IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY
AT ARUSHA

PC CRIMINAL APPEAL NO. 16 OF 2023

(Arising from Criminal Appeal No 8/2023 of Arumeru District Court, Originating from Emaoi Primary Court Criminal Case No 458 of 2023)

LIALO LOINYENYE ..... APPELLANT

VERSUS

LOMITU LOINYENYE ..... RESPONDENT

JUDGMENT

05th & 23rd February 2024.

Masara, J

This is a second appeal filed by the Appellant against the Respondent against the decision of the District Court of Arumeru ("the first appellate court") in respect of Criminal Appeal No. 8 of 2023 which convicted him and thereby reversed the decision of Emaoi Primary Court ("the trial court") that had acquitted him of the offence of Malicious Damage to Property. The first appellate court convicted and sentenced the Appellant to serve a custodial sentence of three months or pay a fine to the tune of TZS 500,000/=. The Appellant was aggrieved and has preferred this appeal on the following grounds:

1. *That the first appellate court erred in law and facts by convicting and sentencing the Appellant herein on the evidence adduced in which the prosecution failed to prove the case beyond reasonable doubt.*
2. *That, the appellate magistrate unfairly disallowed the defence of ALIBI put by the Appellant in his defence.*
3. *That, the first appellate court erred in law and fact when failed to properly evaluate Appellant evidence and consequently occasioned miscarriage of justice on part of the Appellants side.*

At the hearing, Ms Caroline Mollel, an advocate from the Legal and Human Right Centre, appeared for the Appellant, while Mr L.M. Ndanga, learned advocate, appeared for the Respondent. The Appeal was heard through filing of written submissions. Both parties filed their submissions as per the schedule.

A brief background to this Appeal can be summarized as follows: At the trial court, the Appellant stood charged of the offence of Malicious Damage to Property, contrary to section 326(1) of the Penal Code, Cap. 16, R.E 2022. The Respondent was the Complainant. It was alleged that on 31st August 2022, the Appellant unlawfully and without claim of right destroyed, by uprooting, 17 beacons valued at TZS 320,000/=, the property of the family of Loinyeye Liking'orie. The trial court held that

the offence against the Appellant was not proved to the required standard; hence, the Appellant was acquitted.

Dissatisfied with the trial court's decision, the Respondent appealed to the first appellate court which reversed the trial court's decision, as it found the Appellant guilty of the offence, convicted and sentenced him as above stated.

Arguing in support of the appeal, the Appellant's counsel submitted on the 1st and 3rd grounds of appeal that, pursuant to section 114(1) of the Law of Evidence Act and Regulation 5(1) of the Magistrate's Court (Rules of Evidence in Primary Court) Regulations, in criminal cases, the burden of proof is vested upon the prosecution. That the prosecution is duty bound to prove elements as spelt out in the case of **Maliki George Ngendakumana vs Republic, Criminal Appeal No. 353 of 2014 CAT**.

He impressed that, in the case of **Julius Malobo vs Revocatus Msiba and Another (PC Criminal Appeal 3 of 2020) [2020] TZHC 923,** elements to be proved in order to sustain a conviction on the offence of Malicious Damage to Property include, among others:

> "(i) *He owns the property or properties, (ii) That the said property(ies) has or have been destructed or damaged, (ii) That*

the same was damaged or destructed by the accused person, and (iv) That the *act of so damaging or destructing must have been actuated by malice."*

The Appellant's counsel further argued that the trial court's records reveal that the Respondent was suing the Appellant in his capacity as the administrator of the estate of the late Loinyenye Liking'orie, where the issue of ownership had been proven.

Counsel went on to state that, on the issue as to whether it was the Appellant who damaged the property, doubts remain as SU5 testified that on the date that the Respondent was putting beacons, the Appellant was not present and no one saw the Appellant uprooting the beacons as alleged. Further, that the Appellant's evidence in the trial court was to the effect that he was not around during all the trouble and after he was charged it is when they went and found the Respondent uprooting the beacons, whereby they were able to take pictures of him and the pictures were accepted by the trial court as exhibit D1, D2, D3 and D4. That, the evidence given by the Respondent's witnesses raised doubts as to who committed the offence.

It was the Appellant counsel's further assertion that, pursuant to the provision of Regulation 1(1) of the Magistrates' Courts (Rules of

Evidence in Primary Courts) Regulations, GN No. 22 of 1964, the act of the 1st appellate court to convict the Appellant without showing that the elements of malicious damage to property were proven beyond reasonable doubts has occasioned miscarriage of justice on the part of the Appellant.

Submitting in respect of the 2nd ground of appeal, the Appellant's counsel urged that, when an accused person does not give notice of *alibi,* the court has two options; either to ignore or accord no weight at all or take cognizance of the defence. That, where a court decides to take cognisance of the defence, it is duty bound to subject such defence to a critical analysis and give reasons for rejecting it. For this, reference was made to the decisions in **Charles Samson vs Republic [1990] TLR 39** and **Ludovick Sebastian vs Republic (Criminal Appeal 318 of 2007) [2010] TZCA 13.** The Appellant prays that the Appeal be allowed and the conviction and sentence be quashed and set aside.

In rebuttal, the Respondent denied the assertions by the Appellant. Regarding the grounds of appeal, counsel for the Respondent submitted that, in the trial court, the Respondent managed to prove the case beyond reasonable doubts, such that the Appellant pleaded that in selling the farm in dispute he had bought a case. That the Appellant

presented a forged 'will' of his mother before the trial court, while his mother is still alive and that the Appellant demolished the house built on the disputed farm so that the buyer could not know that there was a building.

On the 2nd ground of appeal, counsel for the Respondent strongly disagreed with the submissions made by the Appellant regarding the defence of *alibi* and further submitted that the Appellant was present at the scene of crime and he was the one who removed the beacons, as was seen by his brothers and sisters. That the Appellant was at the scene and not at Monduli as he contended.

Counsel for the Respondent also contended that the Appellant was a habitual criminal. Using his own words, Counsel stated that the Appellant has a 'CV on criminology' within his family of 31 members, as he has been convicted on 5 different cases. Basing on that submission, it is the Respondent's prayer that the decision of the first appellate court be upheld.

In a brief rejoinder submission, the Appellant denied to have pleaded that he bought a case and submitted that the allegation does not hold water as they are mere words which do not form part of the proceedings. On the issue of criminal records, counsel for the Appellant

stated that the convictions are disputed as some of those matters are on appeal.

Having carefully considered records of both the trial court and the first appellate court, the grounds of appeal as well as the submissions for and against the appeal, the issue for the determination by this Court is whether the Respondent proved that the Appellant committed the offence of Malicious Damage to Property. I will address this issue with relation to the grounds of appeal proffered.

In the first ground of appeal, the Appellant queries the judgment of the first appellate court on the ground that it convicted and sentenced him on insufficient evidence. As per the judgment of the first appellate court, the Appellant was convicted on account that the prosecution witnesses adduced their evidence implicating and connecting the Appellant with the offence; that is, he was seen at the scene of the crime uprooting and destroying the beacons. Further, the Appellate magistrate was of the view that the defence of *Alibi* raised by the Appellant was not properly raised.

As stated by the Appellant's counsel, Regulations 1(1) and 5(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN. No. 22 of 1964 and 66 of 1972, in criminal cases, it is the

complainant who carries the burden of proving the case, unless the accused admits the offence. And that, by so doing, the court must be satisfied beyond reasonable doubts that the offence was committed by the accused. For clarity, I reproduce the said Regulations.

Regulation 1(1) reads:

> *"Where a person is accused of an offence, the complainant must prove all the facts which constitute the offence, unless the accused admits the offence and pleads guilty."*

Regulation 5(1) and (2) on standard of proof provides thus:

> *"(1) In criminal cases, the court must be satisfied beyond reasonable doubt that the accused committed the offence.*
>
> *(2) If, at the end of the case, the court is not satisfied that the facts in issue have been proved the, the court must acquit the accused."*

Basing on the above provisions of the law, it is imperative for this Court to ascertain whether the first appellate court considered and was satisfied that the ingredients of the offence of Malicious Damage to Property were established before the trial court to warrant the verdict against the Appellant. I do this as the two lower courts' decisions are at variance, necessitating a re-examination of the evidence. The provisions of section 326(1) of the Penal Code under which the Appellant's charge was preferred and convicted provides:

"326(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years."

The ingredients of the offence of Malicious Damage to Property as cited in the above subsection are as rightly submitted by the Appellant's counsel and as validated in the case of **Julius Malobo** (supra).

Applying the cited ingredients of the offence to the facts of the matter at hand and after going through the first appellate court's records, I find it apposite to review the evidence as, in my view, the learned appellant court magistrate did not put into consideration some important ingredients of the offence before arriving on the conclusion he made.

I will start with the first ingredient regarding ownership of the property allegedly destroyed. The charge sheet which the Appellant pleaded to, on the particulars of the offence, states in the Kiswahili Language that:

"Wewe Lialo Lonyeye unashitakiwa kuwa mnamo tarehe 31/08/2022 majira ya saa 10:00 Hrs huko maeneo ya shamba lililopo maeneo ya jaluo Ngaramtoni Wilaya ya Arumeru na mkoa wa Arusha bila uhalali na kwa makusudi uliharibu mali ya familia ya marehemu Loinyeye Likingorie kwa kungoa bikoni kumi na saba zenye thamani ta Tsh 320,000/- kitendo ambacho ni kosa na kinyume cha sheria. Msimamizi wa mali hizo za familia ni Lomitu Loinyeye."

From the above quote, it is notable that the property alleged to have been destroyed by the Appellant is owned by the family of the late Loinyeye Liking'orie to which Lomitu Loinyeye is the administrator of the estate. For one to claim and conclude that a certain property has been maliciously destroyed then one needs to prove ownership of the said property.

The evidence adduced by the prosecution witnesses in the trial court was to the effect that the properties belong to their late father, while the other prosecution witnesses alleged that the same is family property. If the second version is to be preferred, there is no doubt that the Appellant is one of the family members. Failure to prove beyond reasonable doubts ownership of the property allegedly destroyed by the Appellant would warrant the acquittal of the Appellant, as was so done by the trial court.

In order to convict a person for the offence of malicious damage to property, it must be proved that a person wilfully and maliciously damaged the property of another person. That means, it was necessary for the prosecution to prove that the Appellant destroyed properties of another person. However, in the present case, the evidence reveals uncertainties regarding whether the destroyed properties belonged to

the deceased, the estate of which fall under the administration of the Respondent, or whether the properties are owned by the family, within which the Appellant belongs.

It was incumbent upon the first appellate court to ascertain the issue of ownership of the properties allegedly destroyed before entering a conviction against the Appellant. From the evidence on record, the issue of ownership remains unresolved. This is *ipso facto* the main ingredient of the offence the Appellant stood charged of. The other ingredient of malice cannot stand if the alleged property ownership is uncertain.

Having so found, I need not move to the other ingredients of the offence, as failure to prove that the properties allegedly destroyed by the Appellant belonged to a person other than the Appellant, disposes of the appeal in favour of the Appellant. In the circumstances and for the fore stated reasons, it is the finding of this Court that the evidence on record is not watertight to prove the case against the Appellant beyond reasonable doubts.

Consequently, the appeal has merits and the same is hereby allowed. The conviction against the Appellant by the first appellate court is hereby quashed and the sentence set aside. The trial court's decision is

accordingly upheld. The fine imposed to the Appellant, if paid, should be refunded to him forthwith.

Yohane B. Masara

JUDGE

February 23, 2024