

**IN THE HIGH COURT OF TANZANIA**  
**DAR ES SALAAM DISTRICT REGISTRY**  
**AT DAR ES SALAAM**

**PC. CRIMINAL APPEAL NO. 4 OF 2020**

*(Arising from Criminal Appeal No. 32 of 2019 Temeke District Court; Origin  
Criminal Case No. 616 of 2019 Mbagala Primary Court)*

**ELIA MDOE.....APPELLANT**

**VERSUS**

**PIUS GABRIEL.....RESPONDENT**

**JUDGMENT**

*25/03/2021 & 14/12/2022*

**S.M. KULITA, J.**

This is the 2<sup>nd</sup> appeal by the Appellant, **ELIA MDOE**. It arises from the Criminal Appeal case No. 32 of 2019 Temeke District Court, whose origin is Criminal Case No. 616 of 2019 Mbagala Primary Court. The Appellant herein, Elia Mdoe was charged and convicted by Mbagala Primary Court for Malicious Damage to Property, contrary to the provision of section 326 of the Penal Code. He was sentenced to pay a fine of Tsh. 50,000/= or to serve the imprisonment of 3 (three) months in alternative.

He was aggrieved with that decision and decided to appeal at Temeke District Court in Criminal Appeal No. 32 of 2019. Further aggrieved with the decision, hence this appeal with the following grounds;

1. That, there were inconsistency of testimonies at the Primary Court.
2. That, the sacks of sand were wrongly kept by the Respondent's father on the Appellant's land.
3. That, the removal of sand bags/sacks by the Appellant on the respondent's land was lawful.
4. That, the trial Magistrate was wrong to award costs in its decision which was for the original case.

The matter was argued by way of written submissions. While the Appellant is represented by Mr. Pius M. Mkenda, Advocate, the Respondent enjoys the legal service of one M.R. Kiondo, Advocate. Before submitting Mr. Pius M. Mkenda, Advocate opted to combine the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal and argued them together.

Submitting for the 1<sup>st</sup> ground of appeal which is all about inconsistency of testimonies at the trial Primary Court, Advocate for the Appellant, Mr. Pius M. Mkenda stated that the record transpire that the testimonies of the complainant's (Respondent's herein) witnesses at the trial court who purported to be the eye witnesses, are contradictory on the date for the commission of the offence. The counsel stated that, the said contradiction affects even the charge sheet which provides that the date for commission of the offence is 16/05/2019.

As for the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal Mr. Mkenda submitted that the Respondent had no land adjacent to the Appellant's premises. He said that the bags of sand alleged to have been removed by the Appellant were wrongly kept thereat by the Respondent's father, Gabriel Manyika. That was

noticed from the cause of action which involved the Respondent's father and the Appellant in the Land Case No. 2 of 2018 Kijichi Ward Tribunal and thereafter Temeke District Land and Housing Tribunal, Land Appeal No. 21 of 2018. In that sense, Mr. Mkenda said that the Respondent herein had no locus to complain for the alleged premises and he is unaware of the boundaries.

As for the last ground the Appellant's Counsel stated that the trial Magistrate was wrong to award costs while the case before him was not civil, but criminal.

He concluded by praying for the appeal to be allowed.

In the reply thereto, Advocate for the Respondent, Learned Counsel M.R. Kiondo, made a general submission in respect of all grounds of appeal that the trial court carefully analysed the evidence before it and its decision was wholly endorsed by the 1<sup>st</sup> appellate court. He said that, unless there is evidence that leads to miscarriage of justice, the 2<sup>nd</sup> appellate court is not entitled to interfere the findings of the 1<sup>st</sup> appellate court. He said that the Appellant has failed to show matters of evidence which this 2<sup>nd</sup> appellate court should interfere.

The counsel further stated that save for ground number 3, all other grounds of appeal lodged this court are new. That, they were not raised at the 1<sup>st</sup> appellate court which is a wrong procedure. He said that this court has no jurisdiction to entertain them.

As for the discrepancy in the testimonies of the witnesses for the Respondent (complainant) at the trial court, the respondent's counsel submitted that not

all discrepancies in the prosecution case leads to dismantle of its case. He said that, the discrepancies highlighted by the Appellant are minor. They don't go to the root of the case.

The counsel concluded by stating that the appeal is frivolous, vexatious and baseless, he prays for the same to be dismissed with costs.

In rejoinder, the Appellant's Counsel reiterated what he had submitted in his submission in chief. He however insisted on the credibility of the Appellant's testimonies that their contradiction goes to the root of the case. The lower courts were therefore wrong to disregard it.

Before I step into analysing the grounds of appeal that have been tabled before me, let me resolve the issue of their competency as challenged by the Respondent's Counsel that they are new ones. He said that save for the 3<sup>rd</sup> and 4<sup>th</sup> grounds, all other grounds of appeal are new. He averred that they are not the ones raised before the 1<sup>st</sup> appellate court. The Respondent's Counsel is of the views that it is fatal.

I can agree with the Respondent's Counsel that, it is a position of the law that the appellant who has lost the case in his first appeal is precluded to raise new grounds of appeal at the 2<sup>nd</sup> appellate court. He has to argue the same grounds of appeal that he had raised in the 1<sup>st</sup> appellate court. This was also held in **THOBIAS MICHAEL KITAVI V. R, Criminal Appeal No. 31 of 2017, CAT at Arusha (unreported)**.

However, in the matter at hand, save for the 4<sup>th</sup> ground of appeal in which the Appellant challenges that the 1<sup>st</sup> appellate court was wrong to award costs for the Respondent while the matter in question is criminal, all other 3

grounds were raised and discussed in the 1<sup>st</sup> appeal. The grounds of appeal number 1, 2 and 3 in this appeal deal with the same issues as to the 1<sup>st</sup> and 3<sup>rd</sup> grounds in the Petition of Appeal lodged at the District Court.

In these grounds of appeal the critical issues were the following; **one** *whether the sacks of sand were wrongly kept by the respondent on the appellant's land and whether they were removed by the appellant*, **two** *whether the prosecution evidence produced at the trial court was weak*. Nature of these two issues should not only be directly seen in the pleadings, you can even find them in the submissions where the parties make wide explanations on what they allege in respect of the appeal. Therefore, the grounds of appeal that the Appellant has raised before this 2<sup>nd</sup> appellate court are not new. They are the same as those raised and discussed at the District Court.

As for the 4<sup>th</sup> ground of appeal which is about costs, as alleged by the Respondent counsel that it emanates from the District Court. It was not among the orders issued by the Primary Court, that's why it has been raised for the 1<sup>st</sup> time before this court. It is therefore not fatal for the Appellant herein to raise it in this 2<sup>nd</sup> appeal.

Having concluded that all other grounds of appeal are not new, hence lawful, I am going to analyse the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds collectively.

Upon going through them I have noticed that most of them based on the issue of malicious damage to property caused by removal of the sand bags at the Respondent's land.

Though in the charge sheet it was also alleged that the Appellant had cut down the respondent's trees over the suit premise, no evidence has been thoroughly adduced to that extent. Further, in its analysis the trial court said nothing about it. The same applied to the 1<sup>st</sup> appellate court, nothing has been said in its judgment about cutting down of trees by the appellant. Even the parties themselves, while submitting before the 1<sup>st</sup> appellate court as well as before this court, they were silent on the issue.

In their respective judgments the trial court and the 1<sup>st</sup> Appellate court never made analysis and conclusion on that issue of cutting down of trees by the Appellant on the Respondent's premise. Not only that, but even in my perusal over the trial court record where the complainant, Pius Gabriel (the Respondent herein) called 4 (four) witnesses, apart from himself, neither of his witnesses who purported themselves being eye witnesses, testified on that issue.

For that scenario, there is no proof on the issue of cutting down of trees by the Appellant. Thus, the only issue in question relating to malicious damage to the Respondent's property solely based on the removal of sand bags/sacks from the scene by the Appellant.

The record transpire that the Appellant admitted to have removed the sacks of sand that were extended outside his land, that is the Respondent's premises. The records transpire that the Appellant did so in executing the decision of the Land Case No. 2 of 2018 of Kijichi Ward Tribunal in Temeke District delivered on 13/08/2018. The other party to that said case, Gabriel Manyika who is the respondent's father was aware of that.

In his submission before this court, as well as the 1<sup>st</sup> appellate court, the Respondent's counsel stated that, the Appellant did not involve the Respondent nor the local authorities in removing the said sand sacks from the premise. On the other hand the Appellant stated that, as it was the order that was already made by the Ward Tribunal, he had no duty to notify the said authority or the Respondent.

To me, the question is, if the said act was actually done, did it lead to the damage of Respondent's property, which is a disputable issue in this matter? This can be answered in the determination on whether in removing the said sand sacks, the Appellant damaged any property owned by the Respondent.

The trial court's record transpire in the judgment and proceedings that Accused person, Elia Mdoe (the Appellant herein) did remove the sand sacks from the scene but there was no explanation as to what was damaged regarding that act. Was it the land structure at the scene, or something else got damage due to that act? The trial court's argument which was supported by the District Court was that the removal of the said sand sacks by the Appellant before the lapse of 45 days prescribed time for appeal was unlawful. But that argument by itself, without any proof as to what has been damaged, does not constitute the offence of malicious damage to property under section 326 of the Penal Code.

Further, it was not narrated by any witness including the Respondent that the said value of damaged property mentioned to be Tsh. 500,000/= as per the charge sheet, was for the removal of sand sacks or the cut down of trees. The fact that the Respondent had no evidence to adduce in respect of the

said sum of money, it was wrong for the trial court to conclude that there was damage against any of the Respondent's property.

In upshot, the case at the Primary Court was not proved beyond all reasonable doubts which is a standard of proof in criminal cases. Thus, the Primary Court's proceedings and that of the District Court are hereby quashed and all the decisions made therefrom are set aside. I find the appeal meritorious, hence **allowed**. This being a criminal case, I grant no order as to costs.

HL

**S.M. KULITA**  
**JUDGE**  
**14/12/2022**

