**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**PC CRIMINAL APPEAL NO. 11 OF 2022**

***(C/F Criminal Appeal No. 9 of 2022 from the District Court of Babati at Babati, Originating from Criminal Case No. 319 of 2021 at Babati Primary Court.)***

**ABDALLAH ALLY** _____ **1ST APPELLANT**

**ALLY IDDY** _____ **2ND APPELLANT**

**VERSUS**

**IDD KASIMU** _____ **RESPONDENT**

## JUDGMENT

*12/06/2023* **&** *23/08/2023*

**BADE, J.**

The Appellants herein were arraigned before the Babati Primary Court in Criminal Case No. 319 of 2021 and charged with two counts, one, Criminal Trespass contrary to section 299 (1) of the Penal Code (Cap 16 R.E 2019) and two, Malicious Damage to Property contrary to section 326 (1) of the Penal Code.

The allegations against the appellants can be gleaned from the particulars of the offences thus on 22nd day of February 2021, 16.30hrs at Usole Hamlet, Mwanda Ward, Sanga Iwe Village, within Babati District in Manyara Region the appellants did enter into the farm of Respondent unlawfully and close his fish pond by using hoes and shovels. That on the same date, same hours appellants did maliciously damage the fish pond of the Respondent.

The Appellants pleaded not guilty. Respondent then Complainant summoned one witness to make out his case. The Appellants summoned two witnesses. At the end of the trial, the Magistrate acquitted both appellants. The Respondent was aggrieved by such a decision and therefore appealed to the District Court of Babati on three grounds as follows:

i. *That, the trial Court erred in law and fact for not properly evaluating evidence of both sides hence reaching an erroneous decision as the Respondent prove his case beyond a reasonable doubt.*

ii. *That, the trial Court erred in law and fact for not convicting the Appellants after they admitted in their defence that they had trespassed into the Respondent's farm.*

*iii. That, the trial Court erred in law and fact for not according the Respondent opportunity to cross-examine the Appellants' witnesses hence reaching into an erroneous decision.*

After hearing oral submissions from both sides, the 1st Appellate Court overruled the decision of the trial Court and convict both Appellants and sentenced the 1st Appellant for the 1st count to pay a fine in the tune of TZS 100,000 or in default, to serve three months in prison, and for the 2nd count to pay a fine of TZS 500,000. The 2nd Appellant for the 1st count was conditionally discharged and ordered not to commit any offence for the period of three months. For the 2nd offence he was also conditionally discharged on the condition that he will not commit any offence for the period of three months. Both Appellants were ordered to pay compensation of TZS 1,200,000, the money they had after selling the soil from the Respondent's farm. Dissatisfied with the said decision the Appellants lodge the instant appeal on four grounds:

*i. That, the first Appellate Court erred in law and in fact when it convicts and sentenced the Appellants whilst the offence of malicious damage to property was not proved beyond a reasonable doubt.*

*ii. That the first Appellate Court erred in law and in fact when it determined the issue of malicious damage to property while there was clearly a land dispute between the parties.*

*iii. That, the first Appellate Court erred in law and in fact when it concludes that the respondent was the lawful owner of the plot of land while it did not have jurisdiction to determine land matters.*

*iv. That, the first Appellate Court erred in law and in fact when it fails to follow the laws while deciding the appeal before it.*

This appeal was argued by way of written submissions having obtained the leave of the court to so do, both parties appeared in person unrepresented. Meanwhile, the Appellants lodged a joint submission.

With regard to the first ground of appeal they submitted that for the offence of malicious damage to property to be proved, the side that is prosecuting need to establish three elements, one, the accused person with malice aforethought damaged the property; two, there is proof of damage; and three, the property damaged belongs to the one who alleged. They further argued that all three elements of the

offence had not been proved beyond reasonable doubt as it is impossible to hold that the accused persons with ill motive or malice damaged the property. They added that as it can be seen from the proceedings of the trial court the first Appellant testified that he believes that he was working on his father's farm. That this alone is sufficient to exonerate the accused persons of any guilty because the first appellant truly believes that the farm on which he was working, belongs to his father, who is the second Appellant. Further, the 2nd Appellant was not seen anywhere near the said farm, but more importantly, he too believed in earnest that the farm which he is claimed to have damaged belongs to him. To support their position, they cited the case of **Lawrence Mateso vs R (1996) TLR 118** where the court held:

> *"Before a person is convicted of that offence, malice, inter alia must be admitted or proved. But the word malice here is not used in the sense understood by lay man, it is used in a technical sense. Here the word does not necessarily mean personal spite against the owner or possessor of the damaged property. It is enough if the accused intended wrongful damage to the property, because if that intention is*

*admitted or demonstrated to have existed the law will presume malice. The presumption is of course rebuttable".*

Moreover, they further submitted that throughout the proceedings of the trial court there is no evidence proof that there is any damage that was occasioned on the Respondent's property. The Respondent herein fails to bring proof of the damage by either a third-party witness or valuation report of the said damage.

On the third element of ownership of the property they submitted that there was no concrete proof which shows the land which was the matter in issue in those proceedings were the same land which was alleged to be damaged by the appellants. That the documents produced by Respondent during trial could be about an entirely different land and hence in the absence of complete proof that they were about the same land the first appellate court erred in holding that there was proof of damage. To cement their position, they cited the case of **Mohamed Mashauri vs Gerald Amandi, Criminal Appeal No. 12 of 2019** where the High Court stated:

*"Unfortunately, the Land Ward Tribunal judgment does not bear the sketch map to show the disputed land for this court to satisfy*

*itself of the exact area which the appellant is alleged to have ploughed and damaged respondent's property".*

In their view, the court document alone cannot prove ownership of damaged property. They insisted that the offence of malicious damage to property was to be proved beyond the reasonable doubt.

With regard to the second ground, they submitted that having read the entire proceeding of the case one would realize what was going on was that there was an ongoing land dispute between the parties concerning the land alleged to have been damaged. They further argue that the first Appellate Court erred by entertaining the said criminal case and that the fact that there was a land dispute vitiates the whole criminal case as it was impossible to determine whether the accused person damaged the property of another or he was working on his own piece of land. It is their contention that on various times the higher courts have stated that whenever there is a land dispute, a criminal case cannot stand as the accused person has a valid defense of Bonafide claim of right.

On the third ground of appeal, they submitted that the court which has the exclusive right to try land matters is the District Land and Housing Tribunal. That the District Court has no mandate to determine who is the lawful owner of a plot of land. They referred this court on page 6 of

the typed judgment which stated that ".... but I will peruse the trial court records to ascertain who is a legal owner". That the first Appellate Court went on to explain the court record tendered and resolved that the Respondent was the legal owner. In their view this is not correct as the first Appellate Court has no idea about the land in dispute in the documents presented in court in relation to the property that was damaged. They concluded that the first Appellate Court exceeded its jurisdiction and thus occasioned injustice to the appellants.

Arguing the fourth ground of appeal, they submitted that the first Appellate Court awarded compensation to the tune of TZS 1,200,000 as the money allegedly obtained from selling the soil. The laws on awarding compensation are clear, that the compensation or refund must be awarded when the said loss or damage has been proved. They further argued that the Respondent has not proved that he had lost TZS 1,200,000 or that the said damage was worth that much. They insisted that in awarding compensation first Appellate Court did not follow the set rules and laws thus occasioned injustice to the appellants. They insist that the award was baseless and had no legs to stand, urging this Court to quash and set aside the decision of the first Appellate Court.

Responding, the Respondent submitted in reply in general terms. He strongly opposed the appeal and supported both the conviction and sentence passed by the first Appellate Court. He submitted that the first Appellate Court performed its duty legally to reevaluate the evidence adduced in the trial court. He contends the power of the first Appellate Court to reevaluate evidence is confirmed in the case of **Makubi Dogan vs Ngodongo Shinyanga, Civil Appeal No. 78 of 2019 CAT at Shinyanga (Unreported)** where the Court of Appeal held:

> *"We wish to note that this being the first appellate court it is entitled to reevaluate the entire evidence on record by reading it together with subjecting it to a critical scrutiny and if warranted arrive at its own decision. This task is bestowed upon us by the provisions of Rule 36 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules)".*

He contended further that it is a cardinal legal principle that the prosecution side should prove the case beyond reasonable doubt as provided for in Rule 18 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations. That the proving of the case was done successfully in the land dispute filed in the Ward Tribunal of

Magugu at Babati in Manyara Region in Application No. 9 of 2018, its judgment was admitted in the Appellate court at Babati in Criminal Case No. 319 of 2021.

Further, the Respondent submitted that first Appellate Court could not be tied up with scrutinizing the land ownership issue which was already resolved by the Ward Tribunal of Magugu which is a competent body to try and determine land disputes in the particular jurisdiction. To support his position, he cited the case of **Sylivery Nkangaa vs Raphael Alberto (1992) TLR 110** where it was held that:

> *".....iii) a charge of criminal trespass cannot succeed where the matter involves land in a dispute whose ownership has not been finally determined by a civil suit in a court of law.*
>
> *iii) A criminal court is not a proper forum for determining the rights of those claiming ownership of land. Only a civil court via a civil suit can determine matters of land ownership".*

In further argument, he contends that the first Appellate Court observed the case of **Ismail Bushaija vs Republic, (1991) TLR 100** where it was held that:

"(i) *Since this case boils down to a dispute of ownership of the shamba which is the subject matter of these criminal proceedings it seems that this is a clear defence of bonafide claim of right,*

*(ii) It is wrong to convict a person for criminal trespass when ownership of the property alleged to have been trespassed upon is clearly in dispute between the complainant and the accused;*

*(iii) When in a case of criminal trespass, a dispute arises as to the ownership of the land the court should not proceed with the criminal charge and should advise the complainant to bring a civil action to determine the question of ownership".*

So he submits that the appeal is a result of a land ownership dispute which was in fact resolved by the Ward Tribunal on 6th day of November 2018. The same was ruled in favor of the Respondent. He referred this Court at the last paragraph of the Ward Tribunal's judgment stating that:

*"Baraza limempa haki Idd Kasimu kuendelea na eneo lake kwa kufuata kifungu cha 16 (1) (a) Kifungu kidogo cha* ***sheria ya Mwaka 2002".***

Respondent further added that no appeal or reference was preferred against the decision of the Ward Tribunal.

On the allegations that the first Appellate Court erred in law to decide on the land ownership in the criminal case, he submitted that the first appellate court was right to reverse the decision of the trial court after perusing the whole evidence adduced and documentary evidence admitted during trial, and that evaluation was done legally as per **Makubi Dogani's case (supra).**

Moreover, he submitted that the court could not uphold the trial court's judgment and neither could it deal with or be tied up on the issues of ownership as that is the position laid down in the case of **Sylivery Nkangaa's case (supra) and Ismail Bushaija's case (supra).**

In conclusion, the Respondent submitted that the first Appellate Court did neither err in law nor in fact to convict the appellants on oral and documentary evidence tendered as it did. That the first Appellate Court

after perusing evidence adduced had no option but to reverse the trial court's decision based on the Respondent's evidence.

The Appellants had not rejoined despite being given the opportunity to so do, other than simply urge this court to find the appeal with merits.

Having read the rival submission from both parties in this appeal, I think the issue for the court's determination is whether the charge of malicious damage to property against the Appellant was proved to the required standard.

Section 326(1) of the Penal Code provides that:

*"Any person who wilfully and unlawfully destroys or damages any property commits an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years."*

I shall address myself starting from the 1st ground of appeal, that offence of malicious damage to property was not proved beyond reasonable doubt. In order to prove the offence of malicious damage to the property prosecution needs to prove two elements among others, one, that the act was done willfully and two the act was unlawful. Further the Court has expounded in this offence through the case of

**Scolastica Paul vs Republic** (1984) TLR 187 where the Court held that:

> *" To constitute the offence of Malicious damage to property there must be evidence of damage or destruction of the property and the ownership of the property".*

This is to say that the prosecution needs to establish; first, that the accused/appellant herein acted willfully (with intent or malice) secondly, damage or destruction of the disputed property, and thirdly, proof of ownership of the damaged property.

The Black's Law Dictionary, 9th Edition defines the term malice as:

> *"the intent, without justification of excuse, to commit a wrongful act; the reckless disregard of the law or of a person's legal rights; ill will ...."*

At the trial court when the charge was read over, the Appellants denied the offense. Thus, they never admitted the ingredient of malice nor was it established and proved by the respondent. The appellate court should have directed itself to make a finding on whether or not the trial court when determining the matter did consider this important ingredient proved by the prosecution before

overruling the trial court decision and convicting the Appellants. The evidence adduced by the respondent at the trial was not sufficient to prove that the appellants acted wilfully and unlawfully to destroy the Respondent's fish pond.

The trial Court ought to have established and made a finding that the 2nd Appellant was aware that the land did not belong to his father. Making the presumption that the land which was adjudicated upon by the Ward Tribunal was the same land that is being alleged to have contained the fish pond that has been destroyed is erroneous particularly because it can easily be that the same land which the parties had had a dispute over, is being at issue once again, so proving that this is the land being litigated about, and which dispute had been resolved previously is crucial. Equally important, is the fact that establishing ownership is a technical issue, especially because there were no title deeds with marked beacons to include or exclude a certain part of a disputed land. This make it imperative that a finding on ownership is actually made.

Having said that I find this ground to be with merit.

The same logical reasoning would also canvass the 2nd and 3rd grounds of appeal since without making a finding that there was an

ongoing land dispute among parties, and that the complainant is actually the lawful owner of the disputed damaged land, it becomes impossible to determine the charged offense. The trial court record shows that there was a dispute that was resolved by the Ward Tribunal declaring the Respondent to be the owner of the farm. Despite the argument by the Respondent that no one appealed that decision; the issue still remains did the trial court establish the land now at issue is the same land over which the dispute was resolved at the Ward Tribunal? I did not see any evidence on record to establish this fact, and in that regard, I find it was erroneous for the first appellate court to determine otherwise. Similarly, the first appellate court should not have declared or supported the unfounded declaration through its judgment that Respondent was the lawful owner of the farm, cementing on what was ruled out by the Ward Tribunal without distinguishing what exact land is being at issue. The proving of the one ingredient over the ownership of the property alleged to have been damaged would put clarity to the appellate court's findings. I thus allow these two grounds of appeal.

On the final ground of appeal on legality of the compensation that was awarded to the Respondent. It is Appellants' contention that

such award has no legal basis as the Respondent did not prove the damage or extent of the destruction of the disputed damaged property. It is my considered view that damages have to be proven, so a valuation report which analyzed the extent of damage or evidence that establishes the damage general and specific should have been adduced and be on record for the first appellate court to award the same. Otherwise I must agree with the Appellants that the said award of damages becomes without any basis factual or legal. The first appellate court simply decided to award damages predicated on the amount which the Appellants supposedly obtained after they illegally sold the soil from the Respondent's farm.

Now before I pen off going through the evidence of the trial court, I did not see anywhere where the 2nd Appellant was mentioned by any witness that he was seen in the respondent's farm. It is only 1st Appellant who admitted to have been on that farm on the allegation that it belongs to his father. I think it was wrong for the first Appellate Court to convict and sentence 2nd Appellant on the offences not proved against him. So despite the outcome of this appeal, I would have acquitted the said 2nd Appellant on both offences and set aside any sentences passed against him.

But as it is determined, this appeal is also allowed for the reasoning above explained.

On the consequence, the orders and conviction of the first appellate and the trial court are all quashed and set aside. Whichever party is interested can approach the doors of the court/tribunal to establish their rights on any competent forum as they deem fit.

The Appellants are entitled to their costs.

It is so ordered.

**DATED** at **ARUSHA** on the **23rd** of **August 2023**.

**A.Z. BADE**
**JUDGE**
**23/08/2023**

**Ruling Delivered** in chambers on **23rd August, 2023** before counsel for the Applicants; and Respondents appearing in person.

HIGH COURT OF TANZANIA

**A. Z. BADE**
**JUDGE**
**23/08/2023**