IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 103 OF 2021

(Originating from the Decision in Criminal Case No. 64 of 2020; In the District Court of Kilombero, at Ifakara by Hon. L. O. Khamsini, SRM)

SOLEA MDADIJA.....1ST APPELLANT

KADALA PAMBE.....2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

02/09/2021 & 09/11/2021

CHABA, J.

In the District Court of Kilombero, at Ifakara Solea Mdadija and Kadala Pambe, herein the appellants were arraigned to answer a charge comprised of seven (7) Counts of which all related to malicious damages to property contrary to section 326 (1) of the Penal Code, Cap. 16 of the Revised Edition 2002, now [Revised Edition of 2019]. It was alleged that on 25th July, 2019 at or about 10:00 hours at Melela Chita area in Kilombero District within Morogoro Region, the appellants willfully and unlawfully destroyed eleven (11) acres of planted paddy and caused a damage of Tanzanian Shillings 400,000/= on the property of Wenseslaus Kalumbalelo

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(First Count) damaged 4.34 acres of planted paddy with value of Tsh. 264,000/= the property of Medard Njahala (Second Count), destroyed 2.9 acres of planted paddy valued at Tsh. 16,000/= the property of Davis Undole (Third Count), 14 acres with a total value of Tsh. 220,000/= the property of Herman Lifumbuka (fourth count), damage to 5.7 acres with value of Tsh. 320,000/= the property of Zainabu Masaga (fifth count), destroyed 3 acres with value of Tsh. 156,000/= the property of Joel Joseph Mpimwa (sixth count) and 2.34 acres with value of Tsh. 236,000/= the property of Ameton Exavery Ndiabi (seventh count).

The material facts of the case extracted from the prosecution case portrays that, on the material date, all the victims - six in numbers, who actually witnessed the event of destruction (damages) caused by the appellants who were grazing their herds of cattle. It is in the court record that when the victims' properties were destroyed by the said herds of cattle which were scattered all over the paddy field area, the appellants were seen lively standing around watching what was going on. And when the appellants were asked why they were doing that, their response was adverse. About six (6) complainants appeared in court and gave their testimonies save for one Davis Undole, the owner of 2.9 acres of planted paddy who was alleged to have gone to report the incident to the Village Executive Officer (the VEO) and eventually the suburb chairman of Melela one Feruz Undole was asked to go to the crime scene and witnessed the incident.

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Upon reached to the crime scene, the suburb chairman did witness the damages caused by the heads of cattle which were under the supervision of the appellants who were present watching the ongoing destructions of the planted paddy through grazing. Another witness who appeared before the trial court and advanced his testimony is the agricultural officer (PW7) one Philbert Laurent whose testimony mainly based on a report following assessment and valuation of damages of paddy plantations conducted by his predecessor agricultural officer who actually witnessed the said damages. PW7 is the successor in office and the custodian of the report thereof. He tendered in evidence the said report and the same was admitted as exhibit PE.1.

In their defence, the appellants denied the allegations against them and contended that on the material date they were arrested while at their respective homes. They called three witnesses to support their testimonies including Mr. Sauli Mashauri (DW3) the suburb chairman of Msindo, their domicile. He testified that he knew the appellants. They are just normal peasants owning no cattle at all. In that view, it was impossible for them to cause the alleged damages or destructions.

It is on the basis of the evidence adduced by the prosecutions witnesses namely, Wenseslaus Kalumbalelo (PW1), Zainab Massaga (PW2), Henry Herman Lifumbuka (PW3), Joel Joseph Mpimwa (PW4), Ameton Exavery (PW5) and Medad Paul (PW6) respectively, and the valuation report, herein admitted as Exhibit PE.1; the trial court found the appellants guilty of the offences they stood charged and accordingly convicted them

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on all seven (7) Counts. Each appellant was sentenced to serve five (5) years imprisonment on every Count he stood charged. That means each of the appellant had to serve thirty-five (35) years in jail. However, the trial court ordered the sentences imposed against them to run concurrently. In addition, the trial court ordered compensations to the victims parallel to the figures shown in the charge sheet. The court ordered the appellants to effect compensations to the victims after completion of their jail terms.

Discontented by the decision of the trial court, the appellants vide the assistance of the officers at Kiberege Prison, lodged six (6) grounds of appeal and later on, vide the services of Mr. Sikujua Funuki, learned advocate they filed another six (6) grounds of appeal termed as additional grounds of appeal. When the matter was called on for hearing, the counsel for the appellants opted to abandon about five grounds from the petition of appeal and one ground from the additional grounds, henceforth remained with six (6) grounds of appeal which for brevity can be condensed as follows:

1. That, the trial magistrate erred in law and fact by convicting the appellants basing on the contradictory evidence of prosecution side.
2. That, the charge against the appellant was defective.
3. That, there was variance between the charge sheet and the evidence adduced.
4. That, the appellants were not cautioned as per the requirement of the law.
5. That, the trial magistrate erred in law and fact to convict the appellant on the weak evidence.
6. That, the prosecution did not prove their case beyond reasonable doubt.

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During hearing, the appellants were represented by Mr. Sikujua Funuki, learned advocate, whereas Mr. Ramadhani Kalinga, learned State Attorney entered appearance for the Respondent / Republic.

Mr. Funuki was the first man to kick the ball rolling. He commenced to argue with the **first ground of appeal** by submitting that the testimonies advanced by all prosecution witnesses were contradictory, and indeed their evidence contradicted from one witness to another. He accentuated that the PW2, PW3, PW4 and PW6 respectively, everyone asserted that; *"ng'ombe walianza kulisha shambani kwake."* The learned counsel insisted that PW.7, the Agricultural Officer told the trial court that the valuation of the alleged destruction was made on 29th May, 2019 which is the date before occurrence of the event. That is to say, the valuation of the damaged paddy took place first and then the event of destructions followed on the 27th July, 2019. It was Funuki's contention that these contradictions have a lot to be desired. And if that is the position, then the same should be decided in favour of the appellants. To glue his contention, he cited the case of **Consolata Kija v. Republic,** Criminal Appeal No. 129/2019 (unreported) quoting the holding by the Court of Appeal of Tanzania in **Abuu Omary Abdalah and 3 Others v. Republic,** Criminal Appeal No. 28 of 2010 (unreported), where the it was held:

> "Where there is any doubt, the settled law is to the effect that in such a situation an accused person is entitled as a matter of right to the benefit of doubts".

He further submitted that there is another contradiction which is apparent on record at page 10 of the typed trial court proceedings.

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According to the evidence of PW1, the same shows that he was uncertain in which date the event took place. Another contradiction is that, in the charge sheet (fifth count) the property alleged to have been destroyed belongs to Zainabu, where in evidence is recorded as Zaituni (PW2). From these explanations, Mr. Funuki had the view that the prosecution witnesses gave contradictory evidence.

With regards to the **second ground of appeal** pertaining to the defectiveness of a charge, Mr. Funuki underlined that the appellants were charged under the repealed revised edition of the law. He contended that the appellants were charged contrary to section 326 (1) of the Penal Code [Cap. 16 R.E. 2002] instead of [Cap. 16 R.E. 2019].

As to the **third ground of appeal**, the learned counsel vehemently insisted that the charge sheet and the evidence adduced by the prosecution witnesses varies. The learned brother argued that the evidence of PW2 shows that the paddy area that was destroyed is one acre, while in a charge sheet (the amended/substituted charge sheet) it shows that the area which was destroyed is five (5) acres. Again, PW3 told the trial court that the area that was destroyed is 14.5 acres, whereas the charge sheet indicates 14 acres. Mr. Funuki had the view that, looking at these pieces of evidence, it is obvious that the same brings confusions something which made the appellants in one way or another fail to understand exactly what they were facing before the trial court. The learned counsel also underscored that the appellants were alleged to have destroyed **pad** where the whole evidence is talking of **paddy.** It was his argument that, the

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appellants failed to understand the contents of a charge sheet. He added that the effect of this variance is to nullify the trial court proceedings or proceed to acquit the appellants as it was held by the Court of Appeal of Tanzania, sitting at Shinyanga in **Mtobangi Kelya & Another v. Republic,** Criminal Appeal No. 256/2017 (unreported) at page 15 and 19.

In respect of **fourth ground of appeal**, Mr. Funuki contended that the appellants were never cautioned by the police officers as required by the law under section 131 of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) read together with sections 57 and 58 of the same Act. He therefore, asked this court to fault the trial court proceedings. For ease of reference, it read:

> "**Section 131** - Immediately after a police officer charges a suspect with an offence, the police officer shall caution the person in writing and if practicable orally, in the prescribed manner."

On the **fifth ground of appeal,** the learned counsel contended that the appellants were convicted on the basis of weak evidence. He submitted that it is a cardinal principle of law that weak defense of the accused person cannot be the basis of conviction whatsoever, but the trial magistrate convicted the appellants basing on their weak defence. He referred this court to an extract from the judgment of a trial court at page 11, which read:

> "...By this observation I see no merit in the defence testimony. It basically over weighed by that of the prosecution side..."

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He went on to highlight that it was a fatal error committed by the trial magistrate. To buttress his argument, he referred the court to the case of **Christian Kale and Rwekaza Benard v. Republic**, (1992) TLR 302 in which it was held that:

> "An accused person ought not to be convicted basing on the weakness of his defense, but on the strength of prosecution case."

He further cited the case of **John Joseph Makune v. Republic** [1986] TLR 44 which underlined the same position.

On the **sixth ground of appeal**, the learned counsel explicated that there is no any evidence to prove that the appellants were apprehended with their cows despite the fact that the prosecution witnesses testified that the appellants were put under arrest with their cows. He said, it is unknown where those heads of cattle were taken or sent to. He contended that the victims stated to have gone to the VEO who prepared and issued letters to the victims so that they could report the matter to the nearest police station, but such letters were not produced in evidence or even the VEO himself did not appear before the trial court and testified. He then prayed the Court to draw an adverse inference as it was held in **Hemed Said v. Mohamed Mbilu** [1984] TLR 115.

In conclusion, Mr. Funuki stressed that the appellants were charged with seven (7) Counts, but neither the prosecution witnesses testified in conjunction with the allegations, nor evidence were advanced to prove all

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these Counts. But the trial court proceeded to convict and sentence the appellants on all seven counts. He prayed the appeal be allowed.

In reply, Mr. Kalinga combined the **first and third grounds of appeal** as the same relates to one issue of inconsistency of the evidence aired by the prosecution witnesses. He submitted in seriatim that:

One, concerning differences on dates stated by PW1 and PW2 as claimed by the learned counsel for the appellants, the learned State Attorney accentuated that from the court record at page 10 and 12 of the typed trial court proceedings, it shows that PW1 and PW2 testified that the incident took place on 25/07/2019.

Two, when PW7 advanced his testimony before the trial court, during cross examination he said he prepared his report on the 29th May, 2019. But during examination in chief, PW7 told the trial court that his report was prepared on 29th August, 2019. He referred this court to page 25 of the trial court proceedings.

Three, as to the question of uncertainty of the evidence adduced by PW1 regarding the occurrence of the incident in which date exactly the same occurred, Mr. Kalinga submitted that the witness testified that the event occurred on 25th July, 2019 as revealed on page 10 of the typed trial court proceedings.

Four, since every victim had his or her own shamba when the said herds of cattle invaded the respective area while in scattered form,

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therefore, the argument that every witness claimed that the said herds of cattle commenced to invade his or her shamba, was obvious (right).

Five, regarding contradiction in respect of the alleged acres by the prosecution witnesses and those which appears in the charge sheet, Mr. Kalinga conceded with the learned counsel that PW3 said his 14.5 acres were damaged, whereas the charge sheet shows it was 14 acres. However, he maintained that PW3 happened to utter such a statement when was cross-examined. But in reality, he testified in chief that his area was 14 acres. To back up his argument he referred this court at page 14 of the typed trial court proceedings. He was of the view that this should be counted as a minor variation. As regards to the evidence adduced by the PW2 who stated that the destructions occurred on his part is only 1 acre contrary to the 5 acres shown in a charge sheet, Mr. Kalinga dismissed such complaint as baseless and nothing of the kind transpired in the court records.

Sixth, in respect of the word used in the record namely, **pad** to mean the properties that were destroyed instead of **paddy,** Mr. Kalinga accentuated that such a defect was caused by typing error. He explicated that the appellants were fully informed of their charges through the charge sheet and the good thing is, the appellants were represented by the learned advocate (Mr. Funuki). It was Mr. Kalinga's contention that as an officer of the court, the learned counsel was duty bound to assist the court at a point. He underscored that, **pad** are the ones used by women during menstruation period, while **paddy** means **mpunga in swahili**. The

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learned State Attorney vehemently insisted that despite of the differences between the two words, but contentious matter remain undisputed that it relates to agricultural field. He believed that, in that view the appellants did understand what was going on before the trial court. Henceforth, the appellants were not prejudiced on their rights.

Mr. Kalinga submitted further that such a defect may be cured by invoking in place the overriding objective principles as it was voiced by the Court of Appeal of Tanzania in **Mabula Makoye and Amos Shabani v. Republic,** Criminal Appeal No. 227 of 2017 (unreported), where the Court held:

> "With the coming into force of the provisions of section 3A of the AJA which give prominence to the overriding objective introduced into the AJA following its amendment by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 - Act No. 8 of 2018 to determine matters on their merits, we think, the course taken by the first appellate court to treat the omission as curable under section 388 of the CPA, was quite in order and appropriate in the circumstances."

Mr. Kalinga stressed that our Apex Court maintained that minor mistakes are curable under section 388 of the CPA as the same do not amounts to irregularities.

Regarding the second ground, Mr. Kalinga submitted that the charge sheet was not defective. Though it was cited under section 326 (1) of the Penal Code [Cap. 16 R.E. 2002] and not [Cap.16 R.E. 2019], but in his opinion, the same did not change anything because the ingredients of the offence remained the same. The provision of the law and the

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particulars of the offence were good as it was framed, failure to write [R.E. 2019] did not cause any injustice.

In respect of the **fourth ground**, Mr. Kalinga contended that the argument advanced by the counsel for the appellant is somehow confusing in respect of a cautioned statement. The way he understood is that the cautioned statement and confession statement are quite different. The earlier are warning words regardless of whether the accused admits the offence or not, and the latter is a statement of the accused when he admits having committed the offence. He said, section 57 and 58 of the CPA gives explanations in respect of a cautioned statement. He contended that the question that the appellants were convicted without being cautioned, the court record is silent and indeed nowhere, as far as the prosecution evidence is concerned, depicts that the appellants were convicted on the basis of a cautioned statement. Instead, the appellants were convicted on the basis of the testimonies adduced by the prosecution witnesses.

As to the fifth ground of appeal, Mr. Kalinga submitted that the evidence was sufficient to convict the appellants. He referred this court at pages 9, 10 and 11 of the typed trial court proceedings on which the trial magistrate made her analysis. He maintained that at page 10, the trial magistrate considered the defense evidence of the appellants and PW3 as well. Therefore, the trial court considered the evidence from both sides, that is why she weighed and came up with her findings.

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On the **sixth ground of appeal**, on whether the prosecution case was proved beyond reasonable doubt or otherwise, the learned State Attorney responded by raising two questions, **one**, whether the appellants are the ones who committed the offence, **two**, whether the offence of malicious damages to property was intentionally committed. Addressing the first question, Mr. Kalinga contended that the evidence adduced by PW3 as shown at page 15 is to the effect that the appellants were the pastors found pasturing the said heads of cattle and he knew them before. PW.1 told the court that the appellants were present on the fateful date and also, he knew them before. At page 12, PW.2 told the trial court that the appellants were present at the scene of crime. PW4 gave similar evidence as shown at page 16 of the typed trial court proceedings. Moreover, PW5 and PW6 did not hesitate to mention their names (Kadala Pambe and Solea Mdadija) and said they knew them very well.

On the question whether the appellants committed the offences they stood charged maliciously or otherwise, Mr. Kalinga's response was in affirmative. He said, at page 10 of the typed trial court proceedings, is clear that when PW.1 asked the appellants why they released their herds of cattle to graze into the field of paddy, the appellant's response was this; *"Ng'ombe watakula wapi sasa?"*.

The learned State Attorney also explicated that at page 14 of the trial court proceedings, PW3 requested the appellant to remove the groups of herds of cattle, but they refused and told him to take any step or measures if at all could wish. At page 16 also, the record shows that PW4 when

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asked them why they brought their cows into their paddy field, they said, *"tulishe wapi ng'ombe wetu?"*. The same word was uttered by PW6 at page 19 of the trial court proceedings.

During submission, Mr. Kalinga raised another question whether or not there was damage to claimants' properties. On this point, his answer was positive because the paddy field were destroyed and the assessment and valuation of the damages was scientifically explained by the Agricultural Officer (PW7) who gave his testimony and backed it up by his report which proved that the paddy in the field were destroyed through grazing.

Furthermore, Mr. Kalinga elucidated that the appellants were caught while at the scene of crime and stayed there for some hours. The prosecution evidence is clear that on the material date the said cows were left free and scattered in the paddy field meanwhile grazing the planted paddy. He emphasized that there is nowhere in the court record showing that those herds of cattle were drove away from the paddy field.

Regarding the complaint that the VEO was not called to testify before the trial court, Mr. Kalinga underscored that the prosecution brought competent witnesses as per section 127 of the Tanzania Evidence Act [Cap. 6 R.E. 2019]. He then stressed that the evidence adduced by the prosecution witnesses are clear that the appellants are the ones who committed the offences by freeing their heads of cattle in the paddy fields owned by the victims where they grazed thereon. Moreover, the appellants also were caught while at the scene of crime. He elucidated that the evidence of PW3, PW4 and PW5 respectively, pointed out that they knew

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the appellants for a long time. With regards to the evidence adduced by PW3, Mr. Kalinga clarified that the prosecution witnesses told the trial court that **the appellants were herdsmen (wachunga mifugo)** and not **peasants or pastoralists (siyo wakulima au wafugaji).**

To end up his submission, Mr. Kalinga emphasized that the complainants used to stay in different places, but their paddy field were in one area. The paddy field (mashamba ya mpunga) owned by PW1 to PW6 are situated in one location called Melela area, and the prosecution witnesses gave consistent evidence on this fact. He therefore prayed the court to uphold the findings of a trial court and its decision.

In his rejoinder, Mr. Funuki maintained what he submitted in chief and added that the overriding objective principle can neither be used to cure the defects on the charge sheet nor the defects on the proceedings pertaining to the usage of the word **pad.** It was Mr. Funuki's contention that the overriding objective principle cannot be applied blindly by violating the laid down procedures and requirements of the law under section 132 of the CPA which requires the charge sheet to disclose all facts of the case and the particulars of the offences as necessary information in respect of the nature of the offence charged. It was his view that the overriding objective does not apply in the circumstances of this case and the case of **Ntobangi Kelya (supra)** which he cited above, is the most recent than **Mabula Makoye and Amos Shabani (supra)** cited by the learned State Attorney, he argued.

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I have meticulously considered the grounds of appeal and submissions of both parties. Having so done, the central issue for determination by this court is whether the trial court's findings were faulty against the appellants.

Upon scrutiny of the evidence on record as received by the trial court, I find it appropriate to proceed and determine the grounds of appeal *in seriatim* as they appear and argued by both sides.

Commencing with **the first and third grounds of appeal** which are intertwined, the appellants contends that there was contradiction or inconsistence of the evidence adduced by the prosecution witnesses and variance in evidence between the charge sheet and the evidence tendered before the trial court.

To respond on the **first ground**, I would like to begin by expressing the general view that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. (See: **Dikson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007, CAT, (unreported). In this case, the Court had the following to say:

> "..In all trials, normal contradictions and discrepancies are bound to occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence.

The Court added that:

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> "Material contradictions are those which are not normal and not expected of a normal person, and that courts have to label the category to which a contradiction, discrepancy or inconsistency may be categorized. Minor contradictions, inconsistencies, or discrepancies which do not affect the case of the prosecution."

It went on to state that:

> Should not be made a ground on which the evidence can be rejected in its entirety. While minor contradictions and discrepancies do not corrode the credibility of a party's case, material contradictions and discrepancies do."

As elucidated by the Court of Appeal, I have no hesitation to state here that the contradictions noted and spotted in the present case were not material as they could not deflect the facts that the victims' paddy fields were destroyed and damaged on the material date of 25/7/2019 by herds of cattle. I say so because, it is apparent on record that all the witnesses from PW1 to PW6 while testifying in chief did mention the fateful date that, it was on 25/07/2019 when the paddy field were grazed and destroyed by herds of cattle save for PW3 who testified in chief that it was on 28/07/2019. I believe that this is a bit confusion on his side and a normal contradiction caused by either lapse of time from the time when the offence was committed to 23rd September, 2020; or it could be possible that a slight mistake occurred on his or her part. The same is featured in the evidence adduced by the Agricultural Officer herein PW7 who stated that he prepared his report on 29/05/2019, when was cross-examined, although during examination in chief he testified that his report was prepared on 29/08/2019. It is my considered opinion that the defects

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noted by the defence counsel, did not affect the prosecution case and the same didn't go to the root of the case.

But again, I am persuaded to join hands with the learned State Attorney that each complainant or victim testified that the grazing started at his or her planted paddy field, and ever since it is undisputed fact that the cattle were many in numbers and when these cows reached at the crime scene, they scuttled in the paddy field and scattered all over the complainants' shamba's which are located in one location. It is an obvious fact that every complainant could have testified that the said herds of cattle entered first into his or her shamba. Henceforth, the first ground is non meritorious and I proceed to dismiss it.

On the **third ground of appeal** pertaining to variance of prosecution evidence to what it is stated in the charge sheet; again, I am persuaded to subscribe to the proposition submitted by the learned State Attorney that there is a minor variance in respect of the affected area, the acres alleged by the prosecution witnesses to have been destroyed varied from what is stated in the charge sheet. The records are clear that PW3 said, the area destroyed is/had 14.5 acres, whereas the charge sheet shows that it was 14 acres only. This variance featured in record during cross-examination, but while testifying in examination in chief, his evidence shows that he mentioned that he owned 14 acres. Regarding the appellants' complaint that the testimony of PW2 reveals that 1 acre of planted paddy was destroyed contrary to the 5 acres stated in the charge sheet, I would like to state that in as much as the court record is concerned, this fact does not

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feature therein. It is a principle of sanctity of the record which entails that the trial court record accurately represents what happened in court. (See the cases of **Halfani Sudi v. Abieza Chilichili, Civil Reference No. 11 of 1996, CAT at Dsm** and **Flano Alphonce Masalu @ Singu & 4 Others v. the Republic,** Criminal Appeal No. 366 of 2018, CAT at Dar Es Salaam, (All unreported). In the circumstance of this case, I am of the view that the appellants have submitted nothing to impeach the trial court record, which I find the claim baseless. For these reasons, the third ground is devoid of merit.

On the **second ground of appeal** which relates to the defect of the charge by citing the Penal Code as Chapter 16 Revised Edition of 2002, instead of Revised Edition of 2019, I would like to point out that, it is apparent that among the few Laws of the Land that were revised under the General Laws Revision Notice, 2020. GN. 140, the Penal Code, Chapter 16 was also included in the schedule. The respective Government Notice was published on the 28th February, 2020 and it came into operation. However, looking at the charge sheet the appellants herein were accused to have committed the offence before the GN. 140 of 2020 came into operation. As far as the non-retrospectivity of the said law is concerned, they were properly charged with the law cited in a charge sheet, that is Revised Edition 2002, which was still under operation. This ground is devoid of merits and it is hereby thrown overboard as well.

On the fourth ground of appeal, the counsel for the appellants contends that the appellants were not cautioned. I do not wish to detain

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myself here since I am puzzled with a complaint considering the fact that the very appellants' counsel never mentioned this fact when the matter was before the trial court. In the circumstance, I believe that the complaint raised is an afterthought. The records from which this appeal emanates are silent and do not support the appellants' claim. But again, the fact that the cautioned statements of the appellants were never tendered in court should not be interpreted that the appellants were never cautioned. It is not the rule of evidence that prosecution should tender the statements of the accused person(s) in every case, but only where it believes the said statement to be material and beneficial to prove their case. This ground is unfounded and hence it is hereby dismissed for lack of merits.

In respect of **the fifth and sixth grounds of appeal**, which are intertwined, these grounds ought to be, and I hereby proceed to determine them together. The appellants are contending that there was insufficient evidence to prove the case beyond reasonable doubt. Through their learned counsel, the appellants complained that **one,** the victims testified to have gone to the VEO after finding the appellants committing the said offence and the VEO issued letters to them so that they could report the matter to the nearest police station, but such letters were not produced in evidence or even the VEO himself did not appear before the trial court and adduce his evidence. In countering, the learned State Attorney submitted that the prosecution side brought competent witnesses as per section 127 of the Evidence Act (supra). **Two,** that the trial magistrate did rely on the weakness of the defence evidence to convict the appellants. Again, there was no any information as to what happened to the herds of cattle which

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were alleged to have been under control of the appellants when were arrested. As well the witnesses did not prove all Counts, but the appellants were convicted and sentenced accordingly. On the other side, the learned State Attorney contested that there was sufficient evidence to prove that the appellants are the ones who committed the offences leveled against them. Correspondingly, there is plenty of testimonies from the prosecution witnesses who also told the trial court that they knew the appellants even before occurrence of the incident. The appellants' ***actus reus*** were proved by conduct and the ***mensrea*** was manifested through the words they uttered upon being asked to stop grazing in the ***locus in quo.***

It should be noted that it is always upon the prosecution to call material witnesses to prove the case beyond reasonable doubt and in exercising this noble task, they are not limited in terms of number of witnesses whom they should call. Section 143 of the Evidence Act (supra) provides in clear terms that there is no particular number of witnesses required in proving a case. What is important is, the credibility of a witness and weight of evidence (See the case of **Simba s/o Mswaki v. Republic**, Criminal Appeal no. 401 of 2021, CAT at Dar es salaam, (unreported)).

The fact that the witnesses whom the prosecution side paraded were the victims who were the eye witnesses of the incidence (PW1 to PW6), and the Agricultural Officer (PW7) who conducted and prepared the evaluation report and eventually tendered the report in Court, I believe in one way or another there was no need to draw the adverse inference for

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not calling the VEO since the witnesses paraded could reasonably prove the elements of the offences of which the appellants were charged with.

I have gone through the evidence on record and I have noticed that the trial magistrate upon ascertained the evidence adduced by the prosecution witnesses, who essentially, testified that the appellants are the ones whom were caught grazing into the paddy field owned by the victims, were so connected and responsible with the matter. The evidence of PW3, PW4 and PW5 are also vital because they told the trial court that they knew the appellants before the material date. PW3 told the trial court that the appellants were herdsmen (their main duty was to graze animals) and not cattle owners. PW3 also stated that the appellants are the ones whom were herding the said herds of cattle. The same story was stated by PW1, PW2, PW4, PW5 and PW6 respectively. Again, PW5 and PW6 mentioned the names of the appellants and insisted that they knew them very well. The ***mensrea*** of the appellants can be exhibited and proved by the testimony of PW1 who asked them why they destroyed the paddy field? However, their response was to this effect; ***"Ng'ombe watakula wapi sasa?".*** Even the evidence of PW4 shows that when he asked the appellants why they brought their cows into their paddy field, they simply replied that, ***"tulishe wapi ng'ombe wetu?".*** The damages caused by the herds of cattle which were supervised by the appellants was proved by the evidence of PW7 who testified and produced the valuation report (Exhibit PE.1). I believe that the trial magistrate upon considered these pieces of evidence against the established defence by the appellants that

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they were arrested while at their homes, she went on to conclude that the case was proved beyond reasonable doubt, which I subscribe to it.

From the foregoing, it goes without saying that the trial magistrate did not reach a conviction basing on the weak evidence of the defence side as it was alleged by the appellants. This can be evidenced at page 10 of the typed judgement when she held that:

> "...so to speak in my view, there has been a clear evidence of malicious damages to property which in this case is on the paddy that had been placed in mounds yet other paddy that had not been harvested as testified by all prosecution witnesses but well evidenced by PE1 collectively...."

At page 11, the record read:

> "...by this observation I see no merit in the defence testimony. It has been basically outweighed by that of the prosecution side..."

The appellants also complained that the 7th Count was not proved. On this aspect, I do not wish to detain myself here since the valuation report (Exhibit PE1) together with the evidence adduced by PW7 which evidence are corroborated by the evidence of other prosecution witnesses, herein PW1, PW2, PW3, PW4 , PW5 and PW6 respectively, are in my opinion, sufficient to prove that the appellants were found destroying the respective planted paddy around the crime scene with malice which were visualized through their uttered words or adverse response to the victims when the two were confronted at the *locus in quo.* For these reasons, this ground also crumbles for lack of merit, and it is hereby dismissed.

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Having considered the grounds of appeal lodged by the appellants and upon assessed the evidence on record and paid attention on oral submissions advanced by both sides, I am convinced that the prosecution side proved their case based on the required standards. I am also satisfied in my mind that the trial magistrate safely relied on the evidence adduced by the prosecution witnesses to arrive to the appellants' conviction.

That said and done, to the extent of my findings, the instant appeal is devoid of merits. It is hereby dismissed in its entirety.

It is so ordered.

DATED at **MOROGORO** this **30th day of November, 2021.**

M. J. CHABA

JUDGE

30/11/2021

Court: Judgment delivered under my hand and Seal of the Court in Chamber's this 30th day of November, 2021 in the presence of the appellants who appeared in persons linked via video conference from Ukonga Prison in Dar es Salaam, and Ms. Vestina Masalu, learned State Attorney for the Respondent / Republic.

Signature: .....

M. J. CHABA

JUDGE

30/11/2021

Right of Appeal fully explained.

M. J. CHABA

JUDGE

30/11/2021

Signature: .....