THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO 2 OF 2023

(Originating from Liwale District Court at Liwale in Economic Case No 61 of 2021)

JUMA ALLY MCHUCHE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

12th & 26th June 2023

LALTAIKA, J.

The appellant herein **JUMA ALLY MCHUCHE** was arraigned in the District Court of Liwale at Liwale (the trial Court) charged with three counts: 1 Criminal Trespass c/s 299(a) of the Penal Code Cap 16 RE 2019. (2) Theft c/s 258(1) and 265 of the Penal Code Cap 16 RE 2019. 3. Malicious damage to property c/s 326(8) (f) of the Penal Code Cap 16 RE 2019.

When the charge was read over and explained to the appellant (then accused) he denied wrongdoing. The trial court entered a plea of not guilty

and proceeded to conduct full trial. At the end of the trial, having been convinced that the prosecution had proved the case to the required standard, convicted the appellant as charged and sentenced him to a FOUR year imprisonment term for all counts.

Dissatisfied, the appellant has appealed to this court on four grounds as reproduced hereunder:

1. *That, the trial Magistrate failed to call material witness to prove the Appellant apprehension in connection to this incident.*
2. *That, exhibits PI, P2 and P3 were wrongly relied upon by the Court in convicting the Appellant herein as the same were highly relied upon in convicting the Appellant without being read to the immediately after its admission.*
3. *That, the trial Magistrate erred in law and fact by convicting the Appellant based on uncorroborated evidence.*
4. *That, the prosecution failed to prove their case beyond reasonable doubt.*

When the appeal was called on for hearing, the appellant appeared in person, unrepresented. The respondent republic, on the other hand, appeared through Mr. Steven Aron Kondoro, learned State Attorney. The appellant prayed that his expounded grounds be considered. He reserved his right to a rejoinder and requested the learned State Attorney to proceed with his part.

Mr. Kondoro announced that he did not support the appeal and wished that both conviction and sentence of the lower court were upheld. The learned State Attorney proceeded to state that the appellant had presented four grounds of appeal but upon examination, he concluded that these grounds could be grouped into three.

On the first ground, Mr. Kondoro explained that the complaint was related to the failure to call a material witness. Referring to section 143 of

the Evidence Act Cap 6 RE 2022, they noted that there was no specific requirement for the number of witnesses to prove a fact in issue. They agreed with the appellant that Hadija Mpyagila was an important witness in the case due to her involvement in the purchase of the seven acres of cashewnuts farm. However, Mr. Kondoro argued that this information alone was not sufficient to compel the prosecution to use her testimony.

He referred to page 9 of the lower court's proceedings, which indicated that the farm purchased by Hadija was matrimonial property, even though she was the buyer. They asserted that the decision to call witnesses to testify in court was within the prosecution's discretion. In this particular case, they claimed that Ms. Hadija Mpyagila was not considered an essential witness. He cited the case of **YOHANIS MSIGWA V. REPUBLIC [1990] TLR** 148, where the Court of Appeal of Tanzania (CAT) held that "It is upon the prosecution to choose which witness to produce and which evidence to tender." Based on this, Mr. Kondoro stated that the respondent, the Republic, believed that the first ground had no merit and should be dismissed.

Moving on to the second ground of appeal, Mr. Kondoro clarified that it pertained to the complaint about exhibits that were allegedly relied upon improperly since they were not read over to the appellant during admission.

Referring to the case of **HUANG QIN AND XUFUJIE V. REPUBLIC** Crim App No 173 of 2018, Mr. Kondoro mentioned that it was established that documents must be read out after admission. This case highlighted

the requirement that every exhibit should be read over to the accused person as a prerequisite for admission. Additionally, he cited the case of **ROBINSON MWANJISI AND THREE OTHERS V. R.** [2003] TLR 218, where the court emphasized the necessity of reading over documents after they had been cleared and admitted. He also mentioned the case of **ANANIA CLAVERY BETELA V. R.** Crim Appeal No 355 of 2017 (Unreported), which stated that the failure to read over an exhibit after it had been cleared for admission and admitted as evidence was considered wrong and prejudicial.

Contrary to the appellant's claim, Mr. Kondoro asserted that the exhibit in question was indeed read over to him in court. He referred to the lower court's proceedings at page 10, 11, and 12, which demonstrated that exhibits P1, P2, and P3 were read out loud in court, and the appellant responded accordingly. Therefore, Mr. Kondoro requested that the ground of appeal be dismissed.

The learned State Attorney moved on to the third ground of appeal, which revolved around the complaint that the prosecution side failed to prove their case beyond reasonable doubt.

According to Mr. Kondoro, it is the responsibility of the prosecution to establish the case beyond reasonable doubt. He explained that for a case to be deemed proven beyond reasonable doubt, the evidence must be sufficiently strong to convict the accused without any doubts. He referred to the case of **MAGENDO PAUL AND ANOTHER V. REPUBLIC** [1993]

TLR 219, which emphasized the requirement for strong evidence to remove any doubts.

Based on his observations of the proceedings in the lower court, the nature of the offenses with which the appellant was charged, and the evidence presented by the witnesses, Mr. Kondoro asserted that there was no doubt that Jumna Ally Mchuche had committed the offenses. He believed that the respondent republic had successfully proven its case beyond reasonable doubt. Therefore, he requested that the ground be dismissed for lack of merit.

The appellant on his part, prayed for his grounds of appeal to be taken seriously. He maintained his innocence, stating that **he had reached an agreement with Hadija to sell his farm to her under the condition that she would wait until the cashews were harvested.** The appellant claimed that Hadija had given him an agreed amount of 1,100,000 TZS and accepted the condition. However, she went ahead and harvested the crops without his permission. The appellant and his wife reported the incident to the Village Executive Officer (VEO) named Frank Nazaro.

Hadija visited the VEO's office and admitted to harvesting the crops, claiming that she had the right to do so as she was the appellant's in-law. She received a warning, and the appellant and his wife requested compensation of 1.5 million TZS, which Hadija agreed to. This incident occurred in 2019, and the appellant did not see Hadija again until 2021. The appellant continued his activities on the farm.

However, on September 28, 2021, the police, accompanied by the VEO, arrested him. The appellant explained that he and Hadija were involved in a buyer-seller relationship and were also relatives, but Hadija decided to involve the police. On September 29, 2021, the appellant was taken to the Primary Court, where the magistrate advised both parties to settle the matter amicably and suggested taking the issue to the Land Tribunal.

Upon returning to his property, the appellant discovered that it had been set on fire, including his TV screen, bags of clothes, and other belongings. Some maize was also taken. Despite being found not guilty in the land-related conflict, the appellant was arrested again on the insistence of the Officer in Charge of the Station (OCS). The following day, he was arraigned in the District Court on charges of burning 5 kilograms of cashews, which he denied. The appellant emphasized that his main reason for appealing to the court was to seek his release as he firmly believed he had not committed the offense.

I **have dispassionately considered the grounds of appeal**, submission by the learned State Attorney and the lower court records. I must admit that this appeal is the most dramatic I have handled so far. Reading through the lower court records was like watching a movie. Luckily, I have taken some time to reflect upon the records before me and I will try to be as simple as possible to share the lessons. Albeit Einstein's [attributed] quote "imagination is more important than knowledge" is especially important here. At an appellate level where I deal mainly with

written texts it is vital to employ the power of imagination to "see" the witnesses who appeared in the trial court as reevaluate their evidence.

Picture this: everything is set for delivery of a judgement in a criminal court. The two most important individuals in the room the magistrate and the accused are facing each other. All eyes are on the magistrate as he goes through piles of A4 papers and adjusting his specs. There is deafening silence. Not even the sound of anyone coughing. Everyone is anxious, some impatient and almost no one knows what the verdict will be. Suddenly the accused person takes to his heels. He runs away as fast as he can turning the court into a marathon show of the accused and the police who, fearing that they would be held responsible, try to outrun the accused. The silence turns into an uproar everyone shouting **"huyo! Huyo! Mkamate!"** This is exactly what happened on the 14th day of December 2021 when the impugned judgement, the subject of this appeal, was about to be delivered by Liwale District Court. Read on.

To cut a long story short, the appellant was apprehended. He was brought back to court to face the music. This time the learned Magistrate was not as composed. He was enraged. He put aside the judgement he was getting ready to deliver and proceeded to conduct summary proceedings. The marathoner accused faced two additional counts: Contempt of Court c/s 114(1) (a) of the Penal Code (supra) and escaping from lawful custody c/s 116 of the Penal Code (supra). He was convicted for both counts and sentenced two six months and two years imprisonment terms respectively.

Why did Juma Ally Mchuche run away from a court of law? The answer is simple: he knew that the court was not going to act fairly. Apparently, he is not a member of the hunter-gatherer's community who live on their own in the bush with zero knowledge of our modern court system. In fact, I found him to be very intelligent albeit completely unschooled. As will be explained, Bwana Mchuche had been to court before where he allegedly pleaded guilty to the same offence and sentenced to six months jail by Liwale Urban Primary Court. He tried the best he could, as indicated by the previous discussion, to show me that the trial court acted unjustly. I agree. Read on, to find out why.

To be fair, this was not supposed to be a criminal offence in the first place. The learned trial Magistrate allowed himself to slip into error by accepting the charge of criminal trespass against established legal principles handed down by superior courts and, more importantly, outright failure to think critically and untangle the quagmire. As a result, a man in the street may be tempted to think that both Liwale Urban Primary Court and the trial court were used to facilitate land grabbing. Worse enough these courts had no jurisdiction to entertain the matter. As one reads through the impugned judgement, there is no doubt that the learned magistrate was well vested with the knowledge of the law. He cited the correct provisions of the law and case law authorities. To my surprise, however, his analysis resulted in the opposite of what he was expected to conclude.

Going back to the facts, to make it easier to link up the dots, the appellant had sold his piece of land measuring seven acres to a person

called **Hadija Mpyagila.** It appears that the buyer and the appellant are in-laws. It appears further that the terms were not conclusive because the appellant continued to use the land in the pretext that he needed to harvest the cashewnuts before relinquishing his rights. Although, as alluded to above, the appellant was arraigned in court, pleaded guilty and sentenced to six months imprisonment, he went back to the same land after completion of his prison sentence.

When he was arraigned in the District Court again for criminal trespass, the learned trial magistrate should have been alerted that the issue of ownership of the land was still unsettled. In the case of **SYLIVERY NKANGAA v. RAPHAEL ALBERTHO [1952] TLR 110** cited by the learned Magistrate in his judgement, this court (Mwalusanya J. as he then was) stated as follows:

> *"A criminal court is not the proper forum for determining the rights of those claiming ownership of land. Only the civil court via a civil suit can determine matters of land ownership...That being the case, the charge of criminal trespass is not maintainable as the ownership of the land in dispute has not been dissolved by a court of law in civil suit...The honest claim of right can only be destroyed after a court of law in civil suit determines who is the owner of the land in dispute."*

There is no doubt that the trial court clothed itself with jurisdiction of a land court by determining ownership based on the purported contract of sale and the so-called memorandum of family meeting. Although, in the end, the learned trial Magistrate sought to justify his erroneous (I would say disastrous) misinterpretation of the law by seeking refuge to section

43A of the Evidence Act Cap 6 RE 2019, it does not take much thought to realize that he simply failed to realize that two wrongs do not make a right.

This court has emphasized time and time again that inability to ruthlessly separate criminal offences from civil and contractual misunderstandings breeds injustice. More affluent members of our society are increasingly inclined to abuse criminal machinery to further their personal interests. This should not be allowed. Needless to say, this fundamental misdirection is capable of nullifying all proceedings and setting aside the judgement of the trial court as I shall shortly do. However, I am inclined to go back to the first ground of appeal just to put some records straight and emphasize on critical thinking.

I am aware that, as per section 143 of the Evidence Act (supra), there is no specific legal requirement for prosecution to call a specific number of witnesses to prove a fact in issue. Without prejudice to the foregoing, I must state that the appellant's last words caught my attention. He asserted that he had reached an agreement with Hadija to sell his farm to her under the condition that she would wait until the cashews were harvested. The learned trial Magistrate uncritically accepted the assertion by PW1 who claimed that he was the husband of Hadija and that the farm bought by Hadija was family property. What happened to privity of contract? Worse still there was no evidence produced to show that Hadija was indeed too sick to come to court. Not only did the trial court turned itself into a land court as alluded to above but also failed to critically examine the exhibits tendered in light with our procedural law.

Premised on the above, I hereby allow the appeal. I nullify proceedings of the trial court, quash the conviction, and set aside the order for compensation and jail term sentences. Further, I order that **JUMA ALLY MCHUCHE** be released from prison forthwith unless he is being held for another lawful course.

It is so ordered.

E.I. LALTAIKA
JUDGE
26/6/2023

Court

This Judgement is delivered under my hand and the seal of this court this 26th day of June 2023 in the presence of Mr. Melchior Hurubano, learned State Attorney and the appellant who has appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
26.06.2023

Court:

The right to appeal to the court of appeal of Tanzania fully explained.

E.I. LALTAIKA
JUDGE
26.06.2023