IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 44 OF 2021

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

JUMA SABAS MTEMI ..... RESPONDENT

(Appeal from the decision of the District Court of Kilosa at Kilosa (Hon. F.G. KESSY, RM))

dated the 17th day of December, 2021

in

Criminal Case No. 371 of 2019

JUDGMENT

Date of Last Order: 12/11/2021 &
Date of Ruling: 23/11/2021

S.M. KALUNDE, J.:

The respondent was arraigned before the District Court of Kilosa at Kilosa charged with Malicious Damage to Property contrary to section 326(1) of **the Penal Code [Cap.16 R.E 2002]**. The facts of the offence were that on the 13th day of November, 2018 at about 11:00 hrs. at Muungano village within Kilosa District in Morogoro Region did willfully and unlawfully cut down and destroyed 6 acres of

coconut trees and mango trees valued at Tshs. 8, 480,000.00 the property of Haruni s/o Nchimbi.

The respondent denied the charges whereupon, to establish its case the prosecution paraded five witnesses: Haruni Nchimbi **(PW1)**; Nuhu Magwala **(PW2)**; Awadhi Mohamed **(PW3)**; Abas Ramadhan Msozi **(PW4)** and Ignas Punge **(PW5)**. Together with the above witness testimonies the prosecution tendered two documentary exhibits: a Sale Agreement **(Exhibit P.1)** and Valuation Report **(Exhibit P.2)**. the prosecution account of story was to the effect that: on the fateful day whilst on his farm, and being in company of PW2, PW1 saw several people cutting his coconut and mango trees with intent to make timber. He identified the respondent as one of the individuals carrying out the exercise of cutting trees. The matter was allegedly reported to the police, whereby an investigation ensued. After conclusion of the investigation, a valuation on the destroyed trees was carried out by PW3, the agricultural officer from Mabwerebwere. The Valuation Report indicated the coconut and mango trees destroyed to be valued at **Tshs. 8, 480,000.00.** The

respondent was arrested and arraigned in court for the charges as stated heretofore.

In his defense, the respondent testified on oath and paraded three (3) witnesses. **JUMA SABAS MTEMI (DW1)** testified that on fateful day whilst attending a funeral ceremony for his aunty, he was notified of the incident where timber from the farm belonging to Sued Lunku was being shipped from the farm to an unknown place. DW1 phoned one **Salehe Moma (DW3)**, the "Kitongoji Chairman" to intervene. DW3 called **Ally Bwana Ally (DW2)** and asked him to stop the car which was ferrying the timber to an unknown place. DW2 asked the driver for levies which were due on the consignment of timber. The driver did not have the levy with him, DW2 contacted the VEO who ordered the fifty three pieces of timber to be kept at the village office. According to DW2, following the incident, the VEO summoned PW1 and the Ward Chairperson. On his part, **Ramadhani Isyaka (DW4)** gave another interesting testimony to the effect that he saw, PW1 participating in cutting the mango and coconut trees.

Upon hearing both sides the learned trial magistrate was satisfied that the prosecution had failed to establish that the respondent was responsible for the willful and unlawful destruction of the alleged property on account that the valuation report. Exh. P.2 was insufficient to establish the occurrence of the crime as it was conducted almost six months from commission of the offence. The respondent was acquitted of the charges.

The Director of Public Prosecutions was not happy about the decision adjudicated by the learned trial magistrate hence logged the current appeal. The appeal is predicated on the following grounds of appeal:

(1). *That the Trial Magistrate erred in law and in fact by holding that the prosecution evidence did not prove the case beyond reasonable doubt.*

(2). *That the Trial Magistrate erred in law and in fact by failing to evaluate the prosecution's evidence and hence arrived at a wrong conclusion.*

(3). *That the Trial Magistrate erred in law and in fact by misdirecting herself by not taking into*

account exhibit P.2 which was admitted in Court."

At the hearing the appellant was being represented by **Ms. Monica Ndakidemi**, learned State Attorney whilst the respondent enjoyed the legal representation of **Mr. Nehemia Gabo,** learned advocate. I appreciate both counsel's industrious submissions which nursed this judgment.

Having examined the grounds of appeal and heard both the counsel for the appellant supporting; and the respondent's learned advocate resisting the appeal, I will now turn to consider the merits or otherwise of the appeal in the light of the submissions, facts and evidence gleaned from the record of the present appeal. However, before doing that I find it pertinent to prelude my determination with the principles which will guide this Court in determining the appeal. Firstly, I am aware of the salutary principle of law in our jurisdiction that a first appeal is in the form of a re-hearing. In that respect I will subject the evidence tendered before the trial through a fresh re-evaluation by subjecting it to a scrutiny and where necessary arrive at my own conclusions of facts. This is what was stated in the case of

D. R. Pandya vs Republic, (1957) EA 336 as well as **Iddl Shaban @ Amasi vs Republic**, Criminal Appeal No. 2006 (unreported) to mention but a few.

In addition to that, I will also be mindful of the principle enshrined under section 110 and 111 of **the Evidence Act, Cap. 6 R.E. 2019**, that he who alleges must prove. That therefore means that, before the trial court, it was the prosecution that had a duty to prove the case against the respondent to standard known to our law, that is beyond reasonable doubt.

There is no dispute that the respondent was charged with offence of malicious damage to property contrary to section 326 (1) of the Penal Code. The respective section reads:

> *"326. -(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years."*

In view of the above section, to prove that offence the prosecution had to establish each of the following crucial ingredients of the offence:

(i) That there is damage or destruction to property;

(ii) That the damage was willful and unlawful; and

(iii) Participation of the respondent in the damage or destruction.

In support of the appeal Ms. Ndakidemi insisted that, through testimonies of PW1 and PW2, the prosecution was able to establish that they saw the respondent allegedly destroying the respective property. It is on record that, PW1 and PW2 testified that they saw the respondent holding a chainsaw which he dropped and ran away. She added that, an evaluation conducted by PW3 was able to establish the value of the alleged property to be at an estimated Tshs. 8, 480,000.00. Upon examination of the records, I find the prosecution account of story wanting in merits. Firstly, PW1 and PW2 did not provide an account on why they did not arrest or pursue the respondent when they saw him cutting the trees. One would expect

that now that they had caught the respondent ready handed the two would proceed to have him under control. They did not do so. They did not even collect the chainsaw which they said he dropped and ran away. This would have been strong evidence of the destruction. Secondly, they did not report the matter to any local authority. One would expect that, upon identification of the respondent, the immediate action would have been to report the matter to the local authorities for their immediate intervention to arrest the situation. The fact that the matter was not reported to any local authority raises doubts on the prosecution story.

Another important element the prosecution had to prove was whether the damage or destruction of the property was done willfully and unlawfully. To do that the prosecution had to establish that the destruction was actuated with malice and that it was unlawful. To prove this the prosecution sought to rely on the testimony of **Abas Ramadhan (PW4)** and **Ignas Punge (PW5)** whose testimony was that PW1 was the lawful owner of the area where the trees (timber) were allegedly harvested. The prosecution tendered the sale agreement, Exh. P.1, to witness the sale of land between PW4 and

PW1. However, upon examination of records I noted that the said sale agreement was not affixed with a stamp duty as required by section 5 read together with section 47 of **the Stamp Duty Act, Cap. 189 R.E. 2019**. The section reads:

> *"47.-(1)* ***No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence or shall be acted upon,*** *registered in evidence authenticated by any such person or by any public officer, unless such instrument is duly stamped:"* [Emphasis mine]

In amplifying the importance of compliance with the above section the Court of Appeal in **Zakaria Barie Bura vs Theresia John Muberu** [1995] TLR 211 had this say:

> ***"The second reason why the appellant could not have obtained the title to the suit premises,*** *even if the sale agreement had not been tainted with illegality,* ***is the fact that neither document containing the agreement bears any indication of payment of stamp duty according to the Stamp Duty Act. By law, such omission renders the sale agreement inadmissible as evidence in court.*** *"* [Emphasis is added]

A similar observation was also taken in the case of **Zanzibar Telecom Ltd vs. Petrofuel Tanzania Ltd** (Civil Appeal No. 69 of 2014) [2019] TZCA.

On the strength of the provisions of section 47 of the Stamp Duty Act (supra) and the above authorities I am satisfied that the Exhibit P.1 was improperly admitted in evidence and ought to be excluded by the trial court and I hereby do. Having expunged from the records the content of Exh. P.1 it cannot be said with certainty that, if at all there was damage or destruction of property, the same was unlawful. The weakness in this point is also exuberated by the fact that the defence had insisted that the farm where the trees were allegedly harvested was the property of Sued Lunku. The testimony was not watered down in evidence hence raising doubts onto the prosecution case. In absence of proof that the property damaged or destroyed were the property of PW1, the complainant, it cannot be safely said that the destruction was the damage was willful and unlawful.

In the second ground the prosecution complained of the learned trial magistrate's handling of Exhibit P.2, the evaluation

report tendered by PW3. Ms. Ndakidemi insisted that the report was valid having been conducted in the presence of village executives. She implored that it was not proper for the trial magistrate to disregard the report. However, upon going through the records I noted that the said the village executives, who attended the valuation exercise were not paraded in court to testify. The counsel contended that it was improper for the magistrate to discredit the report for the simple reason that it was taken six months after the incident. On his part Mr. Gabo insisted that PW3 failed to establish in evidence how he was able to establish the value of the damaged property six months after they were destroyed.

On my part, having examined the records, I cannot but agree with Mr. Gabo that the state of valuation report leaves a lot to be desired. **One**, PW3 failed to establish education qualification and experience in the assessment and economic evaluation of timber or forestry products. It is on record that, besides his durational work experience as an agricultural officer, he did not provide a narration of his specialty or academic credentials relevant to his testimony. **Two**, it is also on record that, the witness failed to provide an account of

how he was able to identify the value of the trees destroyed six months after they had been destroyed. If he was indeed an expert in the valuation of forestry the witness would have provided, at least, some scientific foundations for his assessment for example say the types or species and value of the said species or timber; their sizes be it in terms of numbers or volumes or their diameter or merchantable height. In absence of scientific proof on how he was able to evaluate the alleged destruction it cannot be safely vouched that there was indeed destruction solely based on his bare words. With that extrapolation, I am satisfied that the learned trial magistrate was right in not relying his decision on Exh. P.2 whose content and weight in evidence was questionable.

In absence of **Exhibits P.1** and **P.2** the prosecution case remains with no legs upon which to stand. On top of that, the prosecution case became even shakier after it had failed to link or establish that the respondent was responsible for or at least that the destruction or damage was carried out under his watch or instructions. Further to that, there was also another denting piece of evidence by DW4 who testified that PW1, the complainant,

participated in the harvesting of the trees. The evidence by DW4 was not shaken or discredited in cross-examination. Relying on the principle that failure to cross-examine on a piece of testimony entails conceding to it. The prosecution then conceded that the complainant was also a participant in the destruction of the alleged property.

Further to that, the unhealthy state of the prosecution evidence is aggravated by the fact the respondent raised the defence of alibi and the same was not discredited by the prosecution. It is trite that once the accused sets up the defence of alibi, then the prosecution has the duty/burden to produce evidence to discredit the said alibi. It is on record that the respondent said on the fateful day he was attendant a funeral of his aunt. The story is supported by the testimony of DW3; and it is on record that the alibi was not evidentially discredited by the prosecution. With the alibi unchallenged, this Court is convinced that there were doubts on the evidence about the participation of the respondent in the commission of the offence. As such an important element of the offence, the involvement of the respondent, was not accurately established in

evidence. The doubts, therefore, operate to the benefit of the appellant.

The above pointed anomalies generate doubts in the prosecution case. It well settled that once there exist doubts in the prosecution case, the same must be interpreted in favour of the accused person, the respondent in this case. Relying on the above principle, I am satisfied that the unhealthy state of evidence in the prosecution was not sufficcient to establish the charges against the respondent beyond reasonable doubt.

That said, this appeal is wanting in merits. It is, consequently, dismissed.

Order accordingly.

DATED at **MOROGORO** this **23rd** day of **NOVEMBER, 2021**.

S.M. KALUNDE

JUDGE