

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

PC. CRIMINAL APPEAL NO. 14 OF 2022

*(C/F District Court of Karatu at Karatu in Criminal Appeal No. 04 of 2022, Originating
from Karatu Primary Court in Criminal Case No. 633 of 2021)*

MAHO NG'AIDA APPELLANT

VERSUS

STEPHANO BENEDICT RESPONDENT

JUDGMENT

28th February & 27th May, 2023

GWAE, J.

The appellant was charged with the offence of malicious damage to property c/s 326 of the Penal Code, Cap 16, Revised Edition, 2019 (the Penal Code) before Karatu Primary Court (the trial court) in Criminal Case No. 633 of 2021.

It was alleged that, on 10th September, 2021 at Alalio Bugeri area, within Karatu District in Arusha Region, the appellant maliciously cut down different variety of respondent's trees namely; croton, michrosta and acacia polycartha, all worth Tshs. 530,750/= . In his defence, the appellant admitted to have only pruned his trees within his land property for making charcoal and that, he neither trespassed nor cut any trees within the respondent's property. In the end, the trial court found the appellant

guilty and sentenced him to six (6) months of conditional discharge and ordered him to pay the respondent Tshs. 530,750/= as compensation of the destroyed trees.

Aggrieved, the appellant appealed to the District Court of Karatu at Karatu (first appellate Court) vide Criminal Appeal No. 04 of 2022 which dismissed his appeal and upheld the trial court's decision. Hence, the current appeal with nine (9) grounds of appeal as follows;

1. That, the first appellate court erred in law and fact in finding that, the trial court had jurisdiction to entertain the offence of malicious damage to property which ownership of the landed property was not certain.
2. That, the first appellate court erred in law and fact in failing to find that, the trial court had no jurisdiction to entertain the land case.
3. That, the first appellate court erred in law and fact in failing to find that, the trial court failed to give sufficient consideration and weigh the evidence adduced by the accused and his witnesses.
4. That, the first appellate court erred in law and fact in failing to consider the standard of proof in criminal cases, which is proof beyond reasonable doubt and convicted the appellant basing on the issued framed on ownership of land which its proof was under balance of probability.

5. That, the first appellate court erred in law and fact in upholding sentence and compensation order against the appellant.
6. That, the first appellate court erred in law and fact in failing to properly evaluate evidence of both parties and reached to a bad and erroneous decision.
7. That, the first appellate court erred in law and fact in failing to find that, the trial court failed to frame issues relevant to criminal cases.
8. That, the first appellate court erred in law and fact in failing to find that, there was variance between the prosecution evidence and the charge.
9. That, the first appellate court erred in law and fact in not finding that, the trial court relied on its own decision on valuation report which was not tendered by neither the respondent not the forest officer during hearing of the case.

When this appeal was called on for hearing before me, the respondent defaulted appearance. Hence, hearing proceeded *ex-parte*. The appellant who appeared in person and unrepresented prayed that, all his grounds of appeal be adopted. He however added that, it is true that he cut trees but the same were located in his farm and not the respondent's farm.

Having gone through the subordinate courts' records as well as appellant's grounds of appeal, this court is now tasked with only one issue

of determination which is whether the case against the appellant was proved at the required standard. I will do so having in mind plethora of authorities in relation to principles regarding second appeals.

Firstly, the 2nd appellate court cannot discuss new ground not raised, discussed and determined by the trial court nor the first appellate court. This was held in **Nurdin Musa Wailu vs. Republic** Criminal Appeal No. 164 of 2004 (unreported) that:

"...usually the Court will look into matters which came up in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."

See also; **Seleman Rashid @ Oaha vs. Republic** Criminal Appeal No. 190 of 2010, **Bihani Nyankongo & Another vs. Republic** Criminal Appeal No.182 of 2011 (both unreported).

Secondly, this court can only interfere with concurrent findings of the lower courts if there has been a misapprehension of evidence or a miscarriage of justice or violation of some principle of law or procedure (See **Amratlal Damodar and Another vs. A.H. Jariwalla** (1980) TLR 31.

Having these two principles in mind, I will start with the first two grounds regarding jurisdiction of the trial court in determining the dispute

involving the parties. It is clear throughout the trial and appellate stage that, the appellant's stance is that he sought for and obtained permit to prune two (2) of his trees within his landed property for the purpose of making charcoal and that, he neither trespassed nor cut any trees within the respondent's landed property. On the respondent's side, he is vividly found claiming that, the appellant used the same permit to cut more than two trees some of which were located within his land. From these clear facts, the appellant strongly insisted that the subordinate courts had no jurisdiction.

It is a trite principle that, the issue of jurisdiction is so paramount that courts must be certain and assured of their jurisdictional position before or at the commencement of the trial. Because it is a creature of statutes, jurisdiction can neither be assumed nor clothed to the court by the parties. The Court of Appeal in the case of **Fanuel Mantiri Ng'unda vs. Herman Mantiri Ng'unda & 20 Others**, Civil Appeal No. 8 of 1995 (unreported) held thus:-

*"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature.....**The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the***

commencement of the trial ... It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case." (Emphasis added)

See also; **Aloisi Hamsini Mchuwau & Another vs Ahamadi Hassan Liyamata**, Criminal Appeal No. 583 of 2019, Court of Appeal sitting at Mtwara (unreported).

With the above principles in attention, it is therefore of paramount importance that, the issue of jurisdiction be ascertained at the early stage before going into merit or otherwise of the case. It is so for an obvious reason that, it is the one, which gives a court of law or quasi-judicial body authority to determine the matter before it.

In the appeal at hand, the appellant is challenging the decision of the first appellate court upholding the decision of the trial court that, it had jurisdiction to entertain respondent's complaints. His argument is that, the ownership of the landed property within which the alleged offence of malicious damage of the property occurred was uncertain. Parts of respondent's testimony who testified as SM1 at the trial court reads;

"...mnamo tarehe 10/09/2021 saa kumi jioni nilifika nyumbani na kueleza na Paskali Benedict (kaka yangu) kuwa SU1 alikuwa amekata miti. Nilienda kujiridhisha na kukuta kweli miti yangu aina ya migunga, miari (croton,

mictrasta, acasia, phcanta, na croton michro stachyuz)
yenye thamani ya Tshs. 530,750/= tu. Kesho yake
nilienda Ofisi ya kijiji kulalamika ambako nilipewa barua
*ya kumsimamisha SU1 **lakini hata hivyo aliendelea***
kuingia eneo la tukio kukata na kuchoma mkaa.
(Emphasis added)

From this excerpt, even the respondent clearly demonstrated that, he acknowledges appellant's trespass into his land, cut down his trees and made charcoal thereof. In response to the above piece of testimony, the appellant herein partly testified that;

"...mnamo tarehe 20/09/2021 saa saba mchana, nilikata
miti yangu aina ya migunga miwili matawi yake, na
midogo midogo tu kwenye shamba langu kwa ajili ya kuni
na mkaa nyumbani kwangu...."

Regarding whether or not the trial court had jurisdiction, the first appellate court, upheld the trial court's decision that, there was no dispute of ownership of the landed property where the alleged pruned and cut trees situated. I respectfully disagree with his holding basing on the fact that, from the abbreviated facts, it is uncontroverted that, the genesis of the matter is a on the cut down and pruned trees which each party claim to be situated in his land. This is purely a land dispute and ought to have been filed in the court or tribunal vested with such powers. All matters concerning disposition of land, whether by sale, mortgage, evictions,

demolitions of properties attached to land etc. are land matters within the jurisdiction of the land courts as per the provision of section 3 of the Land Disputes Courts Act, Cap 216, R.E. 2019.

Additionally, section 167 (1) of the Land Act, Cap 113 R.E. 2019 and section 62 (2) of the Village Land Act, Cap 114 R.E. 2019 provides for official bodies clothed with exclusive jurisdiction over land matters including, Village Land Council, Ward Tribunal, District Land and Housing Tribunal, High Court and Court of Appeal of Tanzania. This is in exclusion for proceedings of a criminal nature which may be adjudicated in ordinary courts *as per section 4 of the Land Disputes Courts Act which states that;*

4.-(1) Unless otherwise provided by the Land Act, no magistrates' court established by the Magistrates' Courts Act shall have civil jurisdiction in any matter under the Land Act and the Village Land Act.

(2) Magistrates' courts established under the Magistrates' Courts Act shall have and exercise jurisdiction in all proceedings of a criminal nature under the Land Act and the Village Land Act.

As I am of the view that, the dispute between the parties was not of a criminal nature. Therefore, I am constrained to hold that, the trial court erred in entertaining the matter and the first appellate court erred in upholding that the trial court had jurisdiction to entertain it. Since the

respondent himself testified that, the appellant trespassed into his land and cut trees therein, it is my considered opinion that, he ought to have pursued his right of ownership first in land courts before claiming for malicious damage and compensation or the claim of damages to property might have pursued through civil litigation.


Having discussed as herein, I will not deliberate other grounds of appeal as the 1st and 2nd grounds are found to have merit and suffice to dispose of the appeal in its entirety.

In the upshot, this appeal is allowed. The concurrent decisions of the courts below are consequently quashed and set aside. The ancillary order as to compensation is equally set aside. The respondent may institute a land case in a court of competent jurisdiction where he may also claim damages arising from the alleged damage of the trees.

It is so ordered.

Dated and delivered at **ARUSHA** this 27th day of May, 2023.




MOHAMED. R. GWAE
JUDGE