IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

PC. CRIMINAL APPEAL NO. 4 OF 2023

(Originating from Criminal Appeal no. 40/2022 before Itilima District court, the same originate from Criminal Case No. 45/2022 before Luguru Primary Court)

SINGILI MBIU .....APPELLANT

VERSUS

MADUHU MANG'OMA.....RESPONDENT

JUDGMENT

30th October & 6th December, 2023

F.H. MAHIMBALI,J

The appellant was arraigned before the trial court for the offence of Malicious damage to property C/S 321 (1) of the Penal Code. The appellant was found guilt and convicted for the offence charged and he was sentenced to pay a fine of TZS 500,000/= or to serve imprisonment for the terms of six months. The appellant was unahppy with the decision he appealed to the 1st appellate court unsuccessffully hence this second appeal marshelled with four grounds of appeal;

1. That the appellate magistrate erred in law by holding that the trial court decsion while the case at the trial court was not proved beyond reasonable doubt.

2. That the appellate magistrate erred in law by his failure to take into ccount the contradictions of evidence from the respodent's side
3. That, the appellate magistrate erred in law by holding that the appellant admitted himself to have commited the offence without stating clearly on how the admission was made and without understanding the kind of Baraza la wazee (Elder Council) of which also no one from Baraza la wazee appeared in the trial court to support the case.
4. That, the appellate Magistrate erred in law and facts by a total failure to evaluate properly the evidence on records rather he relied on weak ground which also does not qualify to be the admission of the appellant on the commission of the offence.

When the appeal came for hearing on 29th September 2023, the Court suo motto raised a legal issue whether the conviction was based on the charged offence.

Mr. Sabini submitting on this issue raised, argued that as per charged offence of malicious damage to property c/s 321(1) of the penal code, the conviction did not base on the charged offence this is because malicious damage to property is not created by section 321(1) of the penal Code. Section 321(1) of the Penal Code is setting fire to crops. Therefore

there was an error by the trial court basing its conviction on a none charged offence.

According to him, he was of the view that the appellant was wrongly convicted to a none charged offence. He therefore, prayed that the proceeings of the trial court and first apppellate court be quashed, and also set aside conviction and sentence meted out agaisnt the appellant.

On his side, Mr. Kaunda- learned advocate for the respodent respodning to the issue raised, at the first place he concured with the learned counsel's submission on the proper citation of the law incriminating the appellant, thus the appellant was wrongly charged. However as per proceeding and records of the trial court, the appellant admitted to have committed the offence of malicious damages to property. As per law that was an offence as per Section 326(1) of the Penal code.

Mr. Kaunda further submitted that in the circumstances, what the court is supposed to do on the overwhelimng evidence is that a person who enters a plea of guilty pursunant to s. 360 of the CPA, has no right of appeal. Therefoer the appellant is precluded from appealing even if he was charged by a wrong citation of the law. By his admission that he destroyed the said plants, he is denied from disputing it now. By the way

he has not been prejudiced by that improper section of the law. Had there been proof of prejudice, this submission would have carried water. Exceptions on the appeal to a plea of guilty are limited see **Frank Mlyuka vs. Rep, criminal Appeal No. 404 of 2018 CAT at Iringa at page 13.**

Mr. Kaunda finally presssed that the appellant has no right of appeal on his own plea of guilty and therefore prayed for the appeal be dismissed with costs.

In rejoinder Mr. sabini, reiterated his submission in chief. He also added that the appellant at the trial court did not admit the commission of the offence as contended by Mr. Kaunda. The trial court's proceedings and the judgment are explicit on that.

Therefore, what Mr. Kaunda is submitting is not reflective of the court record. Considering the eviedence of the appellant himself at the trial court, he only stated to have cleared his own farm but not destroying respondent's property as alleged.

Mr. Sabini further alluded that it is the foundation of the law that an accused person is only charged for cantravening the relevant penal provision and not otherwise. As per charge sheet, the penal

sheet, the penal provision is s. 321(1) of the Penal Code and not 326 (1) as per convicting reached by the trial court's judgment. Thus conviction based on section 321(1) of the Penal Code is unfounded. He thus prayed that conviction be quashed and set aside, appeal be allowed.

I have keenly scanned the trial court's records especially the complained charged sheet. It is true that the appellant was charged with the offence of malicious damage to property C/S 321 (1) of the Penal Code but the trial court convicted the appellant based on section 326 (1) of the Penal Code.

The charge reads:

" KOSA; NA KIFUNGU CHA SHERIA: KUHARIBU MAZAO K/F 321 (1) SURA 16 YA K/A MAREJEO 2019

MAELEZO YA KOSA: Wewe Singili Mbiu unahsitakiwa kwamba mnamo tarehe 25/07/2022 majira ya 10:00 asbh huko katika Kijiji cha Idoselo kata ya Mwamapalala wilaya ya Itilima na mkoa wa Simiyu, kwa makusudi na bila halali ulikata mazao ya katani yenye tasmini ya kiasi cha Tshs 532,000/= mali ya Maduhu Mangóma kitendo ambacho nikosa kisheria."

Conviction of the trial Court: " *.... Inamtia hatiani mshitakiwa kwa kosa la kuharibu mali k/f 326(1) sura 16 K/A"*

Section 321(1) of the penal Code reads;

"Any *person who willfully and unlawfully sets fire to;*

(a) a crop of cultivated produce, whether standing, picked or cut;

(b) crop of hay or grass under cultivation, whether the natural or indigenous product of the soil or not, and whether standing or cut; or

(c) any standing trees, saplings or shrubs, whether indigenous or not, under cultivation, is guilty of an offence and is liable to imprisonment for fourteen years.

From the extract above, since the appellant was facing a charge of the malicious damage to property, then he ought to have been charged under section 326(1) of the Penal Code which states that: -

"*Any person who willfully 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*"

Therefore, he being charged under section 321 (1) which does entail the detailed particulars of the case and conviction being based on a different penal provision, the trial court was not justified in reaching that finding

unless it was a cognate offence which was not the case. Substitution moves from a greater offence to a minor one which is cognate to it. Thus, in substituting the conviction of the offence of malicious damage to property for that of setting fire to crops, the trial court strayed into serious error. See **Joseph Leonard Manyota v. Republic** (Criminal Appeal No. 485 of 2015) [2017] TZCA 260 (11 August, 2017) TANZLII, **Julius Josephat v. Republic** (Criminal Appeal No. 3 of 2017) [2020] TZCA 1729 (18 August. 2020) TANZLII, **Karimu Jamary @ Kesi v. Republic** (Criminal Appeal No. 412 of 2018) [2021] TZCA 95 (9 April, 2921) TANZLII, **Director of Public Prosecutions Vs. Lengai Sabaya & 2 Others,** Criminal Appeal No. 231 of 2022, CAT at Arusha, to mention but a few.

The issue now is whether such wrong citation prejudiced the accused person. In the case of **Frank Kanani vs. The Republic,** Criminal Appeal No. 425 of 2018 TZCA at Bukoba registry (www.tanzlii.org) the Court was faced with a similar situation and held that:-

> *"In a situation where an accused is charged under a wrong provision of the law with insufficient particulars of the offence, such deficiency denies him the right to a fair trial because he*

will not be in a position to know the nature or seriousness of the offence he was charged with."

The Court of Appeal Judges went further and quoted the holding in the case of **Abdallah Ally V. Republic** Criminal Appeal No. 253 of 2013 (unreported) where they stated that:-

"...being found guilty on a defective charge based on wrong and or non-existent provision of the law, it cannot be said that the appellant was fairly tried in the below courts. "

I subscribe to the above position and find that the appellant was convicted with the wrong provision of the law which renders the charge to be defective.

That being the position, the question now is whether such defect is curable. In the case of **Alex Medard vs. The Republic,** Criminal Appeal No. 571 of 2017, TZCA at Bukoba registry (www.tanzlii.org) the Court was encountered with a similar situation and held that: -

"As to whether the defective charge could be salvaged, we do not agree with Ms. Maswi's stance that the defect can be cured under section 388 of the CPA. To the contrary, we think, as

was argued by Mr. Kabunga, it cannot be cured as the appellant did not receive a fair trial"

This position was stated in a number of cases, just to mention a few, they include **Isdori Patrice vs. Republic,** Criminal Appeal No. 224 of 2007; **Khatibu Khanga v. Republic,** Criminal No. 290 of 2008; **Joseph Paul @ Miwela v. Republic,** Criminal Appeal No. 379 of 2016; **Maulid Ally Hassan v. Republic,** Criminal Appeal No. 439 of 2015 (all unreported); **and Mussa Mwaikunda v Republic,** [2006] TLR 387**.**

However, I am declined to agree with the argument of Mr. Kaunda that, the appellant should be responsible guilty with the offence of malicious damage to property due to overwhelming evidence on records and that the appellant admitted to have committed the alleged offence.

There is no any piece of evidence suggesting that the appellant admitted to have destroyed plants of the respondent. Similarly, there is no any proof of evidence as to whether allegations against the appellant were proved. Page 1 of the trial court's proceedings is explicitly clear on whether the appellant pleaded guilty to the charged offence. The record establishes the following:

*"**Mahakama:** Shtaka limesomwa mbele ya mshitakiwa kwa lugha inayoeleweka naye amejibu*

***Mshtakiwa:** si kweli*

***Mahakama:** Mshitakiwa amekiri shitaka dhidi yake"*

The trial court records reveal that on 9/9/2022 the matter proceeded inter partes. See page 6 of the typed proceedings. Now the question to be asked, if the appellant had admitted to the charge, how the trial court proceeded to hear the matter on merit while there was plea of guilty. I must therefore conclude that the appellant did not admit the charge against him.

Mindful the matter originated from the primary court, therefore the Criminal Procedure Act Cap 20 is not applicable to that court. The proviso of CPA cited by Mr. Kaunda when arguing this appeal is inapplicable as the matter originates from the primary court.

Given the above position, it is my finding that the appellant was charged with the wrong provision of the law which does not tally with the particulars of the offence. In that view, this finding is enough to dispose off this appeal leave alone the contradicting evidence by the respondent. Therefore, the appeal is allowed to the extent of the issue raised by the

Court suo motto and consequently the proceedings and judgments of the subordinates' courts are hereby quashed and set aside. Parties shall bear their own costs. No retrial is ordered as per available evidence in record.

It so ordered.

DATED at SHINYANGA this 6th day of December, 2023.

F. H. Mahimbali
Judge

Judgment delivered today the 6th day of December, 2023 in the presence Mr. Kaunda, learned advocate for the Respondent, the appellant being present in person and Ms Beatrice, RMA, present in Chamber Court.

F.H. MAHIMBALI

Judge