

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

**ARUSHA SUB REGISTRY**

**AT ARUSHA**

**PC CRIMINAL APPEAL NO. 6 OF 2023**

(C/F District Court of Arumeru at Arumeru, Criminal Appeal No. 12 of 2022,  
Originated from Emaoi Primary Court, Criminal Case No. 256 of 2022)

**BETWEEN**

**JOSEPH NAIGISA.....APPELLANT**

**VERSUS**

**ROSE JOSEPH.....1<sup>ST</sup> RESPONDENT**

**ERASTO JOSEPH.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

18/09/2023 & 6/11/2023

**MWASEBA, J.**

Being aggrieved by the whole decision of the District Court of Arumeru at Arumeru via Criminal Appeal No. 12 of 2022, the appellant appealed to this court based on the following grounds:

- 1. That, the appellate Court erred in law and fact for holding that the respondent had a claim of right over the land on which the maize was planted as she paid Tshs.2,*

*Hereta*

*300,000/= with two calves and a bull to the mortgagee in order to redeem the mortgaged land.*

*2. That, the appellate Court erred in law for not according proper weight the decision of the District Land and Housing Tribunal that overturned the decision of the Ward Tribunal (See Exhibit D1) and hence reached an erroneous decision.*

*3. That, the appellate Court erred in law in applicability of the doctrine of "Claim of right" as provided under Section 9 of the Penal Code [ Cap 16 R.E 2019].*

Briefly, the respondents herein were sued by the appellant at Emaoi Primary Court for theft contrary to Sections 265 and 258 of the Penal Code, Cap 16 R.E 2019. The appellant alleged that on 25/05/2022 at 07:00 hrs at Mwandeti, within Arumeru District in Arusha Region, the respondents harvested maize at the farm of the appellant measured 2 ½ acres worth Tshs. 5,000,000/=. After the trial court heard both parties and their documentary evidence, it decided that the respondents had a genuine claim against the appellant as he owed them Tshs: 2,300,000/=: one bull, and two calves.

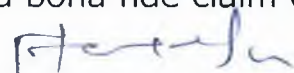


Aggrieved, the appellant appealed to the District Court of Arumeru at Arumeru (first appellate Court) vide Criminal Appeal No. 12 of 2022 which dismissed his appeal and upheld the trial court's decision. Hence, the current appeal based on the grounds submitted herein above.

When this appeal was called on for hearing which was done by way of written submission, Mr. Elibariki Maeda, learned counsel represented the appellant whereas Mr. Kennedy Mapima, learned Counsel Represented the respondents.

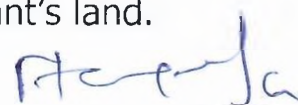
Submitting on the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, Mr. Maeda argued that the respondents alleged to have a bona fide claim of right against the respondents as they claimed from the appellant Tshs. 2,3000,000/=, two calves and one bull which were paid to redeem the harvested land. He submitted further that the respondents relied on the decision of Mwandeti Ward Tribunal which was nullified by the District Land and Housing Tribunal in land Appeal No. 8 of 2019. It was his further submission that if the respondents' claim is based on such decision, the proper cause could have been to execute the decision and not to harvest the appellant's farm without permission.

Regarding the last ground of appeal, Mr. Maeda grieved that the 1<sup>st</sup> appellate court misconstrued the application of a bona fide claim of right



while there is no one who received the said amount of money on behalf of the appellant herein. Furthermore, he submitted that at Mwandeti ward tribunal the issue of redemption of mortgaged property was discussed but the appellant being aggrieved by its decision, he appealed to the District Land and Housing tribunal where the same was nullified. Thus, **Section 9 of the Penal Code** was not applicable in this matter. It was his further submission that, the respondents stole the maize with the intention of defrauding the appellant.

On his side, Mr. Mapima strongly opposed the appeal. On the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal, he retorted that as the 1<sup>st</sup> respondent redeemed the land which he cultivated on 27/12/2021 and harvested on 20/5/2022, and that the 1<sup>st</sup> appellate court was right to hold on a claim of right by the respondents. He argued further that the issue of claim of right was not among the appellant's grounds of appeal at the 1<sup>st</sup> appellate court. Hence, it cannot be raised at this stage. He bolstered his argument with the case of **EFC Tanzania Microfinance Bank Ltd v. DMK Legal**, Civil Appeal No. 82 of 2020 (Reported at Tanzlii). It was his further submission that the respondents never admitted to have harvested the maize of the appellant, but they harvested their own maize and there is no evidence that the respondents encroached into the appellant's land.



Responding to the last ground of appeal, Mr. Mapima submitted that as this ground also deals with the doctrine of the claim of right, this court has no jurisdiction to determine it as it was never raised at the 1<sup>st</sup> appellate court. He argued further that the appellant was supposed to prove his claim beyond reasonable doubt, and he failed to do so at the trial court. He prayed for the appeal to be dismissed with costs for want of merit.

In a brief rejoinder, Mr. Maeda submitted that it was not true that the farm was cultivated and harvested by the respondents as it was SM2 who was given the work by the appellant to cultivate and keep the farm until he harvests it. Regarding the issue of claim of right, he submitted that the interpretation accorded on the said term by the 1<sup>st</sup> appellate court is not what the law intended for under **Section 258 (1) of the Penal Code**. Therefore, the appellant has the right to challenge that line of reasoning. He maintained his prayer for the appeal to be allowed with costs.

Having gone through the subordinate courts' records and submissions made by the counsels for the parties, this court is called upon to determine the issue of whether the case against the appellant was proved beyond reasonable doubt or not.





Before going further, Mr. Mapima raised one issue that, the grounds of appeal raised at this stage were not raised at the 1<sup>st</sup> appellate court, hence this court lacks jurisdiction to entertain the matter. On his side, Mr. Maeda argued that as the issue of bona fide claim of right was discussed by the Hon. Magistrate in his Judgment, hence, it was proper for the appellant to raise grounds of appeal based on that line of decisions.

I am aware that the second appellate court has only jurisdiction to entertain the grounds which were raised by the appellant in the first appellate court. It cannot entertain a new ground that was not raised by the appellant at the 1<sup>st</sup> appellate court unless it involves a serious point of law. As it was held in the case of **Butera Isaya v. Faustine Simeo**, Misc. Land Appeal No.39 of 2020 (CAT-Reported at TanzLii) where the court cited with approval the case of **Bihan Nyankongo & Another v. Republic**, Criminal Appeal No. 182 of 2011 (Unreported) in which the Court of Appeal of Tanzania held that: -

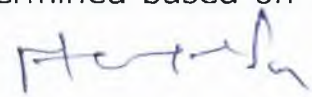
*"The court on several occasions held that a ground of appeal not raised in the first appeal cannot be raised in a second appeal."*

This court upon taking time to revisit the records of this case noted that the grounds raised at the 1<sup>st</sup> appellate court were as follows:



- 1. That, the trial court erred in law and fact for holding appellant was indebted to the tune of Tshs. 2,300,000/= two claws and bull by 1<sup>st</sup> respondent without any proof being tendered to that effect.*
- 2. That the trial court erred in law and fact in considering exhibit D1 a decision of Ward Tribunal which was nullified by District Land and Housing Tribunal of Arusha, hence reached into erroneous verdict.*
- 3. That the trial court erred in law and fact for failure to holding the case against the respondent have been proved beyond reasonable doubt that indeed the respondents did steal appellants crops on 20/5/202.*
- 4. That the trial court erred in law and fact for failure to properly analyse and evaluate the evidence tendered in court.*

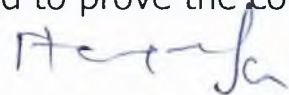
Upon Comparing between the grounds raised at the 1<sup>st</sup> appellate court and the grounds raised at this stage, this court noted that the 3<sup>rd</sup> ground of the appeal before this court was not raised at the 1<sup>st</sup> appellate court. Hence this court lacks jurisdiction to entertain the same. As for the 1<sup>st</sup> and the 2<sup>nd</sup> grounds of appeal, this court noted that they were raised at the 1<sup>st</sup> appellate court, thus, this appeal will be determined based on those two grounds.



This Court has in so many occasions reiterated its settled position that a second appellate Court should not disturb the concurrent findings of fact by the two courts below unless it is clearly shown that there has been a misapprehension of the evidence or a miscarriage of justice or a violation of some principle of law or practice. See the case of **Jamali Ally @ Salum v. Republic**, Criminal Appeal No 52 of 2017 (CAT - Unreported).

Mr. Maeda on the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal complained that it was wrong for the 1<sup>st</sup> appellate court to rely on a bona fide claim of right as there is no proof that the appellant received Tshs. 2,300,000/=, two calves and one bull to redeem the harvested land. He argued further that the claim was based on the decision of the Mwandeti Ward Tribunal which was already nullified by the Arusha District Land and Housing Tribunal via Appeal No. 8 of 2019. On his side, Mr. Mapima replied that the 1<sup>st</sup> appellate court was right regarding the issue of bona fide claim of right as the land was already redeemed by the 1<sup>st</sup> respondent and it was cultivated by them.

Having gone through the records of the trial court and 1<sup>st</sup> appellate court this court noted that there was no misapprehension of evidence nor miscarriage of justice at the two lower courts. This is for the reason that at the trial court, the appellant was duty bound to prove the commission





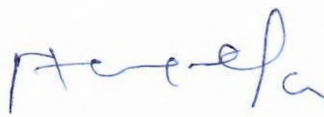
of the offence of theft by the respondents. However, the appellant failed to exercise his duty to the required standards that's why the claim of theft did not stand. Looking at the decision of Arusha DLHT which nullified the decision of the ward Tribunal, the issue of land ownership between the parties herein was not settled as the DLHT nullified the decision of the Ward Tribunal. The record is silence if any of the parties herein instituted a fresh case to prove ownership of the said land. That being the case, there is no way one can prove stealing from the farm which its ownership is in dispute. See the case of **Sylivery Nkangaa v. Raphael Albertho** [1992] TLR 111.

In the circumstances, I find no merit in this appeal hence it is dismissed forthwith. The decision of the two lower courts is upheld.

It is so ordered.

**DATED at ARUSHA** this 6<sup>th</sup> of November 2023.



  
**N.R. MWASEBA**

**JUDGE**