/8/2021, which was Saturday, and therefore they had to filed on the next working day, which was on 23/8/2021, hence filed within time.

Before going to the merit of the appeal, I am bound to address the issue of time limitation as it touches on the jurisdiction of the Court. I have perused the records and found out that what has been submitted by Mr. Kalonga is factual. Records shows that the District Court judgment was delivered on 22/7/2021 and the appeal was lodged on 23/8/2021.

It is provided under S. 25(1)(b) of the Magistrates' Courts Act, [Cap 11 R.E 2019] that a party aggrieved by the decision of the District Court in its appellate jurisdiction, shall appeal to the High Court within 30 days after the date of such a decision. In this case, the impugned judgment was delivered on 22/07/2022 and therefore 30 days due for an aggrieved party to lodge an appeal ended on 21/8/2021.

As rightly submitted by Mr. Kalonga, 21/8/2021 was Saturday and courts functions were closed. Hence, the appellant had to lodge his appeal in a next working day which was on Monday of 23/8/2021. This is subject to S. 19(6) of the Law of Limitation Act, [Cap 89 R.E 2019] which states as follows;

> *Where the period of limitation prescribed for any proceeding expires on a day when the Court in which such proceeding is to be instituted is closed, the proceeding may be instituted on the day on which the court reopens.*

Therefore, this appeal was lodged within prescribed time and hence the respondents' contention fails.

Regarding the merit of the appeal, the first issue for determination is whether the respondents were convicted and sentenced by the trial Primary Court basing on defective charge as it was decided by the appellate District Court leading to their acquittal.

The records show clearly that the charge which the respondents were arraigned with didn't mention the subsection of the section 326 of the Penal

Code, [Cap 16 R.E 2019] which creates an offence of malicious injuries to property. The charge in question states that;

> *"**KOSA NA KIFUNGU CHA SHERIA**: KUHARIBU MALI K/F 326 SURA YA 16 K/A*
> ***MAELEZO YA KOSA:***
> *WEWE CHRISTOPHER MALAMLA, DAUDI CHIMWENDA, YOHANA PHILIMONI NA KENETH CHIDOLE WOTE KWA PAMOJA MNASHTAKIWA KUWA MNAMO TAREHE 14/9/2010 MAJIRA YA 07.00 MCHANA HUKO KATIKA MBUGA YA MAKANGWA NAE NEO LA KIDONGO CHEKUNDU EKARI 35 MLIHARIBU MALI KWA KUCHOMA MAJIANI YENYE THAMANI YA TSH. 800,000/= MALI YA PATRICK S/O MADEJE MLIFANYA HIVYO MKIJUA NI KOSA KWA MJIBU WA SHERIA ZA NCHI HII".*

There is no dispute that section 326 of the Penal Code, has a total of 9 subsections which provide for different aspects of the offence of malicious injury to property. The District Court found that the charge was defective for the reason that it didn't mention the specific subsection of section 326 and adjudged the trial Court's proceedings a nullity.

Mr. Kalonga in that regard has contended that the non-citing of subsection didn't render the charge defective because the particulars of offence specified the offence of malicious injury to property in which the respondents were charged with.

It is the requirement of the law under the Primary Courts Criminal Procedure Code, [3rd Schedule of the Magistrates Courts Act, Cap 11. R.E 2019] (PCCPC), under S. 21(2); that the charge must identify the offence or

offences, including the law and the section, or other division thereof, under which the accused person is charged.

It is apparent that the charge in question as quoted herein above has identified the offence of malicious injury to property contrary to section 326 of the Penal Code without stating the subsection thereof. While it is very true, as stated by the learned appellate Magistrate in the appellate District Court that S. 326 of the Penal Code has several subsections therefore the charge was supposed to identify the subsection as required by the law, I respectfully, differ with him on the consequence thereof. In my opinion this is a defect which is curable. Therefore, it was a misdirection on part of the appellate District Court to quash the entire proceedings, conviction and sentence meted to the respondents by the trial Primary Court, for non-citing of a subsection of law.

This above opinion is inspired by the decision of the Court of Appeal in **Mohamed Clavery V. R,** Criminal Appeal No. 470 of 2017 (CAT Dar es salaam), where the Court dismissed a complaint on a defective charge which cited a non-existing provision of the Penal Code but which was revealing the offence of rape. The Court of Appeal, in the cited case had the following to say;

> *"We are certain that the appellant,* ***even though the charge was defective, he knew that he was charged with rape of a girl aged fifteen years. The date, time and place at which the offence was committed were also known to the appellant. He was therefore able to appreciate the***

charge facing him. *In the premises we do not see any prejudice being occasioned on the part of the Appellant."*

[Emphasis Added]

The Court of Appeal also referred to its earlier decision in the case of **Jamali Ally @Salum vs Republic Criminal Appeal No. 52 of 2017** in which it was held that;

"It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) ***enabled him to appreciate the seriousness*** *of the offence facing him and eliminated all possible prejudices.* ***Hence, we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388 (1) of the CPA."***

[Emphasis Added]

In the light of the above authorities, the court hold the view that the charge in question and its statement of offence as well as particulars of offence made the respondents appreciate the nature of the offence they were charged with. Therefore, they were not prejudiced any how by the non-citation of the subsection of section 326 of the Penal Code. I therefore order insertion by pen of subsection (1) to the cited section 326 so that it reads 326(1).

In addition, records enlighten that the respondents were aware of the offence they were charged with because were able to plead not guilty to the

offence and their line of cross examination to the prosecution witnesses as well as their defence shows that they were corresponding to the charge of malicious injuries to property contrary to S. 326(1) of the Penal Code.

As there was no miscarriage of justice which was occasioned to the respondents by failure to state a subsection the shortfall is curable under section 388(1) of the Criminal Procedure Act, [Cap 20 R.E 2019], which states;

> *"388.(1)- Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial or make such other order as it may consider just and equitable."*

For the above reason, I answer the first issue in the negative.

The second issue which come up is whether the charge was proved beyond reasonable doubt to warrant the respondents' conviction.

The trial Primary Court records, show that the evidence adduced by SM2-Rahel Lameck was watertight. She has informed the Court that before the incident, around 09.00 am, she saw the respondents clearing the farm of the 4th respondent near the appellant's farm, and on 01.00 pm she saw

fire burning the appellant's farm while the respondents were trying to stop the fire. That, upon the respondents' failure to stop the fire, she saw them running from the scene and she decided to call the appellant, being the owner of the farm, to inform him about the incident.

With the above evidence, it is clear that the respondents are the one who started the fire at the appellant's farm, hence damaged appellant's property. SM2 identified all the respondents. She saw them at 09.00 am and at 01.00 pm trying to stop the fire, up to the last point when they decided to run after failing to stop it.

On the other hand, SM1, Patrick Madeje, the complainant at the trial Court and the appellant herein, corroborated SM2's evidence by stating that he went to his farm after receiving a call from SM2 and found his farm was burning. Therefore, there is no doubt that the appellant's farm was damaged from the fire which SM2 had testified about.

Despite that the respondents opposed the charge against them, their defence has not raised doubt on the appellant's evidence. This is because SM2 properly identified the respondents. Further SU5 who testified for the respondents informed the trial court that she was the one who instructed all the respondents (including 4th respondent who tried to adduce defence of alibi) to clear her farm after renting it from SU4 and that on the date of the incident 14/9/2020 at 09.00 am, she met the respondents at the alleged farm for handing over after clearing it. However, it has not been made clear as to where the respondents went after handing the farm over to SU5. This makes the Court to find the evidence SM2 reliable. For these reasons, the

second issue on whether the charge against the respondent was proved beyond reasonable doubt, is answered in the affirmative.

The third issue which arise is whether the sentence imposed upon the respondents by the trial Primary Court was proper. It is trite rule that sentencing is a discretion of the convicting Court. However, the same can be interfered with by the appellate Court in the circumstances as narrated in the case of **Kija Japhet V. the Republic,** Criminal Appeal No. 584 of 2017, where the Court of Appeal at Mwanza stated;

> *"Although it is settled law that, sentencing is the domain of the trial Court, the appellate Court can alter or interfere with the sentence imposed by the trial Court, where there are good grounds for doing so. This has been emphasized in a number of cases including:* ***Republic V. Mohamed Ali Jamal*** *[1948] 15 E.A.CA.126;* ***Silvanus Leonard Nguruwe V. Republic*** *[1981] TLR 66;* ***Swalehe Ndugajilunga V. Republic*** *[2005] TLR 94;* ***Rajabu Daudi V. Republic****, Criminal Appeal No. 106 of 2012 and* ***Ilole Shija V. Republic****, Criminal appeal no. 357 of 2013 (both unreported). In the case of* ***Rajabu Daudi V. Republic*** *(supra) the Court stated as follows:*
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> *"The law is well settled that the circumstances in which the Court can interfere with the sentence are those where it is:*
>
> ***(a) manifestly excessive, or***
> ***(b) based upon a wrong principle, or***
> ***(c) manifestly inadequate, or***
> ***(d) plainly illegal, or***
> ***(e) where the trial court failed or overlooked a material consideration or***
> ***(f) where it allowed an irrelevant or extraneous matter to affect the sentencing decision****".*
> **[Emphasis Added]**

However, appellate courts are warned not to interfere with a sentence just because it would not have imposed that sentence if it were the trial court. See a case of **Wilson Fanuel V. R** (1993) TLR 267 (CA).

With the above guidance in mind, I have considered the sentence imposed upon the respondents. All respondents were ordered to pay fine of Tshs. 400,000/= and in default, to serve imprisonment for 12 months. However, the trial Court went further to impose order of payment of Tshs. 5,000,000/= as compensation for the damage they caused to the appellant.

The Primary Courts Criminal Procedure Code, [3rd Schedule of the Magistrates Courts Act, Cap 11. R.E 2019] (PCCPC) is clear as to the powers of the Primary Court in sentencing. Hence, Primary Courts are bound to comply with it in imposing sentence to convicts. The imposed fine of Tshs. 400,000/= or 12 months imprisonment, is obviously made against paragraph 2(4) of PCCPC which has set a scale of fines. For order of payment of fine of Tsh. 400,000/=, its default under PCCPC is imprisonment of 4 months and not 12 months as the trial Primary Court pronounced.

Also, the compensation of 5,000,000/= is against paragraph 5(1)(b) of the PCCPC which gives the Primary Courts powers to order payment of compensation not above Tshs. 100,000/= for offences not provided under the Minimum Sentences Act. Since the offence of malicious injury to property is not among the offences under the Minimum Sentences Act, the trial Primary Court had power to order compensation to the extent of Tsh.

100,000/=. For this reason, the third issue is answered in the negative. For the extent shown the sentence imposed was not proper in law.

Understandably, that the trial Court awarded such compensation in regard to the amount of damage calculated by Veterinary Officer. However, the opinion of the veterinary officer cannot warrant the court to exceed its jurisdiction.

It is also understandable that the damage caused by the respondents may exceed the scale of compensation set by law. If that is the case, the appellant may use other legal avenue, to pursue his right if he still sees a need to do so. This includes to institute a civil suit as it was stated in **Joseph Chaleani V. Republic** (1987) TLR 107 (HC).

In final analysis, the appeal is allowed only to extent indicated above. The conviction of the respondents by the trial Primary Court is upheld and the sentence is rectified as shown above, the respondents to pay fine of Tsh. 400,000/= in default to serve 4 months imprisonment and each respondent to pay compensation of Tsh. 100,000/= to the appellant.

To recap on the above analysis, this Court holds that the defects in the charge sheet curable by inserting the subsection (1) to the cited section 326. This is done by pen in court's records. The charge against the respondent was proved beyond reasonable doubts through the testimony of SM2 which was corroborated by SM1 and SU5. However, the sentence imposed by the trial Primary Court was not proper in the eyes of law. Applying revisionary powers under section 43 of the Magistrates Courts Act, [Cap 11 R.E 2019],

the sentence is rectified to the effect that each respondent to pay fine of Tsh. 400,000/=, in default to serve 4 months imprisonment plus payment of compensation of Tsh. 100,000/=. The decision of appellate District Court is therefore vacated.

Since the records shows that the respondents have paid fine of Tshs. 400,000/= each, they have partly satisfied the sentence. Therefore, the respondents are ordered to pay compensation of Tsh. 100,000/= each, in order to satisfy sentence in whole.

It is ordered accordingly.

DATED at **Dodoma** this 20th day of July, 2022

ABDI S. KAGOMBA

JUDGE