

TANZANIA / JUDGMENT

bora yusuph abdallah vs happiness cosmas 2024 tzhc 852 30 january 2024

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TZHCDECIDED
30 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF SHINYANGA AT SHINYANGA PC. CRIMINAL APPEAL NO. 13 OF 2022 BORA YUSUPH ABDALLAH APPELLANT VERSUS HAPPINESS COSMAS RESPONDENT [Appeal from the Decision of District Court of Shinyanga at Shinyanga.] (Hon. C.S. Langau, RM) dated the 13th day of April, 2022 in Criminal Appeal No.2 of 2022

JUDGMENT

2(Jh Ju/~ 2023 & 3[Jh Jenaery, 2024. S.M. KULITA, I. The appellant herein had instituted a Criminal Case No. 170 of 2021 at Kizumbi Primary Court against the respondent herein for offence of Malicious Damage to Property, contrary to section 326 of the Penal Code [Cap 16 RE 2019]. The allegations in nut shell were to the effect that, on 16th June, 2021 at Ndala Ward, within the District and Region of 1 Shinyanga, the respondent herein did break the appellant's house and stole some properties therefrom. Hearing commenced and after a thorough scrutiny of the defense evidence, that the appellant's house was broken by the Court Broker, following a public auction he had conducted for it, whereby the respondent emerged the winner. That led the trial court to declare that the appellant herein had failed to prove her case. Hence, the respondent was acquitted. That was 24th day of November, 2021. That decision aggrieved the appellant, hence appealed at Shinyanga District Court. As luck was not on her side, again, the District Court found the appellant's appeal lacking merits, hence dismissed. That was 13th day of May, 2022. That decision too aggrieved the appellant, hence this second appeal with eight grounds which can be summarized into 7 (seven) as follows; one, the appellant's documents for her valid possession of the land in question were not considered, two, the pt appellate court erred by disregarding the illegal procedures of selling the disputed land in the public auction, three and eight, the trial court and the 1st appellate court failed to consider that the appellant instituted this criminal case as a result of malicious damage to property, four, the 1st appellate court wrongly 2 relied on the respondent's evidence while there were no documents vindicating the same, five, the Ward Tribunal wrongly pronounced the respondent a winner instead of mediating only, six, the 1st appellate court misconceived the issue of standard of proof, seven, the 1st appellate court failed by not knowing that the District Land and Housing Tribunal would have determined the

appellant's case only after the Ward tribunal had failed to mediate the matter and finally issue a certificate for its failure. On the 17th day of May, 2023 the matter came for hearing. Both parties appeared in person, unrepresented. Submitting in support of the appeal, the appellant stated that she tendered to court her documents to prove that she is a lawful owner of the land in question, but they were not considered. She added that, she had no information on the sale of her house which is an indication that the procedures for the auction were not followed. Lastly, she prayed for her grounds of appeal to be considered as part of her submissions. In reply, the respondent submitted that, she together with her husband bought the house in dispute in the public auction. As the appellant refused to vacate, the house was broken by the Court Broker. She added that, the legal procedures were followed after the appellant had been removed from the house. 3 In rejoinder the appellant stated that, the public auction did not adhere the procedures as she had no information on it. She concluded that, that being a position, even the sale, was invalid. She added that, the issue of debt had already been settled at the Primary Court, where she was ordered to pay it in instalment and that she was so doing. This was the end of both parties' submissions. It should be born in mind that, at the Kizumbi Primary Court, the appellant herein had sued the respondent for malicious damage to property which he alleged to be his house. The case was preferred under section 326(1) of the Penal Code. The section reads; - I~ny person who wilfully and unlawfully destroys or damages any property is guilty of an offence, '~ With the dictate of the above quoted provision of the law, the Appellant had the duty of proving that, the Respondent herein, wilfully and unlawfully damaged his house. Both, the trial court and the 1st appellate court, had the duty of determining whether the appellant managed to prove that. In the cause of passing through the records, I have found the respondent's defence reflecting that, she together with her husband are 4 bonafide purchasers of the house in question. That, they purchased it through a public auction, and that, it was the Court Broker who had broken and evicted the Appellant from the said house. According to the records, that was ought to be done as the Appellant was rejecting to honour the court order of vacating the premises, while the respondent was in need to occupy the premises and make the house broken for their necessary steps. This version of the story was cemented by the testimony of Christopher Kabenga from Abajaja Court Broker Company, who had testified to that same effect before the trial court, Kizumbi, in the Criminal Case No. 170 of 2021, the original case. As that is not enough, I also went through the exhibits found in the trial court's records. The same show that, the appellant had borrowed money from one Samwel Fusi. The appellant had put the house in question as collateral. When the appellant failed to repay the loaned amount, Samwel Fusi drugged her to the Primary Court, where she was ordered to pay it in instalments. However, the appellant failed to execute it. After the appellant had continued failing to repay the said loan, Samwel Fusi instituted the steps of selling the house in question to get his money back. 5 The records further transpire the presence of a notice, authored by the Ward Executive Officer (WEO) for Ndala, the area where the house in question was situated, dated 16th March, 2016, that they received an order from the executing court to supervise the sale of the appellant's house, and they actually complied with the said order. Apart from that evidence, in the record, there is a letter from Abajaja Court Broker, who through the court order, managed to evict the appellant from the house in question on the 16th day of June, 2020. In her submissions, the appellant's herein agrees that, he had a case at the

Primary Court, whereby Samwel Fusi emerged a winner over the money borrowing claim against her. For the evidences that I have endeavoured to summarize above, it is obvious that, the respondent herein has not damaged the appellant's house wilfully and unlawfully. She only did that after she had emerged the bonafide purchaser for the said house through the public auction, regarding the court order to sale the appellant's house in question. Be it that, the procedures in public auction were not followed, or that the appellant had no notice on the sale of the house in question, all these do not make the respondent to be the offender in the appellant's 6 case. The reason behind is that the respondent never entered the premises and broke the house in question wilfully and unlawfully as alleged. I tried to analyse this appeal in general as some of the appellant's grounds have been questioning matters which are out of the ambit of this case. For example, the issue of failure of the Ward Tribunal to give a certificate of failure to mediate the parties. This issue in anyhow, does not relate in knowing whether the respondent had wilfully and unlawfully damaged the appellant's house. For that matter, I am of firm mind that, this appeal in unmeritorious, hence I proceed to dismiss the same. S.M. KULITA JUDGE 30/01/2024 S.M. KULITA JUDGE 30/01/2024 _-. 7

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