IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
PC CRIMINAL APPEAL NO. 02 OF 2023
(C/F Criminal Case No. 4 of 2022 before the District Court of Hai at Hai)

RABIEL ONAUKILO LEMA.....1ST APPELLANT
GODLOVE RABSAIDIA LEMA.....2ND APPELLANT
DANIEL PAULO YOHANA.....3RD APPELLANT
NOBERT ANNY LEMA.....4TH APPELLANT
JUMA MKWAWA CHAHAMA.....5TH APPELLANT
EMMANUEL LEMA.....6TH APPELLANT
JOHN ROBERT LEMA.....7TH APPELLANT
PAUL DARABE HINTAI.....8TH APPELLANT
HONEST FRANCIS MKAMA.....9TH APPELLANT

VERSUS

NORA DOMINICK MUSHI.....RESPONDENT

JUDGMENT

Last Order: 12th June 2023
Judgment: 30th June 2023

MASABO, J.:-

The appellants are aggrieved by the judgment of the District Court of Hai at Hai exercising its appellate jurisdiction in Criminal Appeal No. 04 of 2022 which originated from the Primary Court of Hai District at Bomang'ombe (the trial court). The particulars of the offence as drawn from the record were that, on the material date, the second appellant (DW2) in the company of the village chairman went to the respondent's home. On arrival, they

inquired on the whereabouts of her son, one Charles (Chale). When told that he was not there and his whereabouts were unknown, they demanded to be given an item worth Tsh. 500,000/- a demand which was not honored. Angered, the 2nd appellant called on other people who acting on his instructions, moved the respondent's households from her house. The court was told that the items taken away include a bed, mattress, beddings, a big and small table, bear and soda crates. They then demolished her chicken coop and two rooms of her house and burnt out the chicken coop materials and the households. Having accomplished their ill mission, the 2nd appellant warned the respondent that a similar incident would repeat should the said Charles be seen in their home. It was also alleged that, in the course of the incident, the appellants stole Tshs. 350,000/= the property of the respondent.

This incident which happened in the presence of the village chairman (PW2) was then reported to a police station. The appellants were arrested and charged with the two offences. Meanwhile, PW4, an investigation officer, was sent to the scene on 14/07/2022 and while there he saw the demolished house and remains of the burnt items. He then secured an axe and machete (panga) which were admitted as Exhibit P1.

In defence, all the appellants categorically denied the offence, raised a defence of alibi and brought forth witnesses to corroborate their story. Convinced by the respondent's evidence, the trial court found the appellants guilty for the offence of malicious damage to property and sentenced them

to community service for a period of six months. It further ordered them to rebuilt the house the, chicken coop, and all the demolished buildings within thirty days, repayment of the destroyed and burnt down items, compensation, costs for the suit and the disturbance she faced due to the malicious damage to her properties.

Aggrieved, the appellants preferred an appeal before the District Court of Hai at Hai on the following two grounds;

1. That the trial magistrate erred in law and in fact by not evaluating properly the weight of the complainant's evidence whereof failed to reach a finding that the complainant had proved the case beyond reasonable doubt in respect of the count of damage of property.
2. That the trial magistrate erred in law and fact by conclusively ordered the appellants to compensate the complainant, whereas there was no evidence establishing ownership of the said destructed properties (house, chicken coop, kitchen and toiled) of they belong to the complainant, Charles or Dominic Mushi (the husband of the complainant)

The first appellate court dismissed the appeal after it established that the case against the appellants was proved beyond reasonable doubt and there was no reason to fault the trial court. Still aggrieved, the appellants have preferred this appeal on the following four grounds which I shall herein reproduce for reference;

1. That, the District Court being the 1st appellate court failed totally to re-evaluate the evidence adduced at the trial court and reached at a wrong conclusion that the respondent had proved case beyond reasonable doubt while not all ingredients of the offence of were provide in respect of the count of malicious damaged to property.
2. That, being the first appellate court the District court erred in law for its failure determined the grounds of appeal presented before it specifically ground number two which addresses the issue of the respondent to be compensated by the appellant without establishing ownership of the said destructed property if they belong to the respondent, Charles or Dominic Mushi instead the District Court proceeded to raise new facts which were not adduced by the complainants and her witnesses at the trial court.
3. That, the first appellate court erred in law by convicting the appellant based on contradictory and inconsistency evidence adduced by the respondent and her witnesses.
4. That, the first appellate court erred both in law and fact by cementing the decision of the trial court by convicting the appellants on the case which was not proved beyond reasonable.

Based on those grounds, the appellants prayed the court to allow the appeal. The hearing of this appeal proceeded by way of written submissions. The Appellants were represented by Mr. Makarious Munis, learned Advocate and the respondent was unrepresented.

Submitting is support of the 1st and 2nd grounds, Mr. Munisi argued that in appeal, the appellate court is not expected to raise new facts while determining the appeal but in the instance appeal, the 1st appellate court raised a new fact as seen in page 6 where it stated that, "PW3 when cross examined by 1st appellant said the house belongs to him and his wife, the respondent". This fact was not stated during trial. PW3 never said that the house belonged to him and his wife but stated that the house was his. He further argued that PW2 stated that per government records, the house belongs to Charles and even during population and housing census, the house was registered in the name of Charles, a fact which was never disputed. He argued further that the magistrate ought to understand that the duty of the defence is to raise doubts and that, the appellants herein dutifully and credibly discharged such duty and the doubt was never disputed by the respondent.

He proceeded that the principle that whatever attached to land forms part of it cannot be broadly interpreted to or applied to vest ownership of the properties on the respondent because under Chagga traditions when a male child reaches the age of majority, he is given a parcel of land to build his house. And, much as the said parcel of land can be within the family

compound, the house so built, does not fall into the ownership of the parents, but the son. He maintained that, since there was no concrete evidence that the house belonged to the respondent, the appellate court materially erred in its findings as the house belonged to Charles. He added that, as the Respondent was neither the owner of the house nor its occupant, she was not conversant with the properties which were in such house.

On the 3rd and 4th grounds, it was submitted that, there were material contradictions in the respondent's case and the same went to the root of the case. According to the counsel, the first major contradiction was apparent in the identification of the perpetrators of the alleged offence. PW1 testified that, it was the appellants who destroyed the house while PW2 stated that there were more than 100 people and PW3 maintained that it was many people but he remembered the appellants and that it was not his duty to know other people who destroyed the properties. Thus, it is possible that, the offence was committed by many people. Besides, PW2 the village chairman who was leading the group was not charged with any offence. Intriguing also, he argued, is the manner by which the appellants were identified as no details were revealed as to how the appellants were identified in the middle of a crowd of more than one hundred people. He proceeded that the distance between the respondent's house and the property alleged to have been destroyed was not certain and it was not disclosed whether the respondent knew or had seen the appellant prior to the incidence. He maintained that, as the evidence was based on visual identification, the criteria laid down in the case of **Waziri Aman vs.**

Republic [1980] TLR 250, **Rajab Hassan Mfaume and 3 Others vs. Republic,** Criminal Appeal No. 30 of 2022 and **Alexander vs. R** [1981] TLR 426 ought to have been followed but they were not. Thus, the appellants were not properly identified. They were simply arrested because they happened to be at the scene of crime.

Lastly and while citing the case of **Director of Public Prosecution vs Daniel Wasonga** (Criminal Appeal No. 64 of 2018) [2022] TZCA 418 where the Court of Appeal quoted the case of **Said Ally Ismail vs Republic**, Criminal Appeal No. 242 of 2010 (unreported), Mr. Munisi argued that, contradictions by witnesses or between witnesses are unavoidable. Thus, not every contradiction of witnesses would cause the prosecution case to flop save where the contradictions go to the root of the case. In the present case, the contradictions were major and go to the root of the case because, much as they raise no serious doubt on the destruction of the house and household items, they entertain a serious doubt on the perpetrator. From the evidence, it is apparent that the respondent and PW3 were not at the scene of the crime and they never saw the appellants committing the crime.

In reply, the respondent submitting on the first and second ground of appeal she argued that, the first appellate court did not bring in new facts as alleged by the appellants. He referred this court to paragraph 2 of page 7 of the first appellate court's judgment in substantiation and argued that, whatever Charles had with the appellants, the appellant had no right to demolish the said house. On the third and fourth grounds of appeal, she submitted that

the inconsistencies pointed out by the appellants' counsel are minor and cannot justify the act of demolition of the house. She argued that the appellants were properly identified and concluded that both courts did not err in fact and law in their respective findings.

I have carefully and dispassionately considered the submissions of the parties alongside the lower court records placed before me. This being the second appeal, I will proceed guided by the trite law that, in second appeal such as the present one, the appellate court will not interfere with the concurrent findings of fact of the lower courts unless there is a misapprehension of evidence by misdirections or nondirections or when it is clearly shown that there has been a miscarriage of justice or violation of some principles of law or procedure as held by the Court of Appeal in myriad decisions including in **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31, **Jafari Mohamed v. Republic,** Criminal Appeal No. 112 of 2006 (unreported) **Raymond Mwinuka vs. The Republic,** Criminal Appeal No. 366 of 2017 (unreported) and **Salehe Ramadhani Othman @ Salehe Bejja v. R**, Criminal Appeal No. 532 of 2019.

In **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** (supra), the Court of Appeal stated that: -

> Where there are two concurrent findings of facts by two Courts, the Court of Appeal, as a wise rule of practice should not disturb them unless it is clearly shown that

> there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure.

And in the latter case, **Salehe Ramadhani Othman @ Salehe Bejja v. R**, (supra) it instructively held that;

> ...this being the second appeal, we are guided by a salutary principle of law which was restated in ***Director of Public Prosecutions v. Jaffari Mfaume Kawawa*** [1981] TLR 149 and ***Mussa Mwaikunda v. The Republic*** [2006] TLR 387 that, in a second appeal the Court is only entitled to interfere with the concurrent findings of facts made by the courts below if there is a misdirection or non-direction made. The rationale behind that, is because the trial court having seen the witnesses is better placed to assess their demeanour and credibility, whereas the second appellate court assess the same from the record."

Additionally, this appeal being of a criminal nature and having originated in the primary court, I will further be guided by regulation 1(1) of the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations GN. No. 22 of 1964 which states that, in criminal cases it is the complainants who carries the burden of proving the case unless the accused admits the offence. Further guidance is drawn from the principle that, just as in cases that originate in the district court and courts higher in the hierarchy, the standard of proof in criminal cases before primary courts is proof beyond reasonable doubt as stated in regulation 5(1) and (2) which provide that: -

> 5(1) In criminal cases, **the court must be satisfied beyond reasonable doubt that the accused committed the offence** [emphasis added].
>
> (2) If, at the end of the case, the court is not satisfied that the facts in issue have been proved, the court must acquit the accused.

Accordingly, a conviction can only be metered or sustained if the court is satisfied beyond reasonable doubt that the offence was committed and that, it was committed by the accused person. In the present case, the trial court was convinced that the case against the appellants was proved beyond reasonable doubt and the first appellate court was similarly convinced that the case was proved to the required standards and on such basis, it sustained the conviction and dismissed the appeal. The appellants' counsel has passionately argued that, there were misapprehensions of the evidence and the law which has occasioned a miscarriage of justice hence the necessity for interference to remedy the injustices occasioned. In brief, the misapprehensions and non-directions on the law and facts being complained against are in the following areas; **one,** at appellate stage, the appellate court raised a new fact; **two,** the two lower courts never established ownership of the destroyed properties; ***three,*** there were contradictions on evidence of the respondent's witnesses; and ***four***, the appellants were not properly identified in the crime scene.

Starting with the last three points, the determination whether there were misapprehensions and non-direction on these areas, takes me aback to the

provisions of section 326(1) of the Penal Code, Cap. 16 which establishes the offence of malicious damage to properties by which the appellants were charged and convicted. It states thus: -

> 326(1). Any person who wilfully and unlawfully destroys or damages any property is guilt of an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years.

The ingredients of the offence created by this provision as expounded by this court in **Julius Malobo vs Revocatus Msiba and Another** (PC Criminal Appeal No. 3 of 2020 [2020] TZHC 923 [Tanzlii] are four, namely;

1. The complainant owns the property or properties,
2. The said property(ies) has or have been destructed or damaged,
3. The property(ies) was/were damaged or destructed by the accused person, and
4. The damaging or destruction of the property (ies) was actuated by malice.

There is no dispute about the first ingredient as both parties are at common regarding the damaged and destroyed properties. However, the appellant's counsel has argued that, the ownership of the properties was not established as there are inconsistencies between the witnesses. On the one hand, it was attested that the house belonged to Charles but on the other hand, it was said, the house belonged to the 2nd respondent or in the alternative, jointly owned by her and her husband, PW3. To appreciate his argument, I have found it apposite to revisit the evidence on record. In this endeavour, I have

observed that, PW2 testified that the house and the properties damaged belong to one Charles who is the son of the respondent and PW3. The respondent, testifying as PW1 averred that the house belonged to Charles. On his party, the respondent's husband, testifying in chief as PW3, stated that he jointly owned the house with the complainant and he further stated as follows:

> "Tarehe 12/7/2022 saa 8 mchana alifika Mwenyekiti akiwa na mshtakiwa 2 wakaamkuta shamba na mke wangu wakaniita kwenye kiwanja chaangu alikuwa na watu wengi na aliniuliza kijana wangu Chale yupo wapi nilimwleza sifahamu alipo ..... ndipo wakatuita na kutuambia **kitendo walichokifanya apo kwa Chale** akija na tukimfungulia watakuja **kutufanyia tena kwetu".**

Cross examined by the 4th accused he replied:

> Nyumba ilibomolewa ina namba 51 **kwangu mpaka kwa Charles kuna umbali wa mita 30**....

Examined by the 9th accused, he stated:

> Charles ni mtoto wangu, ana miaka 23 nilijenga na kumwambia akae apo kwenye nyumba ...

Lastly, when clarifying this issue to the court, he stated:

> Charles anafanya biashara ya duka, **sijaja, sina kielelezo cha kuonyesha eneo hilo ni langu**.

These self-evident extracts from the court proceedings credibly demonstrate that the issue of ownership remained grey. From this record, it cannot be held with precision whether the house and the assets destroyed belonged to the complainant who was before the court, were jointly owned by her and husband, PW3 or it belonged to their son Charles who was not in court and his whereabout were unknown. Accordingly, I subscribe to the argument made by the Appellant's counsel that there was a misapprehension of the evidence as to the ownership and the first appellate court materially erred in its finding that the house was jointly owned by the respondent and PW3. The second ground of appeal is consequently allowed.

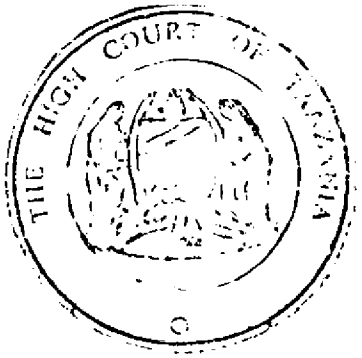
On the 3rd ground of appeal to which I now turn, it has been contended that there were contradictions in the complainant's case. I shall resolve this ground analogous to the 4th ground of appeal as they both concern the identification of the appellants and they answer the question whether the appellants were sufficiently implicated. Submitting in support of these grounds, Mr. Munisi maintained that first, there were contradictions between PW1, PW2 and PW3 on whether the appellants were present at the scene and whether they perpetrated the offence. Whereas PW1 and PW3 maintained that they were present, PW2 who was also present at the scene told the court that he did not see the appellants at the scene and second, the appellants were not properly identified. On her party, the respondent has argued that the appellants were sufficiently implicated. They were properly

identified and the consistencies if any were too minor and incapable of vitiating his case.

While revising the evidence, I have observed that the contradictions in the complainant's case are too conspicuous. PW1, PW2 and PW3 were all present at the scene but their recollection on whether the appellants were there and committed the offence varied materially. Whereas PW1 and PW3, alleged that the appellants were there and committed the offence, PW2 stated he did not see them. Assuming they were there as stated by PW1 and PW3, and save the for the 2nd appellant who allegedly conversed with PW1 and PW3, it is not certain how the rest of the accused persons were identified amidst a crowd of 100 infuriated people hailing from three different hamlets who had come to reprimand Charles for his allegedly criminal conducts. In my firm view, much as the offence was committed in broad day light, the circumstances of the case craved for a concrete demonstration of how the appellants were identified. Since PW1 and PW3 testified that they were eye witnesses to the offence, it was certainly crucial for these two witnesses to disclose how they identified the appellants and they could have done that by, among other things, stating whether they were familiar to the appellants so as to enable the court to judge whether the chances for mistaken identity were eliminated. The omission materially weakened the complainant's case. The omission considered conjointly with the contradictions above stated, leads to the conclusion that the appellants were not adequately implicated. Accordingly, the 3rd and 4th grounds of appeal passes and are upheld.

For the fore stated reasons, I see no need to proceed to the remaining ground of appeal as the finding in the above grounds sufficiently resolves the appeal. Accordingly, I allow the appeal, quash the conviction and set aside the sentence and compensation order imposed against the appellants by Bomangómbe Primary Court and subsequently set aside the judgment of the District Court. Let the appellants be refunded the money already paid by the appellants to the respondent, if any. Order accordingly.

DATED and delivered ay **MOSHI** this 30th day of June, 2023



J. L. MASABO

JUDGE