

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGMENT

Case no CR: 13/2018

In the matter between:

THE STATE

v

NDIINA EGUMBO

ACCUSED

(HIGH COURT NLD REVIEW CASE NO.: 132/2016)

Neutral citation: *S v Egumbo* (CR 13/2018) [2018] NAHCNLD 18 (20 February 2018)

Coram: TOMMASI J et JANUARY J

Delivered: 20 February 2018

Flynote: Criminal law — Malicious injury to property — Accused pleading bona fide and reasonable assertion of a right — Proof — Onus — Adequacy of.

Summary: The accused admitted that she removed a pre-cast wall and gates belonging to the complainant from her property. She denied that she acted

maliciously and testified that she acted in accordance with her right as the owner of the property. The court held that the evidence supports a finding that the accused removed the structures in a bona fide and reasonable assertion of her right as the owner. The conviction was not in accordance with justice and set aside on review.

ORDER

The conviction and sentence are set aside.

REVIEW JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] This is a matter which came before me on automatic review. The accused was convicted of malicious damage to property and sentenced to 12 months' imprisonment wholly suspended for 3 years.

[2] The accused was charged with having maliciously broken a pre-cast wall around a vacant erf. The accused pleaded not guilty and stated in her plea explanation that the pre-cast was placed on her property and she removed it. The accused from the outset admitted that she committed the act of removing the pre-cast wall but disputed that her action was unlawful i.e. that she raised a claim of right to act in the manner she did.

[3] I shall first deal with the evidence adduced. The state called the complainant who testified that the plot/erf belonged to him but it was on his wife's name. He found that his wall was broken down and the accused admitted that she was responsible. He prepared a quotation for the repair of the pre-cast wall and same amounted to N\$49 000. He further provided the court with a document titled 'Receipt of sales'. This purports to be a sales agreement between Asser Samuel Mweneni Homateni (the brother of the accused) and the wife of the complainant. The property was purchased for an amount of N\$10 000.

[4] Attached to this document were a number of documents inter alia a document titled 'Nomination'. The latter document indicates that the accused and her sister nominated their brother to act as the Estate Representative. It further stipulates that the signatories understand that the appointment only entitles the Estate Representative to collect the assets in the estate, pay creditors and to distribute what remains between the rightful heirs in the estate of their deceased mother. The complainant confirmed that the document was handed to him by the accused's brother and the names which appear thereon are the names of the sisters.

[5] During cross-examination by the accused it became evident that there was a discussion between the accused and the complainant regarding the use of the property by the complainant. The complainant testified that there was no price agreement he entered into with the accused because the plot belonged to his wife. The accused confronted him with the fact that he was informed on the date he was erecting the pre-cast, that she was the owner of the plot. The complainant pleaded ignorance of this fact and told her that she should ask her brother. His concern was for the property she had damaged.

[6] The accused testified that she returned home from her studies in Windhoek and found that there were holes made and pre-cast poles were lying around. She was referred to the complainant. The complainant explained to her that he was awarded a tender to build a school and that he required a place to store his equipment. She wanted to know how much he was going to pay and he stated that he would discuss this later. She asked him if he bought the property as her brother already tried to sell the property. He denied purchasing the property and she allowed him to erect the pre-cast wall with the understanding that he was to rent the property.

[7] She however got word that her brother had in fact sold the property to the complainant and confronted the complainant with this information. He informed her to talk to her brother as he bought the property from her brother. She informed him that she never consented to the sale and instructed him to remove the fence. The complainant ignored her and continued to store his property on the erf. He placed gates which restricted their access to the house where they live. She called the complainant and instructed him to remove the gates. The complainant switched off his phone and she, with the assistance of some other persons, removed the pre-cast

wall and gates. She denied that the pre-cast was damaged in the process. The photographs depicts that some are neatly stacked and some pre-cast sheets are in fact broken. According to her testimony she had taken care not to damage the pre-cast plates. She testified that before removing the pre-cast she went to the police twice, the municipality and the local headman. She was thereafter arrested.

[8] The magistrate conceded that the conviction was not in order as the accused held the bona fide belief of a right in the property and therefor there was no malice. She cited *R v Mandatela & another* 1948 (4) SA 985 (E) and *R v Hoffman & another* 1948 (3) SA 979 SR. These two cases are on point.

[9] In *R v Hoffman, supra*, the court held that once a willful and malicious destruction of property is proved on a charge of malicious injury to property, the onus is on the accused to prove that the injury complained of was committed in a *bona fide* and reasonable assertion of a right, whether the belief in the existence of that right was legally correct or not. (Also see *Rex v Mandatela & another, supra* and *Shahmahomed v Hendricks & others* (1920 AD 151 at p 158).

[10] The accused did not deny removing the pre-cast wall of the complainant. According to her she acted within her rights as the owner of the property and she denied that she acted with malice. According to her she removed the structure carefully. The photographs demonstrate that damage was contained to a minimum. This fact accords with the accused's version that she did not want to damage the pre-fab but her intention was to remove same from her property.

[11] It is evident from the documentation provided to the court *a quo* that the accused was an heir to the property. The accused disputed the legitimacy of the documentation purporting to be a sale agreement during cross-examination and she clearly did not believe that her title to the property was compromised by the 'sale' of the property by her brother. The accused believing she was still the owner of the property gave the complainant notice to remove the pre-cast wall and gates. When he refused to do so, the accused removed it and there was evidence that the accused held a bona fide belief that she was the owner of the property and that she was entitled to remove the structure which was on her property.

[12] The learned magistrate, under these circumstances ought not to have convicted the accused of malicious damage to property. The conviction by the court a quo was not in accordance with justice and same ought to be set aside.

[13] In the result the following order is made.

The conviction and sentence are set aside.

M A Tommasi
Judge

I agree

H C January
Judge