IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF MANYARA)

AT BABATI

PC. CRIMINAL APPEAL NO. 16 OF 2023

(Arising from Criminal Appeal No. 10 of 2023 Mbulu District Court, Original Criminal Case No. 202 of 2022 Endagikot Primary Court)

ZAKAYO NEQWAY.....1ST APPELLANT

ISRAEL NEQWAY.....2ND APPELLANT

EMANUEL NEQWAY.....3RD APPELLANT

SAMWEL NEQWAY.....4TH APPELLANT

VERSUS

TLUWAY GORANGA.....RESPONDENT

Date of last order: 29/2/2024
Date of Judgment: 8/3/2024

JUDGMENT

MAGOIGA, J.

The appellants were arraigned before Endagikot Primary Court (the trial court) charged jointly and together with one offence of malicious damage to property contrary to section 326(1) of the Penal Code [CAP 16 RE 2022]. The particulars of the offence as per charge sheet were that, on 20/4/2022

the appellants did damage maize, peas, banana leaves and they also did harvest maize and peas the property of the respondent all valued at Tshs 4,952,000/=.

The appellants pleaded not guilty, hence full trial ensued. At the end, the trial court, found the case against the appellants was not proved and consequently acquitted them.

Aggrieved with the trial court's decision, the appellant filed Criminal Appeal No. 10 of 2023 before Mbulu District Court (the first appellate court). After hearing the parties' arguments on merits, the first appellate court quashed and set aside the trial court's decision. The learned first appellate Resident Magistrate found that there was evidence to prove the offence against the appellants. Consequently, sentenced the appellants to six months conditional discharge and ordered the appellants to pay the respondent compensation at the sum of Tshs 2,500,000/= being the value of the property damaged.

Aggrieved and dissatisfied with the first appellate court's decision, the appellants preferred a joint petition of appeal to this Court faulting the first

appellate court comprising of five grounds couched in the following language:-

1. *That the Hon. Senior Resident Magistrate of the first appellate court grossly erred in law and facts for failure to uphold the trial court's verdict by convicting the appellants despite the fact the appeal was bad in law for want of the right of ownership of the landed disputed property.*

2. *That corollary to 1st ground of appeal, the Hon. Senior Resident Magistrates' court of the first appellate court wholly erred in law and facts for failure to observe that the charge of criminal malicious damage to property cannot stand without solving land dispute.*

3. *That the Hon. Senior Resident Magistrate of the first appellate court erred in law and facts by convicting and sentencing all respondents to six months and condemned to pay compensations to the appellant to the tune of Tshs*

2,500,000/= while the charge of malicious damage to properties was not proved to the required standard in criminal case.

4. *That the 1st appellate court grossly erred both in law and fact for making unfair and biased by articulating his own and new facts for the reasons to favour the appellants and delivered prejudiced judgment.*

5. *That the first appellate court completely erred in law to allow appeal and quashed trial court's verdict and failure to advise the parties to institute a land dispute for determination of the rightful owner of the suit land as indicated in the trial court's judgment.*

At the hearing of the appeal, the appellants were represented by Mr. Basil Boay, learned advocate while the respondent appeared in person. The appeal was disposed of by way written submissions.

In his submission in support of the appeal, Mr. Boay argued jointly the first,

second and fifth grounds of appeal. He abandoned the fourth ground of appeal.

He gave background regarding the ownership of the land on which the crops are alleged to have been damaged. He submitted that the evidence on record shows parties to the instant appeal live together on the said piece of land which has not been divided, hence the trial court was correct in directing the parties to resolve the issue of land dispute before initiating criminal charges.

To buttress his arguments, the learned advocate referred to the case of **Kusekwa Nyanza v Christopher Mkangala**, Criminal Appeal No. 233 of 2016 Court of Appeal of Tanzania at Mwanza (unreported) in which it was observed that;

> ***Neither the criminal charges of trespass nor of malicious damaged to property could stand against the appellant before the issue of ownership over the disputed plot of land had been resolved.***

He submitted further that it was not correct for the 1st appellate court to believe that the land belongs to the respondent as that could only be determined by land courts. To this he referred to the case of **Saudi Juma v Republic** (1968) HCD 158 in which it was observed that;

> ***"when in a criminal trespass, a dispute arise as the ownership of the land, the court should not proceed with the criminal charged and should advise the complainant to bring civil action to determine the question of ownership.***

On the third ground of appeal, the learned advocate for the appellants contended that the value of the crops was Tshs 4,952,000/= as per the valuation report tendered before the trial court. He argued that, the learned first appellate magistrate awarded the respondent a sum of Tshs 2,500,000/= on the ground that the amount shown on the valuation report was too excessive. To this, the learned advocate for the appellants urged the court to interfere with such findings by the first appellate court.

In reply, the respondent argued that the first appellate court correctly

convicted the appellants because the charge before the trial court was on malicious damage to property and not the claim of ownership of the land. She argued that the appellants did not state if they planted the damaged crops rather they based their arguments on the land dispute.

The respondent therefore urged the court to find no merits on grounds 1, 2 and 5.

In reply to the third ground of appeal, the respondent argued that the first appellate court erred in law in awarding her a sum of Tshs 2,500,000/=. She argued that, since the valuation report showed that the value of the damaged crops was Tshs 4,952,000/=, the first appellate court should not have ordered the appellants to pay Tshs 2,500,000/=. Hence she urged the court to substitute the sum of Tshs 2,500,000/= with 4,952,000/=.

In rejoinder Mr. Boay essentially reiterated his arguments in chief.

Having gone through the parties' rival submissions, the issue for my determination is whether the appeal has merits.

I will determine the grounds of appeal in the manner argued by the parties.

As pointed out before, the appellants were charged with malicious damage to property. In order to establish the offence of malicious damage to property under section 326(1) of the Penal Code, there are elements which must be established. This court had an opportunity to expound the said elements in the case of **Julius Malabo v Revocatus Msiba & another**, PC Criminal Appeal No. 3 of 2020 (unreported) as follows;

i. He owns the property or properties,

ii. That the said property(ies) has or have been destructed or damaged,

iii. That the same was damaged or destructed by the accused person and

iv. The act of so damaging or destructing must have been actuated by malice.

I must hasten to add that, the above four elements must be cumulatively established before a criminal charge for malicious damage to property can stand.

The first appellate court was of the view that the appellants were charged with, malicious damage to property and not trespass to land which are two distinct offences. With respect, while I may agree with the learned first appellate magistrate on the distinction of the two offences, in the instant matter no doubt going by the evidence on record, there is land dispute between the parties.

The respondent on one hand claimed that the land upon which the crops were planted belongs to her while the appellants claimed that the land in question belongs to their father. It is settled principle that whatever attached to the land forms part of the land. Therefore, without resolving the question of ownership of the land, the claim of the property damaged could not stand. Hence the trial court rightly directed the parties to resolve the question of ownership of the land first.

Even if I were to agree with the learned first appellate magistrate that the respondent is the lawful owner of the damaged crops, the issue is whether the appellants did damage the said crops.

I have keenly gone through the record, the respondent claimed that the

appellants damaged her crops. But while under cross examination from the appellants' advocate, the respondent said;

> *"...Siwezi kusema kama ni washtakiwa moja kwa moja ila wanarudi kufanya uharibifu huo"*

The record further reveals that while the respondent was under re-examination from her advocate she said;

> *"Siwezi kusema ni mshtakiwa yupi aliyefanya uharibifu kwa kuwa wote huwa wanakwenda kuchukua mahindi yangu"*

If that is not the end, the charge laid against the appellants alleged that such damage was done on 20/4/2022. But the respondent while under examination in chief said that the actual damage was done in July 2022. She also told the trial court that on 20/4/2022 she saw cows from a far distance but she could not identify who was grazing the said cows.

In his evidence PW2 one Christopher Frank, told the trial court that on 20/4/2022 the respondent saw the appellants grazing cattle on her farm.

The above pieces of evidence are not only contradictory but very discrediting ones. Basing on the above pieces of evidence, there was variation between the charge and the evidence on record and the contradictions pointed above go to the root of the matter leading to the conclusion that the offence against the appellants was not proved.

Next for determination is on the quantum of compensation awarded by the first appellate court. The respondent urged the court to award her Tshs 4,952,000/= and quash the sum of Tshs 2,500,000/= awarded to her by the first appellate court. With, respect, since the respondent did not prefer cross appeal against such order by the first appellate court, presupposes that she accepted what was awarded to her. However, in awarding the respondent a sum of Tshs 2,500,000/= the learned first appellate magistrate did not assign reasons for his decisions.

In awarding such amount the learned first appellate magistrate discredited the valuation report since the valuation was conducted seven months after the alleged damage. Having discredited the valuation report, there was nothing on record to prove the value of the damaged crops and as such the

first appellate court had no basis upon which to grant the amount awarded without evidence on record which was specific in nature.

Basing on the above analysis, I find merits on the first, second, third and fifth grounds of appeal.

In final analysis, I find the appeal meritorious and the same is allowed. The decision of the first appellate court is quashed and set aside. The decision of the trial court is restored.

It is so ordered.

Dated at Babati this 8th day of March, 2024

S. M. MAGOIGA
JUDGE
08/03/2024