

TANZANIA / JUDGMENT

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF TANZANIA AT MANYARA PC CRIMINAL APPEAL NO. 000029500 OF 2024 SIGETE KWAY

Y COMPLAINANT / APPELLANT / APPLICANT VERSUS SHABANITE KWAY RESPONDENT / DEFENDANT JUDGMENT

KAMUZORA, J 25th November & 17th February, 2025 The respondent was charged before the primary court for stealing maize from the appellant's farm. The primary court found the respondent not guilty and acquitted him. The appellant unsuccessfully appealed to the district court and this is a second appeal. He raised five grounds of appeal but during hearing, he dropped the 5th ground and argued jointly the 1st, 2nd and 3rd grounds while the 4th ground was argued separately. From the argued grounds of appeal, two issues can be captured;

1. Whether, the district court failed to properly analyse the evidence from both parties.
2. Whether, the district court failed to consider and observe principle of fair hearing. When the matter was called for hearing, parties appeared in person and with consensus, they agreed to argue the appeal by way of written submissions. The appellant complied to the submissions schedule save for the respondent. In his submission on whether there was proper analysis of evidence, the appellant contended that, the trial court based its decision on unfounded and cooked evidence as well as forged documents. That, had the first appellant court re-assessed the evidence, it would have realized that error. He submitted that, the appellant's case was proved beyond reasonable doubt for he presented evidence proving that he was a lessee to the land which was legally owned by the lessor. That, the respondent presented forged document claiming to be the owner of the land and it was relied upon by the two lower courts arriving to erroneous decision. The appellant insisted that, the respondent never owned land to which the stolen crops were cultivated thus, he prayed for this court to order investigation on the respondent's documents which he claimed, it was used to escape criminal liability. It is maintained that, the lower courts acquitted the respondents relying on forged and fabricated documents. On the second issue, the appellant submitted that the first two lower courts disregarded the principle of fair hearing. He submitted that, at all times before the trial court and the first appellate court, the appellant prayed for the court to order investigation of the respondent's documents for they were forged but the two courts below were reluctant to act and as a result, the forged document was relied upon to acquit the respondent. He insisted that the respondent Page. 1

Hon.. DEVOTHA KAM UZORA never owned the land to which the crops were cultivated thus, by failure to order investigation on the validity of the document relied upon by the respondent, the court was unable to see the reality of the matter hence, no justice attained. I will start with the second issue based on procedural irregularity in which, the appellant is faulting the two lower courts for failure to order investigation of the documents relied upon by the respondent. Having gone through the proceedings of the trial court, there is no corresponding proceedings on the tendering or admission of any documentary exhibit from the respondent. The respondent testified in court without tendering any exhibit but in her reasoning, the trial magistrate referred the purchase contract from the respondent. On appeal, the first appellate court also referred that document and concluded that there was dispute over ownership of land which was yet to be determined thus, there cannot be evidence for stealing. I see merit in this issue but not on the appellant's argument that the document was forged but because the referred document was never made part of the evidence before the trial court. The two lower courts erred in referring such document in their decisions while it was not part of evidence. Therefore, whether the said document was forged or not, it cannot be an issue for discussion before this court for it was wrongly referred to by the two courts below. Similarly, the argument that there was no fair hearing merely because the two lower courts failed to order investigation on the claim for forgery over the respondent's document, cannot stand. Therefore, the prayer for investigation order before this court is defunct. Turning to the first issue which refers to the court's failure to analyse evidence, I agree with the appellant that the first appellate court was unable to re-appraise the evidence. From the judgment, it is clear that while the first appellate court was called upon to re-appraise the evidence, the magistrate suo motu raised an issue over the competence of the charge sheet and concluded that the charge was defective for duplicity. The basis for the alleged duplicity was extremely out of the scope and I see no reason to waste much time on that. I will rather step into the shoes of the first appellate court and do what it ought to have done by re-evaluating the evidence and make my own conclusion. It is on record that the appellant herein complained against the respondent for stealing his maize. It was alleged that, the respondent was responsible for harvesting the appellant's maize from the farm located at Galapo village within Babati district in Manyara region which he had rented from Dodo Zuberi for seasonal farming. In his evidence, the appellant claimed that he found people harvesting maize in his farm and reported the matter to the police station. That, those people were arrested but the respondent went at the police station claiming that he was the one who sent them into the farm. His evidence was supported by SMII who upon receiving information from the appellant, he also witnessed two young men carrying maize in the cart. He also participated in sending those young men to the police station. That, the respondent admitted to have sent those young men to harvest maize in the farm because he claimed to be the owner of the farm and the one who cultivated the crops. SMII1 is a police officer who participated in arresting two young men from the farm. She claimed to have found the two young men carrying maize, he arrested and sent them to the police station but later, the respondent also went to the police station. SMIV claimed that the respondent rented a cart (m kokoteni) from him to carry maize from

his farm. That, he went to the farm with two other young men and while loading maize, the police appeared claiming that the maize were stolen thus, they were sent to the police station. SMV and SMVI claimed to witness the lease agreement for the farm between the appellant and one Dodo Zuberi. SMV added that, the farm belonged to neither of the parties to this case. Dodo Zuberi (SM VII) admitted to have leased his farm to the appellant. He Page. 2 Hon.. DEVOTHA KAM UZORA basically claimed to be the owner of the farm after he had purchased the same from Shaban Nasoro Hintay in 2012. In his defence, the respondent denied stealing maize but admitted to have harvested maize from the alleged farm with the help of the laborers. He however claimed that, he was the one who planted that maize for the farm belongs to him. That, he has been in use of the same for 12 years without any dispute. He was supported by SUII who claimed to be the neighbour to the said farm who confirmed that the respondent has been in occupation and use of the said farm for a long time. SUIII and SUIV claimed that they have been assisting the respondent in ploughing and planting crops in that farm. The trial court's conclusion that the respondent did not commit the offence was based on two aspects; first, that, the respondent presented a contract dated 13/08/2012 and two, that, his witnesses supported the fact that the respondent planted maize thus, the respondent could not steal his own property. The trial court further held that, the appellant was unable to present witnesses who planted maize in that farm thus, he was unable to prove the offence against the respondent. On the first aspect, I reiterate my discussion in the first issue that the trial court and the first appellate court wrongly referred the document which was not made part for the respondent's evidence. Apart from that, ownership of farm is not the only proof for the offence of stealing crops unless proved that a party charged for the offence proved to be the one who cultivated the alleged stolen crops. I say so because, in some cases, owners of the farm allow other people to use or rent their farms. In such circumstances, they cannot be considered owners of crops cultivated during the period to when that other person was allowed to use the farm or during leasing period. On the second aspect, I agree with the trial court's conclusion that the appellant was unable to prove that he was responsible for cultivating the said maize. There is no dispute that the respondent harvested maize from that farm but both the appellant and respondent claimed to cultivate maize in the said farm thus, each raising a claim of right over the alleged stolen maize. From the evidence on record, I agree that there was an issue over ownership of land because, the appellant claimed to be the one who cultivated crops in the farm which he leased from the owner of the farm one Dodo Zuberi while the respondent claimed to be the owner of the same farm and the one who cultivated the crops. In simple words, the respondent claimed right over the farm and crops allegedly stolen by him. In the case of John Anne Vs Paulo Anne and Umali Boi, Criminal Appeal No. 22 of 2023, HC at Manyara, this court was faced with a similar situation in which both the appellant and the 2nd respondent claimed right over the land and crops which the respondents were accused of stealing. This court found that, since they both had claim of right over the alleged stolen property, the offence of stealing under section 258 of the Penal Code was not proved. At page 5, this court held: - "I wish to state and do so firmly that the offence of theft cannot be established when the accused

person claim s right to the stolen property. Section 258 o f the Penal C ode defines theft as follows- A person who fraudulently and w ithout claim o f right takes anything capable o f being stolen, or fraudulently converts to the use o f any person other than the general or special ow ner th ereo f anything capable o f being stolen, steals that thing” (Em phasis added). Based on the provision o f section 258 and subscribing to the holding o f this court, it is clear that the offence o f theft in this m atter was not established for there w as a claim o f right over the stolen property by the accused person. Page. 3 Hon.. DEVOTHA KAM UZORA Based on the principle that the prosecution is bound to prove a crim inal case beyond reasonable doubt, the appellant herein being the com plainant before the trial court was duty bound to prove beyond reasonable doubt that he planted m aize in that farm and the same was illegally harvested by the respondent to am ount to the offence o f stealing. H aving re-assessed the evidence in totality, I find that the appellant never presented any w itness to justify that he w as the one who planted the said maize. As sum m arized above, all his w itnesses referred the harvest incident and others referred leasing transaction but neither o f them confirm ed that it was the appellant who planted the said m aize. Since both the appellant and the respondent claim ed to have planted m aize and the respondent presented w itnesses w ho claim ed to have participated in ploughing and planting maize in the farm, such evidence raised reasonable defence w hich needed strong evidence from the appellant to prove that it was not the respondent who planted maize. Since there is no such evidence, the trial court rightly acquitted the respondent. I therefore find.no m erit in this issue. In the final analysis, I find the appeal devoid o f merit and proceed to dism iss it. D espite few errors noted above, the conclusion reached by the two low er courts o f acquitting the respondent, is hereby sustained. D ated a t T H E H I G H C O U R T O F T A N Z A N I A A T M A N Y A R A this 17th o f February 2025 J U D G E O F T H E H I G H C O U R T Page. 4 Hon.. DEVOTHA KAM UZORA

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