IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

CONSOLIDATED APPEAL NO. 06 & 07 OF 2019
(Arising from Criminal Appeal No. 13/2018 of Bukoba District Court; Originating from Criminal Case No. 24/2018 of Kishanje Primary Court)

JUSTINE RUTAHILWA.....APPELLANT

VERSUS

BURCHARD KALUMUNA.....RESPONDENT

JUDGMENT

Date of last order 31/08/2020
Date of judgment 16/10/2020

Kilekamajenga, J.

The respondent was charged with malicious damage to property contrary to **section 326(1) of the Penal Code, Cap. 16 RE 2002** at Kashanje Primary Court. It was alleged that the respondent trespassed into the appellant's land and destroyed 90 trees valued at Tshs. 3,780,000/=. During the trial before the Primary Court, the appellant summoned two witnesses; the appellant and his wife. PW1 informed the trial court that, while at Ngara, he was phoned by his wife informing him that the respondent uprooted 200 trees from his farm. He travelled to his farm and later reported the incident to the hamlet chairman and was given a letter to institute a case before the Primary Court. PW2 despite narrating the previous disputes with the respondent, she informed the Court that

on 23rd December 2017, the respondent went to her house, after a quarrel he (respondent) pledged to uproot the trees. On 27th December 2017, PW2 went to the farm and found trees uprooted; she immediately phoned the appellant and informed him about the incident. Thereafter, on 23rd March 2018, the appellant prayed to close the case but the trial court told him to bring an evaluation report. The case was adjourned and scheduled for another date of hearing when the appellant came with the evaluation report which was admitted as exhibit PP1. Immediately thereafter, the trial court on its own motion closed the appellant's case.

On the other hand, the defence relied on the evidence of three witnesses. DW1 consistently denied committing the offence. DW2 who was the hamlet leader stated that on 11th February 2018, he was approached by the appellant who complained that the respondent uprooted his trees. DW2 gave a letter to the appellant allowing him to institute a case at the primary court. On 13th March 2018, DW2 was phoned by the Ward Agricultural Officer and the Village Executive Officer requesting him to go to the appellant's farm. As DW2 was going to the farm, he met them coming from the farm. Again, they all went back to the farm and did not find any uprooted trees. DW3 testified that on 13th December 2017, he sent the respondent to the hospital who was admitted until

on 23rd December 2017. On 11th February 2018, in the morning, he took the respondent to the church and went to fetch him again at 10:30 am.

Thereafter, the respondent prayed to close the defence case. However, the trial court did not close the defence case and ordered the Village Executive Officer, the Village Agricultural Officer and the Ward Agricultural Officer to appear and testify. The case was thereafter adjourned until another date.

The Ward Agricultural Officer appeared before the court and testified that one day he was phone by the head of the agricultural department of Bukoba and told to go to the appellant's farm to evaluate the uprooted trees. He went to the farm accompanied by the Village Agricultural Officer, the Village Executive Officer and the wife of the appellant; the respondent was represented by his daughter. He counted the uprooted trees which were 90. He wrote the report and forwarded it to the Head of Agricultural Department at Bukoba. The Village Executive Officer testified that, one day he was asked to accompany the Ward Agricultural Officer to the farm for evaluation. At the farm, the Ward Agricultural Officer counted holes where the trees were believed to be planted. They found 90 holes.

Thereafter, the trial court visited the locus in quo where the court recorded evidence from Apolinary Stephano, Nicodemu Nestory, Deocres Gregory and Selina Onesmo. However, none of these new witnesses testified that the respondent uprooted the trees.

At the end, the respondent was convicted with the offence charged. He was given a conditional discharge and ordered to pay compensation at the tune of Tshs. 3,780,000/=. Dissatisfied with the decision of the trial primary court, the respondent appealed to the District Court. The District Court lowered the amount of compensation to Tshs. 800,000/=. Thereafter, both the appellant and respondent preferred appeals to this Court; appeal No. 06 and 07 were finally consolidated.

The appellant advanced the following grounds of appeal:

1. *That the appellate court erred in law and in fact by reducing the compensation payable to the appellant according to valuation report, which was to be Tshs. 3,780,000/= ordered Tshs. 800,000/= to be paid instead without telling how did it arrived to said compensation of Tshs. 800,000/=.*
2. *That the appellate Court grossly erred in law and in fact by deciding that evaluation report was admitted without the respondent being given time to cross examine the same contravention of rule 35 (3) of the primary Court Criminal Procedure Code while admitting that from the primary Court proceedings, the respondent was asked and responded to have no objection regarding the same. The appellate Court had to take into account that, that stage is reached after the opponent party is given the document on his finger tips and actually looking on it, and that is when the respondent accorded opportunity to cross-examine the same and admitted to have no objection.*

3. *That appellate Court erred in law and in fact by failing to consider that the document was tendered by the person of the same profession who works on the same sector with the marker.*
4. *That the appellate Court erred in law and in fact by failing to consider the order amounted to occasion injustice on the party of the appellant whose trees valued to Tshs. 3,780,000/= was maliciously damaged by the respondent.*

On the other hand, the respondent also raised the following grounds of appeal:

1. *That the first appellate court erred in law and fact by upholding the conviction entered by the trial court on weak prosecution testimony which had not proved the commission of the charged offence beyond reasonable doubt;*
2. *That even after finding the faults of the evidence regarding the tendered valuation report the learned magistrate grossly misdirected herself by ordering the payment of the total sum of Tshs. 800,000/= against the appellant without any legal basis.*

During the hearing, the appellant appeared in person while the respondent enjoyed the legal services of the learned advocate, Mr. Lameck John Erasto. The appellant's submission was just brief; he informed the Court that he won the case in the Primary Court and District Court. He however prayed for the Court to award the appropriate compensation on this matter.

On the other hand, the counsel for the respondent informed the Court on how they have been objecting the decision of the Primary Court from the beginning. The respondent appealed against the decision of the Primary Court to the District Court. The decision of the Primary Court was based on contradictory circumstantial evidence. Generally, the decision was merely based on assumptions. Mr. Erasto argued that according to the trial court proceedings, the appellant stated that the trees alleged to be uprooted were 200. However, the only witness for the appellant was his own wife. Again, at page 17 of the trial court proceedings, there is evidence stating that the trees which were destroyed were 90.

Another witness stated that they did not find any tree uprooted but they only observed holes where the trees were believed to be uprooted from. It is unfortunate that the agricultural officer only counted holes to evaluate the value of the alleged uprooted trees. The trial court based its findings on the report by the agricultural officer and granted compensation to the appellant at the tune of Tshs. 3,780,000/=. When arguing on circumstantial evidence, the counsel supported the argument with the case of **Ally Bakari and Pili Bakari v. R [1992] TLR 10**. Furthermore, the evaluation report was tendered after the appellant closed his case hence the respondent was not given an opportunity to cross-examine the appellant on the report. Generally, the case was not proved to

the required standard. He cemented his argument with the case of **Moshi Rajabu v. R [1967] HCD 384**.

In addition, the agricultural officer who tendered the report was not the one who prepared it. In other words, the valuer who prepared the report was not summoned to testify. During the purported evaluation of the trees, the respondent was not involved. Furthermore, the trial court, on its own motion, summoned witnesses not called by the parties something which was against the law.

Mr. Erasto further argued that the trial court is not supposed to bring new evidence during the visiting of the locus in quo. To bolster his argument, he referred the Court to the case of **Kuyate v. R [1967] EACA 815** and **Seperatus Kasita v. Juma Khasimu, PC Criminal Appeal No. 7 of 2016**, HC at Bukoba at page 8. The counsel for the respondent finally urged the Court to set aside the decision of the Primary Court and District Court.

As this is a consolidated appeal, I wish to address the first ground of appeal advanced by the respondent that the case was not proved beyond reasonable doubt. It is the principle of the law that every criminal case must be proved

beyond reasonable doubt. This standard must be observed regardless whether the case is tried by the primary court or any other court. As I have already stated, this case originated from the Kishanje Primary Court. Being a criminal case, its proof does not depart from the law which demands every criminal case be proved beyond reasonable doubt. The standard of proof in criminal law is stated under **Section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2019** which provides that:

> *'A fact is said to be proved when–*
> *(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the* ***prosecution beyond reasonable doubt*** *that the fact exists;'*

Though the Evidence Act does not directly apply in primary courts because primary courts are governed by the Third Schedule of the Magistrates Courts Act, Cap. 11 RE 2019 (The Primary Courts Criminal Procedure Code), the above principle of law has been reiterated in several cases including the case of **Hemed v. Republic [1987] TLR 117** where the Court stated that:

> *'...in criminal cases the standard of proof is beyond reasonable doubt. Where the onus shifts to the accused it is on a balance or probabilities.'*

Therefore, an accused may only be convicted if the prosecution has cleared all doubts regarding the commission of the offence. Mere suspicion cannot be relied

on for conviction as it was stated in the case of **Nathaniel Alphonce Mapunda and Benjamin Mapunda v. R [2006] TLR 395** thus:

> *'In criminal charge, suspicion alone, however grave it may be is not enough to sustain a conviction, all the more so, in a serious charge of murder.'*

In the instant case, the prosecution evidence was marred with irregularities. For instance, while PW1 stated that the uprooted trees were 200, the report by the agricultural officer stated that they were 90 trees. Furthermore, none of the prosecution evidence directly pointed towards the respondent. As hinted earlier, PW1 never saw the respondent uprooting the alleged trees. PW2 also went to the farm four days after the trees were alleged to be uprooted. PW2 who was the wife of PW1 also did not see the respondent committing the alleged offence. Apart from this shaky evidence, the prosecution case seems to be hinged on the evidence of family members; PW1 being the father and PW2 the wife. I am however mindful of the principle of law which was stated in the case of **Ramadhani Sango v. Republic Criminal Appeal No. 175 of 2009, CAT at Tanga** that:

> *"The law does not bar relatives from testifying from an event they may be aware of."*

The above position of law was amplified further in the case of **Mustafa Ramadhani Kihiyo v. R [2006] TLR 323** where the Court stated that:

> *'The evidence of the related witness is credible and there is no rule of practice or law which requires the evidence of relatives to be discredited, unless of course there is a ground for doing so.'*

However, a witness who is a relative may be discredited if such witness has his/her interest to serve in the matter. The position was stated in the case of **Asia Iddi v. Republic 1989 TLR 174** where the Court stated that:

> *"That the evidence of a person who has an interest to serve needs collaboration".*

The above position of the law was further cemented in the case of **Abraham Sagurani v. Republic [1981] TLR 265** thus:

> *"Evidence of a person with an interest of his own to serve must be approached with care and should not be acted up unless collaborated by some other independent evidence."*

In the case at hand, the trial court could have no reason to discredit the evidence of husband and wife if such evidence was credible and reliable. In addition, the number of witnesses does not affect the weight of evidence provided they are credible and reliable witnesses. See, **section 143 of the**

Evidence Act, Cap. 6 RE 2002. This principle of law was fortified further in the case of **Yahanis Msigwa v. R, 1990 TLR 148**, where the court stated that:

> *'...no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen, and his/her credibility.'*

Therefore, a single witness who is credible, reliable and trustworthy may be enough to prove a fact. In the case of **Goodluck Kyando v. R, Criminal Appeal No. 118 of 2003**, the Court stated that:

> *'...every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not believing him.'*

In this case, I find no value in the evidence of PW1 and PW2 because it was entirely circumstantial evidence. However, the court is warned not to rely on circumstantial evidence in convicting the accused unless the evidence convincingly points towards the accused and nothing else. In the case of **Bahati Makeja v. The Republic, Criminal Appeal No. 118 of 2006**, Mwanza (unreported), the Court stated that:

> *"in a case depending conclusively on circumstantial evidence, the Court must before deciding on a conviction, find that the inculpatory facts are*

incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis that of guilty".

In the case of **R v. Kerstin Cameron [2003] TLR 84** the Court had the following to say in connection with application circumstantial evidence:

To ground a conviction on circumstantial evidence, the following principles must apply:

(a) The evidence must be incapable of more than one interpretation;

(b) The facts from which an inference of guilty or adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be connected with the facts from which the inference is to be drawn or inferred;

(c) In murder cases, evidence should be cogent and compelling as to convince a jury, judge or court that upon no rational hypothesis other than murder can the facts be accounted for.

See also the case of **Sadiki Ally Mkindi v. DPP, Criminal Appeal No. 207 of 2009**, CAT at Arusha, (unreported).

As already indicated above, all the prosecution evidence entirely did not tie the respondent to the offence charged. Even the witnesses who testified under the discretion of the trial court did not say anything whether the respondent committed the offence charged. It is a trite law that a person may only be

convicted if the prosecution has proved the beyond reasonable doubt. In the case at hand, the prosecution case was not proved and therefore it was wrong for the respondent to be convicted.

Furthermore, it is apposite at this stage to point out the irregularities observed in the proceedings of the trial court. As pointed out above, when the prosecution prayed to close its case, the trial court demanded the appellant to bring the evaluation report. It was wrong for the court to demand such a report because doing so rendered the trial court to become the prosecution machinery. The court was supposed to close the prosecution case as prayed. If the court believed that the report was important, it could order the same report to be brought by the officer who prepared it. Furthermore, when the evaluation was admitted, the court immediately closed the case without affording the respondent with the opportunity to cross examine the appellant on the report.

Furthermore, when the defence prayed to close its case, the court further ordered more witnesses to come and testify; it is not clear whether such witnesses testified for the prosecution or for the defence. If the court thought that such witnesses were important, it could close the defence case then order such witnesses to testify in order to assist the court in finding the truth.

Thereafter, the trial court visited the locus in quo and found some people there. Again, the court decided to take additional evidence at the locus in quo. This was totally wrong because a court does not visit the locus in quo in order to seek additional evidence but to observed important information relevant for the case. By the way, the prosecution and defence cases were already closed, it is not known whether the witnesses at the locus in quo testified for the prosecution or defence case. All these irregularities are sufficient grounds to move this court to quash the proceedings of the trial court. In conclusion, I allow the appeal preferred by the respondent (Burchard Karumuna), quash the proceedings of the trial court and set aside the decision of thereof. Order accordingly.

Dated at Bukoba this 23rd October 2020.

Ntemi N. Kilekamajenga
Judge
23rd October 2020

Court:

Judgment delivered this 23rd October 2020 in the presence of the appellant present in person and the counsel for the respondent, Miss Liberator Bamporiki. Right of appeal explained to the parties.

Ntemi N. Kilekamajenga
Judge
23rd October 2020