

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL CASE NO 77 OF 2022

*(Originating from the Juvenile Court of Kilwa at Masoko in Criminal Case No
11 of 2021)*

SALMIN HASSANI MALIKIAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

14th & 30th June 2023

LALTAIKA, J.

The appellant herein **SALMIN HASSANI MALIKI**, a minor, was arraigned in the Juvenile Court of Kilwa at Masoko charged with Malicious Damage to Property c/s 326(1) 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 court proceeded to conduct a full trial. Having been convinced that the prosecution had proved the case to the required standard, it convicted the appellant as charged. The Court also

ordered the appellant's parents to pay a compensate to the complainant at the tune of TZS 90,000 (ninety thousand shillings) per month.

Dissatisfied, the appellant obtained legal service from Phoenix Attorneys, a law firm based in the heart of Mtwara with a satellite office in Lindi. A petition of appeal filed at the District Court of Kilwa contains four grounds of appealed as reproduced hereunder:

1. *That the trial court erred both in law and facts by convicting and sentencing the Appellant while the prosecution side failed to prove their case beyond reasonable doubt.*
2. *That, the trial court erred both in law and facts by convicting an accused person while social welfare officer's report was not properly admitted and read loudly before the court.*
3. *That the trial court erred in proceeding with the matter before explaining the substance of the charge to the Appellant.*
4. *That the trial court erred in law and fact by proceeding with the matter without reading and explaining the memorandum of facts to the Appellant.*

When the appeal was called on for hearing **Ms. Nsajigwa** learned State Attorney who represented the respondent Republic informed the Court that the appellant was not in Court. She prayed that the Court invites Mr. Msalenge, learned Advocate who had appeared for the appellant to address the Court on the matter. this case, the appellant was on conditional sentence. The learned counsel for the appellant can shed some more light.

Mr. Msalenge stated that his client was not present in court and provided the background information. He mentioned that the client was arraigned in the District Court of Kilwa at Masoko and given a conditional discharge for one year. Mr. Msalenge pointed out that the conditional sentence had been successfully served from the date of the judgment, December 30, 2021, until the present.

He further explained that the relevant documents for this appeal were received by their Lindi Branch and filed in this court on August 29, 2022. However, due to the lawyer who handled the matter now being a state attorney, they were unable to obtain the records of communication with their client in Lindi.

Mr. Msalenge acknowledged the legal requirement for the presence of the appellant in court as per section 366(2) of the Criminal Procedure Act Cap 20 RE 2019. He also mentioned the court's previous insistence on the presence of appellants in criminal appeals. Given these circumstances, he requested the court to grant them some time to locate the appellant. In case they were unable to do so, they would inform the court accordingly. Ms. Nsajigwa, on her part, expressed no objection to the request made by Mr. Msalenge.

The court considered the narrated circumstances and suggested that, since the sentence had been successfully served, the first option should be to inform the court that the matter has been overtaken by events and request the withdrawal of the appeal. However, if there were still issues worthy of consideration, various factors such as the serving time and the presence of the appellant in person would need to be considered.

Upon careful examination of the scanty records, this court grew even more suspicious of the genuineness of the appeal. To avoid frivolous matters ending up becoming backlog cases, it decided to vacate its previous order of hearing of the appeal and ordered the learned counsel at Phonex Attorney to address the court on why the appeal should not be dismissed.

On the 16/06/2023, Ms. Nsajigwa and Mr. Rainery Songea, learned Advocate appeared for the respondent and appellant respectively.

Ms. Nsajigwa informed the court that the appeal was scheduled for hearing and confirmed her readiness. Mr. Songea acknowledged that the matter was indeed scheduled for hearing. However, he stated that they were aware of the court's order requiring the appellant's presence. They had learned that the appellant is currently in Tabora. Mr. Songea mentioned that the appellant's father, who had instructed them, was present in court as the appellant is a minor. He prayed that he is allowed to address the court.

The accompanying person introduced himself as **Falala Kazamoyo Kona**, a 43-year-old resident of Somanga in Lindi. He stated that he is a pastoralist. According to Mr. Kona, the appellant in the case is his nephew, Salimini Hassan Maliki, who is 17 years old. The appellant was suspected of grazing cows in a wheat farm but was not arrested.

Mr. Kona mentioned that the appellant informed their neighbor about the alleged molestation (injury) of their cows. Upon inspection, Mr. Kona found a cut on the back of one of the cows. He then went to the police station to report the incident and provide an explanation. The following day, a veterinarian arrived and treated the injured cow. Mr. Kona decided to file a complaint in court regarding the injury caused to the cow, although he couldn't recall the name of the person responsible. The perpetrator was convicted and ordered to either pay TZS 100,000 or serve a three-month jail term.

Interestingly, Mr. Kona suggested, the same person who had injured Mr. Kona's cow later became a witness in a case filed against the appellant by an individual named Kopakopa. The court decided to sentence the appellant to a one-year conditional sentence and imposed a fine.

Mr. Kona mentioned that he did not pay a lawyer but rather prayed for assistance. He emphasized that fines are typically paid if there is evidence that one's cows have damaged someone else's property, but in this case, no evidence was presented.

This court noted that Mr. Kona's account was inconsistent with that of his lawyer Mr. Songea. While Mr. Songea introduced him as the father of the appellant who had instructed them, Mr. Kona said the appellant was his nephew. He barely knew what he was saying regarding the appeal. In my opinion based on his demeanor, he did not look like a pastoralist.

This court engaged counsel in a discussion on the way forward. Mr. Songea pleaded with the court to grant them the right to be heard. He insisted that the appellant was a minor and even if he was there, he wouldn't have added anything substantial. The learned counsel opined that cases like the present one may appear simple, but upon a careful look they carried profound legal issues. The court then invited counsel to address the grounds of appeal.

Mr. Songea informed the court that the appellant had presented four grounds of appeal but intended to argue them collectively. The learned counsel averred that he reviewed the proceedings, judgment, and charge sheet and believed that the prosecution had not fulfilled its duty adequately.

According to Mr. Songea, the charge sheet indicated that the damaged farm belonged to **Omari Mohamed Chande**, who they considered an essential witness. He referred this court to the case of **ASHA AMIRI MNGANG'I AND ANOTHER V. MALULID RASHID MNEKA PC CRIM APPEAL NO. 05** of 2021 HCT, Dar, where the court outlined the essential elements of the offense of malicious damage to property. The first element being the complainant as the owner of the property.

In the case at hand, Mr. Songea reasoned, the witness who appeared in court was Omary Mohamed Kopakopa, while the charge sheet mentioned Omary Mohamed Chande, raising doubts about the prosecution's case. Mr. Songea cited the case of **SALUM RASHIDI CHITENDE V. R. CRIM APP NO 204 OF 2015**, where it was stated that the prosecution is obliged to prove the offense was committed on the specific date, time, and place mentioned in the charge sheet.

Mr. Songea emphasized that in criminal matters, the standard of proof is very high, and in case of doubt, the case must be decided in favor of the accused person. He referred to the decision of this Court in **DPP VERSUS GODFREY MICHAEL MWANVONGO @ GODFREY GABRIEL AND THE CASE OF JUSTINE KAKURU KASUSURA @ JOHN LAIZER V. REPUBLIC No 75 of 2010**, CAT Dar to support his argument. He prayed for the appeal to be allowed, the court to set aside the order for the appellant's parent to pay TZS 908700 to the complainant. Before leaving the floor Songea emphasized that the court rectified the contradictions such as the number of crops destroyed. While PW1 says the property was a total of

1368 crops, Mr. Songea averred, PW3 who had conducted valuation stated that they were 1398. Such contradiction, reasoned the learned counsel, brought about doubts on the prosecution case. He prayed for an order to set aside the whole order for compensation.

The learned State Attorney Ms. Nsajigwa, on her part, vehemently opposed the appeal. She expressed her intention to address all the grounds collectively, focusing on the complaint of the inability to prove the case. She acknowledged the variation of names between Omary Mohamed Kopakopa and Omary Mohamed Chande but considered it an error that could be cured by section 388 of the **Criminal Procedure Act Cap 20 RE 2022 (the CPA)**.

Regarding the contradiction in the number of plants damaged, she argued that it was insignificant and would not result in injustice. Ms. Nsajigwa referred to the case of **SCOLARSTICA PAULO V. R.** [1984] TLR 40 to support her argument that the offense of malicious damage to property required evidence of damage or destruction and ownership of the property. She submitted that the case had been proved beyond reasonable doubt.

In rejoinder, Mr. Songea insisted on clarifying the ownership of the farm, pointing out that the charge sheet listed Omary Mohamed Chande as the owner, while the witness testified as Omary Mohamed Kopakopa. He asserted that these were two different individuals, and the complainant did not testify. Mr. Songea argued that section 388 was inapplicable in this case as the charge sheet was the foundation of the case and should have been amended. He disputed the case cited by the respondent's counsel,

SCOLARSTICA PAULO V. R. (supra) claiming it was related to proof of destruction.

I have dispassionately considered the rival submissions and examined the records of the trial court. Admittedly it has been very difficult for me to connect the dots on what exactly happened, who did what and the parameters of the reliefs sought. As a storytelling enthusiast, my thirst for information and contextual backdrop has not been quenched. The learned counsel for the appellant has submitted, very well I would say, on the technical aspects of the appeal. The learned state attorney has also done an equally exemplary job in rebutting the rival submissions. Nevertheless, for this court to exercise its mandate of reevaluating the evidence and come up with its own position, if necessary, more information is needed.

I have no doubt in confirming my earlier suspicion that this appeal is from the bar. Earlier, Mr. Msalenge told us that their colleague who was instructed to deal with the appeal has now been employed as a State Attorney. The name of the learned State Attorney who would most likely not be willing to go back to a matter he handled as a private practitioner is not mentioned. In the spirit of ensuring that litigation comes to an end, the learned Advocates should have taken the chance given to them to consult their client and withdraw the appeal.

As I observed the demeanor of the "father" cum "uncle" of the appellant, I can safely assume that the appellant and his relatives have little if anything to do with the present appeal. If the learned advocates think they

need to advance our criminal law by ensuring protection of basic human rights of the appellant, a minor, I think that could be done through the human rights track by filing a petition under **the Basic Rights and Duties Enforcement Act (BRADEA) 1994**.


I am inclined to state albeit in passing that this court is aware of escalating conflicts between pastoralists and farmers not only in Lindi but also in many other parts of our country. It is, therefore, highly advisable, that the learned counsel for the appellant refrain from employing technicalities that delay or any how seek to circumvent court orders by, among other ways, bringing up appeals that are only halfheartedly pursued. It is the obligation of all citizens of this country to obey court orders. In the words of Romer L.J. in **HADKINSON V. HADKINSON** [1952] 2 All ER 567

*"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. **The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.**"*

In the upshot, the appeal is hereby struck out for being frivolous and vexation. All orders of the trial court remain valid until they are set aside by a court of competent jurisdiction.

It is so ordered.




E.L. LALTAIKA
JUDGE
30/06/2023

Court

This Judgement is delivered under my hand and the seal of this court this 30th day of June 2023 in the presence of Mr. Ms. Atuganile Nsajigwa, learned State Attorney for the respondent and Ms. Anastazia Minja, Advocate for the appellant.



E.I. Laltaika
E.I. LALTAIKA
JUDGE
30.06.2023

Court:

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



E.I. Laltaika
E.I. LALTAIKA
JUDGE
30.06.2023