

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 7 OF 2021

(Originating from the District of Court of Nanyumbu at Nanyumbu in

Criminal Case No. 33 of 2019)

SALUMU RASHIDI SALUM.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

11th Oct. & 15th Dec., 2021

DYANSOBERA, J.:

The appellant and Mwanyura Hassan Rambeshi (2nd accused), were charged in the District Court of Nanyumbu at Nanyumbu with two counts. The first count was conspiracy to commit an offence contrary to section 384 of the Penal Code [Cap.16 R.E. 2002 now the R.E. 2019]. Whereas, the second count was malicious damage to property contrary to section 326(1) of the Penal Code(supra). The appellant was convicted on the second count and sentenced to imprisonment to a term of 38 months. Whereas, his co accused was acquitted on both counts.

The gist of the matter which appeared before the trial court was to the effect that, PW2 (Seif Athuman Kindamba) a member of Msweno AMCOS on 04/11/2017 delivered twelve (12) bags of cashew nuts at Maswera branch which were received, weighed 936 kg and to that effect was given a receipt with Ref. No.248435 (Exhibit P2) by the appellant (the branch secretary) and Mwanyura (branch member). In addition, as far as the weight of his cashew nuts were concerned PW2 was entitled to be paid Tshs. 3,370,536/=. Unfortunately, PW2 was not paid the circumstances which prompted him to report the matter to the police.

PW3 (G.3518 DC Masoud) investigated the complaint of PW2. In his investigation PW3 was given the Msweno Receipt Book (exhibit P1) the appellant and his co accused. Upon his investigation he realised that the Receipt No.248435 was perforated at the place where the amount of cashew nuts was scribbled. PW3 further testified that Exhibit P1 was under the custody of the appellant. Though during his interrogation with the appellant PW3 was told by the appellant that he used delegate the use of the book to Mwanyura. According to his investigation he realised that the appellant and his co accused perforated the receipt so that they could not pay PW2 his dues. Besides, PW3 made another step ahead on the account of PW2. His investigation on this account targeted to find out if the appellant effected payment to PW2 but he came to know that the

appellant and his fellow accused did not honour the account of PW2 with the amount of money was entitled as proved by exhibit P3. The evidence that exhibit P1 was perforated was sourced by PW3, PW2 and PW1.

In their defence, DW1 (Salumu Rashid Salum) and DW2 (Mwanyura Hassani Rambeshi) testified that PW2 brought 700kgs of cashew nuts. And on 04/11/2017 PW2 brought 685kgs of cashew nuts with the aid of DW3 and DW4. DW1 and DW2 issued receipt No.248426 for 685kgs. On a later date PW2 brought another consignment of cashew nuts weighed 36kgs which was evidenced by receipt No.248485. Thereafter, DW1 prepared the payments for PW2 though PW2 went to DW1 with his boss one Iddi Maposa and told DW1 that his payment should be effected to Maposa. Seeing that, DW1 informed his top leaders that PW2's dues would be paid vide his boss (Maposa).

The defence of the appellant and his co accused was supported by the DW3 (Said Ahmad Said) and DW4 (Mbaraka Kaisi Sauna) who accompanied PW2 when he brought his two consignments of cashew nuts to Msweno AMCOS at the branch where the appellant and Mwanyura worked. Between these two witnesses DW3 witnessed both consignments of cashew nuts of PW2 but on the part of DW4 he only witnessed one consignment of 685kgs. As to the second consignment

DW4 told the trial court that when PW2 went to take his second consignment of cashew nuts he decided to go to his farm.

As shown earlier, the trial court found that the prosecution case was proved beyond reasonable doubt. Hence the appellant was convicted and sentenced as such while his co accused was acquitted. Aggrieved, the appellant has appealed to this court and seeks to challenge the decision of the trial court. The petition of appeal contains five grounds of complaints and two additional grounds. Thus, the appellant has filed a total of seven grounds which are to the following effect: -

1. The trial Magistrate erred in law for convicting and sentencing me hence the prosecution side failed to prove the case against the appellant beyond reasonable doubt.
2. That the trial Magistrate wrongly dismissed the accused without considering that the court capitalized on the weakness of the evidences, prosecution and proceedings of the case.
3. That the receipt No.248435 was weighed only 36 kg then PW2 forged the receipt to add 9 and it seems 936 in the receipt while in the CPR book No.248401-248600 it reads 36kg and not 936 kgs.
4. That the CPR book was kept by the messenger, 2nd accused who was acquitted in this case.

5. That the trial Magistrate erred in law and fact to convict and sentence the appellant to serve 38 months without procedure.

The additional grounds are as follows: -

1. That the learned trial Magistrate erred in law by failing to comply with requirements of section 312(2) of the Criminal Procedure Act [Cap. 20 R.E. 2002] in composing the judgment. The judgment failed to disclose the point of determination and also the reasons for the decision as a requirement of section 312(2) of the Criminal Procedure Act. The defence of the appellant was not considered in the judgment...
2. That the trial Magistrate erred in law and fact by unprocedurally admitting exhibit P1, P2, P3 as evidence and acting upon them to convict the appellant.

At the hearing of the appeal, the appellant appeared in person and unrepresented. Whereas, the respondent Republic was represented by Mr. Wilbroad Ndunguru, the learned Senior State Attorney. The appellant submitted that he has filled a total of seven and he is not an employee but worked only for one season. He went further and argued that in 2017 was charged at Nanyumbu Primary Court where he won. He also submitted that in 2020 Seif Athuman Kindamba complained against him that he had to pay him 936 kilograms of cashew nuts while

the CPR book showed 36 kilograms. The appellant stressed that in 2020 he was charged again though he did not get a copy of judgment so that it could have assisted him in his defence. Besides, the appellant submitted that he was denied an opportunity to present his defence documents.

On his part, Mr. Ndunguru from the outset supported the appeal. Firstly, he claimed that, the case against the appellant was not proved beyond reasonable doubt since the evidence is not consistent with the charge sheet. The learned Senior State Attorney went further and argued that the appellant and his co accused were charged with malicious injuries to property contrary to section 326 (1) of the Penal Code but the evidence gathered relates to forgery or altering the document. Thus, Mr. Ndunguru stressed that it is not clear how the document was destroyed since the evidence in record shows that there was imitation or alteration. Therefore, he posed a question as to how destruction of the document was proved.

Besides, the learned Senior State Attorney submitted that G. 3578 PC Masudi showed that the custodian of the documents was, apart from the appellant, one Mwanyura Hassan who was acquitted. Thus, Mr. Ndunguru was of the view that the appellant was wrongly convicted as he had no exclusive access to those documents.

More so, the learned Senior State Attorney submitted that another feature of the language used for destruction or altering is the word "perforation" and it is not clear how the perforation was made. At last, Mr. Ndunguru was of the view that the evidence was too weak to ground conviction.

On my part, I fully subscribe with the learned Senior State Attorney that the case against the appellant was not proved beyond reasonable doubt since the evidence gathered by the trial court was inconsistent with the charge sheet. It is very true that the appellant and his co accused were charged with two counts whereby the first count as per trial court findings it died a natural death. Then, as two the second count the appellant and his co accused were charged with the offence of malicious damage to property contrary to section 326(1) of the Penal Code. And after a full trial appellant was convicted contrary to section 326(1) of the Penal Code which provides as hereunder:-

" 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."

As the provision stands, the offence of malicious damage to property as indicated hereinabove is both a definition and punishment section. Going by the above definition, the act must intentionally or deliberately cause damage to personal, private or commercial property and the damage must be the result of a wilful act with the purpose to harm or cause damage to property. The issue is whether the prosecution proved the case beyond reasonable doubt.

The evidence of PW3, PW2 and PW1 shows that the appellant perforated exhibit P1 which is the CPR Book for Msweno AMCOS by annotating the figure of the consignments of cashew nuts which were brought by the PW2 to the appellant's branch. The word perforation has been defined by various English dictionaries to mean a small hole or row of small holes punched in a sheet of paper. According to the prosecution evidence, shows that there was forgery of the CPR Book which was not the offence facing the appellant.

In the instant case, the prosecution failed to prove that the act of intentionally or deliberately caused damage to personal, private or commercial property and that the damage was a result of wilful act with the purpose to harm or cause damage to property.

This means that the evidence tendered at the trial did not prove the ingredients of the offence.

In view of the above observation, I incline to the first ground of appeal of the appellant and the submission of the respondent Republic that the prosecution failed to prove the case against the appellant beyond reasonable doubt.

Consequently, I find the appeal with merit, allow it. I quash the conviction and set aside the sentence. I order the immediate release of the appellant from custody unless he is lawfully held therein.

It is so ordered.




W.P. Dyansobera

Judge

15.12.2021

This judgment is delivered at Mtwara under my hand and the seal of this Court on this 15th day of December, 2021 in the presence of the appellant who has appeared in person and unrepresented and Mr. Lugano Mwasubila, the learned State Attorney for the respondent Republic.




W.P. Dyansobera

Judge