

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

CRIMINAL APPEAL NO. 97 OF 2023

(Originating from Criminal Case No. 82 of 2022 in the District Court of Kiteto at Kibaya)

MEIJO NDAANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

3rd March & 25th April, 2024

Kahyoza, J.:

The appellant, **Meijo Ndaani** was prosecuted and convicted with the offence of malicious damage to property. Having convicted the appellant, the trial court sentenced him to pay a fine of Tzs. 200,000/= or serve a custodial sentence of three (3) years and to pay compensation of Tzs. 6.794.000.00. The appellant appealed to this Court against both the conviction and sentence, contending that the prosecution failed to prove the case beyond reasonable doubt, the judgment was unjustified and problematic and that the trial court did not consider the appellant's defence.

As the appellant raised a general ground of appeal and the specific grounds of appeal, this court will only deal with the general ground of appeal

whether the prosecution proved the appellant guilty beyond reasonable doubt. The practice of raising specific and general grounds of appeal ought to be discouraged. See the decision of the Court of Appeal in **Deus s/o William vs Republic (Criminal Appeal 152 of 2021) [2022] TZHC 14662 (17 November 2022)**, published on the website, www.tanzlii.org [2020] TZCA 298, where it stated that-

"Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case, it should be considered and taken to have embraced several other grounds of grievance."

I wish to state that the first appeal court, like this court, has a duty to re-evaluate the evidence, thus, it is not fatal if the trial court omitted to evaluate the evidence. It is a duty of the first appellate court to step into the shoes of the trial court to evaluate the evidence, the duty, which will include to consider the defence. For that reason, the first and third grounds of appeal are part and parcel of the general ground of appeal that is whether the prosecution proved the appellant guilty beyond reasonable doubt.

Did the prosecution prove the case beyond reasonable doubt?

The background is clear that; allegedly on 18th day of August, 2022 the appellant destroyed by grazing his cattle on the farm of maize and peas worthy Tzs. 6,794,00.00 the property of Daniel Buka. According to Juma Kisese (**Pw2**) while guarding or keeping safe Daniel Buka (**Pw1**)'s farm saw a herd of cattle led by two young boys heading to the farm he was guarding. He took step to stop them. Scarcely had he moved to stop the herd of cattle from entering into the farm, when he was assaulted by a group of around ten people who put him under arrest. He identified the appellant as he knew him before and by the name Meijo. After they put him under arrest, they allowed their cows and snatched his cellular phone. They grazed their cattle on the farm from 01:00 pm to 06:00 pm, that is almost four hours.

When it was time for them to leave, they led the herd of cattle off the farm and left three people to guard Juma Kisese (**Pw2**). They later left Juma Kisese (**Pw2**). **As** they snatched his cellular phone, Juma Kisese (**Pw2**) had no any other alternative but to walk back to the village to report the incident. No sooner did he commence walking to the village than he met Daniel Buka (**Pw1**), his employer. He reported to him and they went to police.

Daniel Buka (**Pw1**)'s account of event was that he received information from Bakari Musa Hermed (**Pw3**) that the appellant was grazing on his farm and his watchman was put under arrest. Bakari Musa Hermed (**Pw3**) corroborated the evidence of Juma Kisese (**Pw2**) and Daniel Buka (**Pw1**) that on 18.8.2022 at around 02;00pm saw the appellant grazing his herds of cattle on Daniel Buka (**Pw1**)'s farm of maize and peas. He saw him clearly as he went close to him and he knew him very well as all are residents of Kijungu and grew up together in the village. He deposed that he saw him holding Juma Kisese (**Pw2**) captive while his cattle were grazing. On 19.8.2022 G. 4654 D/Cpl Emmanuel (**Pw4**) received the complaint from Daniel Buka (**Pw1**) and started looking for the appellant. He arrested him. He requested the District Executive Director to evaluate the damage and on 25.8.2022 Ali Said Mafita (**Pw5**) valued the damage. G. 4654 D/Cpl Emmanuel (**Pw4**) deposed that the whole farm was destroyed leaving on stalks and webs. Ali Said Mafita (**Pw5**) deposed that all maize was destroyed. As to peas, Ali Said Mafita (**Pw5**) testified that only a few remained. Ali Said Mafita (**Pw5**) tendered the valuation report as Exh.P1.

The appellant raised the defence of *alibi*, that on the material date he was nowhere near the scene of crime. He deposed that on that day they

were electing the village chairman, so he went to vote and took his mother and step mothers to vote. He denied to graze herds of cattle. He denied to know Juma Kisese (**Pw2**). Lazoro Mathayo (**Dw2**) confirmed the appellant's evidence that on 18.8.2022 was an election day as they were voting for the chairman and the secretary of Kijungu village and that he instructed the appellant to chairman and the secretary of UWT to vote. After the election ended, Lazoro Mathayo (**Dw2**) went home. Shortly after he arrived home, he received a call from the police informing him to tell the appellant to report to police the following day. Lazoro Mathayo (**Dw2**) added that the appellant did not graze their cattle on 18.8.2023 but his younger brothers did and that they are the one who grazed the herd of cattle.

Maimu Sentu (**Dw3**) deposed that Meijo took her to the voting place in morning on 18.8.2022 and stayed with the appellant. She also deposed that she knew Bakari Musa Hermed (**Pw3**) who owns no farm but he is a watchman of his relative's farm. Ngalei Taani (**Dw4**) supported the evidence of the appellant and Lazoro Mathayo (**Dw2**) that he was the one grazing cows on 18.8.2022 together his brother Lepilal.

Given the evidence on record like the trial court, I find it established not only beyond reasonable doubt but beyond all doubts that the Daniel Buka

(**Pw1**)'s maize and peas in his farm were destroyed by herds of cattle. The offence was committed during the day time, between 01:00 pm and 06:00pm. It is also proved that Juma Kisese (**Pw2**) who was employed to keep safe the farm witnessed the offence when it was committed. He was put under arrest and his cellular phone snatched from him to prevent him to take action. The appellant's advocate submitted that the offence of malicious damage could not be established as ownership of the land was not proved. He argued that there was no evidence as to how he acquired the land.

I am unable to buy the appellant's advocate's submission that the offence of malicious damage to property was not proved for want of evidence from Daniel Buka (**Pw1**) to prove how he obtained the land. I went through out the evidence on record there is no dispute over ownership of the farm. The appellant did not testify that he owned the disputed land or contend that he destroyed his own crops. The defence evidence opposed the evidence of that Bakari Musa Hermed (**Pw3**) owned a farm near Daniel Buka (**Pw1**)'s farm. The defence evidence from Lazoro Mathayo (**Dw2**) and Maimu Sentu (**Dw3**) was that Bakari Musa Hermed (**Pw3**) was guarding his relative's farm near Daniel Buka (**Pw1**)'s farm.

It is not an issue whether Bakari Musa Hermed (**Pw3**) was guarding his relative's farm or his farm, what matters is that he was at the farm on the date the offence was committed. Thus, I find it true that Bakari Musa Hermed (**Pw3**) knew the owner of the farm close his or his relative's farm. Bakari Musa Hermed (**Pw3**) witnessed what was going on and he reported the matter to Daniel Buka (**Pw1**). It does not matter also whether Daniel Buka (**Pw1**) was the owner or special owner of the damaged farm, what matters is that Daniel Buka (**Pw1**) deposed that he owned the damaged crops and there is no evidence or allegations to suggest the contrary.

The appellant did not cross-examine Daniel Buka (**Pw1**) regarding his ownership of the farm. I find that unlike in **Julius Malobo v. Revocatus Msiba & Another**, PC Criminal Appeal No 03 of 2020 HC at Arusha (unreported) where ownership was at issue, in the present case ownership was not an issue. I agree with the holding of this in **Julius Malobo v. Revocatus Msiba & Another**, (supra) to establish the offence of malicious prosecution, it must be proved; **one**, that the complainant Daniel Buka (**Pw1**) owns the property; **two**, that the property has been destroyed; **three**, it is the accused person who destroyed it; and **four**, that the accused person's act was **actuated by malice**.

I find it proved that Daniel Buka (**Pw1**) is the owner of the destroyed crops and farm as per his evidence and Juma Kisese (**Pw2**), a person he had employed to guard his farm. As pointed above there is no doubt that Daniel Buka (**Pw1**)'s crops was destroyed. I will skip a third element of the offence that is whether it is the appellant who destroyed the crops by grazing on Daniel Buka (**Pw1**) crops and determine the issue whether the person who destroyed crops was **actuated by malice**.

The appellant's advocate submitted forcefully that the prosecution did not prove malice. He submitted that Juma Kisese (**Pw2**), failed to relate between people who held him captive and snatched his cellular phone and the two younger boys who led the herds of cattle to the farm. With all due respect, I am at logger heads with the appellant's advocate's contention that the prosecution miserably failed to establish malice. There is ample evidence to explain that the boys who drove the herds of cattle to Daniel Buka (**Pw1**)'s farm had common intention with those who held Juma Kisese (**Pw2**), the watchman, captive and snatched his cellular phone. Juma Kisese (**Pw2**) deposed that after he saw herds of cattle heading to the farm he took a stick to stop them. He added that those herds of cattle were being driven by two younger boys. No sooner had he moved to stop herds of cattle to enter into

the farm than, he was invaded by around ten people who put him under arrest and snatched his cellular phone.

They put him under arrest while the two boys were grazing on the farm and released him after the boys stopped grazing on the farm and disappeared from the area. He was held captive for four hours. Bakari Musa Hermed (**Pw3**)'s evidence corroborated the evidence of Juma Kisese (**Pw2**), that he found him under arrest while other people driving the herd of cattle on the farm. There is no better evidence to prove that the boys who drove herds of cattle and persons who held Juma Kisese (**Pw2**), the watchman, captive and snatched his cellular phone had common intention to maliciously destroy the crops by grazing the cows on the crops than Juma Kisese (**Pw2**)'s evidence. They held Juma Kisese (**Pw2**), the watchman, captive and snatched his cellular phone to prevent him from stopping the herd of cattle to graze on the farm and report the incident. They released him after the herds of cattle were driven away from the farm and moved to a considerable distance.

I find that there is ample evidence to establish common intention and malice to destroy crops among all people who drove the cows in the farm

and those who held Juma Kisese (**Pw2**), the watchman, captive while the cows were grazing on the crops.

The last issue is whether the appellant was among the people who held Juma Kisese (**Pw2**), the watchman, captive to let other people graze the cows on the crops. The appellant denied the allegation and raised the defence of *alibi*. The appellant's defence of *alibi* was supported by his father, Lazoro Mathayo (**Dw2**), Maimu Sentu (**Dw3**) the appellant's father's wife and the appellant's younger brother, Ngalei Taani (**Dw4**). Lazoro Mathayo (**Dw2**) and Maimu Sentu (**Dw3**) deposed that the appellant took Maimu Sentu (**Dw3**) to vote. Maimu Sentu (**Dw3**) added that after she voted, the appellant returned her home. She deposed that-

"At that time of 11:00am we were with Meijo. We sat together until we finished and went home."

During cross-examination, Maimu Sentu (**Dw3**) deposed that the appellant was not voting. She did not explain why the appellant was there at the voting place or why he had to accompany her. Thus, it is doubtful if the appellant went to polling station with Maimu Sentu (**Dw3**). All in all, the appellant has no duty to establish his *alibi*. It is sufficient for the accused to raise the *alibi* and to leave it to the prosecution to prove his guilty. Thus,

when an accused person puts forward an *alibi* as an answer to the charge or information, he does not thereby assume a burden of proving the defence throughout on the prosecution. This position of the law was pronounced in **Jumane Juma Bosco & Mohammed Jumane v.R**, Criminal Appeal No. 206/2012 CAT (Unreported) and **DPP v. Chibago Mazengo & Another**; Criminal Appeal No. 109 of 2019 (CAT Unreported).

As the trial court ruled out, the appellant did not issue a notice under section 194(4) of the Criminal Procedure Act, [Cap. 20 R.E. 2022 before he raised the defence of *alibi*. He raised the defence of *alibi* belatedly when defending himself. It should be noted that if the accused raises such a defence belatedly it casts doubts on its authenticity. In **Kibale v. U** (1969) Vol. 1 E.A 148, the erstwhile the East African Court held *that a genuine alibi is expected to be revealed to the police investigating the case or to the prosecution during trial. When it so given, the prosecution has an opportunity to investigate its genuineness. The defence of alibi given for the first time during the defence, there is a likelihood that it is an afterthought.* In **Masoud Amina v. R** [1989] TLR 25 the Court denied the accused's defence of *alibi* on account that the accused did not issue a notice and that he did not call the witness who was with him.

In the present case, the appellant raised the defence of *alibi* belatedly but called the evidence to prove it. I will consider the defence although it's authenticity is questionable. The prosecution evidence is that Juma Kisese (**Pw2**), and Bakari Musa Hermed (**Pw3**) the appellant was among persons who held Juma Kisese (**Pw2**) captive. The offence was committed during the day and both, Juma Kisese (**Pw2**), and Bakari Musa Hermed (**Pw3**) knew very well the appellant. There was no chance for mistaken identity. Not only that but also Juma Kisese (**Pw2**), named the appellant on the same day to police and the police ordered Lazoro Mathayo (**Dw2**) to tell his son to surrender to police.

I am alive of the principle of law that every witness must be trusted unless there is evidence to the contrary. In the presence case, I find the prosecution's evidence of identification watertight. It was not shaken by the appellant's defence given in transgression of the law. I find the appellant's defence of *alibi* an afterthought. I accord it no weight. It is true that the appellant was not grazing cows as deponed by the appellant and supported by the evidence of Juma Kisese (**Pw2**), who said the cows were driven onto the farm by two younger boys but the appellant put Juma Kisese (**Pw2**), under arrest to let the two boys drive the cows on Daniel Buka (**Pw1**)'s farm

and destroy the crops. The appellant was therefore, an accessory before the fact.

Section 22 of the **Penal Code** make an accessory before the fact a principal offender. Hence, the appellant was the principal offender. Section 22 stipulates thus,-

"22.-(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely-

(a) every person who actually does the act or makes the omission which constitutes the offence;

*(b) **every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;***

(c) every person who aids or abets another person in committing the offence;"

(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counseling or procuring its commission. (Emphasis added).

I am of the firm view that the appellant was properly identified and did maliciously damage the crops, he was therefore, rightly convicted. I uphold his conviction.

I now move to consider the sentence. The appellant was sentenced to a fine of Tzs. 200,000 and three years in default. He was also ordered to pay compensation to Daniel Buka (**Pw1**). The appellant was the first offender as the record shows, but, the fact that the appellant drove his herds of cattle on to the farm and held Juma Kisese (**Pw2**), captive to prohibit him from driving the herds of cattle off the farm and grabbed his cellular phone to prevent him from reporting the incident, I am of the view that he was not sufficiently rewarded. He was so cruel he deserves both, custodial and fine sentence.

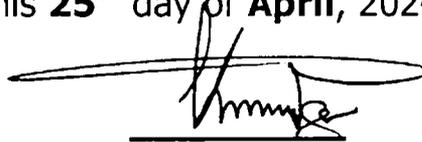
Lastly the trial court ordered the appellant to pay compensation of Tzs. 6,794,000/=. Although, the trial court did not state the basis of the compensation, but it is clear that it over relied on the evidence of Said Mafita (**Pw5**). Said Mafita (**Pw5**) held a Diploma in General Agriculture as per the record and tendered the evaluation report as exhibit P.1. The valuation was based on the coverage of the destroyed crops. It is not possible to establish the actual loss. I am however, convinced that Said Mafita (**Pw5**) did establish the value of the destroyed crops. I will therefore, not interfere with the award. I find it proved.

In the end, I dismiss the appeal, uphold the conviction and sentence for fine and the order for compensation. However, I have formed an intention to enhance the sentence by imposing a custodial sentence which I will do after addressing the appellant that intention which, I hereby do.

The appeal is dismissed.

I order accordingly.

Dated at Babati this **25th** day of **April**, 2024.



J. R. Kahyoza
Judge

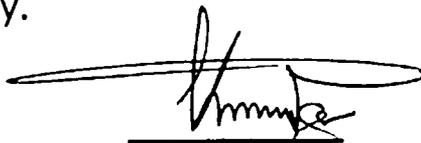
Appellant's advocate: Your Lordship, the appellant is a first offender and he has dependents. I pray to this Court not to impose a custodial sentence to give him an opportunity to take care his family.

Mr. Rwezahura S/A: Your Lordship, I support this Court's intention to enhance the sentence, as the appellant has not been remorseful. I am alive of the fact that the appellant had a right to appeal but given the obvious evidence, the appellant ought to have reconciled with the complaint. Further if the sentence is enhanced, it will deter the appellant and other people from committing similar offences. The appellant's act of maliciously destroying

property is rampant in the area where the appellant resides and has been a source of conflicts between pastoralists and farmers. I support the sentence to be enhanced.

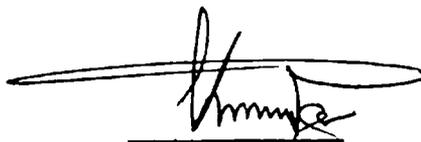
Court: Apart from upholding the fine sentence and the order for compensation, I sentence the appellant to serve one year custodial sentence for the offence he was convicted with, given the appellant's act of holding the watchman under captive, which his friends drive the herds of cattle on the farm to destroy crops. The appellant's act is unwelcome in the civilized society.

I order accordingly.



J. R. Kahyoza
Judge
25/04/2024

Court: Judgment delivered in the presence of the appellant, his advocate Mr. Ibrahim Masewe advocate and Mr. Rwezahura, state attorney for the respondent. Fatina Haymale (RMA) present.



J. R. Kahyoza
Judge
25/04/2024