THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

PC. CRIMINAL APPEAL NO 01 OF 2021

(Originating from Lupalilo Primary Court in Criminal Case No. 25 of 2020)

NAZALIUS MBILINYI ---------- APPELLANT

VERSUS

ALEXANDER THABIT MBILINYI

(MWENYEKITI CA KIJIJI CHA IKONDA) -------- RESPONDENT

15/2 & 18/2/2022

JUDGMENT

MATOGOLO, J.

This is an appeal by one Nazalius Mbilinyi against the decision of the District Court of Makete in Criminal Appeal No. 05 of 2020 which originated from the decision of the Primary Court of Lupalilo in Criminal Case No. 25 of 2020.

The appellant was charged before the Primary court of Lupalilo with the offence of Malicious damage to property contrary to section 326(1) of the Penal Code Cap. 16 R.E. 2019. Before that court one Alexander Thabiti Mbilinyi who was the village chairman of Ikonda village, complained at Tandala police station against the appellant for cutting eucaliptus trees valued at Tshs. 500,000 property of Ikonda village without any colour of

right. After trial he was convicted and sentenced to pay fine of Tshs. 50,000/= or to serve two (2) months imprisonment in default of payment of fine. He was aggrieved with both conviction and sentence.

He unsuccessfully appealed to the District Court of Makete which up held the decision of the trial court. Still dissatisfied he has appealed to this court in which he filed petition of appeal with four grounds as follows:-

1. THAT, the first appellate Court erred in fact and law in holding that the question of ownership of the alleged damaged property was already clearly proved while there was no evidence on record in proof of that fact.
2. THAT, the first appellate Court erred in fact and law in sustaining the conviction arrived at by the Primary Court without having on record evidence sufficient to ground conviction on the charge facing the Appellant.
3. THAT, the first appellate court erred in fact and law in entertaining extraneous matters while determining the appeal before it instead of confining itself on the record of the primary court.
4. THAT, the first appellate court erred in fact and law in failing to consider the rejoinder of the Appellant hence reaching at a wrong decision.

The appellant prays for his appeal to be allowed in that the concurrent findings of the two lower courts be quashed their proceedings nullified and the resulting orders set aside.

Before this court like in the District Court the appellant was represented by Mr. Frank Ngafumika learned advocate. The Respondent

was represented by Mr. Apollo Laizer District Solicitor of Makete District Council. This appeal was argued through written submissions. It is the submission for the appellant that in this case the question of ownership was not proved by the prosecution side. That question of ownership was proved by both the Appellant and the Respondent. But the prosecution failed to substantiate ownership on the issue of demarcation of the property damaged, the size of the damaged property and who were neighbours near the purported damaged property. There was no proof showing that there existed a land dispute between the Appellant and the Respondent and that the Respondent won the case. He said despite SU2 testimony which claims that the land dispute existed but he did not produce in court any documentary evidence to justify his testimony. SU2 only managed to explain the usage of the damaged property, that is it was reserved for social purpose, roads have been constructed and pipes installed in the damaged property, hence both parties to the alleged property were to cut down the trees. The learned counsel said this is according to the testimony of SU1. He said in a situation where each party claims ownership of the damaged property, the court should not proceed with the criminal charge and should advise the complainant to file a suit first in order to determine the question of ownership as it was held in the case of ***SYLIVERY NKANGAA VS. RAPHAEL ALBERTO [1992] TLR 110***. He said in that case it was held that the complainant must prove the following ingredients of the offence of malicious damage to property:-

- He owns the property.
- That, the said properly has been destroyed/ damaged.

- That the same was damaged/ destroyed by the accused.
- That, the act of damaging/destructing must have been actuated by malice.

The appellant submitted that in this case it was not determined by the trial court as well as the 1st appellate court as to who was the owner of the damaged property because each party claimed ownership of the property. On the second ingredient, both parties to the case alleged that the property was damaged (miti imekatwa).

On the third ingredient, the appellant admitted to have been involved in cutting the trees. He cited the case of ***SCHOLASTICA PAULO VS. REPUBLIC (1984) TLR 188***, that to constitute malicious damage to property, there must be evidence of damage or destruction of the property. On the fourth ingredient, that the damage must have been actuated by malice. The appellant said "miti iliyokatwa miwili ipo kwenye eneo langu mimi" means the appellant claims to have bonafide claim of right of ownership in the act of cutting the trees, hence he did not maliciously damage the property. With such a defence, it can be safety said that appellant acted fairly, honestly and reasonably regard to all facts and circumstances of the case. He supported his position by citing the case of ***JOHN CHIZE BAHINGANYI VS REPUBLIC [1988 TLR 234*** in which it was held:

> *"the defence of bonafide claim of right, embodied in section 9 of the Penal Code is only available where the claim of right is fairly honestly, and reasonably held*

having regard to all facts and circumstances".

He also submitted on the standard of proof as provided under Regulations 1(1)(2) of the Magistrate Court (Rules of Evidence in Primary Courts), G.N. No. 22 of 1964 and 1972.

He said basing on those provisions of law, it is the complainant who carries the burden of proving the case unless the accused admits the offence. But in this case both the trial and the appellate courts did not consider the above mentioned provisions of law and the above explained ingredient of the offence committed and arrived to an erroneous decision.

Regarding the third ground of appeal, it is the submission by the Appellant that the first appellate magistrate misdirected himself in discussing facts which were not canvassed at the trial primary court. As extracted from second paragraph of page 7 of the typed of judgment of first appellate court it is stated that "Also vide his letter to the ward tribunal dated 06/01/2016 titled KUKUBALI MAAMUZI AMBAYO MIMI NAZALIUS MBILINYI SIKURIDHIKA NA KUHUSU NO. 92/2016 SASA NATAMKA KWA KINYWA CHANGU KUWA NIMERIDHIKA NA MAAMUZI YA BARAZA LA KATA"/

He said that was not discussed or testified by any witness during the entire proceedings of the trial primary court. Also at page 6 of the typed judgment it is stated that there was no dispute appellant acted with malice on the ground that the strong evidence adduced by the prosecution witnesses (SM1 and SM2) who witnessed that, Appellant committed the act with malice. It is the argument by the Appellant that no witness testified to

the effect that they personally witnessed the appellant to have committed the act, but SM2 have committed the act, but SM2 testified to the effect that when he arrived at the damaged property, the trees were cut and had to involve the police to carry on with investigation so as to identify the accused. He said even if one could see the accused cutting the trees one cannot establish malice from such act. The first appellate court did not confine itself on the evidence on record but rather perpetuated its own assumptions and completely ignore the evidence on record of the trial primary court.

Regarding the fourth ground of appeal for the first appellate court failure to consider the rejoinder by the appellant, the appellant submitted that the 1st appellate court omitted to include and consider the rejoinder of the appellant in determining the appeal while the said rejoinder was filed and dated on 13/01/2021. He said had the first appellate court considered the appellant's rejoinder it would not arrive at the decision it arrived at. He said despite the general principle of law that a second appellate court should not interfere with concurrent findings of two lower courts on matters of fact. But they challenge the two concurrent findings on some matters of fact basing on the exception to the general rule that there is misdirection of evidence and misapplication of principles of law. He invited this court to interfere with the two concurrent findings on matter of facts and law. The appellant prayed to this court to allow the appeal and quash the decision of the trial primary court and nullify the proceedings and the resulting orders be set aside.

In his reply submission counsel for the Respondent did not agree with the appellant's contention in his appeal. He submitted that the question of ownership was not among the issues for determination during trial. According to the records of Lupalilo primary court the question of ownership was already determined by the proper forum. That was confirmed by SU2 testimonies as appears at page 3 paragraph 3 of the judgment by Lupalilo Primary Court in which SU2 testimony reads, that is:

> *"SU2 pia katika ushahidi wake alieleza kuwa yeye kama katibu wa baraza la kata walisuluhisha shauri pale Baraza tarehe 17/03/2016 halafu tarehe 24/03/2016 walienda kwenye eneo la tukio. Hukumu ilipotoka, SM1 alipata haki na walitoa siku arobaini na tano (45) lakini hakuna aliye kata rufaa".*

It is the argument by the Respondent's counsel that the testimony of SU2 was not challenged by the appellant during trial, which confirmed that the question of ownership was already decided by the ward Tribunal since 2016 and the appellant opted not to challenge that decision. While agreeing with the appellant's counsel that a criminal court is not the proper forum for determining the rights of those claiming ownership of land but the case at hand is different because you cannot substitute criminal cases with civil cases. He cited the case of ***Ismail Bashaija vs. Republic (1991) TLR 100*** in which chipeta, J. observed:-

"... when in a case of criminal trespass, a dispute arise as to the ownership of the land, the court should not proceed with the criminal charge and should advice the complainant to bring a civil action to determine the question of ownership"|

He said the case at hand is of criminal nature, at this juncture they cannot invite the court to inquires matters of civil nature. The Appellant cannot run away from criminal liabilities by bringing in issues relating to ownership as the question of ownership was resolved by the testimony of SU.2 at Lupalilo Primary Court that issue of ownership was resolved by the Ward Tribunal and the Appellant has never appealed against that decision. He said the 1st appellate court was correct in holding that the question of ownership of the alleged damaged property was proved by unchallenged evidence of SU2.

As to the second ground of appeal the Respondent submitted that the first appellate court was correct in fact and law in sustaining conviction by the trial court basing on sufficient evidence on record which formed grounds for conviction on the charge facing the Appellant as the dispute before the trial court was in relation to malicious damage to property and not issue of ownership. He said the question here is whether malicious damage to property was proved. And the question of ownership had already been determined by the Ward Tribunal and SU2 confirm that the Respondent was given. He said in order for a person to be convicted for malicious destruction of property, it must be proved that a person willfully

and maliciously damaged the property of another person. Also malicious damage to property is proved when the alleged person is the one who destroyed the properties of the Appellant. He submitted that the prosecution side managed to prove all essential elements of the offence of malicious damage to property as provided under S. 326 of the Penal Code and all ingredient set out in the case of ***JULIUS MALEBO VS. REVOCATUS MSIBA AND ANOTHER***, (PC), Criminal Appeal No. 3 of 2020 High Court (unreported).

He said the Appellant was aware that the trees belong to the Respondent following unchallenged decision of the Ward Tribunal. He said there are statements which prove that the Appellant acted with malice that is "waliporudi kwa mkuu wa kituo aliomba SU1. Atoe Tshs. 500,000/= za miti lakini SU1 aliwaambia hana na kwamba bora wafike mahakamani". The Respondent said, this statement by the Appellant prove that he did the action willfully and maliciously. His claim to have bonafide of right of ownership in the act of cutting trees cannot stand because he was aware of the unchallenged decision by the Ward Tribunal which declared the Respondent as rightful owner. The cited the case of ***SCOLASTICA PAUL VS. REPUBLIC*** (supra), the Respondent's counsel submitted that to constitute malicious damage to property there must be evidence of damage or destruction of the property. He said there is no doubt that, the trees were cut by the Appellant as alleged, so there was destruction. The only issue is whether the act was actuated by malice. To prove that there was malice, the Respondent referred to the definition of malice by Black's Law Dictionary 9th Edition.

He said looking at the evidence a record, SU2 who was the secretary to the Ward Tribunal told the ownership was already determined and the Appellant has never appealed against such decision which was in favour of the Respondent. The Respondent submitted that the Appellant clearly acted with malice and without any legal justification. The first appellate court reached its decision basing on records of the trial court and not otherwise.

Regarding the fourth ground, the Respondent said it is not true that the first appellate court erred in fact and law for failure to consider the rejoinder. It reached its decision after evaluating records of the trial court and all arguments submitted in writing by the parties. The first appellate court sustained the conviction arrived by the trial court basing on sufficient evidence on records which formed grounds for conviction on the charge which appellant was facing. The Respondent prayed to this court to dismiss the appeal and sustain the decision of the trial primary court. In rejoinder learned counsel for the Appellant submitted that it appears the Respondent conceded to their third ground of appeal as he did not oppose the same in his reply submission. But also the Respondent heavily relied upon the testimony of SU2 to substantiate that the question of ownership was already determined by the trial court. The Appellant's counsel argued that the question of ownership was not determined to the required standard. The prosecution did not prove the offence of malicious damaged to property. He said the evidence of SU2 is questionable as he did not mention the Ward Tribunal the dispute was resolved. There was no decision of the Ward Tribunal that declared the Respondent as a lawful

owner. The said decision was not tendered in court at the trial. But also SU1 was not accorded opportunity to cross-examine SU2 as a hostile witness.

The learned counsel maintained that the question of ownership was not resolved and the offence of malicious damage to property was also not prove. She said both cases of ***SYLIVERY NKANGAA VS. RAPHAEL ALBERTHO AND ISMAIL BUSHAIJA VS REPUBLIC*** (supra) are relevant in this appeal as they provide for the way forward when the question of ownership was raised. In principal, the Appellant reiterated what he had submitted in his submission in chief.

Having carefully read the rival submissions by the parties and closely examining the court records, the issue for determination here is whether this appeal has merit, in other words whether the Appellant was rightly convicted on the offence of malicious damage to property. As pointed out at the beginning in this judgment, the Appellant appeared before the Primary court of Lupalilo Makete District charged with malicious damage to property contrary to section 326(1) of the Penal Code. He was found guilty and convicted of that offence. The bone of contention in this case is whether the offence of malicious damage to property was proved against the appellant. While the Appellant saying that the charge of malicious damage to property was not proved against him on the ground that issue of ownership of the area where the trees were cut down was not proved. The Respondents on their part claim that ownership was proved by the decision of the Ward Tribunal which declared the Respondents as rightful owner of that area. This is what SU2 stated in his evidence. SU2 said was

the secretary to the said Ward Tribunal. There is no doubt that before the trial primary court of Lupalilo the Appellant was charged with a criminal offence of malicious damage to property. It is trite law that, in criminal charges, the burden of proof lies on the prosecution throughout, the same never shift to the accused person. What the accused need to do is just to raise doubt on the prosecution case. This was clearly stated by the Court of Appeal of Tanzania in the case of ***MOHAMED SAI'D MATULA VS. REPUBLIC (1995) TLR 3***.

In convicting the Appellant, the trial court relied on the testimonies of SM1 and SU2. The testimony of SM1 did not prove that Appellant did damage the alleged trees let alone that he did so with malice. In actual fact in his defence the Appellant asserted ownership to the cut down trees. SU2 was called by the Appellant as his witness but turned hostile against him and alleged that he was the secretary to the Ward Tribunal which he did not mention and that they reconciled the case between the parties and the Respondent emerged winner in that case. The evidence of SU2 is self defeating. It was correctly submitted by the Appellant's counsel, SU2 was a hostile witness, but the trial magistrate did not afford opportunity to SU1 to cross-examine him. But also his evidence is unworthy of credit. He said he was the secretary before the Ward Tribunal where parties were reconciled. He did not mention the said Ward Tribunal, case number nor did he tender before the trial court the copy of decision passed by the said Ward Tribunal to prove such allegations. If SU2 claimed to have been a secretary to Ward Tribunal, but he failed to disclose important particulars of the case even the decision reached which Respondent termed as proof of ownership, the

two courts bellow should have taken his evidence with caution. As pointed out above his testimony fall short of proving the charged offence. Since the relied upon witness did not disclose important information nor tender Ward Tribunal decision conferring ownership to the Respondent, the issue ownership of the land and trees there on remained unresolved. Under such circumstances, it cannot be said that the offence of malicious damage to was proved to the required standard. In order to prove the offence of malicious damage to property, one needs to prove the following ingredients:-

(i) The complainant owns the property or properties.
(ii)The said property or properties has/have been destroyed or damaged.
(iii) The same was destroyed by the accused.
(iv) The act of damaging/ destroying was actuated with malice.

In order for the offence of malicious damages to property to be committed in terms of S. 326(1) of the Penal Code, the accused must willfully and unlawfully destroy a damages any property. There must be evidence of damage or destruction of the property as it was held in the case of ***Scolastica Paul vs. Republic,*** (supra). But that act must be willful and malicious. The prosecution did not prove all those elements for the offence of Malicious damage to property to have been done. It is provided under Regulations 1(1) and 5(1) and (2) of the Magistrate's Court

(Rules of evidence in primary court), GN 22 of 1964 and 60 of 1972 as follows:-

> *Reg. 1(1) 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.*
>
> *Reg. 5 (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 court must acquit the accused. The above reproduced provisions guide the trial of criminal cases and explain the burden of proof".*

Now the question which begs an answer is whether the trial primary court correctly discharged its duty. The quick answer is no, it ended upon convicting the Appellant while there was no sufficient evidence to prove the changed offence. The 1st appellate court also fell in the same pit by upholding conviction.

The 1st appellate court upheld the conviction against the Appellant basing on the fact that SM1 and SM2 in their evidence proved that the offence was committed by the Appellant as they were present and saw the Appellant cutting the tress with malice, and that the Appellant did not deny to have cut the trees.

Firstly, the evidence of SM1, SM2 and SU2 fall short of proving the offence of malicious damage to property under Section 326(1) of the Penal Code. Although Appellant admitted to have cut the trees but he asserted ownership to those trees as can be seen in the proceedings of the trial court during his defence as he clearly said:-

> *"... Hiyo sehemu ni mali yangu ni urithi wa baba tumepakana na shule ya secondary Lupalilo. Shamba hilo lina matuta na miti aina ya milingoti iliyopandwa na babu na barabara imepita katikati ya shamba langu mimi".*

After that defence, Respondent (SM1) did not cross-examine the Appellant on that fact of ownership which implied that, he admitted what the Appellant stated in his evidence/defence was correct such that he cannot later deny that truth. See the case of ***Nyerere Nyague vs. Republic*** Criminal Appeal No. 67 of 2010, CAT (unreported) and ***Maganga Lushinde vs. Republic,*** Criminal Appeal No. 6 of 2019 CAT (unreported).

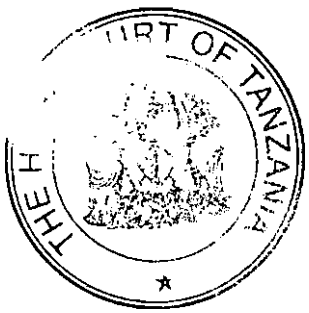
But also SM1, SM2 and SU2 did not reveal in their evidence an act which appellant did showing that he did cut the trees with malice, the act of cutting the trees by itself cannot be malicious unless accompanied with malice. It should be noted, as pointed out earlier that, poof of the charge against an accused person must be proved beyond reasonable doubt. It is unlike in civil matters where the proof is on the balance of probabilities. On

the issue of ownership, the 1st appellate court did not address its mind properly by believing that ownership was proved in civil case purported to have been decided by the Ward Tribunal but which as pointed out above was neither cited its number nor was a copy of judgment/ decision tendered in court at the trial. SU2 just mentioned that the matter was decided in 2016. That alone is insufficient to prove ownership of the alleged damaged property by the Respondent. The fact that the Appellant did not appeal against that decision as relied upon by the 1st appellate court is an illusion. The facts given by the Respondent as well as SU2 cannot be said proof of existence of the said case before the Ward Tribunal. Even the words "*KUKUBALI MAAMUZI AMBAYO MIMI NAZALIUS MBILINYI SIKURIDHIKA NA HUKUMU NO. 92/2016 SASA NATAMKA KUWA KWA KINYWA CHANGU KUWA NIMERIDHIKA NA MAAMUZI YA BARAZA LA KATA*" are not proof of the existence of the alleged case. First of all those words are nowhere canvassed in the trial court record. The same feature at the 1st appellate court thus new thing/fact which should not have been entertained as they were not part of the trial primary court record which should have been considered in its decision.

All these were addressed by the appellant in his rejoinder but which was not considered which also is an error in procedure as the 1st appellate court ought to have resolved all issues/complaints placed before it.

Having so elucidated, I find merit in this appeal. Given the evidence on record, it is obvious that the Appellant was wrongly convicted of the offence of malicious damage to property under S. 326(1) of the Penal Code as the evidence proving that offence against the appellant is wanting. The

appeal is hereby allowed. Conviction passed against the Appellant is hereby quashed and the sentence of payment of fine of Tshs. 50,000/= or to serve two months imprisonment set aside. If the appellant paid the fine the same should be restored to him. It is so ordered.



F. N. MATOGOLO
JUDGE
18/02/2022

Date: 18/02/2022
Coram: Hon. F. N. Matogolo – Judge
Applicant:
Respondent: Present
C/C: Charles

COURT:

Judgment delivered.

F. N. MATOGOLO
JUDGE
18/02/2022