

TANZANIA / JUDGMENT

Emmanuel vs Emmanuel

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB-REGISTRY AT
BUKOKA PC CRIMINAL APPEAL NO. 17 OF 2023 (Arising from Criminal Appeal No, 43 of 2022
District Court of Muieba; Originating from Muleba Urban Primary Court in Criminal Case No.
316/2022) WINCHISLAUS EMMANUEL..... . APPELLANT VERSUS RODOVICK
EMMANUEL.....RESPONDENT

JUDGMENT

24th June and 5th July, 2024 BANZI, J.: On 25th November, 2022, Rodovick Emmanuel (the respondent) instituted a criminal case before Muleba Urban Primary Court (the trial court) alleging that, his blood brother Winchislaus Emmanuel (the appellant) has committed the offence of theft contrary to section 265 of the Penal Code [Cap. 16 R.E. 2022]. The appellant was alleged to steal thirteen trees the properties of the respondent. After a full trial, the appellant was convicted and sentenced to pay fine of Tshs.600,000/=, in default to serve six (6) months imprisonment. His appeal to the District Court of Muleba (the first appellate court) was dismissed with costs and thus, he appealed before this court faulting the decisions of the both courts below. Page 1 of.10 The brief facts leading to the conviction of the appellant reveal that, on 25th August, 2022, the respondent who was in Mwanza, received information that, some people are cutting down his trees. Through his brother, Cleoplace Emmanuel (SM2) and Robert Binunshu (SM3), he came to realise that, the appellant sold those trees to Wiston Kamaleki. As the respondent was on safari to Mwanza, he asked SM3 to go to report the matter to the village authority who gave him a letter to go to the Police. However, upon arrival at police station, he was told to return the matter to the ward tribunal. When parties were called for reconciliation, the ward tribunal decided in favour of the respondent but the appellant refused to sign that reconciliation. The respondent used that reconciliation deed (Exhibit PI) as a proof that, he is the owner of the trees in question and filed criminal charge against the appellant. He also tendered copy of minutes (Exhibit PI) showing how the suit land was distributed among the heirs. In his defence, the appellant denied to have stolen the trees. He admitted to have sent people to cut them down contending that, they were his own property because he planted them after being given bare land by their father in 2005. He went on stating that, all his siblings refused to cultivate the land but when their father died, they emerged with the claims that, they are entitled to inherit from that land. He denied for the clan to Page 2 of 10 have ever convened a meeting for purpose of distributing the land in dispute. He contended that, the clan meeting was for distribution of cows only. At the end of the

trial, the appellant was convicted and sentenced as alluded above. His appeal to the District Court was dismissed with costs. Still aggrieved, he has knocked the doors of this court armed with three grounds of appeal. At the hearing, Mr. Derick Zephurine, learned counsel appeared for the appellant, whereas, the respondent was represented by Mr. Fumbuka Ngotolwa, learned counsel. Mr. Zephurine abandoned the third ground and remained with two grounds thus:

1. That, the first appellate court erred in law and facts by upholding the decision of the trial court while there was the issue of ownership of land which was not yet determined by any competent court/tribunal.
2. That, the trial court and the first appellate court erred in law and facts to uphold the decision of the lower court while the respondent did not prove the case to the required standard. Submitting on the first ground, Mr. Zephurine argued that, the first appellate court erred to uphold the decision of the trial court while there was dispute over ownership of land between the appellant and the respondent which was not yet to be determined by competent court. Concerning Exhibit Page 3 of I/O Pl which was the basis of conviction, he argued that, the outcome of the mediation was not the conclusive proof of ownership considering that, the appellant did not accept such mediation and refused to sign the deed. Under these circumstances, criminal charge cannot stand because the dispute of ownership has not been finally determined. He cited the cases of *Kuswekwa Nyanza vs Chrisopher Mkangala* [2018] TZCA 491 TanzLII and *Verena Emmanuel vs Winchislaus Emmanuel* [2023] TZHC 21342 TanzLII to support his argument. Reverting to the second ground, he submitted that, the case against the appellant was not proved to the required standards because there was no conclusive decision of competent court as to who was the lawful owner of the suit land. In that regard, the respondent was supposed to open the land dispute before the Land Tribunal instead of pursuing a criminal charge before the trial court. Also, the charge was not proved because there was no value of the stolen property. He added that, despite acknowledging existence of land dispute over the suit land and advising parties to file the probate case, the trial court went on and convicted the appellant. This anomaly was not considered by the first appellate court. He therefore prayed for this appeal to be allowed by quashing the conviction and setting aside the sentence. Page 4 of 10 On his side, Mr. Ngotolwa supported the decisions of the trial court and the first appellate court on the reason that, there was no dispute over ownership of land between parties because the deed of settlement from Katoke ward tribunal which was presented before the trial court proved that, the respondent is the lawful owner Of the suit land. Also, considering that it was not challenged, the trial court was right to base its decision on that deed as the same was issued by the competent court per section of 2 (b) of the Land Disputes Courts Act [Cap. 216 R.E. 2019] ("the Land Disputes Courts Act"). On whether or not the offence of theft was proved to the required standards, he submitted that, the six ingredients of the offence of theft laid down by the Court of Appeal in the case of *The Director of Public Prosecutions vs Shishir Shya Msingh* [2022] TZCA 357 TanzLII were proved by the respondent. According to him, the offence of stealing was proved because, there is no dispute that the appellant cut down the trees which were proved to be legally owned by the respondent. Also, considering that those

trees were planted, they were not natural things grown on the land as per section 2 of the Land Act [Cap. 113 R.E. 2019]. Hence, they were movable properties which can be moved by way asportation or conversion. Furthermore, the appellant moved them by selling in order to cause loss to Page 5 of 10 the respondent. He further argued that, the appellant in his defence admitted to cut down those trees and by doing so, he supported the respondent's case. To support his submission, he cited the case of Mohamed Haruna @ Mtupeni and Another vs Republic [2010] TZCA 141 TanzLII. On the order of costs, Mr. Ngotolwa opined that, the first appellate court erred to award costs to the respondent as the law does not provide for that and the parties are siblings. In his rejoinder, Mr. Zephurine insisted that, there was no deed of settlement because the same was not signed by the appellant which indicates that, the reconciliation was not accepted by both sides. Apart from that, the deed of settlement does not conclusively declare the respondent as the legal owner of the land in dispute, therefore, the issue of ownership is still unsolved. Qn the issue of proof of theft, he responded that, trees are immovable properties as they form part of land regardless, they were planted by human beings or naturally grown. Therefore, the offence of theft was not proved. He distinguished the cited case of Mohamed Haruna © Mtupeni and Another vs Republic claiming that, unlike in the case at hand, in the said case, the appellant confessed his guilty. He finally prayed for the conviction to be quashed and the order of costs by the first appellate court to be set aside for being illegal. Page 6 of 10 I have carefully examined the evidence before the trial court. According to the evidence on record, it is undisputed that, on the date of incident, the trees in question were harvested after the appellant sold them to a third party. According to the respondent, those trees were his properties because he is the owner of the land in question following the distribution of the deceased estate. Inversely, the appellant claimed that, the land in question is owned by him and so as the trees which he planted in 2005 after given that land by their late father. From the evidence of both parties, it is obvious that, there is dispute over ownership of land where the trees were planted and harvested, in that regard, the only issue for determination is whether the two courts below acted properly by entertaining the criminal charge in the presence of land dispute between parties. The record reveals that, the trial court relied on Exhibit P1 (minutes of distribution of deceased estate and outcome of the mediation/deed of settlement from Katoke ward tribunal) in order to establish that, the suit land and the trees in question were the properties of the respondent. Likewise, the first appellate court relied on the outcome of the mediation/deed of settlement from Katoke ward tribunal to conclude that, there was no land dispute because the said exhibit conclusively determined the dispute between parties by declaring the respondent as the lawful owner of the suit Page 7 of 10 land. I had opportunity of perusing Exhibit Pi. Starting with the minutes of distribution of the deceased estate, it appears that, after the death of parties' father, the family convened the meeting and distributed the estate of the deceased. However, some of the deceased^ children who participated in the said meeting like SU2, SU3, SU4 and SU5 testified before the trial court in favour of the appellant claiming that, the land in question is not owned by the respondent. This in itself is a clear indication that, there is still probate dispute over the deceased estate, and thus, such exhibit cannot be used as conclusive proof that, the deceased estate was

legally distributed for the respondent to be recognised as the lawful owner of the suit land. On this, parties are advised to resolve the probate matter through formal court system by instituting a probate case before the competent court. Concerning the outcome of the mediation/deed of settlement from Katoke ward tribunal, I am constrained to agree with learned counsel for the appellant that, the same is not a conclusive proof that, the land in question is owned by the respondent because such deed was not consented by both parties to the dispute. The document reveals that, the appellant refused to sign the said reconciliation. Considering the amendment of section 13 (2) of the Land Disputes Courts Act through section 45 of the Written Laws (Miscellaneous Amendments) (No.3) Act, 2021 which ousted jurisdiction of Page 8 of 10 the ward tribunals from enquiring into and determining disputes arising under the Land Act and the Village Land Act, Exhibit Pl cannot be termed as judgment of competent court which finally determined the land dispute between parties. Basically, the evidence on record and exhibit tendered indicate existence of dispute between parties over the land where the trees in question were harvested. With due respect, had the learned magistrate of the first appellate court considered that, he could not have used it to conclude finality of the dispute of ownership of the suit land between the appellant and the respondent. Therefore, under the prevailed circumstances, it was not proper to open the criminal charge against the appellant while there was still unresolved dispute over ownership of land where the trees were alleged to be stolen. In respect of the costs ordered by the first appellate court, I agree with learned counsel of both sides that, it was an error for the first appellate court to order costs against the appellant because, according to section 5 (2) of the Primary Courts Criminal Procedure Code, such order can only be made against the complainant when the court acquits or discharges an accused person of a false, frivolous or vexatious charge. Thus, the order of costs made by the first appellate court is illegal. Page 9 of 10. For the reasons stated above, I allow the appeal by quashing the proceedings and judgments of both courts below. I also quash the conviction and set aside the sentence meted against the appellant. In addition, the order of costs by the first appellate court is hereby set aside. It is so ordered. I. K. BANZI JUDGE 05/07/2024 Delivered this 5th day of July, 2024 in the presence of Mr. Gerase Reuben, learned counsel holding brief of Mr. Fumbuka Ngotolwa, learned counsel for the respondent and Ms. Mwashabani Bundala, RMA and in the absence of the appellant. Right of appeal duly explained. Page 10 of 10

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