

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM

PC CRIMINAL APPEAL NO. 3 OF 2023

(Arising from the decision of the District Court of Kinondoni at Kinondoni in Criminal
Appeal no 15 of 2022 before Hon. H. S. Msongo, PRM
Original Kawe Primary Court Criminal case no 1621/ 2021.)

EDGA SAMWELI APPELLANT

VERSUS

ELLY EMILE RESPONDENT

JUDGMENT

7th & 14th Nov, 2023

KIREKIANO, J.:

This is a second appeal the appellant is determined to convince this court to reverse the concurrent findings of the two lower courts. Before the Primary Court of Kinondoni District at Kawe, the appellant was charged with two counts; the first count was stealing contrary to section 265 and the other count was malicious damage to property contrary to section 326, all courts under the Penal Code Cap 16 [RE 2019].

According to the charge, the allegation was that on 20/07/2021 at Mbweni Maputo Kinondoni District the appellant stole various spare parts of

a tricycle known as *bajaji* all valued at Tshs. 809,000/= the property of the respondent Elly Emile. As such it was alleged that the appellant maliciously damaged the said tricycle.

The trial court found that the charge was well proved it convicted the appellant as charged and sentenced him to community service for three months in the first count and in the 2nd count, he was sentenced to the pay fine of Tshs. 100,000/= or two months term of imprisonment in default. He was also ordered to compensate the appellant Tshs. 500,000/=.

The brief facts of the case were as follows: -

The respondent is a businessman. He deals with transportation operating tricycles popularly known as *bajaji*. In 2020, he was approached by his sister PW2 Veronica who informed him that her driver (the appellant) needed to be recruited as a rider to operate a *bajaji*.

The respondent accepted this with conditions that the rider should sign a contract, it appears from the record that this deal was sealed on 24/8/2020 in what appears to be a hire purchase agreement. The appellant was handed a *bajaji* and respondent sister PW2 Veronica was a guarantor.

It appears that the operation of this tricycle was not prolific. The tricycle was later found parked at Tegeta with several spare parts missing. The guarantor PW2 Veronica verified the non-performance of the appellant side of the bargain in the hire purchase of the tricycle. The respondent later contacted the appellant about this and upon inspection of the said *Bajaj* several spare parts were found missing or damaged. It was based on this that the charges of stealing and malicious damage to property were preferred against the appellant.

The appellant's defence was that he signed a contract with the respondent on a tricycle and PW2 Veronica guaranteed him. The contract was performed smoothly for one month however the tricycle had lots of mechanical challenges, he parked the same at Tegeta after notifying his guarantor PW2 Veronica. He denied stilling the parts of the tricycle nor damaging the same maliciously.

The trial court found that there was evidence that several parts were found missing from the tricycle. It went on to make a finding that the same were maliciously damaged and stolen by the appellant.

In his appeal to the District Court, he complained that the charge was not proved in all elements of the offences. The District Court was not convinced. In disallowing the appeal, the District Court was satisfied that the appellant had removed the alleged spare parts and sold them. The appellant is thus aggrieved with the decision of the district court, his appeal to this court is on nine grounds:

- 1. That, the Honorable District Court Magistrate erred in law and fact by introducing a specific provision of the malicious damage of properties in her judgment which was neither mentioned nor specified in the judgment nor charge sheet.*
- 2. That, the appellate District Court erred in law and fact by introducing a new fact in her judgment which was not in question or introduced in the main trial.*
- 3. That, the appellate District Court erred in law and fact by not determining the grounds of appeal adduced in the appeal.*
- 4. That, the judgment delivered by the appellate District Court is incurably defective for not containing reasons and reasoning of the decision of the Court.*
- 5. The case was not proved beyond reasonable doubt.*
- 6. The district court erred in affirming the admissibility of electronic evidence by the primary court.*
- 7. The district court erred in failure to consider the chain of custody of the property in question*

8. The district court erred in failure to take into account the appellant's defence

9. The district court erred in failure to take into account the procedural irregularities in the from arrest to judgment.

The appellant was represented by Miss Rosemary John learned advocate while the respondent was unrepresented. At the option of the respondent, hearing of this appeal was by way of written submission.

Miss Rosemery for the appellant submitted that the decision of the district court was delivered on 27th October 2023 and he filed his appeal at the district court on 4th November 2022. This was done according to section 25 (3) of The Magistrates Court Act cap 11 [RE 2019]. thus, there is no point that it was out of time

On the first ground, the appellant argued that while the charge in the primary court stated malicious damage to property c/s "326 of the Penal Code" the district court in its judgment cited section "326 (1) of Penal Code" in this he argued it was not proper.

On the second ground, the appellant argued that the District Court brought extraneous matters into consideration when it held that the

appellant had moved some parts from the tricycle **bajaji** and sold them. According to him, this was not reflected on the record of the Primary Court.

On the third ground, the appellant argued that the first appellate court did not properly address the grounds of appeal especially whether the offence of malicious damage to the property was well proved. According to him, the judgment was substantially a summary of evidence and parties' arguments. He cited the decision in **Masele Mabula VS Republic Criminal appeal no 38 2022** to the effect that the appellate court should effectively determine the grounds of appeal.

In the fourth ground of appeal, the appellant argued that the first appellate court decision missed the necessary elements of a judgment in terms of Section 312 of the Criminal Procedure Act (sic).

In the fifth ground, the appellant argued that the first appellate court erred in confirming the decision of the primary court while the ingredients of the two offences were not established. On the offence of theft, the appellant submitted that the element of asportation was not proved. He said there was no evidence proving that he did take anything from the tricycle with the intent to steal.

On the sixth ground, the appellant narrated the provision of section 18 (2) of the Electronic Transaction Act 2015 on the procedure before the admission of evidence by the primary court. Citing **Christina Thomas Vs Joyce Yusto PC Appeal no 84 of 2020** that the admission of electronic evidence was in contravention of the rules of evidence in primary court.

On the seventh ground, he argued that there was no tracking of the chain of custody of the said *Bajaj* thus the offences could not be proved. On the eighth and ninth ground, the appellant was of the view that the appellant was arrested detained and questioned outside permissible time under section 50 of the Criminal Procedure Act cap 20.

He emphasized that the said tricycle was in his possession under the hire purchase agreement. In support of the lack of the elements of stealing, He cited the decision in **Christian Mbunda v Republic**, TLR [1985] but also **Sula Kasila v. Uganda**, Civil Appeal No. 20 of [1993].

As such about the offence of malicious damage to property the said elements of malicious damage were not proved. These elements were stated by this court Tiganga, J in **Julius Malobo v Revocatus Msiba & Others**, Criminal Appeal No. 3/2020;

1. *It must be proved that the property was destroyed.*
2. *That it was the accused who destroyed the property in question*
3. *That the accused destroyed the same with intention without any legal justification.*

The respondent submitted in response to the first ground on citation of the offence section he argued that the same was not raised at the District Court. **Citing Joseph Leko v Republic, Criminal Appeal No. 124 of 2013.** *"Ground of appeal not raised in the first appeal cannot be raised on the second appeal".*

On the second ground, the respondent argued that the issue considered by the first appellate court was whether the Bajaj was stolen or not. The analysis indicating that the spare parts were sold was not a decisive issue to determine the appeal as such the same was not a new fact but the reasoning of the court.

On the third ground, the respondent pointed out that all grounds of appeal were determined by the district court where it said grounds no three four and five were related it did not mean that the same were not considered.

On the fourth ground, he pointed the first appellate court complied with rule 22 of the **Judicature and Application of Laws (Criminal Appeals and Revisions in Proceedings Originating from Primary Courts) GN 390 /2021**. In this, he said the Criminal Procedure Act was not applicable in the primary court.

On the 5th, 6th and 7th ground the first appellate court correctly evidence and found that the charge was proved in the required standard. On the question of the admissibility of electronic evidence, the respondent conceded that the rule of Evidence in the Primary Court is silent on the applicability of electronic evidence in primary court, however. However, given the decision in Asha **Juma Vs Republic Cr appeal no 140 Of 2022** admission of evidence cannot be challenged at this stage.

Lastly, the respondent in the ninth ground pressed that the appellant's argument was pegged on the wrong law that is the Criminal Procedure Act instead of the Primary Court Criminal Procedure Rules.

Before resolving the ground of appeal, it is noted here that this is a second appeal and the two lower courts had concurrent findings that the charge was proved beyond reasonable doubt. In this I am alive to the role

of this court as enumerated in the case of ***Amratlal Damodar and Another vs H. Jariwalla [1980] TLR 31 that;***

"Where there are concurrent findings of fact 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 principles of law or procedure.

From the outset, I wish to address two aspects which featured in the party's submission and grounds of appeal Firstly, the issue which came up in the course of the hearing on the competence of this appeal that is whether this appeal was filed in time. Secondly, issues which came up in the 4th and 9th grounds of appeal, are the rules of procedure applicable in the primary court.

On the first aspect, it is undisputed that the decision of the District Court was delivered on 17/10/2022. Given section 25 (3) of the Magistrate Court Act Cap 11, an appeal ought to be filed within thirty days. It appears that the petition of this appeal was filed electronically in this registry on 16/11/2022. I have perused the record, and as rightly submitted by the

appellant, the petition of appeal was initially filed at the District Court on 4/11/2022.

The rules of procedure governing this court while dealing with the decision of the district court exercising its appellate and revisional jurisdiction over matters originating in primary court are **Judicature and Application of Laws (Criminal Appeals and Revisions in Proceedings Originating from Primary Courts) GN 390 /2021.**

The same provides;

*Rule 6. (1) When a petition of appeal to a district court is filed in that court, it shall immediately be **endorsed with the date of filing, numbered and entered in a register to be kept for that purpose.***

(2) N/a

*(3) The district court shall, when a petition of appeal to the High Court is filed in the district court, **cause the date of filing to be endorsed on the petition before dispatching it to the High Court.***

The petition of appeal was endorsed on 4/11/2022. The subsequent filing of the petition of appeal at the high court was for registration purposes. I thus find that this appeal is properly before this court having been filed in

time at the district court as required under section 25 (3) of The Magistrate Court Act Cap 11.

On the second aspect it is to be noted to the parties that the Tanzania Evidence Act Cap 6 does not apply in Primary court instead the rules of evidence applicable are The *Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations* made under the **Magistrate Court Act**. As such **The Criminal Procedure Act Cap 20** has its equivalent rule in the Primary court that is *Primary Courts Criminal Procedure Code* Third Schedule to the **Magistrate Court Act** Cap 11 (Section 2). There cannot be an argument on infringement of a law which was not applicable in the primary court

Omary Abdallah @ Mbwangwa v. The Republic, (Criminal Appeal No. 127 of 2017) [2019] TZCA 529 (5 March 2019, TANZLII),

"... a charge sheet or information is an important document which puts in motion a criminal trial before a trial court. The charge or information therefore as a primary accusatory instrument must plead the prosecution case with sufficient detail and clarity."

I have considered that the appellant clearly understood the charge facing him in the second count and scanning his defence there is nothing on record suggesting that he was defending a wrong charge. Having considered the whole evidence this anomaly in failure to specify the section in the trial court is curable. This is the position fortified in **Burton Mwapabilege v. The Republic, Criminal Appeal No. 200 of 2009 (unreported)**, it was stated that:

"An illegality in the form of a charge or information may be cured as long as the accused persons are not embarrassed in their defence or there has otherwise been a failure of justice."

The first ground thus lacks merit.

The rest of the grounds no 2nd 3rd, 5th 7th and 8th boil down into a major complaint that is whether the charge was proved beyond reasonable doubt.

I will start with the offence of stealing. To prove the offence of stealing the prosecution side was tasked to prove all elements of stealing cumulatively thus; the appellant did take from the respondent the properties named and that there was an intention to move and take the same out of possession or ownership of the respondent. As such that was done dishonestly to himself or for wrongful gain and without consent of the respondent. See **Director of Public Prosecutions vs Shishir**

Shyamsingh (Criminal Appeal 141 of 2021) [2022] TZCA 357

<https://tanzlii.orgv>

As such the offence of malicious damage to property under section 326 of the penal Code. Apart from damage, it is important to prove malice. There are several illustrative decisions in this area including **Lawrence Mateso vs. [1996] TLR 118 Samatta, JK 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 the layman; it is used in a technical sense.

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"

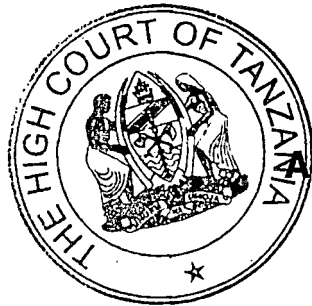
I have scanned the evidence by both sides as it appears on record. It was common ground that the appellant and respondent were in contract on the operation of *Bajaj*. As such, the said Bajaj was operated for some time and when it stopped operation the respondent demanded the appellant to repair the same but the appellant failed. It is also on record that the appellant was given one month to repair the same and he promised to do it by selling his farm which was not done.

It was expected that the evidence of stealing should have come from PW1 the respondent and PW2. All these witnesses indicated the contractual relationship between the appellant and respondent and how the appellant did not perform the same as expected.

The two lower courts found as a fact that some parts of the Bajaj were missing and associated this with stealing and malicious damage to property. There was no evidence showing how the appellant with ill intention did take the parts of the *bajaj* to himself with intent to deprive the respondent, nor how in so doing he maliciously damaged the said bajaji. With respect, I find that this was misdirection because the two courts did not consider the elements of intention to deprive the owner nor malice on the part of the appellant which are essential *men rea* of the two offences.

From the foregoing, and considering the evidence on record, the same did not establish the necessary elements of stealing and malicious damage to property. For the reasons stated I am compelled to reverse the concurrent findings of the two lower courts and hold that the charge against the appellant was not proved beyond reasonable doubt.

This appeal is allowed, conviction sentence and order of the lower court are reversed.



A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

A. J. KIREKIANO

JUDGE

14/11/2023

COURT: Judgment delivered in chamber in presence of Miss Rosemary John for respondent and in absence of appellant.

Sgd: A. J. KIREKIANO

JUDGE

14/11/2023