IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 42 OF 2021

(Arising from Criminal Case no 146 of 2020 in the District Court of Bunda at Bunda)

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

RHOBI S/O MWITA ..... 1ST RESPONDENT

MASWI S/O MARWA ..... 2ND RESPONDENT

KATALINA S/O MARWA ..... 3RD RESPONDENT

TABU S/O RUFUNGA ..... 4TH RESPONDENT

JUDGMENT

24th August & 29th September, 2022

F. H. Mahimbali, J.

The respondents in this appeal were jointly charged at the trial court with one offence of malicious damage to property. It was alleged by the prosecution that the four appellants on diverse dates between 27th and 28th days of October, 2019 at Butakale Migungani area within Bunda District in Mara Region wilfully and unlawfully destroyed 81

ACACIA TREES (MIHALE) valued at TZS: 3,978,000/= the property of one DEBORA D/O MANYAMA.

The respondents pleaded not guilty to the charge, thus compelling the prosecution to summon a total of six witnesses.

In her testimony, PW1 testified that she owns a farm at Bunda – 11 ½ acres as inheritance from her mother who died in 2007. She had been supervising it until 2010, when she fell sick and went to Mwanza. She then gave that farm to her son Manumbu Kalilo so as to supervise it. The farm had acacia trees (Mihale). That in October 2019 she was informed by her son Manumbu Kalilo that some people had invaded the said farm and cut down trees. She told her to go to report the incident to Police. She had then gone to the said farm and saw the damages caused and returned Mwanza for treatment.

PW2 is the son of PW1, he had testified how on 28th October, 2019 had first been informed by one Masasi Rugata Warwa (watchman) that there are people at the farm cutting trees. She first informed his mother (Pw1) and then went to the site and saw the said destruction of about 81 trees. He later went to report the said incident at police.

Masasi Rugata Warwa who was the watchman was first admitted as PW3 but turned hostile in the course of his testimony. His evidence was thus discarded.

Joniphace Jongo then testified as PW3. He testified how on 27th October 2019 at 01 pm while from Butakale to his home, he passed through the PW1's farm. He was about 50 meters long. He saw Caterina Marwa and Rhobi Mwita who were cutting down trees. He identified Rhobi as first accused and Catarina as third accused. He described further that Catarina is the ten-cell leader whereas Rhobi had a land dispute with PW1. As others were much far, he could not manage identify them. When he reached home, he informed PW2 through cell phone about the on-going destruction in her farm.

Mr. Revocatus Katula who testified as PW4, stated that ion 28th October, 2019 at 05pm, on his way to Bunda town from Butakale village, he saw people cutting trees in the farm of PW1 – Debora Manyama. At the site, he had managed to spot Maswi, Catarina and Tabu. He knows them as villagers at Butakale village and that he is familiar to them for the year by then. At court, he had managed to identify the respondents by their names.

Mr. Rajab Said Kijiba testified as PW5. He is land valuer and that he valued the said cut down trees (destroyed) as valuing 3,978,000/=. That the total destroyed trees were 81. Out of which, 21 were young trees while 60 were mature trees. His report was admitted as PE2.

Upon closure of the prosecution's case, the Hon. Trial Magistrate under section 230 of the CPA, made a ruling that the respondent's had no case to answer as the Republic's evidence had failed to establish the prima facie case.

Aggrieved by that finding of no case to answer, the Republic has preferred this appeal based on four grounds of appeal, namely:

1. *That the learned trial magistrate grossly erred in law and fact to find that prosecution has failed to establish a prima facie case against the respondents, the fact which is not true.*
2. *That the learned trial magistrate grossly erred in law and facts to hold that the evidence of PW2 was of great doubt because it was contradictory.*
3. *That the learned trial magistrate erred in law and fact to hold that the evidence of PW2 and PW3 was suspicious.*
4. *That the learned trial magistrate misdirected himself by assuming that the trees were cut by the owner or other strangers.*

During the haering of the appeal, the appellant was represented by Mr. Frank Nchanila learned state attorney. However, the respondents were not traced anywhere upon being dully served as per court's proceedings dated 2nd February and 21st February, 2022. The appeal then pursuant to section 383 (2) of CPA, proceeded exparte against all the respondents as are fully aware.

In arguing the appeal, Mr. Frank Nchanila submitted that all four respondents were being prosecuted before Bunda District Court for an offence of malicious damage to property contrary to section 326 (1) of the penal code, Cap 16 R. E. 2019. That in efforts of establishing the case, the prosecution brought a total of six witnesses (PW1 –PW6). As per evidence in record and the manner the said ruling was drafted the trial magistrate ought not to have reached such a conclusion. What is prima facie case, is different from the details of a judgment. He added that at this stage, the trial court ought not to have laboured much on the details of the case but on the evidence of record whether it sufficed a case to answer. In digest to the ruling (page 1 and 2), what the trial magistrate did is to go to the detail of the case itself.

He submitted that, it is trite law that in prima facie case, there is no need of going to the details of the case. To do so, is pre-judging of

the case. He relied his position in the case of **Kibo Match Group Ltd vs H. S. Impex Ltd**, (2002) TLR 152, he says clearly stated so.

As per ruling of the trial magistrate that there is even a doubt on credibility of PW2's evidence that it is self-contradictory. On prima facie case, the trial court ought not to go that far. Doing so, is pre-judging the whole case. In the case of **DPP vs Ernest Warioba Muhindi and Muhindi Ernest,** Criminal Appeal No 126 of 2021, High Court Musoma Musoma (unreported), Mbagwa, J at page 9 he ruled

> *"...It is a trite law that prima facie case means a standard of proof whose evidence suffices to ground conviction if the accused does not offer explanation. See **Patel vs Republic** [1968] 1 EA 97. Further, it is a clear position of law that in assessing evidence at the prima facie stage, the court is not required to apply **a fully-fledged analysis**. This is what makes prima facie distinct from proof beyond reasonable doubt. See **the Republic vs. Kileo Bakari Kileo and 6 others**, Criminal Sessions Case No.19 of 2011,HC at Tanga and the **Republic vs Jonas James @Kombe**, Criminal Sessions Case No.18 of 2002, HC at Arusha....."*

On this stand, he prayed that this court to allow the appeal on this ground and remit back the case file for it to proceed with defense case before another magistrate.

On the 2nd ground of appeal, he submitted that the trial magistrate had erred to rule that the testimony of PW2 is self-contradictory. As per PW2's testimony (page 9 of the typed proceedings), he disputed to have seen the purported contradiction. What is stated to be self-contradiction is not reflected in the said proceedings. He prayed that this appeal be allowed basing on this ground.

On the third ground of appeal, he argued that the trial magistrate erred to rule that the testimony of PW2 and PW3 was suspicious. He clarified that what is recorded in page 9 and 12 of the typed proceedings for PW2 and PW3 is clearly not marching/collocative with the trial magistrate's findings.

He concluded by urging this court to allow this. The findings of the trial court be quashed and set aside. In its place, this court to order that the respondents had a case to answer to the charge and further remit the case file to the trial court for defense trial with directives that it proceeds before another trial magistrate for fear of bias.

In digest to the submission by Mr. Frank Nchanilla learned state attorney and the ruling on no case to answer by the trial magistrate, the interesting point for discussion is whether the trial court properly

reached the findings of no case to answer to the case as per available testimony of the case.

It is a mandatory procedural requirement that after the closure of the prosecution case, the court is required under section 230 of the CPA to prepare a ruling, finding as to whether the evidence by the prosecution has established the prima facie case for the accused person to answer it. If it finds that the prima facie case has been established, then the accused person will be called upon to defend himself, and he will be informed of his rights in terms of section 230 (1). If the same is not established, then the court will proceed to make findings that the same has not been established and proceed to acquit the accused person.

The section is concede;

> *"Where at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him to make him to make a defense either in relation to the offence with which he is charged or in relation to any offence of which, under the provisions of section 300 to 309 of this Act, he is liable to be convicted the court shall dismiss the charge and acquit the accused person".*

The term prima facie case has not been statutorily defined. However, in the case of **Director of Public Prosecution Vs Morgan Malik & Nyaisa Makori,** Criminal Appeal No 133 of 2013 CAT-(unreported) it was held inter alia that;

> *"a prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence with which he is charged e or kindred cognate minor one ... , the prosecution is expected to have proved all the ingredients of the offence or minor cognate one thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof"*

In **Ramanlal Trambaklal Bhatt Vs The Republic**, (1957) EA 332, defines prima facie to mean,

> *"One on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence".*

This means, at the closure of the prosecution case, the prosecution must have given sufficient evidence capable of convicting an accused person should the accused person forsakes the right to defend himself. That being the case, it is worthy and instructive at this stage, to look at what section 110 and 112 read together with section 3 (2) (a) of the Evidence Act [Cap 6 RE 2022] in as far as the burden and standards

of proof is concerned. These two concepts were interpreted in the case of **Woodmington Vs OPP,** (1935) AC 462. The philosophy behind the principle of Prima facie case is actually premised on the principle enshrined in the case of **Christian Kale & Another Vs. The Republic** (1992) T.L.R 302 CAT and **John Makorobera & Another Vs. The Republic** (2002) T.L.R 296, which insistently held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case not on the weakness of the defence case. That is a reason as to why at the closure of the prosecution case, a case must apparently be proved already, at the required standard of beyond reasonable doubt. In line with this principle of burden and standard of proof, another important principle becomes necessary as enunciated in the case of the case of **Mariki George Ngendakumana Vs The Republic**, Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported), which inter alia held that:

> "*It is the principle of law that in Criminal Cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the Accused person who committed it*"

From what I have explained above, I differ with Mr. Frank Nchanila that acquitting accused persons at the closure of the

prosecution's case is pre-judging. A ruling of no case to answer is a judgment by its own if it acquits the accused person and is not pre-judging if the evidence so establishes.

In the current case, it is undisputed that there was cut down trees of the PW1 and that the said cutting was well witnessed by PW3 and PW4 that these four respondents were dully spotted cutting down the said trees unlawfully. I wonder then with this testimony on record, how the offence of malicious damage to property as charged was not made out by the Appellant to make the respondents not having a case to answer to the charge.

In law contradictions and inconsistencies in the witness's statement or testimony can only be considered adversely if they are fundamental. Errors of observation, memory failure due to passage of time, panic and horror are considered to be of trifling effect and those are to be ignored (see **Sylivester Stephano v. Republic,** CAT-Criminal Appeal No. 527 of 2016 (Arusha-unreported). In **Luziro s/o Sichone v. Republic**, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

> *"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal*

to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."

The foregoing position underscores the splendid position propounded by the Court of Appeal of Tanzania in **Dickson Elia Nsamba Shapurata& Another v. Republic,** CAT - Criminal Appeal No. 92 of 2007 (unreported) in which the learned Justices quoted the passage in Sarkar's Code of Civil Procedure Code. It was held as follows:

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."

In **Mukami w/o Wankyo v. Republic** [1990] TLR, the Court of Appeal took the view that contradictions which do not affect the central story are considered to be immaterial. See also: **Biko/imana s/o Odasi@Bim elifasi v. Republic,** CAT- Criminal No. 269 of 2012.

In this case, I have not seen any serious or notable contradiction warranting the dismissal of the case on no case to answer as alleged by

the trial magistrate. That was a serious omission done by the trial magistrate.

In essence I agree with Mr. Frank Nchanilla's submission that the available evidence in record, didn't warrant the trial magistrate to arrive at that verdict as done. This was a fit case that the respondents needed to give their plausible defense in the charges against them. Otherwise, in the absence of it (reasonable doubt or plausible defense) the respondents should be held responsible. If the evidence on record so far gathered by the prosecution (Appellant) is in-sufficient to enter conviction in the absence of defense, I am tempted to believe that the trial magistrate's convicting standards, are so high beyond those legally provided which then is a bad standard and not recognised by law.

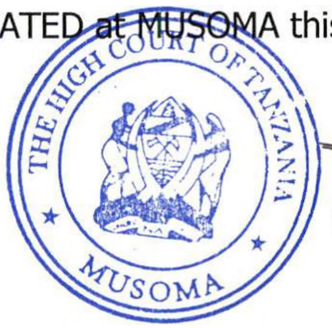
I must insist here that the objective of criminal law is to punish the criminals accordingly and innocents are acquitted. Courts of law are warned from applying law flimsily to the detriment of the victims. To do so, the public will lose confidence with our justice system.

That said, the appeal is allowed, the finding of no case to answer is substituted with that of case to answer. The respondents be traced for

their defense testimony or otherwise the matter to proceed with as per law.

For avoidance of bias, it is directed that the matter to proceed before another trial magistrate with jurisdiction.

DATED at MUSOMA this 29th day of September, 2022.



F. H. Mahimbali

Judge

Court: Judgment delivered 29th day of September, 2022 in the presence of the Frank Nchanila, State Attorney for Appellant, Mr. Gidion Mugoa, RMA and respondent being absent.

Right of appeal is explained.

F. H. Mahimbali

Judge