

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

CRIMINAL APPEAL NO. 20 OF 2021

(C/F Criminal Case No. 106/2019, district Court of Babati at Babati)

DODO TEKWAY..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

15/10/2021 & 10/12/2021

ROBERT, J:-

The appellant, Dodo Tekway, was charged and convicted at the District Court of Babati with an offence of Malicious damage to Property contrary to section 326 (1) of the Penal Code Cap 16 (R.E 2002) and sentenced to conditional discharge. Aggrieved, he preferred this appeal.

The prosecution case was to the effect that, on the 3rd day of September, 2018 at Orngadida Village, within Babati District in Manyara Region, the appellant willfully and unlawfully grazed his cattle and destroyed crops namely sunflower and millet valued at TZS 5,121,200/= the property of one Eustaki s/o Goliati. It was alleged further that, the

owner of the property reported the matter at Galapo Police Station and the police arrived at the scene while the appellant took off using his motor cycle. Thereafter, the appellant was arrested, taken to police station and charged.

After a full trial, the appellant was convicted by the trial court and sentenced to conditional discharge for a period of six (6) months. He was also ordered to pay compensation to the complainant at a tune of half the value of the damaged property which amounted to TZS 2,500,000/=. Aggrieved by both conviction, sentence and the order of compensation, the appellant has now filed this appeal armed with six (6) grounds of appeal:-

1. *That, the trial Court erred in law and fact by dealing with hearsay evidence in determining the matter hence reached into wrong verdict.*
2. *That, the trial Court erred in law and fact by delivering decision based on the contradictory evidence adduced by the respondent during the hearing hence reached into unfair decision.*
3. *That, the Hon. Learned Magistrate of the trial court erred in law and fact for failure to evaluate properly evidence in satisfying itself rather than taking into account weak shark and cooked evidence in relation to this matter henceforth reached into biased decision which is unmaintainable in the eyes of the law.*
4. *That, the trial Court erred in law and in fact in not considering all defence witnesses, evidence and proceeded to determine the matter*

basing in prosecution witness which also failed to prove the charge of malicious damage to property against the appellant beyond reasonable doubt.

5. *That, the learned Magistrate of the trial Court erred in law and fact by disregarding the defence of alibi while on the material date as claimed by the Respondent the appellant was absent but the trial Court convict and ordered compensation against the Appellant.*
6. *That, the learned Magistrate of the trial Court erred in law and fact by making his decision to convict the appellant and order compensation without stating the rationale or giving legal reasoning in relation to the said decision.*

When the matter came up for hearing the appellant appeared in person without representation whereas the respondent was represented by Ahmed Hatibu, State Attorney. At the request of parties, the Court ordered the appeal to be argued by way of written submissions.

Highlighting on the first ground of appeal, the appellant submitted that, the trial court's judgment was based on hearsay evidence which was not corroborated with any other piece of evidence which is totally wrong. He clarified that, while PW1 said he failed to identify the owner of the cattle, PW4 said he was told by PW1 that the alleged cattle belong to the appellant herein. Further to that, Pw4 failed to explain how he identified that the cattle belonged to appellant while it was the alleged event happened at night and there was no light to help him with identification. He faulted the trial Court for relying on hearsay evidence

without corroboration and cited the case of **Fredy Stephano vs Republic**, [2007], T.L.R 65 to support his argument. He maintained that, the decision of the trial court was based on unfounded allegations, a mere word, frivolous, shier lies, weak unfounded evidence, cooked and speculative claims which have no truth in reality. In the end, he prayed for this ground to be allowed.

On the second and third grounds of appeal, the appellant argued that, the prosecution evidence was contradictory. He argued that, the prosecution alleged that they found the appellant together with his two sons at the scene while PW5 (Insp. Stanley Nyangwa) stated that the appellant was not found at the scene on the material date. PW1 testified that, it was the appellant who wilfully and unlawfully grazed his cattle at the complainant's farm and destroyed the crops. Later the said witness said he was not sure if the said cattle were appellant's cattle. PW4 testified that he was sure that the cattle appellant's cattle and they destroyed the crops without offering explanation on how he knew the cattle belonged to the appellant. That, said he maintained that there is merit on the 2nd and 3rd grounds of appeal.

With regards to the fourth ground, the appellant contended that, there was no proper evaluation of evidence at the trial court. He

maintained that, the trial court took into consideration the prosecution's evidence which was full of contradictions and there was no proper identification of the cattle which destroyed the alleged crops. The trial court believed the evidence of PW4 who said there was no need to identify the cattle as he already knew the owner while at that time all the cattle had allegedly run to the bush. The prosecution failed to explain the source of light which helped the witnesses to identify the cattle at that night. Further to that, the prosecution failed to join the appellant's son as a co-accused which leaves a lot of questions regarding the appellant's conviction. Based on that he submitted that, the fourth ground of appeal also has merit.

Coming to the fifth ground, the appellant argued that, at the trial court he presented the defence of alibi that, on the material date he was at Babati attending a criminal case before Hon. Gasabile at Babati District Court which is Misc. Criminal Application No. 26 of 2018. His defence was corroborated by his Advocate Mr. Kuhengwa Ndonjekwa. Unfortunately, the court expunged his defence of alibi for the reason that he failed to give notice as required under section 194 (4) of the Criminal procedure Act Cap. 20 (R.E 2019) while he had notified the court at the earliest stage that he will rely on the defence of alibi. He

maintained that, the Court should have dealt with the substance of the case instead of relying on technicalities. He made reference to the case of **Richard Otieno Gullo vs R**, CAT (Unreported) where the Court of Appeal held that the accused person does not need to prove his defence of alibi if he has given the notice of alibi before hearing.

On the last ground of appeal, the appellant argued that, based on the whole contradictory evidence as adduced herein there was no need for the trial court to order compensation while the charge was not proven beyond reason doubt as required by law. There was no truth on the prosecution evidence and it was marred with contradictions and cooked up things. Therefore, he prayed for this appeal to be allowed with costs and the trial court decision be quashed and set aside.

Responding to the grounds of appeal, counsel for the respondent decided to support the appeal and argued against conviction and sentence imposed to the appellant on the following reasons:- First, ingredients of the offence of malicious damage to property, especially the requirement of malice was not proved by the prosecution. Secondly, at the trial court PW1 testified that, he was informed by PW2 that they saw the appellant's son and other people grazing a group of cattle in his farm. However, no one proved the appellant sent his son and other

people to graze into the complainant's farm and that no peculiar features was given to describe the said cattle to prove they belong to the appellant herein.

Thirdly, although PW1's farm was alleged to have been destroyed, it was not proved that the said act was done maliciously. Further to that, no one testified to have seen the appellant grazing cattle in PW1's farm.

Fourthly, PW1 had nothing to prove that he was the owner of the farm which was allegedly destroyed. He referred the Court to the case of **Scolastica Paul vs Republic** (1984) TLR 187 where the Court held that:-

"To constitute the offence of Malicious damage to property there must be evidence of damage or destruction of the property and the ownership of the property".

He maintained that, the evaluation report tendered at the trial court created a lot of questions for the court to rely on. While the records show that the incidence occurred on 3rd September, 2018 the valuation was alleged to be conducted on 7/09/2018 while the report which was tendered before the court shows that the valuation was conducted on 3/09/2019 which is a year later. Therefore, the trial court

was wrong to order compensation based on hearsay evidence with no concrete and reliable exhibits.

In the end, he submitted that the prosecution failed to prove their charge at the trial court and prayed for the appeal to be allowed.

From the submissions of parties in this appeal, the issue for determination is whether the charge of malicious damage to property against the appellant was proved to the required standard.

Section 326(1) of the Penal Code provides that:

"Any person who wilfully and unlawfully destroys or damages any property commits an offence, and except as otherwise provided in this section, is liable to imprisonment for seven years".

In order to prove the offence charged, the prosecution needs to establish; first, that the accused/appellant herein acted willfully (with intent or malice). Secondly, damage or destruction of the disputed property. Thirdly, proof of ownership of the damaged property

Regarding the first issue, the position of the law was clearly stated in the case of **Lawrence Mateso vs R** (1996) TLR 118 where this court when discussing what constitutes the offence of malicious damage to property had this to say:

"Before a person is convicted of that offence, malice, inter alia, must be admitted or proved. But the word malice here is not used in the sense understood by the layman; it is used in a technical sense. Here the word does not necessarily mean personal spite against the owner or possessor of the damaged property. It is enough if the accused intended wrongful damage to the property, because if that intention is admitted or demonstrated to have existed, the law will presume malice. The presumption is, of course, rebuttable."

Applying the above principle in the case at hand, at the trial court when the charge was read over to him, the appellant denied the offence. Thus, he never admitted the ingredient of malice nor was it established and proved by the respondent. The trial court when determining the matter was supposed to consider whether this important ingredient was proved by the prosecution before convicting him. The evidence adduced by the respondent at the trial was not sufficient to prove that the appellant acted wilfully and unlawfully to destroy Pw1's crops. As a matter of fact, the prosecution did not establish if it was the appellant who grazed the cattle into PW1's farm and caused the alleged destruction.

Secondly, on the damage or destruction of the disputed property, the valuation report (exhibit PE1) indicated the damage done to the crops and the extent of destruction. However, this Court is of the view that the report is marred by the contradictions indicated on the actual date of valuation as pointed out by the appellant. The report is dated 17/5/2019 while it was alleged that the valuation was conducted on 7/9/2018 which brings the impression that the document was prepared for purposes of this case. Even if the report had no problems, it should be noted that the valuation report alone without any other supporting evidence cannot prove that the appellant damaged the property.

Thirdly, on the proof of ownership of the damaged property, before a person is convicted it is important to establish that the property alleged to have been damaged belongs to the person who alleges damage to the property. However, in the present case the trial Magistrate did not address the question of ownership. This ingredient was therefore not proved.

After the closure of the prosecution case, a case must apparently be proved at the required standard of the law. Thus, the trial court had a duty after hearing the evidence on record to prove that the offence was committed and that is the accused person who committed it. In the

instant appeal, the prosecution failed to prove their charge beyond all reasonable doubt.

In the circumstances and for the fore stated reasons, I allow the appeal, quash the conviction and set aside the sentence and compensation order imposed against the appellant by Babati District Court.

It is so ordered.



K.N.ROBERT
JUDGE
10/12/2021